Administering the National Environmental Policy Act

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Summary

In practice, the Council for Environmental Quality (CEQ) has been treated as the "administering agency" for the National Environmental Policy Act (NEPA), and courts and most action agencies have regarded its rules as binding law. Yet, a close examination of NEPA's language and evolution reveals that CEQ authority is grounded more in the president's Article II power than in any statutory delegation from Congress. This executive-branch authority to implement NEPA has garnered strong judicial deference and remained unquestioned despite prevailing doctrine to the opposite effect. The paradox of NEPA also creates an opportunity, as the president's constitutional authority could likewise be used to put NEPA's more substantive elements into effect. NEPA's administration can and should inform a refocused approach by the White House that executes NEPA to its fullest potential: the making of America into a sustainable civilization.

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I. Introduction

A. Questions Plague CEQ's Role

The Council on Environmental Quality (CEQ) was created by the National Environmental Policy Act (NEPA),[1] which by its terms casts CEQ as an advisor to the president. President Richard M. Nixon first ordered CEQ in 1970 to create guidelines for federal agencies to follow in discharging their duties under the statute. Those guidelines also influenced the courts that first interpreted NEPA in some obvious and some subtle ways.

In 1977, President Jimmy Carter ordered that CEQ issue rules binding on all agencies, replacing the informal guidelines with purportedly binding regulations implementing NEPA. Did that make CEQ NEPA's administering agency? Can presidential action of this sort entitle CEQ's interpretations of NEPA to *Chevron*[2] deference? If so, what of the "agencies of the Federal Government" that are charged by the statute with generating its "detailed statements" and pursuing its "national policy"?

In practice, CEQ's rules have been regarded by courts and most action agencies as law, at least in a sense. Yet, the CEQ rules cover only a tiny fraction of NEPA's domain. They say virtually nothing about the priorities that decisionmakers should set, the types of environmental damage we must strive to avoid, or the ways that environmental risks and benefits should be balanced. The U.S. Supreme Court has admonished the lower federal courts repeatedly that it is not the courts' place to opine on any of that, and has done so emphatically and often enough that virtually no one contends otherwise. This leaves NEPA's substance virtually ignored by both CEQ's interpretations and those of reviewing courts.

CEQ and its rules are more than some errant departure from prevailing doctrine, though. They demonstrate something fundamental about our president's authority in the administrative state and perhaps how presidents exert their most enduring influences. If an administration hopes to utilize NEPA to its fullest potential in setting the nation's environmental agenda, it would do well to understand the paradoxes of NEPA's administration to date.

B. Background on NEPA's Administration

NEPA's administration has been full of paradox. The authority of the president and CEQ to implement NEPA, garnering strong judicial deference in doing so, remain unquestioned despite prevailing doctrine to the opposite

1. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
2. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984).

effect. NEPA nowhere vests the authority to "administer" it as a whole, yet it is precisely the sort of policymaking statute that courts know is not for their administration. NEPA is renowned for its oft-copied procedural innovation: the environmental impact statement (EIS). Yet, the statute's real goals are no less than the remaking of America into a sustainable civilization.

Finally, the authority that has made NEPA regulations "law"—the president's power to guide and supervise officers of the United States who execute the law—also estranges them from NEPA's champions. NEPA's typical champions are environmental progressives who regard the "imperial president" skeptically and have attacked White House regulatory review for a generation.[3] To them, executive power is usually cravenly political and anti-environment.

Yet, it is the president's constitutional powers that ground the very NEPA rules forming the basis of contemporary NEPA law. Indeed, as I argue here, only the president's constitutional authority to see that laws are executed can put NEPA's more substantive elements into effect. Part II of this Article explains what it means for an agency to be the administering authority of a goal statute. Part III traces the evolution of NEPA from nonbinding CEQ guidelines to CEQ's regulations and their place in contemporary law. Part IV reconciles NEPA's administration with prevailing Supreme Court doctrines on agency authority. Part V argues that NEPA's administration can and should inform a refocused approach by the White House that executes NEPA to its fullest potential.

II. An Agency's Authority to Administer

This part introduces key terms and relationships in understanding NEPA and its implementation since 1970. Section A describes what modern courts have called the authority to administer a statute. Section B traces the outlines of a typical regulatory agency and the ways that it makes law.

A. *Authority to Administer a Statute*

Whether an agency is empowered with what might be called jurisdictional authority—the authority to govern others with the binding force of law—was long overlooked in court.[4] Only where a challenger's case or controversy[5] turns on the matter must a court reach a determination.[6] Indeed, in part because of the structure of our judicial power, three distinct questions of agency authority have often run together here: (1) the availability and scope of judicial review of agency action; (2) the degree of deference, if any, owed by courts to agencies' interpretations of law; and (3) whether agency actions possess the properties of law. The "system of judicial remedies," as Prof. Louis L. Jaffe called it,[7] has worked as a powerful constraint on the judiciary's attention to these issues.

An exception is *Chrysler Corp. v. Brown*, where the entire controversy turned on whether an agency's rule was "law" within the meaning of the governing statute.[8] To resolve the issue, the Supreme Court had to establish whether and which of the agency's rules could possess the properties of law. The preemption of inconsistent state law, the creation or revision of "substantive . . . individual rights and obligations," and other similar properties were held up as the indicia of agency rules that fit the description of law.[9] In order for agency rules to "have 'the force and effect of law,'" the Court held, "it is necessary to establish a nexus between the [rule] and some delegation of the requisite legislative authority by [the U.S.] Congress."[10] An executive order directing that agencies pursue some policy or take other action was not sufficient to the task, according to the *Chrysler* Court.[11]

The Court's drift on this set of issues long left its precedents virtually irreconcilable.[12] Several of the precedents cited in *Chevron*[13] had conflated the *Chrysler* issue with what deference is owed to an agency's interpretation of law.[14] *Chevron* itself was less about U.S. Environmental Protection Agency (EPA) delegations of authority in the Clean Air Act (CAA)[15] than it was about EPA's particular CAA interpretation being challenged.[16] EPA's interpreta-

3. *See, e.g.*, Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L. & Contemp. Probs. 127 (1991); *Presidential Management of the Administrative State*, 51 Duke L.J. 963 (2001); and *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 Fordham L. Rev. 2487 (2011) [hereinafter Percival, *Who's in Charge?*].
4. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 529-37 (2002). Thomas Merrill and Kathryn Watts identified at least eight different Supreme Court opinions of the last century where the Court ignored the granting or withholding of agency jurisdictional authority. *Id*. at 528 n.306. They singled out *Mourning v. Family Pubs. Serv., Inc.*, 411 U.S. 356, 373-77 (1973), and *Thorpe v. Housing Auth. of the City of Durham*, 393 U.S. 268, 274-81 (1969), as "the low-water mark in terms of attention to congressional delegations of power to agencies to act with the force of law." *Id.* at 537.
5. U.S. Const., art. III, §2.
6. *See, e.g.*, National Petroleum Refiners Ass'n v. Federal Trade Comm'n, 482 F.2d 672 (D.C. Cir. 1973); National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 694-98 (2d Cir. 1975); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990); Kelley v. EPA, 15 F.3d 1100, 24 ELR 20511 (D.C. Cir. 1994).
7. Louis L. Jaffe, Judicial Control of Administrative Action 152 (1965).
8. *Chrysler Corp.*, 441 U.S. at 294-316.
9. *Id.* at 295-302.
10. *Id.* at 304.
11. *Id.* at 303-08; *see also* United States v. Howard, 352 U.S. 212, 219 (1957).
12. Inconsistency by the Court is perhaps to be expected. *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 823-31 (1982) (arguing that the Court is bound to exhibit inconsistency over time). *But see* Michael J. Gerhardt, The Power of Precedent 79 (2008) (judges "generally know from experience, training, and temperament [that] they cannot be too disdainful of precedents or else they risk having other justices show the same, or even more, disdain for their preferred precedents") Michael Gerhardt calls this "the golden rule."
13. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984).
14. *See, e.g.*, Batterton v. Francis, 432 U.S. 416, 424-25 (1977); Morton v. Ruiz, 415 U.S. 199, 231-37 (1974); Mourning v. Family Pubs. Serv., Inc., 411 U.S. 356, 369-70 (1973); *see* Merrill & Watts, *supra* note 4, at 528-87; *cf.* Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 5-6 (1983).
15. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
16. The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit had twice previously construed the CAA's term "stationary source," both times

tion was contrary to the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit precedent construing the CAA, and that court's reversal of EPA was, in largest part, protecting its judicial power to settle the law.[17] But statutes like the CAA, the Supreme Court warned,[18] do more to charge administrative agencies with missions and goals than they do to create standards of conduct by which anyone—including the agency—shall be judged.[19]

Chevron's directions proved much easier to signal than to follow. Precedents addressing our three different questions (with less than perspicuous reasoning) had long seemed virtually interchangeable.[20] For years after *Chevron*, commentators and courts focused on whether and to what extent the decision had overruled the mountain of precedents factoring out whether and to what degree courts should defer to agencies' interpretations of law.[21] Statutes must, after all, grant federal courts jurisdiction to review administrative agency action.[22] So, the differences between jurisdictional and interpretive authority had confounded reviewing courts not merely in how to review an agency's interpretation of legislation[23]; the differences had also confounded courts in how they interpret their own authority to act.[24] Put simply, *Chevron*'s precedent—whether synthesis or revolution[25]—could scarcely have prevented our three issues from intermixing.[26]

Finally, the *Chevron* case was an odd vessel of change: The opinion's author, Justice John Paul Stevens, seems not to have been onboard[27]; the opinion simply ignored contrary authority[28]; and in retrospect, its grounds seem saturated with irony if not mistaken.[29] Deriving legal norms from judicial reasoning is never easy.[30] In practice, "[t]he Court has no rules for determining the breadth or narrowness of a particular ruling, how much or how little deference a justice ought to give a prior decision, the requisite conditions for determining error," or "how to prioritize sources of decision, or how to read prior cases, including the appropriate level of generality at which to state the principles set forth within precedents."[31]

The Court is well aware of its duty to settle the law.[32] Using a sequence of opinions to elaborate, the Court even-

rejecting EPA's interpretation. *See* ASARCO, Inc. v. EPA, 578 F.2d 319, 8 ELR 20164 (D.C. Cir. 1978); Alabama Power Co. v. Costle, 636 F.2d 323, 10 ELR 20001 (D.C. Cir. 1979).

17. Then-Circuit Judge Ruth Bader Ginsburg's opinion in *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 720, 12 ELR 20942 (D.C. Cir. 1982), began by noting that "[i]n ruling upon EPA's regulatory change, we do not write on a clean slate." After describing the holdings in *ASARCO* and *Alabama Power*, the D.C. Circuit panel found itself "impelled" by those precedents to overrule EPA's interpretation of the term stationary source. *Gorsuch*, 685 F.2d at 720 & n.7 (*quoting* Potomac Alliance v. NRC, 682 F.2d 1030, 1031 (D.C. Cir. 1982)). Curiously, even as it disclaimed any view or judgment not dictated by *ASARCO* or *Alabama Power*, the court then took eight pages to explain why EPA's regulations were contrary to the Act's structure and legislative history. *Id.* at 721-28.
18. *See Chevron*, 467 U.S. at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").
19. *See, e.g.*, Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 Colum. L. Rev. 369 (1989).
20. *Cf.* Frank C. Newman, *How Courts Interpret Regulations*, 35 Cal. L. Rev. 509, 513 (1947) ("The Supreme Court has decided hundreds of cases which relate to regulations. In most, the dispute has involved only validity; or words of a regulation were quoted merely to justify some other . . . holding.") (citations omitted). Frank Newman reviewed dozens of cases involving interpretive, jurisdictional, or both types of authority and concluded that "[t]he rule of deference cases" had come to serve as "precedents for nearly all other cases." *Id.* at 528. In decisions relaxing the restrictions on interpreting delegations of lawmaking power, it has been commonplace to cite precedents that involve deferring to agencies' interpretations of their enabling statutes. *See, e.g.*, National Petroleum Refiners Ass'n v. Federal Trade Comm'n, 482 F.2d 672, 676-97 (D.C. Cir. 1973); National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 695-99 (2d Cir. 1975); Santise v. Schweiker, 676 F.2d 925, 933-34 (3d Cir. 1982).
21. *Compare* Kenneth W. Starr, *Judicial Review in the Post*-Chevron *Era*, 3 Yale J. on Reg. 283, 299 (1986) ("[I]t is not clear to what extent the 'sliding scale' [factored] approach is still appropriate, or to what extent any of the factors usually employed in that analysis [of whether a court should defer to an agency's interpretation] are still relevant."), *with* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 373 (1986) ("To read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as 'always defer to the agency when the statute is silent,' would be seriously overbroad, counterproductive and sometimes senseless.").
22. Whether by way of express or implied preclusion of review, the default position in availability of review has long been that some statute must both authorize and locate the appropriate forum of judicial review. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 15 ELR 20335 (1985); Block v. Community Nutrition Inst., 467 U.S. 340 (1984); FTC v. Standard Oil of Cal., 449 U.S. 232 (1980); Califano v. Sanders, 430 U.S. 99 (1977); FCC v. Pottsville Broad. Co., 309 U.S. 134 (1940); United States v. Los Angeles & S.L.R. Co., 373 U.S. 299, 308-13 (1927). On the gradual transition from the common-law writs to the 20th century's statutory regime, see Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law (2012).
23. *Cf.* General Elec. Co. v. Gilbert, 429 U.S. 125, 140-44 (1975) (holding that the Equal Employment Opportunity Commission (EEOC) lacked authority to issue guidelines interpreting Title VII of the Civil Rights Act of 1964, contrary to the Supreme Court's interpretation).
24. *Compare* FCC v. American Broad. Co., 347 U.S. 284, 286-96 (1954) (holding that the Federal Communications Commission (FCC) exceeded the scope of its authority to enforce its statute and that, therefore, the challengers' actions were properly heard in the district court), *with* Columbia Broad. Serv., Inc. v. United States, 316 U.S. 407, 415-25 (1942) (finding that the order promulgating the regulations that the broadcasters challenged was within the scope of the jurisdiction-conferring statute because the regulations were determinative of the challengers' primary conduct rights).
25. *Cf.* Stephen G. Breyer et al., Administrative Law and Regulatory Policy 282 (7th ed. 2011) (beginning the discussion of *Chevron* by questioning whether the decision was a synthesis or a revolution).
26. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642, 673 (1997) (Securities Exchange Commission entitled to *Chevron* deference in interpreting its governing statute because the statute gave the agency authority to adopt rules); United States v. Haggar Apparel Co., 526 U.S. 380, 392 (1999) (*Chevron* cited for giving "controlling weight" to an agency's interpretation of its own regulation interpreting its statutes); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (*Chevron* deference was denied to the Food & Drug Administration's interpretation inferring jurisdictional authority from one statute in part because of other, subsequent statutes' denial of such authority).
27. *See* Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 Nw. U. L. Rev. 551, 556-60 (2012) (noting evidence from retired Justice's papers and his own subsequent opinions that Justice John Paul Stevens had no intention of changing the law through his *Chevron* opinion).
28. *See* Starr, *supra* note 21, at 298-300.
29. *Chevron* purports to be an interpretation—or at least a constructive rehabilitation—of congressional intent. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44, 14 ELR 20507 (1984); United States v. Mead, 533 U.S. 218, 227-28 (2001). But the interpretation seems based less on hard evidence than on intuition. *See* Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 471 (1989).
30. *See* Frederick Schauer, Thinking Like a Lawyer, A New Introduction to Legal Reasoning 36-60 (2009).
31. Gerhardt, *supra* note 12, at 104-05.
32. *Compare* Di Santo v. Pennsylvania, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting) ("It is usually more important that a rule be settled, than that it be settled right."), *with* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson,

tually offered a synthesis of its review doctrines where an agency is Congress' delegate.[33] Following *United States v. Mead*[34] and several subsequent opinions elaborating it,[35] the Court lumped its deferential precedents in behind *Chevron* and announced that its reasons for affording strong deference to agency interpretations stem from (1) the presence within an agency's enabling statute of delegated authority to make law, combined with (2) the agency's deliberate and reasonable use of that authority.[36] Permissible constructions of a statute under such circumstances will be granted deference by reviewing courts, even if a prior judicial construction is to the contrary,[37] and even if the agency's own interpretations have changed over time.[38] *Mead* did not settle the availability of *Chevron* deference to agency interpretations of their own jurisdiction[39] or the precise strength of this type of deference versus others.[40] But it did reorient *Chevron*'s broad and deep reasons for deference to agency interpretations toward the presence and exercise of delegated jurisdictional authority.

Chevron's saga is instructive in three ways. First, the reasoning in judicial opinions meant to reveal the law is often what unsettles the law. Reasoning about something as deeply human and imprecise as our legislation—with its cross-currents and compromises—too often undermines itself. Second, modern statutes tend to set general goals rather than to prescribe the law: "Modern legislation in its essence is an institutional practice by which the legislature . . . issues directives to the governmental mechanisms that implement that policy."[41] And modern courts and agencies (as Congress' delegates) are flexible, self-governing institutions capable of strategy, adaptation, and the turning of circumstances to their advantage. Grounded as they are in statutes flush with compromises, long-term goals, and ambiguous delegations, their authority to define the law comes from a Congress that rarely specifies—assuming it even *has*—its own intentions.[42] Third, with statutes that so characteristically underspecify who shall have jurisdictional, interpretive, and/or residual authorities, doctrinal uncertainties can persist as Congress' agents struggle to identify the content of the law while at the same time working to shape it.[43] The resulting intermixture of judicial and administrative authority constantly challenges students of administrative law to find coherence.[44] No legislation has embodied this challenge more than NEPA, because it is unlike much else in its breadth, transformative goals, and ambiguity as to whom it empowers and whom it constrains.

The typical regulatory agency today is empowered by statute to issue commands that govern, that fix others' legal rights and duties,[45] making a regulatory agency a jurisdictional authority.[46] The next section clarifies the bases

J., concurring) ("[W]e are not final because we are infallible, but we are infallible only because we are final.").

33. In *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000), and *Mead*, 533 U.S. 218, the Court separated the two questions of interpretive authority and the authority to make law in contemporary doctrine by placing them in a dependent relationship: Where the agency has been delegated the authority to make law and properly exercises that authority, the Court held that *Chevron* deference was appropriate.
34. *Mead*, 533 U.S. 218.
35. *See, e.g.*, Barnhart v. Walton, 535 U.S. 212 (2002); Edelman v. Lynchburg Coll., 535 U.S. 106 (2002); Alaska Dep't of Envtl. Conserv. v. EPA, 540 U.S. 461 (2004); Gonzales v. Oregon, 546 U.S. 243 (2006).
36. *See Christensen*, 529 U.S. at 587 ("Interpretations such as those [in this case] . . . which lack the force of law . . . do not warrant *Chevron*-style deference."); *Mead*, 533 U.S. at 228-29 ("[*Chevron*] identified a category of interpretive choices distinguished by an additional reason for judicial deference . . . [where] Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law . . . ."). Such reasoning long predates *Christensen* and *Mead*. *See, e.g.*, Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740-41 (1996); Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990); Rowan Cos. v. United States, 452 U.S. 247, 253-54 (1981); Batterton v. Francis, 432 U.S. 416, 424-25 (1977); Morton v. Ruiz, 415 U.S. 199, 231-37 (1974).
37. *See* National Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980-88 (2005).
38. *See Brand X*, 545 U.S. at 981; FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1822-24 (2009) (Kennedy, J., concurring).
39. In *City of Arlington v. FCC*, 133 S. Ct. 1863, 1875, 43 ELR 20112 (2013), the Court held that FCC's declaratory ruling interpreting §332(c)(7) of the Communications Act was entitled to *Chevron* deference notwithstanding that interpretation's practical effect of expanding the agency's jurisdictional reach.
40. In *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the Court observed that "rulings, interpretations and opinions of [an agency] constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance." The "weight" of an agency's views was to turn on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* This sliding scale differs from *Chevron*'s second step, although it has been difficult to say by how much. *See* David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135, 153-66, 169-75 (2010) (reviewing empirical literature and finding little difference between *Chevron* and *Skidmore* or between any of the Court's different standards).
41. Rubin, *supra* note 19, at 372.
42. *See* David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers 232-39 (1999) (listing and explaining empirical findings that inter-branch tensions affect delegation choices, as do issue-area characteristics, executive organization, and legislative committee structure); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 Harv. L. Rev. 1035, 1042-49 (2006); Jonathan Bendor et al., *Theories of Delegation*, 4 Ann. Rev. Pol. Sci. 235 (2001).
43. *Compare* Rubin, *supra* note 19, at 415:

> A natural question . . . is whether statutory directives that are stated in terms of goals . . . can be enforced by the judiciary as well as by the legislature. In most cases, the judiciary could not serve as the primary implementation mechanism for such statutes since it is designed to adjudicate claims of right, not achieve broad social policy results.

with Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 Colum. L. Rev. 427, 451 (1989) ("While today's theory of legislation must be differentiated from our theory of law, one cannot free one from the other.").
44. *Compare* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 667 (1984) [hereinafter Strauss, *The Place of Agencies in Government*] (arguing that, given contemporary realities, "we can achieve the worthy ends of those who drafted our Constitution only if we give up the notion that it embodies a neat division of all government into three separate branches"), *with* Schauer, *supra* note 30, at 44 ("It is easy to *say* that a court is expected to follow a past decision . . . but it is rarely easy to determine what counts as a past decision.").
45. *See* Lisa Shultz Bressman et al., The Regulatory State 399 (2010) ("Agencies are the institutions primarily responsible for implementing regulatory statutes.").
46. For generations, the philosophical struggle over delegation and the nondelegation doctrine barred many—in their own minds, at least—from conceding that agencies make or create law. *See, e.g.*, Jaffe, *supra* note 7, at 592-94. The "legislative" rule, thus, evolved with doctrine and practice. Prevailing doctrine shifted subtly from the insistence that Congress could not give power to make law, *see, e.g.*, Field v. Clark, 143 U.S. 649, 692 (1892), to

of jurisdictional authority and draws out some contrasts between agencies such as EPA, the Federal Communications Commission (FCC), and the National Labor Relations Board (NLRB), on the one hand, and NEPA's CEQ, on the other hand.

B. Authority to Administer Agency Rules

The foundations of our court/agency model were laid by agencies that did the majority of their work ordering named parties to take or to forgo specified actions.[47] The agencies collected taxes,[48] set rates for service,[49] crafted mass licensing schemes,[50] issued patents,[51] declared unfair methods of doing business[52] and unfair employment practices,[53] and much more. Agencies made and remade legal rights and obligations through such actions and their attendant hearings,[54] implementing statutes that had left the legal norms to be determined. For most of these agencies, their actions were not self-executing. To enforce, the agency had to petition a court with proper venue and jurisdiction and then carry at least the burden of production.[55] Likewise, to challenge agency action, an aggrieved party had to identify a discrete action falling within a relevant jurisdictional statute.[56]

So, the court/agency relationship that these arrangements set was one based largely on the evaluation of discrete commands and other directives to some set of enumerated persons. Whatever record was amassed by the agency in its processing of the particular matter could be certified to the court that was to hear the suit in order to decide the issues of fact, law, and discretion in the pleadings.[57] So, it is not surprising that "the great preponderance of what we today regard as administrative law . . . consists of an elaboration of the implications of [an] appellate review model."[58]

This court/agency relationship was *greatly* elaborated by the emergence of the Federal Register Act (FRA) of 1935[59] and the Administrative Procedure Act (APA).[60] The FRA began the steady expansion of agencies' duties to publicize their assertions of authority. The APA enabled the gradual transition to appellate review of rulemakings and the records therein. Though understood by most observers as a restatement of the law of review accumulated to that point,[61] the APA eventually revolutionized the place of judicial review in our rule of law and in agency governance. Besides setting general statutory default standards of review (a critical fact that went unrecognized in some areas long after the statute's enactment in 1946[62]), the APA standardized agency actions and the judicial scrutiny thereof.[63]

It is hard to overstate the APA's significance in this connection. The review provisions speak of the agency's final "action, findings, and conclusions" that a reviewing court may set aside,[64] while the rest of the Act fixes procedural

the recognition of such grants of authority as the grounds for deference. *See, e.g.*, Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981) (observing that FEC is "precisely the type of agency to which deference should presumptively be afforded" because Congress had vested in it "extensive rulemaking and adjudicative powers").

47. *See* Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 Buff. L. Rev. 765 (1986); Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action,* 36 Geo. L.J. 287 (1948); Report of the Committee on Administrative Procedure, Administrative Procedures in Government Agencies, S. Doc. No. 77-8 (1941) [hereinafter Attorney General's Committee Report]; John Dickinson, Administrative Justice and the Supremacy of Law in the United States (1927).
48. *See* Erwin Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398 (1941).
49. *See* 3 I. Leo Sharfman, The Interstate Commerce Commission: A Study in Administrative Law and Procedure 6 (1935).
50. *See, e.g.*, Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 69-85 (1967).
51. An 1836 statute created the first Commissioner of Patents charged with examining patent applications and provided a right of appeal in cases of denial. *See* Mashaw, *supra* note 22, at 151-52.
52. *See* Federal Trade Comm'n v. Brown Shoe Co., 384 U.S. 316 (1966); Carl McFarland, Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission, 1920-1930 74-77 (1933).
53. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 32-34 (1937).
54. *See* Attorney General's Committee Report, *supra* note 47, at 35-42.
55. Burdens varied but this essential structure was standard. *See* Reginald Parker, *Contempt Procedure in the Enforcement of Administrative Orders*, 40 Ill. L. Rev. 344, 344-46 (1946); Milton Katz, *Appealability of Administrative Orders*, 47 Yale L.J. 766 (1938); McFarland, *supra* note 52, at 179-81; Dickinson, *supra* note 47, at 157-76.
56. *See, e.g.*, Crowell v. Benson, 285 U.S. 22 (1932). Jurisdictional statutes providing for review of agency orders eventually insulated the named agency from judicial review of interlocutory, preliminary, or otherwise nonfinal agency findings, determinations, and other actions. *See, e.g.*, United States v. Los Angeles R.R. Co., 273 U.S. 299 (1927); Helco Prods. Co. v. McNutt, 137 F.2d 681 (1943); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944). As discussed below, this history would later prove pivotal in how the courts interpreted the APA.
57. It was this progression of precedents that first yielded the "substantial evidence" doctrine as a mode of review of agency action. *See* E. Blythe Stason, *"Substantial Evidence" in Administrative Law*, 89 U. Pa. L. Rev. 1026, 1026-29 (1941); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 74-79 (1944).
58. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 940, 941 (2011). Most of that law was shaped in an era dominated by the agencies operating not by rulemakings but by rather more adjudicative means. *See id.* at 953-76.
59. The Federal Register Act (FRA) of 1935, Pub. L. No. 74-220, 49 Stat. 500 (1935), was legislated in the wake of a perfect storm created by the National Industrial Recovery Act. The culmination came in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935)—the only two cases invalidating acts of Congress as violations of the so-called nondelegation doctrine. The storm arose from departmental rules that no one could find—nor even verify existed—while cases supposedly governed by those rules (one of which would become the *Panama Refining* case) were being heard by the Supreme Court. The history was retold by the Office of the Federal Register (OFR) in *A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register* 2 (2006), *available at* http://www.archives.gov/federal-register/the-federal-register/history.pdf. The FRA has been the backbone of the U.S. official digesting and compilation apparatus since 1935. *Id.* at 2-10.
60. 5 U.S.C. §§501 et seq., *available in* ELR Stat. Admin. Proc.
61. *See, e.g.*, U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1948). Like all restatements, the APA took some license in attempting to reconcile the irreconcilable.
62. *See, e.g.*, Dickinson v. Zurko, 527 U.S. 150, 152 (1999) (reversing the Federal Circuit and confirming that the APA §706(2)(E)'s substantial evidence standard applies to the review of U.S. Patent and Trademark Office findings of fact in on-the-record proceedings because no other, more specific statute displaced it); FTC v. Standard Oil of Cal., 449 U.S. 232, 240 (1980) (holding that APA §704 limits the APA's cause of action to final agency actions only).
63. *See* Harold H. Bruff, *Availability of Judicial Review*, *in* A Guide to Judicial and Political Review of Federal Agencies 1, 11-16 (John F. Duffy & Michael Herz eds., 2005) [hereinafter Judicial and Political Review].
64. APA §10(a)-10(e) is codified today as 5 U.S.C. §§701-706. The chief prerequisite for review sought under APA §10 is its express requirement of final

standards for its different kinds of hearings[65] required either by the enabling statute or by the APA itself.[66] Thus, whatever format an agency interpretation of law might take, the APA empowered courts—at the behest of the agency's opponents—to nullify it[67] and to "decide all relevant questions of law."[68]

Agencies had long made rules allocating authority amongst their personnel,[69] and they had long used combinations of rules, rulings, orders, reports, findings, guidance—interpretations of their enabling statutes and prior actions—to communicate and pursue their goals.[70] However, agencies' forms of action were haphazardly denominated.[71] The FRA and the APA aimed to sort out this jumble of impossibly agency-specific practices and to set "systematic and uniform methods in the preparation and publication of administrative regulations."[72] They were remedial statutes meant to curb abuses, bend the curve toward more (if not perfect) standardization, and help to solve the "problem of definition."[73]

Inherent in the problem has always been the interactivity of interpretive and jurisdictional actions, producing what has been called a power of self-interpretation.[74] Agencies must often interpret their own past actions, thereby indirectly interpreting any enabling legislation as well as their past interpretations.[75] Courts also interpret themselves, but agencies empowered to do so raise special concerns. Agency reasons often cue and/or coerce those within their jurisdiction. So, when an agency with jurisdictional authority issues an explanation of an order, finding, or ruling—giving the reasons that a reviewing court can weigh in judging that action's validity—the explanation's relevance to others goes beyond the confines of any particular judicial proceeding.[76]

Even agencies not charged with a statute's administration have long been consulted, their variously expert and/or nationwide perspectives having some weight in the court's independent judgment of what the law means.[77] For the regulated, this has long necessitated the navigation of a porous and shifting boundary between interpretive and jurisdictional authority.[78] If an agency signals the intent eventually to impose the interpretations it espouses, the agency interpretation can become a declaration of how the law will apply in the future.[79] Regulated parties have

agency action, *see* 5 U.S.C. §704 (codifying subsection 10(c))—a prerequisite that the Supreme Court had been helping to establish for years before the APA was enacted. *See, e.g.*, Myers v. Bethlehem Shipbldg. Corp., 303 U.S. 41, 47-50 (1938); *see also* Dickinson, *supra* note 47, at 50.

65. Although the agency's enabling statute determines what type of hearing must be afforded interested persons before the agency finalizes its action, *see, e.g.*, United States v. Allegheny-Ludlum Steel Co., 406 U.S. 742, 756-57 (1972), the APA's hearing provisions, when triggered, are the governing default. *See* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 545-48, 8 ELR 20288 (1978); American Trucking Ass'n v. United States, 344 U.S. 298, 319-20 (1953); *see also* 5 U.S.C. §559.
66. *See, e.g.*, Dominion Energy Brayton Point, LLC v. Johnson, 443 U.S. 12, 14-18 (2006); Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976).
67. The APA defined "actions" in terms of the "whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. §551(13).
68. 5 U.S.C. §706(2). APA §9(a) expressly required that "[n]o sanction . . . be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law." *See* 5 U.S.C. §558(a).
69. *See, e.g.*, John A. Fairlie, *Administrative Legislation*, 18 Mich. L. Rev. 181 (1920); Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 Harv. L. Rev. 259, 260-65 (1938) (describing a separate function of agency practice that amounts to rulemaking and finding that New Deal legislation had created the authority and demand for a great deal more of it).
70. *See* Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 Geo L.J. 1, 4-19 (1940); John Preston Comer, Legislative Functions of National Administrative Authorities 21-49 (1927).
71. *See* Comer, *supra* note 70, at 137-69; Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 Yale L.J. 919, 924-28 (1948); Fairlie, *supra* note 69, at 199 ("There is no approach to uniformity in nomenclature. Rules, Regulations, Instructions, General Orders, Orders, Circulars, Bulletins, Notices, Memoranda and other terms are given to different series of publications by different government offices, with no clear distinction as to the meaning of these terms."). A seasoned administrative lawyer wrote in 1940 that agency interpretations of general effect were "commonly known" as regulations, but might also be "called a 'rule,' or sometimes an 'order' or 'determination'" and even besides that a "'definition' or 'standard.'" Lee, *supra* note 70, at 1.
72. Fairlie, *supra* note 69, at 200; *see* Attorney General's Committee Report, *supra* note 47, at 98-101. OFR has long exerted passive influence with its publishing norms, dividing all agencies' submissions into several fixed categories.
73. *Compare* Griswold, *supra* note 48, at 201-05 ("Administrative rules and regulations are scarcely susceptible of accurate classification. . . . And yet . . . [a]ll that is needed is an official publication, analogous to the Statutes at Large, in which all rules and regulations shall be systematically and uniformly published."), *with* Davis, *supra* note 71, at 919-20 ("Often the best solution of the problem of classifying borderline activities is to avoid classifying them—to skip the labeling and to proceed directly to the problem at hand."). Years later, Kenneth Davis would call the APA's definitions "new obstacles" to the precise identification of rules. Kenneth Culp Davis, 1 Administrative Law Treatise §5.01 (1958).
74. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules,* 96 Colum. L. Rev. 612, 654 (1996) [hereinafter Manning, *Constitutional Structure*].
75. *See, e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173 (2007) (reviewing a rule that embodied the U.S. Department of Labor's interpretation of its regulation and their compatibility and the Court's own interpretation of the underlying statute). To presume that courts owe deference to agency interpretations of the law might, therefore, be a rather daunting concession. *Cf.* Farina, *supra* note 29, at 476 ("It is surely a far more remarkable step than *Chevron* acknowledged to number among Congress's constitutional prerogatives the power to compel courts to accept and enforce another entity's view of legal meaning whenever the law is ambiguous.").
76. *See* Mashaw, *supra* note 22, at 161 ("In our *Chevron*-saturated legal world, we are likely to forget that agency statutory interpretations are not important because the courts give agencies deference—they are important because in most cases federal statutes mean what administrative agencies take them to mean.").
77. *See* Monaghan, *supra* note 14, at 27:
> Frequently the court will (or should) understand the statutory mandate as directing it, not the agency, to supply all or most of the relevant meaning. In these circumstances, the agency view is a datum, a highly relevant one, but a datum only; "it is only one input in the interpretational equation."

(*quoting* Zuber v. Allen, 396 U.S. 168, 192 (1969)). The agency action set aside in *Zuber* was more like EPA's rulemaking in *Chevron* than the U.S. Customs Service's ruling in *United States v. Mead*, 533 U.S. 218 (2001). *Cf. Zuber*, 396 U.S. at 197-211 (Black, J., dissenting).
78. In the (in)famous second *Chenery* case, *SEC v. Chenery (Chenery II)*, 332 U.S. 194, 202-07 (1947), the Court—over a vehement dissent by Justices Robert Jackson and Felix Frankfurter—held that an agency empowered both to promulgate rules of general applicability and to adjudicate matters individually should not necessarily have to sequence them in that order. This *Chenery II* notion has become firmly entrenched in the law. *See* Russell L. Weaver & Linda D. Jellum, Chenery II *and the Development of Federal Administrative Law*, 58 Admin. L. Rev. 815 (2006). It empowers agencies to announce interpretations that they will prospectively impose in future actions—something that could easily coerce regulated parties. *Id.* at 826-27.
79. *See* Frank C. Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 Harv. L. Rev. 929, 934-39 (1950) (describing various agency practices for publicizing interpretations and in-

long (smartly) regarded such declarations as changes in their situation.[80]

For a time, the statutes did little to change the court/agency appellate review model.[81] A few skeptical observers were struck from the outset, though, by the APA's logical division of "rules" and "orders"[82] and how its definition of rule bore little resemblance to the orthodox concept of a rule in law.[83] Phrased to reach any agency "statement" of "future effect," the APA's notion of rules and rulemaking is a catchall, and one indelibly bound to the agency's interpretation of what authorizes it to act.[84] The APA's original §3[85] was disarmingly titled Public Information.[86] Where the FRA's publicity mandates were skeletal,[87] APA §3 required publication in the *Federal Register* of both (1) "substantive rules," and (2) "statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public."[88] Anything that was a rule (whether or not substantive or legislative) was to be published in the *Federal Register*, if only as a notice for public information.[89] Such publication rules eventually took on their own weights in the judicial mind[90] and later featured in the *Mead*/*Chevron* debate, where the appropriate level of judicial deference due took over their existence.[91]

With both jurisdictional and interpretive authorities—and the FRA/APA in the background—agencies have been able to affect legal change in subtle ways. If any question of the authority of an agency's declarations arose in an Article III case, the answer inevitably came down to practical facts about the particular agency, its legislation, and the full context of the interpretation(s) in question.[92] Judicial authority overrode agency authority only when and to the extent required by the U.S. Constitution or for an Article III court to render judgment where its jurisdiction had been supplied.[93] Otherwise, the agency's views prevailed.

Before the *Mead*/*Chevron* synthesis settled the grounds for strong judicial deference to agency interpretations, the Supreme Court had indirectly suggested that an agency without jurisdictional authority (that is, the authority to

ducing others to act in accordance with agency wishes). An agency assured that its interpretations of an enabling statute will, if ever laid before a court in an Article III case, garner a presumption of validity, *see, e.g.*, Commissioner of Internal Revenue v. South Texas Lumber Co., 333 U.S. 496, 498 (1948), might be inclined to announce its interpretations in whatever format was optimal for that agency's present purposes. *See* Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383, 1442-47 (2004). Managing the court/agency interface is usually among the agency's goals. *See id.* at 1446 ("After-the-fact review permits courts to detect the existence of the problems they are looking for and . . . courts have many tools available to respond to those concerns.").

80. The perceived lack of routinized procedure began and remained at the top of the reform agenda in the lead-up to the APA. *See* Attorney General's Committee Report, *supra* note 47, at 102-03. What the contending caucuses contested most were the forms of procedure to be imposed against administrative agency action. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 9 Nw. U. L. Rev. 1557, 1568-78 (1996).
81. Agency orders had long been subject to review under a variety of organic statutes. Rules were reviewable as such based either on the agency's use of an order to make the rules or upon their effects upon the plaintiffs—both before and after enactment of the APA. *See, e.g.*, American Tel. & Tel. Co. v. United States, 299 U.S. 232, 236-45 (1936); Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 417-19 (1942); United States v. American Broad. Co., 347 U.S. 284, 286-90 (1954); United States v. Storer Broad. Co., 351 U.S. 192, 196-202 (1956). *See* Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 Yale L.J. 581, 586-88 (1951); Kenneth Culp Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 Colum. L. Rev. 759, 777-91 (1949).
82. *See, e.g.*, Frederick F. Blachly & Miriam E. Oatman, *The Federal Administrative Procedure Act*, 34 Geo. L.J. 407, 409-12, 426 (1946) (arguing that the APA "classifies as rules a wide miscellany of statements and administrative actions" in order to force them into prefabricated legal and procedural categories); *see also* Paul R. Dean, *Rule Making: Some Definitions Under the Federal Administrative Procedure Act*, 35 Geo. L.J. 491, 492 (1946).
83. *See* 5 U.S.C. §551(4); *cf.* Attorney General's Manual, *supra* note 61, at 13-15 (noting that the definition of adjudication is a "residual" from the broad definition of rule and rulemaking and that the "draftsmen and proponents" of the APA structured the entire statute around the distinction and its inclusive definition of "rule").
84. *See* Jamison E. Colburn, *Agency Interpretations*, 82 Temple L. Rev. 657, 664-66 (2009).
85. APA §3 was amended in 1966 to broaden the class of agency documents that should be published in the *Federal Register*, among other things. *See* Pub. L. No. 89-487, 80 Stat. 250 (1966). It was then expanded still further and given its own cause of action for individual enforcement in 1974 in the Freedom of Information Act (FOIA). *See* 5 U.S.C. §§552-552a, as amended. Finally, the Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996), expanded FOIA's definition of "agency record" to include computer files and added other, auxiliary publication duties for agencies.
86. *See* 5 U.S.C. §552(a)(2).
87. Section 5 of the original FRA required publication of "such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect." The balance of the statute empowered the president to designate publishable material. *See* 44 U.S.C. §305(a).
88. *See* 5 U.S.C. §552(a)(2). By 1946, the FRA had been amended to provide for a *Code of Federal Regulations*. *See* Pub. L. No. 75-158, 50 Stat. 304 (1937). Codification was originally set to repeat every five years and was to include "all documents which, in the opinion of the [issuing] agency, have general applicability and legal effect and which have been issued or promulgated by such agency and are in force and effect and relied by the agency as authority . . . ." *Id.* at §11(a), 50 Stat. at 304-05. With the 1953 amendments, codification was authorized "from time to time" as the Administrative Committee of the Federal Register, "with the approval of the President . . . may deem necessary." *Id.* After that and after the Committee delegated its authority to OFR, codifications were required annually.
89. *Compare* Attorney General's Manual, *supra* note 61, at 30-31 & n.3 (explaining that APA §4's exemption of "interpretative rules, general statements of policy, rules of agency organization, procedure, or practice" was intended to require notice-and-comment procedures for "substantive rules" "issued by an agency pursuant to statutory authority" and that "have the force and effect of law"), *with* Davis, *supra* note 71, at 928 ("According to the theory [behind the APA], legislative rules are the product of a power to create new law, and interpretative rules are the product of interpretation of previously existing law.").
90. *See* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev. 803, 804, 822-38 (2001) (describing this class of rule as "an important element in the hierarchy of agency law" and finding that courts have afforded varying levels of deference).
91. *See* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1 (1990); John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, (2004).
92. Both before and after enactment of the APA, the Supreme Court continued to waver on whether interpretative rules could supply the governing norm settling rights and responsibilities. *See, e.g.*, Commissioner of Internal Revenue v. South Texas Lumber Co., 333 U.S. 496, 501 (1948); Lykes v. United States, 343 U.S. 118, 127 (1952); American Trucking Ass'ns v. United States, 344 U.S. 298, 306-23 (1953); Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 227680 (1969); Mourning v. Family Pubs. Serv., Inc., 411 U.S. 356, 358-62 (1973).
93. *See* Jaffe, *supra* note 7, at 636-53; *cf.* Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1401 (1953) (finally concluding that "[i]n the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."); *Young*, *supra* note 47, at 772-863 (exhaustively reviewing the many exceptions to the requirement that an Article III court adjudicate all cases and controversies).

issue binding rules or orders), was not an agency "administering" the statute in question.[94] An agency not administering a statute is without power over an Article III court's interpretation of the law because, semantically, nothing that the agency does can *change* the law's content; in other words, the agency does not make law.[95]

But agencies like FCC, the Federal Trade Commission (FTC), NLRB, and EPA that do possess jurisdictional authority can coerce those they regulate into following their interpretations of law.[96] They can take and sequence whatever jurisdictional actions pursue the goals of their enabling statutes.[97] And by publishing an explanation of a choice or judgment by notice in the *Federal Register*, such an agency can clothe its reasoning with jurisdictional force, at least indirectly.[98] Indeed, a decades-long doctrinal struggle has probably permanently muddled the APA distinction between substantive rules and all other types of agency rules (statements of future effect) for precisely this reason.[99]

Notwithstanding this intermixing of jurisdictional and interpretive authority, most of what occupies the courts is either (1) the availability of review, or (2) the precise form of deference the agency's action should be accorded.[100] Through it all, the APA's structure has depended on a rule typology that has never quite emerged.[101] When "legislative," jurisdictional rules are to be made, the APA's mandate of notice-and-comment procedures (that is, the paper hearing prescribed by APA §4) has never been enforced by the Supreme Court.[102] The Court's holdings that agencies empowered by statute to make rules after a hearing need only conduct the hearing described in APA §4[103] are vaguely grounded.[104]

The Court's chief response to the shift to agency rulemaking and agencies' administration of their own rules was to broaden the reviewability of "rules" in the APA's confusing sense of the term. In a 1967 trilogy of cases, the Supreme Court set a presumption in favor of the reviewability of any rule that could affect the plaintiff's primary rights or obligations.[105] Agencies' interpretive rules that were once regarded as unreviewable and extra-legal[106] were now subject to review under the APA—whether they were an assertion of jurisdiction or not.[107] In fact, their being afforded judicial deference is, ironically enough, what

94. For example, the Court did so to EEOC and its duties under the civil rights statutes. In a series of cases spanning three decades the Court migrated from: (1) purporting to give great deference to EEOC's nonbinding guidelines interpreting Title VII in a case where EEOC's interpretation matched the Court's, *see* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); to (2) holding that EEOC was entitled to *Skidmore* deference (*see* Skidmore v. Swift & Co., 323 U.S. 134 (1944), discussed *supra*, note 40) at most under Title VII because the statute did not vest EEOC with authority to issue binding rules or orders, *see* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-44 (1976); to (3) applying *Skidmore*'s factored approach in finding that EEOC's guidelines, by contradicting the Court's own interpretation, were not even of sufficient weight to rebut a rebuttable presumption, *see* EEOC v. Arabian Amer. Oil Co., 499 U.S. 244, 256-58 (1991); to (4) finally ignoring a grant of substantive rulemaking authority to EEOC (and two other agencies) in the Americans With Disabilities Act (ADA) while holding that EEOC's interpretation of the ADA was of no effect on the Court's interpretation of the Act's core term, "disability," because the jurisdictional grant was unspecific as to the sections of the statute being administered. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 481-83 (1999).

95. *Compare* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."), *with* Federal Radio Comm'n v. General Elec. Co., 231 U.S. 464, 467-68 (1930) (dismissing writ of certiorari as improperly granted because petition for review of the commission's license denial turned on "purely administrative" matters not properly adjudicated by an Article III court); *Manning, Constitutional Structure*, *supra* note 74, at 622 ("When a statute merely confers authority upon an agency, a reviewing court interprets the statute by determining the scope of the authority assigned.").

96. *See* Davis, *supra* note 71, at 922 ("If by any informal method a prosecuting agency makes known what it will not prosecute, the result is closely akin to the a rule."); Community Nutrition Inst. v. Young, 818 F.2d 943, 948-49 (D.C. Cir. 1987) (finding that because an agency's statement of enforcement policy effectively prevented the agency from enforcing contrary to its statement, the statement was a legislative rule within the meaning of the APA); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

97. *See* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543, 8 ELR 20288 (1978); NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974); SEC v. Chenery, 332 U.S. 194, 201-04 (1947).

98. Ironically, this was among the original objections to administrative agencies and their combination of functions. *See, e.g.*, Dickinson, *supra* note 44, at 36-38, 257-62.

99. *See, e.g.*, Manning, *Nonlegislative Rules*, *supra* note 91, at 914-27.

100. *See* Magill, *supra* note 79, at 1434-37.

101. *Cf.* Dean, *supra* note 82, at 498 (noting that the distinction between rulemakings necessitating formal hearings and those necessitating only notice-and-comment procedures "is very likely to cause some difficulty" given its ambiguity); Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 37-45 (D.C. Cir. 1974) (attempting to distinguish the Federal Power Commission order's statement of policy that was under review from a substantive or legislative rule that required at least notice-and-comment procedures); American Bus. Ass'n v. United States, 627 F.2d 525, 531-34 (D.C. Cir. 1980) (testing the Interstate Commerce Commission (ICC) statement of policy against the *Pacific Gas* criteria and setting aside ICC's statement as impermissible without notice-and-comment procedures pursuant to APA §4); American Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1108-12 (D.C. Cir. 1993) (reviewing multiple tests and factors for distinguishing legislative from interpretive rules); Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.").

102. APA §4's uncertain breadth as a default has allowed several novel rulemaking forms. *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 Geo. Wash. L. Rev. 1 (1995); Michael Asimow, *Interim Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703 (1999).

103. *See* United States v. Allegheny-Ludlum Steel Co., 406 U.S. 742 (1972); Florida East Coast Ry. Co. v. United States, 410 U.S. 224 (1973).

104. *Compare Florida East Coast Ry.*, 410 U.S. at 246 (Douglas, J., dissenting) ("The present decision makes a sharp break with traditional concepts of procedural due process [and the APA]."), *with id.* at 238 (purporting to adhere to past precedent construing the APA's applicability to ICC authorities).

105. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967); Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 170 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967). *Abbott Labs* signaled a presumption of reviewability of rulemakings as such that would soon enable so-called preenforcement review of all kinds of agency rulemakings. *See* Ronald M. Levin, *The Story of the* Abbott Labs *Trilogy: The Seeds of the Ripeness Doctrine*, *in* Administrative Law Stories 431, 477 (Peter L. Strauss ed., 2005) ("What seems to have happened is that, once the Court had made clear that there was no presumption *against* pre-enforcement review, a combination of factors . . . induced courts to find that the *Abbott Labs* balance favors such review in most instances.").

106. *See, e.g.*, American President Lines, Ltd. v. Federal Maritime Comm'n, 316 F.2d 419, 421-22 (D.C. Cir. 1963) (dismissing challenge to interpretive rule as not reviewable regardless of the rule's "practical or psychological effect . . . on the conduct of petitioners" because the rule's legal effect was purely advisory).

107. *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689 (1990) [hereinafter Levin, *Unreviewability*].

made them reviewable because without such weight in court, the rules would not impact affected persons enough to be reviewable![108]

Accordingly, judicial doctrine and the APA invite agencies to announce their interpretations and whatever else guides them in their statutory missions.[109] Publication of such declarations in the *Federal Register* entitles them to judicial notice, at the very least.[110] Doctrine further settles that: (1) agencies can use rules to constrict the relevant issues within any given agency process[111]; (2) agencies should not be pushed into making general rules before reaching and imposing particularized judgments[112]; and (3) no constitutional barriers prevented administrative agencies' rules (or orders) from serving as the basis for even the strictest of civil and criminal penalties.[113] This backdrop for judicial and agency authorities and their relative force allowed CEQ and its interpretations of NEPA to take up an influential—if also curiously obscure—perch in our law.

III. NEPA's Transit From Guidelines to Regulations, 1970-1978

NEPA delegates no authority to the president to administer it, at least not expressly.[114] But because CEQ has always made its rules at the president's behest, NEPA's relationship to the president is of singular importance. The sequence of steps is sometimes ignored,[115] so it is worth reviewing here how CEQ came to issue the regulations of today. When CEQ issued its first interim guidelines in 1970, the memorandum transmitting the guidance to agency heads was published as a *Federal Register* notice.[116] Those interim guidelines were superseded in 1971 by another similar notice.[117]

By 1973, when CEQ was finalizing the first version of its guidelines to be codified in the *Code of Federal Regulations*, it began with a published proposal in the *Federal Register*'s Proposed Rules section, took comment on that proposal, and published a final rule months later in the Rules and Regulations section.[118] CEQ explained that its guidelines should be "codified, in part, because they affect State and local governmental agencies, environmental groups, industry, private individuals, in addition to Federal agencies, to which they are specifically directed," and therefore they should be "widely available."[119] If there were other reasons for codification, they went unstated in that 1973 rulemaking.[120] Even by the lax standards of the day, CEQ's statement of basis and purpose in the 1973 rulemaking was probably legally deficient.[121] Had a preenforce-

108. *See* National Auto. Laundry & Cleaning Council v. Schultz, 443 F.2d 689, 694-704 (D.C. Cir. 1971); *Abbott Labs.*, 387 U.S. at 151. Eventually, the courts tired of the "metaphysical" differences between rules and interpretations that were not rules within the APA definition. *See, e.g.*, American Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1110 (D.C. Cir. 1993). The result is a roving jurisdiction of review of agency "statements of future effect" for any plaintiff with Article III standing. *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 30 ELR 20560 (D.C. Cir. 2000); Utility Air Reg. Grp. v. EPA, 320 F.3d 272 (D.C. Cir. 2003); Environmental Integrity Project v. EPA, 425 F.3d 992 (D.C. Cir. 2005); Sierra Club v. EPA, 536 F.2d 673 (D.C. Cir. 2008).

109. *See* SEC v. Chenery (Chenery II), 332 U.S. 194, 201-08 (1947); United States v. Storer Broad. Co., 351 U.S. 192, (1956); Frozen Food Express v. United States, 351 U.S. 41, 41-42 (1956); FPC v. Texaco, Inc., 377 U.S. 33 (1964); Federal Trade Comm'n v. Colgate-Palmolive Co., 380 U.S. 374, 384-92 (1965); Superior Oil Co., v. FPC, 322 F.2d 601 (9th Cir. 1963); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966); WBEN, Inc. v. United States, 396 F.2d 601 (2d Cir. 1968). Over its history, the *Federal Register* has published different types of agency work but the three conventional types have always been: (1) the proclamations and public documents of the president; (2) agencies rules; and (3) agency notices. Congress' progression has been toward the expansion of both (2) and (3). *Cf.* Pub. L. No. 74-220, ch. 417, §5, 49 Stat. 500, 501 (1935) (requiring publication in the *Federal Register* of such documents of these types having "general applicability and legal effect"); *Newman*, *supra* note 79, at 932. For years after the enactment of the APA and FRA, there seemed to be "an unwitting conspiracy to exclude from the *Federal Register* a huge quantity of documents that have general applicability and legal effect." *Id.* at 933-34. Once amended in 1966, however, agencies faced real consequences for nonpublication. *See* Pub. L. No. 89-487 §3(b), 80 Stat. 250, 250-51 (1966) ("No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published [in the *Federal Register*].").

110. The FRA requires that "[t]he contents of the Federal Register shall be judicially noticed," *see* 5 U.S.C. §1507, and also creates a rebuttable presumption upon publication that the item was "duly issued, prescribed, or promulgated," duly filed with the National Archives as required, and that all other requirements of the Act are satisfied. 5 U.S.C. §1507(1)-(4); *see also* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947).

111. *See, e.g.*, United States v. Storer Broad. Co., 351 U.S. 192, 205-06 (1956); *see also* Heckler v. Campbell, 461 U.S. 458, 461-68 (1983).

112. *See, e.g.*, American Mich. Corp. v. NLRB, 424 F.2d 131, 1330 (5th Cir. 1970) ("In most situations an administrative agency must be allowed some flexibility in deciding whether adjudication or rulemaking is the proper course to pursue.") (*citing* SEC v. Chenery (Chenery II), 332 U.S. 194 (1947)).

113. *See* United States v. Grimaud, 220 U.S. 506, 521 (1911); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937); Yakus v. United States, 321 U.S. 414, 420-22 (1944); Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

114. NEPA does not expressly authorize the president to "guide and supervise" anyone, least of all the federal agencies to which it directs its charges in §§101 and 102.

115. *See, e.g.*, Kenneth S. Weiner, *Basic Purposes and the Policies of the NEPA Regulations*, *in* Environmental Policy and NEPA: Past, Present, and Future 61, 64-65 (Ray Clark & Larry Canter eds., 1997) (stating that "in 1971 CEQ staff issued a set of 'interim' guidelines to all federal agencies for complying with NEPA").

116. *See* CEQ, Statements on Proposed Federal Actions Affecting the Environment: Interim Guidelines, 35 Fed. Reg. 7390 (1970).

117. *See* CEQ, Statements on Proposed Federal Actions Affecting the Environment: Guidelines, 36 Fed. Reg. 7724 (1971).

118. CEQ, Preparation of Environmental Impact Statements: Proposed Guidelines, 38 Fed. Reg. 10856 (1973).

119. CEQ, Part 1500—Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20550, 20550 (1973).

120. In its 1978 statement of basis and purpose finalizing the Carter Administration regulations, CEQ disingenuously stated that "[a]lthough the Council conceived of the [1973] Guidelines as non-discretionary standards for agency decision-making, some agencies viewed them as advisory only." *See* 43 Fed. Reg. at 55978.

121. In 1972, OFR updated its rules on the requirements for statements of basis and purpose (what it termed "adequate preambles"). *See* Admin. Comm. of the Fed. Reg., 37 Fed. Reg. 23602, 23602 (1972). In that 1972 revision, OFR required that "[t]here must be a clear preamble statement that describes the contents of the document in a manner sufficient to apprise a reader, who is not an expert in the subject areas, of the general subject matter of the rule making document," *id.* at 23609, that "[t]o the extent practicable, the preamble statement for a proposed rule making document should also discuss the major issues involved in, and the reasons for, the proposed rules," *id.*, and that "[t]o the extent practicable, the preamble statement for a rule or regulation that was preceded by a notice of proposed rule making, should also indicate in general terms the principal differences, if any, between the rules as proposed and the rules as adopted." *Id.* (*codified at* 1 C.F.R. §1812(a)-(c) (1973)). Finally, the famous dictum in *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968),

ment review petition on that assertion of authority been viable, it might have concluded that CEQ had no power of its own to administer NEPA.

Finally, when President Carter ordered CEQ to promulgate regulations that would bind all agencies, CEQ undertook a notice-and-comment process—one that went above and beyond APA §4's demands—that the Supreme Court later called "comprehensive."[122] CEQ finalized that rulemaking in a statement of basis and purpose that again would have failed if a preenforcement challenge had been pursued. Yet, CEQ's regulations were regarded as binding and jurisdictional almost immediately, and have been so ever since.[123] Indeed, CEQ once asserted in a question-and-answer guidance document about the rules that a substantial violation would give rise to its own cause of action.[124] Article III courts have now long measured action agencies' compliance with these CEQ regulations,[125] entangling them with NEPA and the judicial precedents construing them to form an irregular body of NEPA law, the grounds of which are cryptic.

This part challenges the conventional narrative by examining the legal bases of CEQ's rules and, by implication, NEPA's legal content. As Section A reviews, NEPA grants no rulemaking authority to CEQ or the president. Sections B and C trace CEQ's interpretations of NEPA from the statute's formative judicial precedents. Section D reveals the powerful influences that the standard of review has exerted over time.

A. NEPA and the President

President Nixon's signing statement on January 1, 1970, enacting NEPA was less about the statute than about further legislation still under debate in Congress.[126] When CEQ published its first Interim Guidelines memo on May 12, 1970,[127] just 56 days after Nixon ordered that guidelines be prepared and 132 days after NEPA's enactment,[128] the agency had a blank slate. No prior judicial interpretations had been declared and none of the agencies to which NEPA applied had interpreted it by rulemaking or other public means. That was the last time the NEPA slate would be so clean.[129]

What CEQ did not do with its blank slate is as important as what it did. For while the original Nixon guidelines urged agencies to adopt procedures and other internal means ensuring the widest possible use of NEPA's detailed statement tool, the guidelines did nothing to specify how environmental loss or degradation should factor into or weigh upon agencies' decisions.[130] The Nixon guidelines neither declared nor asserted the president's environmental priorities (such as they were). CEQ, acting as the president's adjunct, said nothing substantive at all about how the environment should weigh in action agencies' choices or reasoning. Gradually, the gap that opened between NEPA's national policy and its procedures widened and hardened into a legal canyon. The orthodoxy today is that NEPA's substantive weight is to be given by—and only by—the multitude of responsible officials taking the government's myriad actions.[131]

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urged that "if the judicial review which Congress has thought it important to provide is to be meaningful, the "concise general statement . . . basis and purpose" mandate by [APA] Section 4 will enable [the court] to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." CEQ's preamble did none of these—pausing neither to address specific comments, nor to note how the final differed from the proposal, nor to articulate the major issues of policy raised by the rulemaking.

122. Andrus v. Sierra Club, 442 U.S. 347, 358, 9 ELR 20390 (1979).
123. *See* CEQ, National Environmental Policy Act—Regulations, Implementation of Procedural Provisions, 43 Fed. Reg. 55978 (1978). A small handful of recent commentators have noticed that CEQ lacks any authority grant in NEPA and argue that, as a result, its interpretations ought not to be afforded *Chevron* deference. *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 895 & n.296 (2001).
124. CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18030 (1981) (question 12(c)).
125. *See, e.g.*, Piedmont Envtl. Council v. FERC, 558 F.3d 304, 318-19, 39 ELR 20036 (4th Cir. 2009) (holding that the agency violated CEQ rules in adopting its own changed NEPA rules, and remanding to the agency for re-promulgation consistent with the CEQ rules); Heartwood, Inc. v. U.S. Forest Serv., 230 F.3d 947, 949, 31 ELR 20217 (7th Cir. 2000).
126. *See Statement by the President Upon Signing Bill Establishing the Council on Environmental Quality, January 1, 1970*, 6 Weekly Comp. Pres. Docs. 11 (1970) (describing CEQ as the president's advisor:

> Under the provisions of this law a three-member council of environmental advisers will be appointed. I anticipate that they will occupy the same close advisory relation to the President that the Council of Economic Advisers does in fiscal and monetary matters. The environmental advisers will be assisted by a compact staff in keeping me thoroughly posted on current problems and advising me on how the Federal Government can act to solve them.

127. CEQ's memorandum was dated April 30, but the published *Federal Register* notice did not appear until May 12. *See* CEQ, Statements of Proposed Federal Actions Affecting the Environment, 35 Fed. Reg. 7390 (1970) [hereinafter Interim Guidelines]. This suggests that the memo was not transmitted to OFR immediately because publication delays then were almost nonexistent.
128. Of all CEQ's published rules, the May 1970 notice is perhaps the most cryptic. It appears to be an instruction from the Council to "Federal departments, agencies and establishments" that bore some legal significance. *See* 35 Fed. Reg. at 7390-91. The OFR rules at the time, much as they do today, permitted publication in the Notices section of the *Federal Register* of "miscellaneous documents not subject to codification" and "[d]ocuments which in the opinion of the Director [of OFR] are of sufficient public interest to warrant publication" but which did not fall within the categories of "the President," "rules and regulations," or "proposed rule making." 1 C.F.R. §13.5(a)-(c) (1969). The necessary implication, then, was that the memo was of *some* "public interest," yet was neither submitted by the president, *id.* at §13.2, nor constituted an agency's "statement of general policy or interpretation, submitted pursuant to section 3(a)(3) of the Administrative Procedure Act." *Id.* at §17.23 (listing each as a document subject to codification).
129. Since then, scores of agency regulations and thousands of court opinions have interpreted NEPA. The broadest survey of NEPA law, Prof. Daniel Mandelker's *NEPA Law and Litigation*, lists almost 3,000 precedents construing NEPA in the districts, circuits, and Supreme Court. *See* Daniel Mandelker, NEPA Law and Litigation (3d ed. 2013) (app. M).
130. No version of the guidelines from Nixon's CEQ, issued between April 1970 and August 1973, made mention of the environmental outcomes favored by NEPA, CEQ, or the president. The 1970 and 1971 versions shared a common §2, the policy statement, directing that environmental impact statements (EISs) were to be used to identify and "avoid to the fullest extent practicable undesirable consequences for the environment." *See* 35 Fed. Reg. at 73091; 36 Fed. Reg. at 7724. In the 1973 version, this policy was qualified still further to state that agencies should "consider" their EISs "along with their assessments of the net economic, technical, and other benefits of proposed actions and use all practicable means, consistent with other essential considerations of national policy, to restore environmental quality as well as to avoid or minimize undesirable consequences for the environment." 38 Fed. Reg. at 20550.
131. *See, e.g.*, Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28, 10 ELR 20079 (1980); Robertson v. Methow Valley Citizens'

This is a curious outcome. Consider that at the same time as CEQ's guidelines were transitioning into supposedly binding regulations, the modern practice of White House regulatory review was emerging.[132] President Nixon had already (infamously) sought more White House control by means of political appointments, presidential directives, and a centralized Office of Management and Budget (OMB).[133] The Carter Administration later laid important groundwork for what would become President Ronald Reagan's watershed Executive Order No. 12291 in 1981,[134] quickly followed by pressures to enforce that order.[135] And the Reagan order soon became the Clinton order,[136] the Bush order,[137] and the Obama order[138]—stitching regulatory review into the fabric of our administrative state.[139] It would be at least curious if Nixon's White House had done nothing to press his agenda in the NEPA determinations of his administration.[140] The evidence suggests that Nixon's priorities were advanced off the record and behind the scenes.[141]

Indeed, Nixon's White House is usually cast as the archetype of secrecy and back-channel maneuvering[142]—a totem of OMB's broader legacy among progressives and the political left.[143] White House regulatory review, they insist, has ever since subordinated reason and the public good to partisan political deals.[144] Some have even argued that the separation of powers must be interpreted to bar the White House from influencing agency choices like those NEPA governs.[145] But these arguments go to the foundations of our presidency and its role in the administration of laws like NEPA.[146] They problematize our very concept of the rule of law—what it means for the president both to execute and to be bound by the law.[147]

Progressives once exalted our presidency as a national asset, the only national authority able to marshal the full force of reason and knowledge to the administration of the laws.[148] Once conservative presidents like Nixon, Reagan, and Bush the younger put their stamp on the office, most progressives came to view executive power skeptically.[149] Presidential control is no longer seen as remedial. Without

Council, 490 U.S. 332, 350-51, 19 ELR 20743 (1989). Commentators often note and assume the immutability of the divide. *See, e.g.*, Amy L. Stein, *Climate Change Under NEPA: Avoiding Cursory Consideration of Greenhouse Gases*, 81 Colo. L. Rev. 473, 475 (2010):

> [W]hile NEPA requires agencies "to consider and give effect to the environmental goals set for the in the Act [and] not just to file detailed impact studies which will fill governmental archives," the agencies are largely free to pursue less environmentally protective alternatives so long as they have met their procedural obligations to consider the impacts.

(*quoting* Center for Bio. Diversity v. NHTSA, 538 F.3d 1172, 1215 (9th Cir. 2008)).

132. *See* Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L.J. 451, 461-63 (1979) [hereinafter Bruff, *Presidential Power*].
133. *See* Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 Harv. L. Rev. 2070, 2092-2100 (2009); David E. Lewis, The Politics of Presidential Appointments: Political Control and Bureaucratic Performance 34-36 (2008); Karen M. Hult & Charles E. Walcott, Empowering the White House 166-72 (2004); Forrest McDonald, The American Presidency: An Intellectual History 338-40 (1994); Hugh Heclo, A Government of Strangers 78-80 (1977); *see generally* Richard P. Nathan, The Administrative Presidency (1983). Nixon's Reorganization Plan No. 2 drew most public attention to his ill-fated Domestic Council joining 10 different cabinet secretaries, the vice president, and the president into a kind of super cabinet in order to gain control of the Executive establishment. *See* Barry D. Karl, *Executive Reorganization and Presidential Power*, 1977 Sup. Ct. Rev. 1, 35 (1977). Less sensational at the time was Nixon's creation of OMB, although its quick politicization changed that. *See* Larry Berman, *OMB and the Hazards of Presidential Staff Work*, 38 Pub. Admin. Rev. 520, 520 (1978) ("[OMB] was a major casualty of the Nixon presidency, in part for what it did, but also for what it appeared to be doing. By responding to the partisan needs of the President OMB depleted valuable credibility with its other clients . . . .").
134. *See* Exec. Order No. 12291: Federal Regulation, 46 Fed. Reg. 13193 (1981).
135. *See* Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12291*, 1983 Duke L.J. 285, 291-93; Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075 (1986). Nixon's creation of OMB within the wider Executive Office of the President (EOP), much like Carter's Executive Order No. 12044, were vital first steps toward the Reagan Administration's 1981 executive order entrenching OMB regulatory review in its modern form. DeMuth & Ginsburg, *supra* at 1076-80.
136. *See* Exec. Order No. 12866, 3 C.F.R. 638 (1993), *codified as amended at* 5 U.S.C. §601 (2006).
137. *See* Exec. Order No. 13258, Amending Executive Order 12866 on Regulatory Planning and Review, 67 Fed Reg. 9385 (2002), and Exec. Order No. 13422, Further Amendment to Executive Order 12866 on Regulatory Planning and Review, 72 Fed. Reg. 2763 (2007), *revoked by* Exec. Order No. 13497, Revocation of Certain Executive Orders Concerning Regulatory Planning and Review, 74 Fed. Reg. 6113 (2009).
138. *See* Exec. Order No. 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (2011).
139. *See* Bressman et al., *supra* note 45, at 571-617; Richard L. Revesz & Michael A. Livermore, Retaking Rationality: How Cost Benefit Analysis Can Better Protect the Environment and Our Health 21-45 (2008).
140. Nixon's presidency, even apart from its morose conclusion, is known for its concerted effort to create within the White House a "counter-bureaucracy" capable of asserting the president's priorities throughout the executive establishment. *See* McDonald, *supra* note 133, at 338-40; *see generally* Mordecai Lee, Nixon's Super-Secretaries: The Last Grand Presidential Reorganization Effort (2010); Bruff, *Presidential Power*, *supra* note 132, at 466-67. The notion that CEQ's work under Executive Order No. 11514 remained indifferent to the substantive policy judgments being made by action agencies could not, in short, withstand scrutiny.
141. *See, e.g.*, Lee, *supra* note 140; John Quarles, Cleaning Up America: An Insider's View of the Environmental Protection Agency (1976).
142. *See, e.g.*, David E. Lewis, Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946-1997, 30 (2003).
143. *See* Berman, *supra* note 133, at 521-22; Morton B. Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291*, 80 Mich. L. Rev. 193, 221-25 (1981); Alan B. Morrison, *OMB Interference With Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 Harv. L. Rev. 1059, 1060-62 (1986); Revesz & Livermore, *supra* note 139, at 21-24.
144. *See* Morrison, *supra* note 143, at 1064-71; Robert L. Glicksman & Sid Shapiro, Risk Regulation at Risk: Restoring a Pragmatic Approach 178-206 (2003); Revesz & Livermore, *supra* note 139, at 24-30; Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260, 1263-82 (2006).
145. *See, e.g.*, Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12291*, 23 Ariz. L. Rev. 1199 (1981).
146. *See* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696 (2007) [hereinafter Strauss, *Overseer?*].
147. *See generally* Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (2010); Bruce Ackerman, The Decline and Fall of the American Republic 6-38, 141-79 (2010).
148. *See* Skowronek, *supra* note 133, at 2083-92; Mashaw, *supra* note 22, at 163 (arguing that President Andrew Jackson's assertion of presidential power, tracking his beliefs in the presidency's authority as a nationally elected leader, set a high watermark that would only be approached again in the 20th century).
149. Richard H. Pildes, *Law and the President*, 125 Harv. L. Rev. 1381, 1383-85 (2012) (*reviewing* Posner & Vermeule, *supra* note 147); William G. Howell, Power Without Persuasion: The Politics of Direct Presidential Action (2003).

the presidency, though, goal-oriented agencies are suspiciously unaccountable.[150] The extreme dispersion of official discretion in the multiagency state, coupled with our Congress' inability to legislate with both clarity and precision, motivate presidentialist leanings.[151] The presidency's national electorate, unique span of control, and energy in the classical sense bolster the case for the president's direction and oversight of the administration of the law.[152]

Yet, that view ignores the statutes Congress has enacted.[153] Congress has been consistently inconsistent in how it has addressed the president,[154] much as it has failed to specify its value priorities more generally.[155] Congress has alternated charges to agency officials, to the president, and combined charges to both of them in its goal statutes.[156] What should statutory silences like NEPA's mean against that backdrop?

The evolution of regulatory review is instructive. The president's power/duty to execute the laws under Article II, §3, have remained the focal dispute in White House regulatory review since it began.[157] For present purposes, the arguments mostly come down to what counts as a statutory empowerment of the president. One point of consensus has been that if the president's discretion is foreclosed or constrained by legislation, then the president must follow the law.[158] But such principles are of little value given how infrequently legislation actually forecloses discretion.[159] More often, implementing statutes comes down to managing incongruous considerations, varying uncertainties, and politics. Administration after administration, the White House offices that review agency rulemakings demonstrate that a single bureau sitting at such an apex attracts vitriol, the impugning of its motives, and worse.[160]

Each of the executive orders on regulatory review has included a caveat that OMB and Office of Information and Regulatory Affairs (OIRA) reviews be done "to the extent permitted by law."[161] Still, a statute's silence as to the president's authority—while charging no one else with the statute's administration—assumes some ex ante understanding of the presidency.[162] NEPA is hardly unique in combining cross-cutting applicability with silence or a gap as to the authority to administer it as a whole (that is, the

150. *See* Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. 633, 643-64 (2000).

151. Administration as gap-filling and other interpretive steps of which *Chevron* and related doctrines speak is accepted even by formalists who insist on an orthodox separation of legislation, execution, and interpretation. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

152. *See*, *e.g.*, Posner & Vermeule, *supra* note 147, at 176-205; Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power From Washington to Bush (2008); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217 (1994). Some, like Steven Calabresi and Christopher Yoo, go so far as to argue that express statutory commands cannot bar the president's superintendence. Short of such extremes, many espouse composite views that allow for some but not all presidential prerogatives. *See, e.g.*, Bruff, *Presidential Power*, *supra* note 132, at 454-56; Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2272-81 (2001); Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 Yale L.J. 2280 (2006); Cass R. Sunstein, *Beyond* Marbury: *The Executive's Power to Say What the Law Is*, 115 Yale L.J. 2580 (2006). Since 9/11 the New Presidentialism has taken on a harder edge. *See* Harold H. Bruff, Balance of Forces: Separation of Powers Law in the Administrative State 121-22 (2006). None of what follows in my argument endorses the reaches of authority claimed by such extreme presidentialists. *See* Bruff, *supra* at 126 (arguing that presidential responses to emergencies and crises need not be conflated with more settled expectations of our separation of powers and constitutionalism).

153. *See* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 Colum. L. Rev. 263, 270-76 (2006) [hereinafter Stack, *President's Statutory Powers*].

154. By "inconsistent" I do not mean that Congress has contradicted itself: Multiple goals are to be expected from an institution like Congress. Rather, I mean that Congress' statutes defy ready summarization in patterns or principles. *Cf.* Stack, *President's Statutory Powers*, *supra* note 153, at 290 ("Congress's preferences for who receives power presumably would not shift based on its relationship with the President if the choice of delegate were of little significance.").

155. *See* Farina, *supra* note 29, at 468-76.

156. *See* Stack, *President's Statutory Powers*, *supra* note 153, at 276-83. Presidential claims of implied statutory authorization under the president's power to execute the laws must contend with the fact that Congress has long demonstrated the capacity to charge its addressees expressly. *Id.* at 284-93 (describing the negative implications from the prevalence of "mixed agency-President" delegations). Still, as then-Prof. Elena Kagan urged, it may well reflect "the general intent and understanding of Congress" when Congress delegates to executive branch officials whom Congress knows "stand in all other respects in a subordinate position to the President," *see* Kagan, *supra* note 152, at 2337-38, that the president be in charge.

157. *See* Strauss, *Overseer?*, *supra* note 146, at 732-38; Kagan, *supra* note 152, at 2277-80.

158. *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). One of the few instances where Office of Information and Regulatory Affairs (OIRA) regulatory review was rebuffed by an Article III court was *Environmental Def. Fund, Inc. v. Thomas*, 627 F. Supp. 566, 16 ELR 20250 (D.D.C. 1986). In *Thomas*, EPA's statutory deadline for the rulemaking had lapsed at least in part because of delays caused by OIRA. The court found that such "interference" was "incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers." *Thomas*, 627 F. Supp. at 570.

159. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-39 (1952) (Jackson, J., concurring) (arguing that presidents act either "pursuant to" a governing statute, in the absence of a governing statute, or by taking "measures incompatible with the expressed or implied will of Congress," and that the boundaries separating these categories of presidential power are "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh").

160. *Cf.* Christopher DeMuth, *OIRA at Thirty*, 63 Admin. L. Rev. 101, 104 (2011) ("The record of thirty years of OIRA oversight is an arresting combination of contentious process and marginal results."); Revesz & Livermore, *supra* note 139, at 31-45; Curtis W. Copeland, Cong. Research Serv., RL32397, Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs 26-27 (2009); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838 (2013).

161. *See* Exec. Order No. 12291 at §2, 46 Fed. Reg. 13193 (1981) ("In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies, to the extent permitted by law, shall adhere to the following requirements."); Exec. Order No. 12866 at §1(b), 58 Fed. Reg. at 51735 ("To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law . . . ."); Exec. Order No. 13563 at §1(c), 76 Fed. Reg. at 3821 ("Where appropriate and permitted by law, each agency may consider . . . values that are difficult or impossible to quantify . . . .").

162. Conventional accounts include: (1) that the president can claim such authority and discretion under the so-called Vesting Clause of Article II, *see, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 570-85 (1994); (2) that the president is barred from claiming such authority and discretion where it is not expressly vested in the president by the statute, *see, e.g.*, Strauss, *The Place of Agencies in Government*, *supra* note 44, at 649-50; (3) that the president's authority and discretion depend on his/her authority to remove the agency's leader(s) from office and the president's capacity to achieve the statute's goals, *see, e.g.*, Bruff, *Presidential Power*, *supra* note 132, at 488-508; and (4) unless it expressly forecloses the president's oversight of its implementation, a statute implicitly invites the White House's superintendence thereof. *See* Kagan, *supra* note 152, at 2326-31.

authority to reconcile it with the rest of the law). Yet, as with other statutes governing the government itself, it is the dispersal of discrete institutions with their own internal ordering, intentions, and goals that make NEPA's administration so important.[163]

NEPA's legislating coalition evidently expected "[a]ll agencies of the Federal Government"[164] to integrate its priorities with theirs.[165] Neither the Act's text nor the conferees' report could clarify how NEPA would fit with the preexisting "mass of legislation,"[166] though.[167] So, who would attend to NEPA's effectuation as law, giving it practical effect across the breadth of agencies, programs, public priorities, and exigencies? NEPA's legislators had no clear sense of the question.[168] The argument that NEPA Title II empowered CEQ to do so[169] ignores the statute's text: CEQ is to "recommend" national policies—not to order them. If NEPA was intended to authorize either the president or CEQ to issue commands with the force of law, its legislators erred unforgivably in their work.[170]

Yet, if it is not the president who shall fashion practical steps in pursuit of NEPA's economywide goals, then the task falls to the invisible hand. With NEPA, if not with every goal statute,[171] there is but one option. If the president's constitutional power/duty is to take care that the laws be faithfully executed, then the president's power/duty hinge on how those laws are administered. NEPA exemplifies this reasoning's inescapability. Much like OIRA regulatory review, CEQ's administration of NEPA has expanded to fill most of the available decisional spaces from which it is not excluded. Also like regulatory review, CEQ's administration of NEPA has reflected the incumbent administration's political priorities detectably but unevenly. Defenders of OIRA's regulatory reviews have pointed to all the ways in which OIRA has grown increasingly professionalized, analytical, and bureaucratic.[172] Detractors note the curious coincidence of suppos-

163. The APA and FOIA are two examples of statutes governing all agencies that lack a single administering authority. More recent such statutes have usually delegated to some administering authority. For example, the Government Performance and Results Act, Pub. L. No. 103-62, 107 Stat. 295 (1993) (GPRA) charges OMB with implementing its planning and performance assessment measures. All covered agencies are bound by OMB's rules implementing GPRA. The Federal Advisory Committee Act (FACA) is another; it charges the General Services Administration with its implementation.

164. 42 U.S.C. §§4333, 4334. Commentators have often invoked NEPA's drafters and their intentions as a source of interpretive reasons. *See, e.g.*, Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 Envtl. L. 533, 533-34 (1990) (quoting comments by Sen. Henry M. "Scoop" Jackson (D-Wash.), expressing the U.S. Senate bill's purposes from the floor of the Senate and declaring the comments "a noble statement of the drafters' intent!"). But NEPA's meaning is no more necessarily a reflection of that group's intentions than it is of President Nixon's. *See, e.g.*, Charles M. Cameron, Veto Bargaining 20 (2001) (describing presidential power over the legislative process in wielding the veto); J. Richard Broughton, *Rethinking the Presidential Veto*, 42 Harv. J. Legis. 91, 127-33 (2005) (describing modern presidents' use of the veto as a means of advancing their political agendas). Accordingly, my account will speak of NEPA's legislating coalition including Nixon.

165. *See* H.R. Rep. No. 91-765, at 9 (1969) [hereinafter Conference Report] ("each agency of the Federal Government shall comply with the directives set out in [NEPA §102(2)(A)-(H)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible."); *cf.* Hanna J. Cortner, *A Case Analysis of Policy Implementation: The National Environmental Policy Act of 1969*, 16 Nat. Res. J. 323, 328-30 (1976) (describing use by Rep. John Dingell (D-Mich.) of committee oversight hearings to encourage agencies to adopt NEPA's policy objectives as their own). The definitive work on the congressional wrangling over the precise wording and intended effects of the bill's statement of national policy may be an unpublished dissertation by Terence Finn. *See* Terence T. Finn, Conflict and Compromise: Congress Makes a Law—The Passage of the National Environmental Policy Act (1972) (unpublished dissertation, Georgetown University) (on file with author). Finn details the depth of disagreement among Reps. Dingell, Emilio Daddario (D-Conn.), Wayne Aspinall (D-Colo.), and other U.S. House of Representatives leaders, *see id.* at 311-94, and how incoherent their compromise positions grew throughout the fall of 1969, *see id.* at 525-27.

166. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting).

167. The central NEPA controversy—to what extent, if any, its national policy trumps action-agencies' enabling legislation—grew from its own muddled text. Section 104 states that "[n]othing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency," 42 U.S.C. §4334, while §101(b) states that it is the "continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy," to coordinate its own actions to six listed, environmentally protective ends. 42 U.S.C. §4331(b)(1)-(6). Section 105 states that "[t]he policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies." 42 U.S.C. §4335. Nevertheless, NEPA §§102 and 103 "authorize[ ] and direct[ ] . . . all agencies of the Federal Government" to reform themselves in specific and tangible ways, including through the use of impact statements. 42 U.S.C. §§4332-4333. Finn traced the idea of a national policy statement to the House Subcommittee on Science, Research, and Development during the period 1965-68. *See* Finn, *supra* note 165, at 84-128. From that time to the conference committee in fall 1969, the precise legal valence of such a policy statement divided Congress. Perhaps, most important to the law's passage was that (beyond its strange ambivalence) the Nixon Administration eventually supported the bill. *Id.* at 549.

168. *See* Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 Nat. Res. J. 243, 254-56 (1976). "There are few clues in the legislative history concerning what NEPA's congressional authors expected impact statements to look like," *id.* at 256, and there is even less to find specifying how NEPA's priorities would be reconciled with preexisting laws and agency missions. Nevertheless, NEPA's authors deliberately chose the statute's approach and preferred that action agencies themselves internalize its policy and values as opposed to delegating the authority to check their actions to some other, ex post regulator. *See* William L. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 Ind. L.J. 205, 222 (1989) (reviewing Senator Jackson's public and private remarks on NEPA as it was supposed to function and finding that Senator Jackson, like others, expected that it would "lead action-oriented federal agencies to internalize environmental quality considerations in their decision-making"); Matthew J. Lindstrom & Zachary A. Smith, The National Environmental Policy Act: Judicial Misconstruction, Legislative Indifference, & Executive Neglect 49 (2001) (noting that Senator Jackson, Sen. Edmund Muskie (D-Me.), and others fought for language in the bill ensuring that "environmental considerations were taken seriously by all federal agencies").

169. *See, e.g.*, Craig N. Johnston et al., Legal Protection of the Environment 105 (3d ed. 2010).

170. The president's power to issue executive orders with all the properties of law—where legislation specifically empowered or directed the president to do so—was quite familiar by 1970. *See, e.g.*, Farkas v. Texas Instruments, Inc., 375 F.2d 629, 632 (5th Cir. 1967); Yakus v. United States, 321 U.S. 414, 420-22 (1944); J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394 (1928); United States v. Midwest Oil Co., 236 U.S. 459, 470 (1915); Field v. Clark, 143 U.S. 649 (1892).

171. *Cf.* Sierra Club v. Costle, 657 F.2d 298, 405-06 & n.524, 11 ELR 20455 (D.C. Cir. 1980) (arguing that the desirability of presidential control and supervision of "executive policymaking" is "demonstrable from the practical realities of administrative rulemaking"); Kagan, *supra* note 152, at 2335 ("[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests."); Andreen, *supra* note 168 (arguing that Congress opted in NEPA for a largely decentralized structure with only very limited supervision of completed EISs by EPA).

172. *See, e.g.*, Sunstein, *supra* note 160, *passim*.

edly neutral outcomes such as lengthy OIRA delays with agency actions having political costs for the president.[173] The net result for regulatory review has been stalemate and latent uncertainty.[174]

NEPA declares that "it is the continuing responsibility of the Federal Government to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources."[175] Is that an indirect invitation to the only officer of the United States with enough practical power and discretion to make such a thing happen? Or is it aimed at any and every officer, employee, and functionary of the United States?[176] Four of CEQ's charges in the Nixon order were duties to advise or assist the president, while another four ordered CEQ to make some determination, investigation, or search.[177] The following were the charges to CEQ vis-à-vis other federal agencies:

> **(f)** Coordinate Federal programs related to environmental quality . . .
>
> **(h)** Issue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by Section 102(2)(C) of the Act;
>
> **(i)** Issue such other instructions to agencies, and request such reports and other information from them, as may be required to carry out the Council's responsibilities under the Act. . . .[178]

Thus, the Nixon order clearly envisioned CEQ administering §102(2)(C) in some sense, even if NEPA did not.[179] NEPA Title I variously addresses "the Federal Government,"[180] "each person,"[181] and "all agencies of the Federal Government."[182] It addresses no other person, office, or agency directly.[183] NEPA Title II as enacted addressed both the president and CEQ, though it has since been amended to address only CEQ.[184] So, while perhaps marginally more circumscribed now than when CEQ first began its work interpreting NEPA, the president's authority under NEPA is similar to that under any other statute that is "law" being executed.[185]

A statute like NEPA that leaves the authority to administer it unallocated invites contests of will, only some of which ever reach a court.[186] Eventually, the contests of will

173. *See, e.g.*, Editorial: *Stuck in Purgatory*, N.Y. Times A22 (July 1, 2013). Interestingly, in a book-length defense of OIRA regulatory review and particularly of OIRA's record during the first Obama Administration, Cass Sunstein never once mentions delays. *See* Sunstein, *supra* note 160, at 249-60.

174. Jack Goldsmith and John Manning exhume Chief Justice Vinson's dissent in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 667 (1952) (Vinson, C.J., dissenting), for their "completion power" thesis—the claim that every statute, by its nature as a finite expression of a goal or purpose in an infinitely varied world, delegates the power to reconcile it with other laws and priorities. *See* Goldsmith & Manning, *supra* note 152, at 2283-86. Vinson argued that the president's power to direct officials charged by a statute with its implementation was a residual capacity necessitated by the "'mass of legislation [to] be executed'" and the president's unique capacity to oversee and to integrate all of it. *Id.* at 2285 (*quoting Youngstown*, 343 U.S. at 702 (Vinson, C.J., dissenting)). This is precisely the same argument the Office of Legal Counsel made defending President Reagan's 1981 executive order on OMB regulatory review. *See* Larry L. Simms, Office of Legal Counsel, *Proposed Executive Order Entitled "Federal Regulation,"* 5 Op. Off. Legal Counsel 59, 60 (1981) [hereinafter Simms Memo].

175. 43 U.S.C. §4331(b).

176. *Cf.* John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 Ecology L.Q. 233, 315-16 (1990) ("The proper balance between law and politics in statutory interpretation is especially unclear when the statute is symbolic rather than functional. Although the legislature sidesteps difficult policy issues in enacting symbolic legislation . . . [t]he dilemma that agencies and the courts face is deciding whether to take the legislature's words literally or to reformulate legislative policy.").

177. In Section 3 of Exec. Order No. 11514, subsections (a), (b), (g), and (j) direct CEQ to help the president, and subsections (c), (d), (e), and (k) direct it to make a finding or a search of some form. *See* Exec. Order No. 11514, Protection and Enhancement of Environmental Quality, 35 Fed. Reg. 4247, 4247-48 (1970).

178. *See* Exec. Order No. 11514, Protection and Enhancement of Environmental Quality, 35 Fed. Reg. 4247, 4247 (1970).

179. One of the chief benefits of delegating power to an agency is often the incentive it gives that agency to acquire information. *See* Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. Pol. Econ. 1 (1997). While the authority to guide (i.e., issue guidelines) is not the authority to govern (i.e., issue commands), NEPA Title II and CAA §309 are silent as to both. The conference managers were in relative agreement that CEQ not review particular actions but rather focus on large-scale, long-term trends. *See* Finn, *supra* note 165, at 522-59.

180. 42 U.S.C. §§4331(b) (NEPA §101(b) declares the "continuing responsibility" of "the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources" toward its listed ends).

181. 42 U.S.C. §§4331)(c) (NEPA §101(c) records Congress' "recognition" "that each person has a responsibility to contribute to the preservation and enhancement of the environment").

182. 42 U.S.C. §§4332(2), 4333 (NEPA §§102(2) and 103 address their respective duties to "all agencies of the Federal Government"). Much as NEPA §101(a) declared its "national environmental policy" in relation to "the Nation" as a whole, *see* 42 U.S.C. §§4331(a), §§102 and 103 address "all" agencies equally as an aggregate. NEPA contains no definition of agency, however, so the default definition of agency in NEPA's context would be the APA's definition at 5 U.S.C. §551(1) (defining "agency" as "each authority . . . of the Government of the United States" but exempting "Congress, the courts, or the governments of the possessions, Territories, [and] the District of Columbia").

183. Section 102(2)(B) requires that all agencies of the federal government shall, "*in consultation with the Council on Environmental Quality*," devise means of quantifying environmental costs and benefits. 42 U.S.C. §4332(2)(B) (emphasis added). It might be argued that this empowers CEQ. An action agency's duty, after all, might correlate to CEQ's power or right in some Hohfeldian sense. However, to my knowledge CEQ has never asserted such jurisdictional authority from §102(2)(B).

184. Title II's only empowerment of the president—that he compile and transmit to Congress annually an Environmental Quality Report detailing trends, predictions, and current conditions—was repealed by the 104th Congress. *See* 31 U.S.C. §1113. Title II in its own terms states what the "Council" should "appraise," "recommend," "employ" (tools, not people), "assist and advise," "gather," "analyze and interpret," "compile and submit," "review and appraise," "develop and recommend," investigate, "document and define," "report," utilize, or study—and with whom it should "consult." NEPA §§202-205, 42 U.S.C. §§4342-45. Moreover, it was an amendment to NEPA, enacted April 14, 1970, Pub. L. No. 91-224, 84 Stat. 114 (1970), known as the Environmental Quality Improvement Act of 1970, that organized CEQ internally, now comprising an Office of Environmental Quality that provides CEQ with its staff. NEPA §202(c)(2), 42 U.S.C. §4372(d)(1). Although this later statute caused significant friction in Congress and the Nixon White House prior to its passage, *see* Finn, *supra* note 165, at 561-67, it had little practical effect.

185. *Cf.* Kagan, *supra* note 152, at 2319-23 (reviewing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and other decisions and concluding that the cases "strongly suggest that Congress may limit the President's capacity to direct administrative officials in the exercise of their substantive discretion" but that the burden is on Congress to do so expressly).

186. Interpreters of Article II never argue that statutory silences like NEPA's are irrelevant. Indeed, certain statutory silences have undermined presidential authority. *See, e.g.*, Kendall v. United States ex rel. Stokes, 37 U.S. 524, 610 (1838) ("The executive power is vested in a President. . . . But it by no means follows that every officer in every branch of that department is under

turn to arguments rooted in the ideals and purposes of our separation of powers, the indeterminate texts thereof, and the exigencies of particular cases.[187] Arguments that it is the president's prerogative to administer usually rest on the staggering volume of our legislation,[188] and two power grants in Article II—§1's Vesting Clause and §3's Faithful Execution Clause.[189] These are real arguments, to be sure.[190] The Constitution is unclear about how the president is to relate to federal departments, bureaus, offices, and their leaders.[191]

But holding that the judiciary's liberalized interpretations of statutory authority grants in the 1970s empower the president to create a jurisdictional authority out of thin air[192] ignores an essential facet of NEPA: The statute prefers the passive forces of disclosure and analysis over those of command and control.[193] It is one thing for a court to examine a general or nonspecific grant of jurisdiction and, in deference to Congress or an administering agency, interpret it liberally.[194] It is even arguably coherent to deny real deference where a statute delegates to multiple agencies.[195] It is something else again to infer jurisdiction to prescribe the law from nothing more than a statute's provisions creating an agent and vesting it with advisory functions.[196]

The remainder of Part III of this Article explains how practice has papered over these questions, and introduces an argument (more fully developed in Parts IV and V) that NEPA's administration sheds a particularly revealing light on certain constitutional and political fault lines beneath our presidency, the rule of law, and the administration of goal-oriented statutes like NEPA.

B. Nixon Guidelines and CEQ's Obscured Footings in NEPA

Executive Order No. 11514 (the Nixon order) cited the generic authority vested in the president by and "in furtherance of the purpose and policy" of NEPA as its grounds for charging CEQ with its 11 distinct "[r]esponsibilities."[197] Again, nothing in the statute or in either of its 1970 amendments suggests that Congress expected CEQ to serve as a regulator of any sort.[198]

the exclusive direction of the President."); Humphrey's Executor v. United States, 295 U.S. 602, 621-27 (1935) (concluding that the president lacks authority to dismiss an agency official on his own grounds if the governing statute lists the grounds for the official's dismissal); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute."); United States v. United States Dist. Ct., 407 U.S. 297 (1972) (unanimously rejecting President Nixon's claim of independent authority to wiretap enforcement targets without a warrant); Sierra Club v. Costle, 657 F.2d 298, 406-08, 11 ELR 20455 (D.C. Cir. 1981) (assuming in analyzing White House communications with EPA that the EPA Administrator possessed the final decisionmaking authority over the setting of CAA standards where the Act vested authority in the Administrator and said nothing of presidential authority); Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1537-39, 23 ELR 20560 (9th Cir. 1993) (remanding to the agency for findings regarding off-the-record White House communications in a matter that the statute had seemingly designed to be on the record and governed by the APA).

187. *Cf.* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1971-2005 (2011) (arguing that "ordinary interpretation" typically entails reconciling broad purposes with more concrete but still largely indeterminate texts).

188. *See, e.g.*, Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 President. Stud. Q. 850, 860-61 (1999) (arguing that the president's power increases over time as more ambiguous delegations accumulate and must be executed concurrently).

189. *See, e.g.*, Calabresi & Prakash, *supra* note 162, at 570-85 (arguing that Article II's Vesting Clause and Take Care Clause jointly invest the president with the power to substitute his judgment and discretion for that of any official subordinate to him in the execution of federal law); Morrison v. Olson, 487 U.S. 654, 699-705 (1988) (Scalia, J., dissenting).

190. *See* Bruff, *supra* note 152, at 144-54.

191. Article II presumes that Congress will create departments, department heads, and offices subordinate thereto "by law." It is notoriously ambiguous as to the president's power to oversee or direct them, though. *See* Bruff, *supra* note 152, at 411-49.

192. *See, e.g.*, Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army, 288 F. Supp. 2d 64, 70 (D. Mass. 2003) (declaring that "NEPA . . . authorized the CEQ to enact regulations describing environmental review procedures that federal agencies are to follow to comply with NEPA") (*citing* NEPA §§202. 204). The court's statement is clearly erroneous. *See, e.g.*, Comcast Corp. v. FCC, 600 F.3d 642, 652 (D.C. Cir. 2010) (noting a different agency's concession that statutory statements of policy do not themselves delegate regulatory authority).

193. Even the most permissive constructions of jurisdictional authority involved statutes providing for *some* authority to make rules and regulations, to issue licenses, or to take some other sort of binding action. *See, e.g.*, National Ass'n of Pharm. Mfrs. v. Food & Drug Admin., 637 F.2d 877, 889 (2d Cir. 1981) (interpreting the legislative history of the governing statute to find that a general grant of rulemaking authority to FDA was sufficient grounds for FDA to issue "substantive," "legislative" rules implementing its enabling legislation); National Petroleum Refiners Ass'n v. Federal Trade Comm'n, 482 F.2d 672, 677 (D.C. Cir. 1973); Permian Basin Area Rate Cases, 390 U.S. 747, 747-77 (1968). NEPA says nothing of the sort vis-à-vis CEQ or the president.

194. Thus, in *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870-75, 43 ELR 20112 (2013), where FCC was expressly granted authority to issue rules and orders having the force of law, the sole issue was the type of deference to FCC's interpretation of its Act tending to enlarge the subject matter scope of its jurisdiction. The Court afforded FCC *Chevron* deference, much as it had routinely interpreted general authority grants liberally before *Petroleum Refiners* and the other lower court cases typically invoked as having broadened agencies' rulemaking authorities. *See, e.g.*, American Trucking Ass'ns v. United States, 344 U.S. 307, 312-13 (1953); United States v. Southwestern Cable Co., 392 U.S. 157, 167-78 (1968).

195. While the Supreme Court has never taken up this issue in a NEPA case, several lower federal courts have found that action agencies are not entitled to *Chevron* deference in their legal conclusions about NEPA. *See, e.g.*, Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144, 1150-51 (D.C. Cir. 2001); American Airlines v. Dep't of Transp., 202 F.3d 788, 803 (5th Cir. 2000); American Forest & Paper Ass'n v. U.S. Forest Serv., 137 F.3d 291, 297, 28 ELR 21122 (5th Cir. 1998); DuBois v. U.S. Dep't of Agric., 102 F.3d 1273, 1285 n.15, 27 ELR 20622 (1st Cir. 1996). Yet, in *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 19 ELR 20652 (9th Cir. 1989), the plaintiffs made a persuasive case that the Corps' NEPA implementing regulations—reviewed by EPA and referred to CEQ for various deficits where the proposed regulations languished for five years—should not receive *Chevron* deference because the Corps does not administer NEPA and had demonstrated its lack of NEPA expertise. The Ninth Circuit held that the "principles underlying *Chevron*" entitled the Corps' interpretations to *Chevron* deference. *Sylvester*, 884 F.2d at 399.

196. NEPA's legislative history provides no support for the notion that Congress intended CEQ to be NEPA's administrator and simply mistook the tools it granted the CEQ. *See* Finn, *supra* note 165, at 546 (noting that the conference managers kept the provisions on CEQ as Representative Dingell wanted them, and Dingell had advocated for a council that was advisory only); *cf.* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2181 (2004) ("Congress, as the first branch of government, is the primary source of governmental authority.") [hereinafter Merrill, *Exclusive Delegation*].

197. *See* Exec. Order No. 11514, Protection and Enhancement of Environmental Quality, 35 Fed. Reg. 4247, 4247 (1970).

198. *See* Lindstrom & Smith, *supra* note 168, at 43-50; *see also* Finn, *supra* note 165, at 546-67.

NEPA grants CEQ no jurisdictional authority whatever, a fact not lost on the courts first interpreting its informal guidelines.[199] If anything, NEPA's Title II reflects a particularly opaque compromise between the Act's progressive architects and a diffident administration, each wary of the other.[200] Yet, as often as courts have noticed CEQ's interpretive authority,[201] they have rarely linked it to presidential power under Article II.

The 91st Congress had a peculiar way of making CEQ the authoritative interpreter of NEPA, if it had any such intent at all.[202] NEPA fashioned CEQ in the mold of an advisor to the president, while at the same time articulating a cross-cutting and gargantuan agenda for changing American society as a whole.[203] NEPA's Title I, where it declares its multifaceted national policy and levies its famous "action-forcing" duties for all agencies of the federal government, empowers neither the president nor CEQ to direct or regulate or order those other agencies.[204] NEPA perhaps assumes the president will do what he will vis-à-vis NEPA's responsible officials by jawboning and other informal means.[205] Jawboning is less about authority than it is about influence, of course.[206] And although the Constitution bars inferences of inherent authority,[207] Article II empowers the president. Indeed, statutory silences as to agency authority have rarely been resolved in the agency's favor.[208]

When the Nixon CEQ finalized its guidelines in 1971, they mostly restated the interim guidelines, focusing on the preparation and circulation of EISs rather than on substantive environmental priorities.[209] The guidelines aimed to guide those empowered by law to take actions on behalf of the United States.[210] As with every other modern White House's assertion of authority to influence others' law and policymaking, though, the Nixon guidelines intersected with scores of statutory texts empowering these others in terms—arguably refuting the claim that it is the president's (not the responsible official's) policy to make.[211] Then, as now, quiet White House influence off the record prompted lawsuits alleging violations of administrative law, every one of which has failed unless the proceeding was on the record.[212] But APA rules published in the *Federal Register* are neither jawboning nor quiet White House influence. And CEQ's memorandum, "designed to . . . interpret . . . law,"[213] certainly was a rule in the APA sense.

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199. *See, e.g.*, Greene Cnty. Planning Bd. v. Federal Power Comm'n, 455 F.2d 412, 420-22, 2 ELR 20017 (2d Cir. 1972).
200. Lindstrom & Smith, *supra* note 168, at 43-44; Andreen, *supra* note 168, at 216. On the left's views of the Nixon Administration at the time, see Arthur M. Schlesinger Jr., *The Imperial Presidency* (1973).
201. *See, e.g.*, Andrus v. Sierra Club, 442 U.S. 347, 357-58, 9 ELR 20390 (1979); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355, 19 ELR 20743 (1989) (*citing Andrus*, 442 U.S. at 358). By the time *Andrus* was decided, the courts of appeal had repeatedly held that because NEPA tasks CEQ with appraising all agencies' NEPA efforts, its findings about those agencies' NEPA compliance were entitled to weight of some kind. *See, e.g.*, Sierra Club v. Morton, 514 F.2d 856, 87071 & n.22, 5 ELR 20463 (D.C. Cir. 1975); Environmental Def. Fund v. TVA, 468 F.2d 1164, 1177-78, 2 ELR 20726 (6th Cir. 1972) (inferring that NEPA's tasks for CEQ were the equivalent of "implementing and administering" NEPA and that CEQ's interpretations for that reason were entitled to "great weight").
202. Matthew Lindstrom and Zachary Smith retell the tale of NEPA's passage in the fall and winter of 1969. *See* Lindstrom & Smith, *supra* note 168, at 34-52; *see also* Frederick R. Anderson, NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act 1-14 (1973); Neil Orloff & George Brooks, The National Environmental Policy Act: Cases & Materials 26-34 (1980); Andreen, *supra* note 168, at 214-23 & n.128; Lynton Keith Caldwell, The National Environmental Policy Act: An Agenda for the Future 30-33 (1998). The story is of an eager and determined coalition of Senators Jackson, Muskie, and Dingell, opposed by Nixon's White House and other forces of the status quo like Congressman Aspinall. Lindstrom and Smith argue that, in the views of Senators Jackson and Muskie, "[t]he CEQ's provisions were essentially to oversee the implementation of NEPA," and that President Nixon merely demanded "more control in the executive office." *See* Lindstrom & Smith, *supra* note 168 at 43, 52. While the tale is often told to emphasize President Nixon's disingenuous environmentalism, it has never (so far as I have found) been told to emphasize NEPA's latent presidentialism.
203. *See* Caldwell, *supra* note 202, at 38-40. The Council of Economic Advisers (CEA) was established by the Employment Act of 1946 and tasked with studying, reporting, and furnishing the president with expertise on the whole economy. Before his death, Lynton Caldwell repeatedly argued that CEQ's being modeled on CEA was meant as a way of freeing CEQ from subservience to the president, *see id.* at 38-42, although the more that bodies such as CEA grew dependent upon the president the less persuasive the argument became. *See* Lynton K. Caldwell, *Implementing NEPA: A Non-Technical Political Task*, *in* Environmental Policy and NEPA: Past, Present, and Future 25, 38-40 (Ray Clark & Larry Canter eds., 1997).
204. *See* NEPA §§101-105. NEPA §2, which stands apart from its two main titles, is supposedly a remnant from the Senate version of the bill that emerged from the conference proceedings reconciling S. 1075 and H.R. 6750. *See* Caldwell, *supra* note 202, at 38-40. Section 2 articulates the statute's purposes, one of which was to "establish a Council on Environmental Quality." Nothing specifies CEQ authority to issue orders, rules, or to take other actions having legal effect.
205. *See* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 Colum. L. Rev. 943, 943 & n.1 (1980).
206. Most of this jawboning is never publicized. *See* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 Mich. L. Rev. 1127, 1157 (2010) ("With a couple of notable exceptions, numerous searches of Federal Register statements issues since January 1981 have disclosed no proposed or final rules in which the agency referred to the content of OMB or OIRA review or Presidential preferences, directives, or priorities."). This hints at the critical difference between a president who removes a subordinate from office and assumes the political risks of doing so and a president who quietly influences that same official. *See* Strauss, *Overseer?*, *supra* note 146, at 706-07; Mashaw, *supra* note 22, at 148-55.
207. *See, e.g.*, American Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108 (1902); City of Arlington v. FCC, 133 S. Ct. 1863, 1877, 43 ELR 20112 (2013) (Roberts, C.J., dissenting). This is equally true of the courts as it is of others, though. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
208. CEQ is an agency in this sense, too. *See, e.g.*, Soucie v. David, 448 F.2d 1067, 1073-75, 1 ELR 20147 (D.C. Cir. 1971); Citizens for Resp. in Wash. v. Office of Admin., 566 F.3d 219, 222-24 (D.C. Cir. 2009).
209. *See* CEQ, Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724 (1971).
210. CEQ's procedure in 1973 offers a contrast. Unlike the 1971 guidelines, the 1973 guidelines were described in the *Federal Register* in a notice of proposed rulemaking as a "directive" (rather than a "memorandum"). *See* CEQ, Preparation of Environmental Impact Statements, 38 Fed. Reg. 10856, 10856 (1973) ("This directive provides guidelines to Federal departments, agencies, and establishments for preparing detailed environmental statements . . . ."). While the 1973 notices included the mandatory citation of authority required of any notice of proposed rulemaking or finalization, *see* 1 C.F.R. §22.2 (1972), the 1971 notice included no such citation of authority.
211. *See* Peter L. Strauss, *Presidential Rulemaking*, 72 Chi. Kent L. Rev. 965, 984 (1997) ("Where Congress has placed the statutory duty in the Administrator of the EPA, or the Secretary of Labor, one could say it has delegated rulemaking power to the President only if that were the necessary constitutional consequence of its choice.").
212. *See* William D. Araiza, *Judicial and Legislative Checks on* Ex Parte *OMB Influence Over Rulemaking*, 54 Admin. L. Rev. 611, 615-25 (2002); Mendelson, *supra* note 206, at 1137-46.
213. 5 U.S.C. §551(4).

Like the Reagan order routinizing regulatory review a decade later,[214] the Nixon order and CEQ's 1971 and 1973 guidelines paid little attention to their own legal grounds.[215] Today, the Nixon Administration's environmental priorities and plans for NEPA must be gleaned from "a rather convoluted record."[216] NEPA Title I self-evidently aimed for more than just paper-pushing, and the Nixon Administration actively cultivated the impression that it was firmly committed to the cause.[217] Yet, the detailed statement requirement has since become NEPA's sole required action.[218] And there is good reason to conclude that the Nixon order and subsequent CEQ practice, grounded in the president's power to "take Care that [NEPA §102(2)(C)] be faithfully executed" by "all agencies of the Federal Government,"[219] is why. Left out of the Nixon order altogether was any mention of the president's powers or priorities with respect to NEPA's more substantive aspects.[220] Those were the harder questions—questions from which the Nixon order, CEQ, and the courts hearing NEPA's first challenges carefully abstained.

Judicial authority is not the default for NEPA (especially now for "substantive" NEPA) that it is for other cross-cutting statutes.[221] Indeed, courts must tread carefully even on NEPA's procedural turf. While the judiciary may be better positioned to effectuate a statute like the APA as law than the agencies it governs,[222] several APA issues—such as what words in an enabling statute trigger APA procedures—entail exactly the kind of balancing judgments that the *Mead*/*Chevron* synthesis leaves to agencies.[223] Procedural NEPA involves the same managerial, technical, and political factors,[224] which is precisely why so much NEPA decisionmaking is beyond judicial scrutiny in the

214. *See* Strauss, *Overseer?*, *supra* note 146, at 719 & n.105; *cf.* Mendelson, *supra* note 206, at 1146-57 (observing that Executive Order No. 12291 "systematized" White House review of agency rulemaking from what had been ad hoc jawboning to a regular practice dominated by civil servants, routines, but relatively little disclosure).

215. *See* Exec. Order No. 12291, Federal Regulation, 46 Fed. Reg. 13193, 13193 (1981) (preamble) ("By the authority vested in me as President by the Constitution and laws of the United States . . . it is hereby ordered as follows . . . ."). A memo justifying the president's authority to issue Executive Order No. 12291 came to the conclusion that where nothing affirmatively prohibits the president from directing other "officers of the United States," Article II enables him to do so. *See* Simms Memo, *supra* note 173, at 61 ("We believe that an inquiry into congressional intent in enacting statutes delegating rulemaking authority will usually support the legality of Presidential supervision of rulemaking by executive agencies."). If any such advice was sought or given by the Nixon White House before issuing Executive Order No. 11514, it has never been made public.

216. J. Brooks Flippen, Conservative Conservationist: Russell E. Train and the Emergence of American Environmentalism 109 (2006). Train reportedly briefed Nixon on NEPA compliance throughout the executive branch two days before the order was signed and Nixon's order became CEQ's best leverage over the many departments, bureaus, boards, commissions, and agencies to which CEQ directed its attention in those first months. *Id.* at 90-108.

217. Nixon's "environmental messages" to Congress in 1970 were famously ambitious. *See* CEQ, Environmental Quality: The First Annual Report of the Council on Environmental Quality viii-xi (1970) (President's Message). To say that the Nixon order paid *no* attention to Title's I policy goals is perhaps an over-statement. *See* Exec. Order No. 11514, 35 Fed. Reg. 4247, at §2 ("Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals."). But it was certainly not the assertion of presidential prerogative that CEQ's emphasis on detailed statements became and especially not the assertion of prerogative that OMB regulatory review became. *Cf.* Strauss, *Overseer?*, *supra* note 146, at 715-18 (describing "common ground" among scholars' accounts of the constitutional presidency that includes "exercises of Presidential authority readily fit [to] the 'oversight' mold").

218. *Compare* Caldwell, *supra* note 202, at 42-43 (calling the EIS the statute's chief "mandatory performance requirement" reviewable by the courts), *with* Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97-98, 13 ELR 20544 (1983) (concluding that in enacting "NEPA [Congress] did not require agencies to elevate environmental concerns over other appropriate considerations" but instead only mandated that agencies take a "hard look" at their choices through an EIS).

219. 42 U.S.C. §§4332(2), 4333. The argument is that Article II's Faithful Execution Clause, *see* U.S. Const., Art. II, §3, vests both the power and the responsibility of executing the "Laws" (even a "policy" law like NEPA) in the president. *See* Kagan, *supra* note 152, at 2247-48 & nn.1-5 (collecting sources making and refuting the argument); Strauss, *Overseer?*, *supra* note 146, at 702-03; Bruff, *Presidential Power*, *supra* note 132, at 461-63; Goldsmith & Manning, *supra* note 152, at 2295-97; Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291*, 4 Va. J. Nat. Resources L. 1, 15-16 (1984).

220. In NEPA §2, the heads of federal agencies were directed to "[m]onitor, evaluate, and control on a continuing basis their agencies' activities so as to protect and enhance the quality of the environment." Exec. Order No. 11514, §2(a), 35 Fed. Reg. at 4247. They were further ordered to "develop programs and measures to protect and enhance environmental quality" and "assess progress in meeting the specific objectives of such activities." *Id. Compare* Percival, *Who's in Charge?*, *supra* note 3, at 2540 ("[T]he absence of Presidential directive authority means that Presidents must persuade agency heads when they want to influence regulatory decisions entrusted by law to them."), *with* Calabresi & Prakash, *supra* note 162, at 664 ("An Executive without the power to execute is gibberish linguistically and bears no relationship to the Chief Executive Magistrate created by the Constitution.").

221. While several statutes not administered by a single agency have defaulted to the Article III courts for authoritative interpretation, *see* Stack, *President's Statutory Powers*, *supra* note 153, at 291-92, the judiciary is clearly not NEPA Title I's authoritative interpreter, at least to whatever degree NEPA Title I has any substantive content. The Supreme Court has held unequivocally, repeatedly, and over time that NEPA's "national environmental policy" is not for the Article III courts to choose. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558, 8 ELR 20288 (1978); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227, 10 ELR 20079 (1980); Robertson v. Methow Valley Recreation Council, 490 U.S. 332, 349, 19 ELR 20743 (1989).

222. *See* Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997); Magill, *supra* note 79, at 1425-42; Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J.L. & Pol. 105, 143-44 (1997).

223. *See* City of West Chicago v. NRC, 701 F.2d 632, 641, 13 ELR 20648 (7th Cir. 1983); Chemical Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1480-83, 19 ELR 20868 (D.C. Cir. 1989); Friends of Ompompanoosuc v. FERC, 968 F.2d 1549, 1557 (2d Cir. 1992); Dominion Energy Brayton Point, LLC v. Johnson, 443 F.2d F.3d 12, 16-18 (1st Cir. 2006).

224. *Compare* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866, 14 ELR 20507 (1984):

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

with Vermont Yankee, 435 U.S. at 551-55 (reversing lower court as having substituted its judgment for the agency's on what alternatives should be weighed and considered in opposition to proposal, and concluding that the agency was well within the "proper bounds of its statutory authority" when it decided that reopening an administrative record to allow a better-informed judgment would be too cumbersome).

ordinary course.[225] Even procedural NEPA often escapes judicial jurisdiction.[226]

This lack of judicially manageable standards in NEPA mirrors administrative law's perennial trouble distinguishing reviewable discretionary judgments from unreviewable discretion. The trouble first surfaced in *Marbury v. Madison*, if not before.[227] In our own time, Congress has provided for judicial review of agency action in a web of statutory grants of federal court jurisdiction, venue, and waivers of sovereign immunity. But Congress has rarely included the president therein.[228] And if the president alone were to execute NEPA's substance, it might be exempt from judicial review.[229] Goal-oriented agencies may not accurately gauge the broader public's priorities.[230] But the responsibilities of running for office,[231] if not the need to maintain the support of public opinion,[232] orient those around the president to that sorting of public priorities. (Nixon's presidency exemplifies the point: If only for purely political reasons, Nixon signed more environmental laws into effect than any other two presidents combined.[233]) The *Chevron* Court and others assumed such a president and tacitly approved this kind of political White House oversight.[234] It *is* political, though, and accordingly sits uneasily with the more orthodox, "rule of law" understanding of authority in administrative law.[235]

Many progressives have come to the conclusion that presidential power may be uniquely suited to addressing a problem such as climate change, given the relative inability of the states, Congress, the courts, or mission-bound agencies to achieve economywide greenhouse gas controls.[236] However, the challenge for progressives and conservatives alike remains reconciling their accounts of presidential power with latent statutory goals like those in NEPA §§101-102.[237] In Section C, below, I describe how NEPA courts finessed that problem.

C. Nixon CEQ Guidelines in the Formative Judicial Precedents

The agencies charged with NEPA's implementation in Title I are authorized and burdened directly by the statute—its categorical charge to "Federal agencies."[238] Yet, as discussed

225. *See* Jason J. Czarnezki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 Stan. Envtl. L.J. 3, 10-15 (2006) (linking NEPA's "proceduralism" to *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 1 ELR 20110 (1971), and concluding that governing Supreme Court doctrine interpreting the APA's standards of review does not permit lower federal courts to prescribe the weight that agencies should give to environmental considerations).

226. *Compare* Czarnezki, *supra* note 225, at 17 ("[I]t would be arbitrary and capricious to give *no* weight to environmental factors in light of NEPA's mandate that agencies use "all practicable means" to protect the environment") (emphasis added), *with* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 Yale L.J. 2, 83 (2009) ("In assessing the weight to be given to political influence, courts likely would need to take into account both the *content* and the *form* of the political influence . . . [and] will need to draw lines between permissible and impermissible political influences (with which they will be uncomfortable".").

227. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.")

228. *See* Strauss, *Overseer?*, *supra* note 146, at 751-57. Functionally, the *Abbott Labs* presumption of reviewability is arguably reversed in cases of final action by the president. *See* Mississippi v. Johnson, 71 U.S. 475, 501 (1866); Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 108-14 (1948); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Franklin v. Massachusetts, 505 U.S. 788, 796-801 (1992); Dalton v. Specter, 511 U.S. 462, 468-77 (1994). This alone distinguishes the president's discretion from that of other officers. *Cf.* Moe & Howell, *supra* note 188, at 855 ("Any notion that Congress makes the laws and that the President's job is to execute them—to follow orders, in effect—overlooks the essence of separation of powers. The President is an authority in his own right, coequal to Congress, and not subordinate to it.").

229. *Cf.* Strauss, *Overseer?*, *supra* note 146, at 753-54 (noting that judgments entrusted to the president, unlike those entrusted to agency officials, are free from the constraints of FOIA and the APA's recordkeeping and other procedural requirements, and are rarely subject to jurisdiction to adjudicate); *but cf.* Kevin Stack, *The Reviewability of the President's Statutory Powers*, 62 Vand. L. Rev. 1171, 1192-1212 (2009) (arguing that a variety of nonstatutory forms of ultra vires review remain valid even after the APA's effective bar to the review of presidential action under the standard forms of statutory review). If the president were to delegate the responsibilities to an agency like CEQ, however, this consideration would be reduced quite substantially.

230. *See* Serge Taylor, Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform 58-70 (1984); Stephen Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 11-19 (1993); Eric Biber, *Too Many Things to Do: How to Deal With the Dysfunctions of Multiple-Goal Agencies*, 33 Harv. Envtl. L. Rev. 1, 13-30 (2009).

231. *Cf.* James A. Gardner, What Are Campaigns for? The Role of Persuasion in Electoral Law and Politics 147-89 (2009) (describing and defending a model of "tabulative" campaigning wherein candidates seek and gain office by excelling at tallying and understanding public opinion from varied and diffuse signals detected on the campaign trail).

232. *See* Richard E. Neustadt, Presidential Power and the Modern Presidents 185 (1990) (arguing that a president's practical power from day to day is governed by his or her "ongoing credibility" with the public).

233. *See* Russell E. Train, *The Environmental Record of the Nixon Administration*, 26 Pres. Studs. Q. 185 (1996).

234. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66, 14 ELR 20507 (1984):

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charge with the administration of the statute in light of everyday realities.

see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 59, 13 ELR 20672 (1983) (Rehnquist, J., concurring, joined by Burger, C.J., Powell and O'Connor, JJ., concurring) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").

235. *Cf.* Jaffe, *supra* note 7, at 572 ("*Discretion . . . is not self-defining; it does not arise parthenogenetically from "broad" phrases*. Its contour is determined by the courts, which must define its scope and its limit.").

236. *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1173-76, 1197-1203 (2012) (discussing the Obama Administration's coordinated efforts to improve fuel economy, reduce oil consumption, and cut greenhouse gas emissions where disorganization and inaction had long prevailed); Lisa Schultz Bressman, *The Future of Agency Independence*, 63 Vand. L. Rev. 599, 665-72 (2010).

237. In his final work, Caldwell dwelled at length on "Presidential responsibility" to execute NEPA just as its drafters supposedly would have wanted, *see* Caldwell, *supra* note 212, at 44-46, all while denying the president any power to determine how NEPA might be bent to fit political needs and realities. *See id.* at 45-46 (arguing that EOP, as distinct from the White House, should be kept protected from the president's "politics" and "personal priorities").

238. NEPA's reference to agencies without defining them presumably defaults to the APA's definition, although that default has usually been assumed as cognate to NEPA's lack of an independent cause of action. *See, e.g.*, Center for Food Safety v. Johanns, 451 F. Supp. 2d 1165, 1176 (D. Haw. 2006).

above in Section III.A., NEPA arguably demands presidential leadership and coordination if its national policy is to have any practical effect.[239] The federal government of which NEPA speaks is, without intentional leadership, nothing but a legal abstraction, composited from centuries of social, political, and legal sedimentation. Still, the Nixon CEQ's nonbinding guidelines for Title I's execution were a rather anodyne assertion of power, as shown by the cases that followed.

CEQ's interim guidelines were replaced by a more detailed version in April 1971.[240] In addition to CEQ's insistence on §102(2)(C)'s application to projects in progress at the time of NEPA's enactment,[241] the amended guidelines enhanced the foundation of the modern public EIS process by broadening and deepening agencies' duties to circulate draft EISs.[242] Where NEPA §102(2)(C) was silent on the circulation of draft EISs beyond any "Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved,"[243] CEQ's guidelines urged that affected state and local governments be given the opportunity to review and comment on draft statements wherever and however appropriate and in accordance with procedures preferred by the Executive Office of the President (EOP).[244]

In short, the guidelines expanded NEPA §102(2)(C)'s process requirements for the proposal and preparation of an EIS.[245] That evolution was bolstered by the enactment in December 1970 of CAA §309.[246] Section 309 expanded the circulation of most EISs to the newly created EPA and required that EPA "review and comment in writing on the [EIS] of any matter relating to [EPA] duties and responsibilities. . . ."[247] It also provided that should EPA find any proposal/EIS "unsatisfactory from the standpoint of public health or welfare or environmental quality," EPA was to publish its determination "and the matter shall be referred to [CEQ]."[248] Nothing was said about what should happen once the matter was referred to CEQ,[249] but requiring the exchange of drafts and comments on most EISs surely served as an exemplar.[250]

Section 309's referral provision said nothing of CEQ's authority to resolve disputes and the 1971 guidelines said nothing about the content of EISs that was not at least implied by §102(2)(C).[251] But through the uncoordinated suits of dozens of NEPA plaintiffs, action agencies were

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For the sake of argument, we may assume that this inference is correct even though the law's scope need not necessarily hinge on what part(s) of it are judicially cognizable.

239. *See, e.g.*, Anthony D'Amato & James H. Baxter, *The Impact of Impact Statements Upon Agency Responsibility: A Prescriptive Analysis*, 59 Iowa L. Rev. 195, 215 (1973) ("NEPA not only encourages, but virtually commands interagency cooperation in the preparation of impact statements, and in practice this cooperation must take place on a continuing and informal basis both in addition to and preceding the formalized comment process."); Andreen, *supra* note 168, at 229 (finding that EPA's role of reviewing EISs under CAA §309 and bringing objections to CEQ was intended to empower EPA and others to "blow the whistle on harmful environmental actions and press the case against such actions all the way to the [EOP]").
240. *See* CEQ, Statements on Proposed Federal Actions Affecting the Environment—Guidelines, 36 Fed. Reg. 7724 (1971). Like the interim 1970 guidelines, the 1971 version was again published as a memorandum in the Notices section of the *Federal Register*.
241. CEQ's interpretation of §102(2)(C) that it apply to projects already in progress as of the date of NEPA's enactment was a significant factor in several early, prominent contests about NEPA duties. The interpretation factored into the decision in a challenge to the Tellico Dam, *see* Environmental Def. Fund v. Tennessee Valley Auth., 339 F. Supp. 806, 811, 2 ELR 20044 (E.D. Tenn. 1972), challenges to the Gillham Dam, *see* Environmental Def. Fund v. Corps of Eng'rs, 325 F. Supp. 749, 759, 1 ELR 20130 (E.D. Ark. 1971), and in the challenge to the never-built Interstate 485 in Atlanta, *see* Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132, 144, 1 ELR 20629 (N.D. Ga. 1971). In none of those opinions did a court state that it was bound to adopt CEQ's interpretation of NEPA and in none did a court disclose in any detail exactly how CEQ's interpretation factored into its judgment.
242. NEPA §102 required that "[p]rior to making any detailed statement, the responsible Federal officials shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any [EIS] involved." 42 U.S.C. §4332(2). CEQ's interpretation of this duty allowed the agencies seeking comment to impose a 30-day deadline, after which failure to respond would be interpreted as "no comment to make." *See* 1971 Guidelines, 36 Fed. Reg. at 7725 (§7). CEQ urged agencies to seek practical accommodations of one another. *See id.* at 7726 (§10(b)) ("It is important that the draft environmental statements be prepared and circulated for comment . . . early enough in the agency review process before an action is taken in order to permit meaningful consideration of the environmental issues involved.").
243. 42 U.S.C. §4332(2)(C). The subsection finishes with the command that "[c]opies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, [CEQ] and to the public" as provided by FOIA. *Id.* This clearly requires the wide availability of final EISs and perhaps assumes the availability of draft EISs—to the "appropriate" "State[ ] and local agencies"—but it does not unequivocally require the wide availability of draft EISs nor of other NEPA documents.
244. *See* Interim Guidelines, 35 Fed. Reg. at 7391-92 (§§3, 9); 1971 Guidelines, 36 Fed. Reg. at 7724-26 (§§3, 9). Section 10(b) of the 1971 Guidelines stated that: "To the maximum extent practicable no administrative action . . . subject to section 102(2)(C) is to be taken sooner than ninety (90) days after a draft [EIS] has been circulated for comment, furnished to [CEQ] and . . . made available to the public pursuant to these guidelines; neither should such administrative action be taken sooner than thirty (30) days after the final text of an [EIS] (together with comments) has been made available to [CEQ] and the public." *Id.* at 7726. Thus, as with its interpretation of Title I that agencies prepare EISs "unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible," *id.* at 7724, CEQ took care to suggest use of its draft-to-final procedures only where permitted by law.
245. By urging the involvement of state and local agencies consistent with existing OMB procedures, CEQ was perhaps enhancing §102(2)(C)'s "redundancy," a strength Taylor emphasized a decade later. *See* Taylor, *supra* note 230, at 262-71. Having redundant checks on an action agency's analysis of the alternatives and likely consequences improves its reliability. "With numerous potential critics, it is more difficult for the agency to be sure that one opponent will not find a politically serious flaw in its EIS . . . ." *Id.* at 263.
246. 42 U.S.C. §7609.
247. EPA's review jurisdiction is broad; Congress arguably meant to give CEQ a "full partner" in NEPA's administration. Andreen, *supra* note 168, at 223-29. That goal has been left mostly unfulfilled.
248. 42 U.S.C. §7609(b).
249. Section 309's silence as to CEQ's power to resolve such disputes may well have been a hedge given that "in systems with separation of power, it is unlikely that any one party will have the kind of commanding position enjoyed by (single-party) winners in parliamentary systems." Bendor et al., *supra* note 42, at 265.
250. *See* Anderson, *supra* note 202, at 229-34.
251. Sections 6(c) and 8 of the guidelines reflected the passage in December 1970 of CAA §309 and the jurisdiction to review and comment upon EISs granted to EPA. *See* 36 Fed. Reg. at 7725-26. Otherwise, the guidelines again followed the elements listed in NEPA §102(2)(C) without deviation and said nothing about CEQ's referral authority or duties. Years later, CEQ would report that it had become a kind of mediator in the dozen and a half referrals received up to September 1981. *See* CEQ, Environmental Quality: The Twelfth Annual Report of the Council on Environmental Quality 176 (1982).

compelled by judicial doctrine (and the threat of litigation) to prepare all of their EISs through a kind of public notice-and-comment process.[252] Referrals became yet another dimension of CEQ as a legal curiosity.

Three months after those guidelines were published, the D.C. Circuit announced its watershed opinion in *Calvert Cliffs Coordinating Committee v. AEC*,[253] rebuking the Atomic Energy Commission for its obstinate approach to NEPA.[254] Judge Skelly Wright's opinion in *Calvert Cliffs* is a landmark—the beginning of the NEPA canon—and is thought by some to have "played a pivotal role in creating modern environmental law. . . ."[255] Notably, the panel assumed without deciding that the plaintiffs had standing to bring their suit, a petition for review proper only in the courts of appeal under the Hobbs Act.[256] Their claims, in essence, were that AEC's "procedural rules [did] not comply with the congressional policy"[257] set out in NEPA Title I and that AEC had deliberately marginalized NEPA from its operations.[258]

The *Calvert Cliffs* court agreed and remanded the case to AEC to "revise its rules governing consideration of environmental issues" so that the agency exercise its "substantive discretion [to] protect the environment 'to the fullest extent possible.'"[259] (That remand began a decade-long struggle in the D.C. Circuit over the licensing of nuclear installations consistent with NEPA.[260]) *Calvert Cliffs* read NEPA to require the integration of environmental loss and degradation with other considerations, judgment by judgment.

Calvert Cliffs became the germinal precedent for a case-by-case-balancing interpretation of NEPA §§101-102 without relying on CEQ.[261] The *Calvert Cliffs* panel interpreted NEPA for itself to reach the express conclusion that NEPA's national policy injected environmental degradation and protection into every freestanding exercise of judgment by every officer of the United States administering "policies, regulations, and public laws," dignifying them as separate factors to be weighed in the decisionmaking.[262] The D.C.

252. *See* National Helium Corp. v. Morton, 455 F.2d 650, 656-57, 1 ELR 20478 (10th Cir. 1971) (holding that EISs are "an intra-departmental matter" and that neither the APA nor NEPA compels on-the-record adjudications). In *Greene County Planning Bd. v. Federal Power Comm'n*, 455 F.2d 412, 422, 2 ELR 20017 (2d Cir. 1972), the Second Circuit held in January 1972 that it was "essential" that commission staff draft the statement and that "full scrutiny of the hearing process" in an FPC licensing proceeding be given to that statement, including giving the intervenor-plaintiffs "the opportunity to cross-examine . . . witnesses in light of the statement." Quoting CEQ's First Annual Report, the court noted that "Often individuals and groups can contribute data and insights beyond the expertise of the agency involved." *Id.* In *Hanly v. Kleindienst*, 471 F.2d 823, 836, 2 ELR 20717 (2d Cir. 1972), the same court held in December 1972 that "before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision." The Ninth Circuit in *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1280 & n.10, 1281-82, 3 ELR 20045 (9th Cir. 1973), did cite the 1971 guidelines for the requirement of a public notice-and-comment EIS process, albeit in a case involving an agency that had provided ample notice and opportunity to comment on a draft EIS.

253. 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 1971).

254. *See Calvert Cliffs*, 449 F.2d at 1117 (observing that AEC's "crabbed interpretation of NEPA makes a mockery of the Act").

255. *See* A. Dan Tarlock, *The Story of* Calvert Cliffs: *A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, *in* Environmental Law Stories 77, 77 (Richard J. Lazarus & Oliver A. Houck eds., 2005); *see also* Nicholas C. Yost, *The Background and History of NEPA*, *in* The NEPA Litigation Guide 1, 8 (Albert M. Ferlo et al. eds., 2012) ("No case more pervasively and powerfully shaped the course of NEPA's implementation than the *Calvert Cliffs* decision.").

256. *See* 28 U.S.C. §§2341-51, 2353 (1970). The so-called Hobbs Act, enacted in 1950, governed petitions for judicial review of the final orders and certain other actions of five agencies, one of them AEC. *See* 28 U.S.C. §2342. The subject of the petition was AEC's notice-and-comment rulemaking ostensibly implementing NEPA as it applied to AEC's licensing proceedings. *See* Tarlock, *supra* note 255, at 93. The plaintiffs' lawyers had chosen that AEC order to challenge rather than an adjudicated operating license so as to avoid the delay and difficulty of challenging an actual on-the-record licensing. *Id.* at 91-93. The *Abbott Labs* presumption of reviewability negated an argument that review of the rules should await an actual licensing. The next year, however, in *Sierra Club v. Morton*, 405 U.S. 727, 734-36, 2 ELR 20192 (1972), the Supreme Court clarified that plaintiffs must prove an injury-in-fact to their interests in an affected environment—not merely a generalized grievance of the sort that the *Calvert Cliffs* plaintiffs had pled.

257. *Calvert Cliffs*, 449 F.2d at 1112.

258. *Cf. Calvert Cliffs*, 449 F.2d at 1122 (rejecting AEC's argument that NEPA must come second to the "pressing" national need for more electric power and holding that "NEPA compels a case-by-case examination and balancing of discrete factors").

259. *Calvert Cliffs*, 449 F.2d at 1129. The phrase "to the fullest extent possible" was taken from NEPA §102's language prefacing both subsection (1) and subsection (2). *See* 42 U.S.C. §4332 ("The Congress authorizes and directs that, to the fullest extent possible . . . ."). Thus, grammatically, the qualifier reaches every identifiable duty arising under §102, including but not limited to the "detailed statements" requirement of §102(2)(C). However, no part of §102—indeed, no part of NEPA—states a duty to "protect the environment" to the fullest extent possible. This subtle change by the *Calvert Cliffs* court may explain why so many interpret later Supreme Court cases, especially *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 8 ELR 20288 (1978), and *Strycker's Bay Neighborhood Ass'n v. Karlen*, 444 U.S. 223, 10 ELR 20079 (1980), as having "effectively killed any possibility of judicial enforcement of NEPA's substantive goals." Lindstrom & Smith, *supra* note 168, at 119; *see also* Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century*, 12 J. Land Use & Envtl. L. 275, 286-90 (1997); Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy*, 33 Wm. & Mary Env. L. & Pol'y Rev. 483, 540-48 (2009). NEPA deserves the credit more than the Supreme Court, though.

260. Two monuments in the NEPA canon, *Calvert Cliffs* and *Vermont Yankee*, grew out of the struggle. Other important decisions include *Union of Concerned Scientists v. Atomic Energy Comm'n*, 499 F.2d 1069, 4 ELR 20605 (D.C. Cir. 1974); *Carolina Envtl. Study Grp. v. United States*, 510 F.2d 796, 5 ELR 20181 (D.C. Cir. 1975); and *Natural Res. Def. Council, Inc. v. NRC*, 685 F.2d 459, 12 ELR 20465 (D.C. Cir. 1982), *rev'd sub nom.* Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 13 ELR 20544 (1983).

261. The opinion justified its interpretation of NEPA—requiring a prophylactic procedural approach by each agency so that that agency is sure to "consider environmental issues just as they consider other matters within their mandates"—through textual analysis of the Act and select legislative history. *See* Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1112-17, 1 ELR 20346 (D.C. Cir. 1971). Its single mention of the guidelines was to note their consistency with its interpretation. *See id.* at 1118 n.19. To the *Calvert Cliffs* court, the guidelines were "persuasive," i.e., "optional" authority and citing them as consistent was no more than a makeweight argument. *See* Schauer, *supra* note 27, at 69-70.

262. *See Calvert Cliffs*, 449 F.2d at 1117-24. This interpretation of NEPA's national policy caught on quickly with other courts. *See, e.g.*, Lathan v. Brinegar, 506 F.2d 677, 689, 4 ELR 20802 (9th Cir. 1974); Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132, 138-40, 1 ELR 20629 (N.D. Ga. 1971); City of New York v. United States, 337 F. Supp. 150, 160, 2 ELR 20275 (E.D.N.Y. 1972); Natural Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 833-34, 2 ELR 20029 (D.C. Cir. 1972); Environmental Def. Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 294-97, 2 ELR 20740 (8th Cir. 1972); Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1279-82, 3 ELR 20045 (9th Cir. 1973).

Circuit went to great lengths to note the availability of judicial review of such exercises of discretion.[263]

Other courts quickly followed, often characterizing this as NEPA's real practical difference.[264] The Supreme Court would eventually adopt the same interpretation, albeit by linking review to the APA's arbitrary and capricious standard.[265] The interpretation reinforced the view of NEPA as a means of informing not only the executive branch and Congress, but also the wider public.[266] It supported the application of NEPA to projects already underway at the time of NEPA's enactment so long as real discretion over their resolution remained.[267] And it paved the way for the now-bedrock consensus that agencies preparing EISs must use the process to take a hard look at their options and predicted impacts, and to consider alternatives in a meaningful way.[268]

As the U.S. Court of Appeals for the Second Circuit held in *Hanly v. Kleindienst*, this model frames NEPA's factual, legal, and discretionary dimensions.[269] What the alternatives can be and whether they are preferable necessarily involves facts about the world at large, an understanding of an agency's authority under the law, and a judgment pairing one to the other. Courts quickly held that action agencies could not manipulate the alternatives to avoid amending proposals.[270] Oddly, though, *Calvert Cliffs* had nowhere suggested discrete review standards to be applied to the different dimensions. It gave no deference to AEC, which, by the court's logic, was charged with NEPA's administration and effectuation.[271] Whatever the *Calvert Cliffs* panel's vision, though, that very set of questions would soon dominate NEPA.

Apart from NEPA's emergence in 1970-1971, the Nixon Administration was seeking more control over all agencies. Nixon created OMB[272] as well as a super cabinet-level Domestic Council to carry out his agenda.[273] The latter was tasked with resolving disputes between development-oriented agencies like AEC, the Federal Power Commission (FPC), and the U.S. Army Corps of Engineers (the Corps), and the ascendant environmental movement.[274] OMB would become the face of regulatory review.[275] CEQ's approach, however, was always "soft power." Nixon's CEQ chair, Russell Train, was a Washington insider and worked skillfully to use decisions like *Calvert Cliffs* and *Hanly* as leverage over others, advancing CEQ's views on NEPA compliance.[276]

In a series of memos to agency heads, CEQ began construing the judicial interpretations of NEPA as they were published in order to guide responsible officials in their NEPA compliance.[277] Whatever its position within EOP

263. *See Calvert Cliffs*, 449 F.2d at 1115. The *Calvert Cliffs* panel did not cite *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 1 ELR 20110 (1971), a precedent decided earlier that year that similarly affirmed the reviewability of agency judgments balancing discretionary choice factors. But the obvious continuity between Justice Thurgood Marshall's opinion in *Overton Park* and Judge Harold Leventhal's opinion in *Calvert Cliffs* was not lost on the U.S. Court of Appeals for the Tenth Circuit in the noted *National Helium* case decided later that same year. *See* National Helium Corp. v. Morton, 455 F.2d 650, 655-56 & n.12, 1 ELR 20478 (10th Cir. 1971).

264. *See, e.g.*, Ely v. Velde, 451 F.2d 1130, 1138, 1 ELR 20612 (4th Cir. 1971); *Environmental Def. Fund, Inc.*, 470 F.2d at 297-300; Conservation Council of N.C. v. Froehlke. 473 F.2d 664, 665, 3 ELR 20132 (4th Cir. 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463, 466, 3 ELR 20041 (5th Cir. 1973). As was recognized in 1973, "[t]he practical issue is not so much whether there is a duty of balanced decision-making, but rather whether there is a judicially-enforcable [sic] duty of balanced decision-making." D'Amato & Baxter, *supra* note 239, at 243. As discussed below, soon thereafter the standard of review—where the subject of review is essentially cognitive in nature—came to dominate the judicial contests.

265. *See* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21, 6 ELR 20532 (1976); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28, 10 ELR 20079 (1980); Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378, 19 ELR 20749 (1989). Despite the urgings of the Solicitor General to the contrary, the Supreme Court in *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 6 ELR 20528 (1976), ignored an early invitation to hold that action agencies whose enabling statutes make no mention of environmental factors are barred from considering them. *See* Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and Peek Behind the Curtains*, 100 Geo. L.J. 1507, 1539-40 (2012) (describing the Solicitor General's oral argument urging the Court to adopt this limiting interpretation of NEPA).

266. *See Morton*, 458 F.2d at 833.

267. *See, e.g.*, Arlington Coal. on Transp. v. Volpe, 458 F.2d 1323, 1331-32, 2 ELR 20162 (4th Cir. 1972); Environmental Def. Fund v. Tennessee Valley Auth., 468 F.2d 1164, 1174-75, 2 ELR 20726 (6th Cir. 1972).

268. *See Morton*, 458 F.2d at 838; *Kleppe*, 427 U.S. at 410 n.21. The Second Circuit's two *Hanly* cases were formative in this NEPA interpretation as well. *See* Hanly v. Mitchell, 460 F.2d 640, 645-48, 2 ELR 20216 (2d Cir. 1972); Hanly v. Kleindienst (Hanly II), 471 F.2d 823, 825-32, 2 ELR 20717 (2d Cir. 1972). This is not to be confused with the D.C. Circuit's own hard look review of agency action, discussed below.

269. *See Hanly II*, 471 F.2d at 828.

270. *See Morton*, 458 F.2d at 836-38.

271. The *Calvert Cliffs* opinion famously remarked in dicta that "reviewing courts probably cannot reverse a substantive decision on its merits [weighing NEPA §101's policy goals] unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1115, 1 ELR 20346 (D.C. Cir. 1971). This dicta would eventually grow into the deferential standard in subsequent cases involving actual balancing, transforming later courts' view of NEPA's overall place within agency choice, although suggestions of that deferential standard were present in early cases as well. *See, e.g.*, Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 786-87, 1 ELR 20469 (D.C. Cir. 1971); Environmental Def. Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 298-300, 2 ELR 20740 (8th Cir. 1972).

272. In Reorganization Plan No. 2 of May 1970, Nixon created OMB from its smaller predecessor, the Bureau of the Budget. *See* Reorganization Plan No. 2 of 1970, 35 Fed. Reg. 7959, 7959 (1970) (§§101-102). OMB's powers and responsibilities grew quickly through subsequent executive orders and directives.

273. *See* Lee, *supra* note 140; Lewis, *supra* note 133, at 34-36.

274. Quarles, *supra* note 141, at 3-36; Flippen, *supra* note 216, at 72-157.

275. *See* Alfred A. Marcus, *EPA's Organizational Structure*, 54 L. & Contemp. Probs. 5, 21 (1991); Copeland, *supra* note 160, at 5. As Hanna Cortner observed in 1976, "[u]nable to sanction agencies for noncompliance, CEQ . . . relied upon environmental litigants and the courts to accomplish [in persuading agencies to adopt its guidelines] what it could not." Cortner, *supra* note 165, at 327.

276. *See* Flippen, *supra* note 216, at 95-96.

277. Commentary at the time assumed that the Nixon order clothed CEQ with authority like that it began asserting in its memoranda to agency heads. *See* Herbert F. Stevens, *The Council on Environmental Quality's Guidelines and Their Influence on the National Environmental Policy Act*, 23 Cath. U. L. Rev. 547, 550-52 (1974). Memos and other communications from Timothy Atkeson, CEQ General Counsel from 1970-73, became a common delivery almost immediately after the guidelines were published. *See id.* at 559-73. In particular, one of these memos, sent in May 1972, issued CEQ's 10 different compliance recommendations to agency heads based upon its interpretation of the then-published decisions of the federal courts. *See* CEQ, Memorandum for Agency and General Counsel Liaison on National Environmental Policy (NEPA) Matters: Recommendations for Improving Agency NEPA Procedures, May 16, 1972 [hereinafter Atkeson Memo] (copy on file with author). The Atkeson Memo was later cited by the D.C.

or Nixon's agenda, the historical record is clear that CEQ had to assert itself over those other agencies while the courts were interpreting NEPA in resolving cases at a brisk pace.[278] Nixon's closest advisors, the lack of any substantive constraints in CEQ's rules, CEQ's limited staffing, and its lack of jurisdictional authority all kept it from executing more about NEPA than the preparation of EISs.[279]

Nixon's CEQ and *Calvert Cliffs* pushed action agencies to adopt their own procedural rules guiding personnel on EISs, to provide for timely comments by others on draft EISs, and to integrate EISs with the rest of the administrative record underlying agency choice.[280] Both EPA and CEQ were focused on EIS sufficiency.[281] At the same time, environmental plaintiffs were crowding judicial dockets with NEPA claims opposing government action where no other law would help them. In a few short years, NEPA contests had populated the *Federal Reporter* with hundreds of precedents.[282] As CEQ adapted, its careful attention to the lawsuits created a complex, almost unique blend of judicial, presidential, and agency authority in NEPA's administration.[283]

Courts were urged to "exercise . . . their lawmaking function" in NEPA cases and "give environmental considerations a very high priority."[284] The guidelines became CEQ's evolving platform for combining its interpretations with those of the courts.[285] The Supreme Court, aside from Justice William O. Douglas' opinions for himself as a Circuit Justice, never ventured anything on the Nixon guidelines' force or validity, though.[286] By early 1976, more than 60 agencies had adopted rules structuring their NEPA processes in step with the growing body of precedent and CEQ's urgings.[287] Because of how attuned to the judicial interpretations CEQ became and remained, action agencies' rules tended to track CEQ's guidelines, if sometimes grudgingly.[288]

Circuit in *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n (SIPI)*, 481 F.2d 1079, 1087-88 & n.30, 3 ELR 20525 (D.C. Cir. 1973), for the aggregating principle analyzed below in Part V.

278. Thus did NEPA compliance so quickly focus on Title I's "action-forcing" duty—the detailed statement requirement. *See* Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1113 & n.7, 1118, 1 ELR 20346 (D.C. Cir. 1971).

279. *See* Kenneth E. Gray, *NEPA: Waiting for the Other Shoe to Drop*, 55 Chi.-Kent L. Rev. 361, 370-75 (1979).

280. Section 2 of CEQ's 1971 Guidelines stated that: "As early as possible and in all cases prior to agency decision concerning major action or recommendation or a favorable report on legislation that significantly affects the environment, Federal agencies will, in consultation with other appropriate Federal, States, and local agencies, assess in detail the potential environmental impact in order that adverse effects are avoided, and environmental quality is restored or enhanced, to the fullest extent practicable." 36 Fed. Reg. at 7724. That adverse effects were to be "avoided . . . to the fullest extent practicable" rather than to the fullest extent possible (as NEPA §102 prefaced its obligations) suggests that CEQ was qualifying its directives to other agencies based either on the White House's priorities or its own interpretation of NEPA §101(b)—but not based upon NEPA §102's text per se.

281. Initial reactions to NEPA from the mission-oriented agencies were in many cases lackadaisical, offending NEPA's champions in Congress. *See* Andreen, *supra* note 168, at 223-29. CAA §309's enactment at the end of 1970, requiring the routing of draft and final EISs to EPA for its review, was Congress' reaction and the Act's only important structural adjustment. *Id.* at 223-33. EPA reviews attracted a great deal of attention, especially as it became clear that EPA's single most common conclusion was that the EISs being generated contained insufficient information to evaluate the proposed action. *See* Angus Macbeth, *The National Environmental Policy After Five Years*, 2 Colum. J. Envtl. L. 1, 29-32 (1975).

282. *See* Anderson, *supra* note 202, at 298-307, app. B. Over 200 cases had been filed by the time of CEQ's Third Annual Report. *See* CEQ, Third Annual Report of the Council on Environmental Quality 247 (1972). In the earliest decisions following *Calvert Cliffs*, NEPA §102(2)(C)'s requirement of a detailed statement served as the most common grounds for relief against inadequate EISs. *See, e.g.*, Environmental Def. Fund, Inc. v. Froehlke, 473 F.2d 346, 3 ELR 20001 (8th Cir. 1972); Silva v. Lynn, 482 F.2d 1282, 1284-85, 3 ELR 20698 (1st Cir. 1973). It is often reported that the volume of NEPA litigation peaked in 1974 on the basis of federal court filings. *See, e.g.*, CEQ, Environmental Quality: The Ninth Annual Report of the Council on Environmental Quality 407 (1978) (reporting that 189 cases were filed in 1974, 152 in 1975, 119 in 1976, and 108 in 1977).

283. The Third Annual Report in 1972 began CEQ's focus on the year's significant judicial opinions, a tradition that would outlast the annual report itself.

284. Louis L. Jaffe, *Book Review*, 84 Harv. L. Rev. 1562, 1564 (1971) (reviewing Joseph L. Sax, Defending the Environment: A Strategy for Citizen Action (1971)).

285. For example, among the half-dozen memoranda published in its *Federal Register* notice of December 1, 1977, is CEQ's memo to agency heads concerning the Supreme Court's opinion in *Kleppe v. Sierra Club*. *See* CEQ, National Environmental Policy Act: Administrative Interpretation, 42 Fed. Reg. 61066, 61069 (1977). In that memo, CEQ went to great lengths to note how the Court's analysis "echoe[d]" and "support[ed]" both its 1971 guidelines and "many lower court decisions" construing them. *Id.* at 61070 & nn.17-30. This pattern continued after the guidelines transitioned to regulations. Beyond the noted 40 Most Asked Questions guidance, which was an extended exposition of the Carter regulations, *see* CEQ, Forty Most Asked Question Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (1981), the Reagan CEQ sought comment on NEPA implementation in August 1981 and published a guidance memo (known as the Hill Memorandum) in July 1983. *See* CEQ, Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263 (1983) [hereinafter Hill Memo]. The Hill Memo was addressed to heads of federal agencies and treated six distinct issues, each arising directly under the Carter regulations. *See* 48 Fed. Reg. at 34263 ("The purpose of this document is to provide the Council's guidance on various ways to carry out activities under the regulations.").

286. Justice Douglas issued impassioned dissents from the denials of certiorari in *2,606.84 Acres of Land in Tarrant Cnty., Tex. v. United States*, 402 U.S. 916, 1 ELR 20155 (1971), and *Committee for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917, 1 ELR 20534 (1971), and filed an opinion as the Circuit Justice in granting a stay in *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 4 ELR 20666 (1974). None of these opinions bore any precedential force at all. *See The Powers of the Supreme Court Justice Acting in an Individual Capacity*, 112 U. Pa. L. Rev. 981 (1964); Russo v. Byrne, 409 U.S. 1219, 1221 (Douglas, C.J., 1972) ("My authority is to grant or deny a stay, not to determine whether the Court of Appeals is right or wrong on the merits."). Yet, in the *Gribble* opinion, Justice Douglas, after reviewing the appointment qualifications for CEQ members, CEQ's authority to "review and appraise the various programs and activities of the Federal Government" in NEPA §204(3), and its "unequivocal position that the [EIS] in this case is deficient," opined that CEQ's interpretation of NEPA was "entitled to great weight." *Gribble*, 417 U.S. at 2547.

287. *See* CEQ, Environmental Impact Statements: An Analysis of Six Years' Experience by Seventy Federal Agencies (1976) (tbl. 1) [hereinafter CEQ, Six Years' Experience]. Many of these agency rules were codified in the *Code of Federal Regulations*.

288. *See* Senate Committee on Interior and Insular Affs., The Council on Environmental Quality—Oversight Report, 94th Cong., 2d Sess. at 81-85 (1976). For example, the FPC, after noting that CEQ guidelines were advisory only, elected to amend its time limits for EPA's and other comments on draft statements to conform to CEQ's recommended 45 days. *See* FPC, Notice: Implementation of National Environmental Policy Act, Order 415-B, 36 Fed. Reg. 22738, 22739 (1971). But FPC also categorically excluded from NEPA reviews any project proposal under 2,000 horsepower (roughly 2,000 kwh). *See* 36 Fed. Reg. at 22739, §2.81. CEQ's April 1971 Guidelines counseled against such categorical limits in an item that foreshadowed its "cumulative effects" doctrine. *See* CEQ, Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724, 7724 (1971) ("The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the actions proposed (and of further actions contemplated).").

To compare the procedures that action agencies had adopted—or had still failed to adopt—by the end of 1971[289] to what CEQ said NEPA required shows a gap between CEQ's guidance and what was happening across the federal establishment. By the end of 1971, one executive department and some two dozen independent agencies had still not announced any NEPA implementation.[290] The first judicial decree forcing an EIS on a begrudging Corps office had already featured prominently in CEQ's first annual Environmental Quality report.[291] Yet, one commentator, in sifting data from EPA's CAA §309 reviews of EISs in 1975, found that "most agencies, particularly the developmental agencies, [we]re still not able to meet the basic requirements of the Act on a regular basis."[292] CEQ no doubt had already concluded that it lacked the power to enforce much of anything by itself.[293]

OMB's power over action agencies' budgets—the hammer backing OIRA[294]—had no analogue at CEQ. In *Hiram Clarke Civic Club v. Lynn*, the U.S. Court of Appeals for the Fifth Circuit squarely held that CEQ's guidance was "merely advisory," and that alleged agency noncompliance therewith literally "raise[d] no legal issue" because CEQ was without legal authority to bind, in that case, the Department of Housing and Urban Development.[295] Even CAA §309(b)'s referral mechanism vested no jurisdictional authority in CEQ. Yet, over and over again, the lower courts took care to signal or to state expressly that, although not binding, CEQ's interpretations of NEPA were entitled to weight.[296] Most action agencies went out of their way to ensure that their procedures implementing NEPA were consistent with CEQ guidelines.[297]

This pattern held in every reported case where a court was urged by a litigant to defer to or adopt a CEQ interpretation of NEPA: The guidance, though not binding, required earnest consideration by the court.[298] CEQ's interpretations, once mentioned in a reviewing court's opinion as having some kind of juridical weight, no doubt subtly shaped subsequent judicial practice and, presumably, action agencies' choices in turn. But action agencies also knew the law, and their compliance with the guidelines sometimes reflected the difference between interpretations that guide and those that govern.[299]

A good example of the dynamic is CEQ's "suggestion" in a 1972 memo that agencies consider completing aggregate statements for whole programs instead of many piecemeal, step-specific documents.[300] That suggestion ultimately factored into the D.C. Circuit's holding in *Scientists' Institute for Public Information v. AEC (SIPI)*,[301] requiring that the

289. *See* CEQ, Implementation of National Environmental Policy Act: Notice of Opportunity for Public Comment on Procedures, 36 Fed. Reg. 23666 (1971). In its December 10, 1971, notice, CEQ ostensibly invited public comment both on its guidelines and the action agencies' procedures, 15 of which had not been published apart from this notice. 36 Fed. Reg. at 23666. The memos and other informal agency communications published in CEQ's *Federal Register* notice all provided detailed guidance on the preparation and circulation of draft and final EISs as required by NEPA and as advised in CEQ guidelines. No agency-specific rules published to that point mentioned preferred environmental outcomes, although several were published as regulations in the making. *See, e.g.*, Department of Defense, Part 214—Environmental Considerations in Department of Defense Actions, 36 Fed. Reg. 15750 (1971).

290. The U.S. Government Manual, 1971-1972 edition, was updated on July 1, 1971. *See* Government Printing Office, The U.S. Government Manual 1 (1971). Comparing that publication's list of departments and independent agencies shows that the Department of Labor and some 24 independent agencies were unaccounted for in CEQ's published notice of December 1971.

291. *See* CEQ, Environmental Quality: First Annual Report of the Council on Environmental Quality 22 (1970).

292. Macbeth, *supra* note 281, at 33.

293. *See* CEQ, Third Annual Report, *supra* note 282, at 246 ("With a total staff of less than 60, the Council cannot make a thorough study, even for advisory purposes, of every [EIS] filed with it."); *cf.* Taylor, *supra* note 230, at 309:

> An impact statement system depends on outsiders, public and private, having sufficient resources to challenge the intertwined technical and value premises of the organization preparing the impact analysis. . . . The EIS process benefited enormously from the rise of legally and scientifically well-endowed environmental interest groups at the start of the decade.

294. Copeland, *supra* note 160, at 15-19. For an in-depth look at the power politics inside OMB's budgetary oversight of EPA, see Olson, *supra* note 219.

295. Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 426, 3 ELR 20287 (5th Cir. 1973); *see also* Greene Cnty. Planning Bd. v. Federal Power Comm'n, 455 F.2d 412, 421, 2 ELR 20017 (2d Cir. 1972); Continental Ill. Nat'l Bank & Trust v. Kleindienst, 382 F. Supp. 107, 114-19 (N.D. Ill. 1973). Other courts noted that NEPA provided no regulatory power to CEQ in its role as EIS reviewer, either. *See, e.g.*, National Helium Corp. v. Morton, 455 F.2d 650, 656, 1 ELR 20478 (10th Cir. 1971).

296. *Compare* Ely v. Velde, 451 F.2d 1130, 1137-38 & n.22, 1 ELR 20612 (4th Cir. 1971) (*citing* 1971 Guidelines' §5(b) in determining the relevant factors for finding a "major federal action"), *with* Minnesota Pub. Interest Research Grp. v. Butz, 498 F.2d 1314, 1320 & n.18, 4 ELR 20700 (8th Cir. 1974) (adding in a footnote that the court's construction of "major federal action" was "basically the position taken by [CEQ]" in the 1971 Guidelines). In *Greene Cnty.*, 455 F.2d at 421, the Second Circuit concluded that, although the guidelines were "merely advisory" and CEQ had "no authority to prescribe regulations governing compliance with NEPA," the courts should not "lightly suggest that [CEQ] . . . has misconstrued NEPA." In *Hanly v. Kleindienst*, 471 F.2d 823, 828, 2 ELR 20717 (2d Cir. 1972), the court resolved that it would defer to the action agency's interpretation of NEPA §102(2)(C)'s significance threshold so long as it was not arbitrary or capricious because, in the court's view, that interpretation "comports with the general pattern of NEPA . . . and with guidelines issued by [CEQ]." (*citing* April 1971 guidelines). Interestingly, the U.S. Court of Appeals for the Eighth Circuit, in *Environmental Def. Fund v. Corps of Eng'rs*, 470 F.2d 289, 300-01, 2 ELR 20740 (8th Cir. 1972) (the Gillham Dam opinion) seemed to suggest that CEQ's interpretation of the scope of review under NEPA §102(2)(C), as stated in a CEQ annual report, bore some weight or authority—citing the report ahead of scholarly opinion—in holding that a reviewing court should scrutinize the action agency's balancing of reasons.

297. *See* Anderson, *supra* note 202, at 279; Orloff & Brooks, *supra* note 202, at 424.

298. *See* Stevens, *supra* note 277, at 550-58; Anderson, *supra* note 202, at 87-88. An unreported order by the U.S. District Court for Arizona in June 1970 imposing a preliminary injunction implied that a failure to "compl[y]" with CEQ's interim guidelines constituted a violation of NEPA. *See* Sierra Club v. Laird, 1 ELR 20085 (D. Ariz. 1970). But the Corps' channel-clearing project in that case was being undertaken without any NEPA review and could easily have been found in violation of NEPA's literal text.

299. *See, e.g.*, Comptroller General, U.S. GAO, Improvements Needed in Federal Efforts to Implement National Environmental Policy Act of 1969 (1972) (B-170186) (detailing failures of Department of Housing and Urban Affairs to follow CEQ guidance); Richard N.L. Andrews, *Agency Responses to NEPA: A Comparison and Implications*, 16 Nat. Res. J. 301 (1976) (comparing the Soil Conservation Service and the Corps for the causes of delay and minimizing interpretations of NEPA); Neil Orloff, The Environmental Impact Statement Process: A Guide to Citizen Action 40-43 (1978).

300. *See* Atkeson Memo, *supra* note 277, at 17-19; CEQ, Third Annual Report, *supra* note 282, at 233-34.

301. 481 F.2d 1079, 1087-88, 3 ELR 20525 (D.C. Cir. 1973). The *SIPI* court's holding that a programmatic statement was necessary would later inform a CEQ requirement in the 1978 regulations. *See* 40 C.F.R. §1502.4(b).

agency prepare an EIS on its research and development of a new type of nuclear reactor.[302] Once the D.C. Circuit held as much in *SIPI*, the precedent would go on to ground the court's holding requiring a programmatic EIS in *Sierra Club v. Morton*[303] (coincidentally the first D.C. Circuit application of its noted "hard look" review that attracted Supreme Court attention[304]), spurring layers of judicial doctrine and agency practice construing NEPA's action and proposal concepts in tandem.[305] The decision anchored a common pattern.[306]

D. *From Impact to Arbitrariness Reviews: Of Hard Looks and Citizen Suits*

NEPA played a leading role in the development of arbitrariness review in the 1970s. It provided "new testing for emerging ideas about fair informal procedure."[307] With no provision of its own for judicial review, actions to enforce NEPA had to rely on APA §10 and its related doctrines.[308] Section 10 allows courts to set agency action aside if it is arbitrary and, as the D.C. Circuit honed its approach to this review throughout the 1970s, NEPA actions became a pillar of that court's effort to remake the court/agency relationship.[309] Several other courts also took the opportunities that NEPA provided, either to demand an express statement of reasons for their review or to encourage such express statements in indirect ways.[310] NEPA's detailed statements offered, in some contexts for the first time, a detailed recordation of an agency's reasoning, the agency's available information, and its handling of uncertainty.[311]

In its NEPA cases and others, what the D.C. Circuit demanded in these contexts were explanations—agency perspicuity as to what was being weighed and balanced—something NEPA §102(2)(C) had squarely targeted.[312] Where an agency found no EIS required, the D.C. Circuit soon demanded an express explanation why.[313] Where an agency found an effect of minor (not major) significance, the D.C. Circuit expected an explanation why.[314] This line of decisions established that agencies must articulate the considerations or factors they were weighing in their decisionmaking and ground them in their governing legislation.[315] The *Calvert Cliffs* opinion was pivotal to these ends

Besides this aggregative principle in *SIPI*, the D.C. Circuit's approach to the effects threshold necessary to trigger NEPA §102(2)(C) was noteworthy—and also prompted by CEQ. The court rejected the argument that a risk of environmental damage in the distant future was necessarily insufficient to trigger NEPA, *see* 481 F.2d at 1090, thereby setting a precedent that would play a leading role in the D.C. Circuit's struggle with nuclear power.

302. *SIPI*, 481 F.2d at 1088.
303. 514 F.2d 856, 872, 5 ELR 20463 (D.C. Cir. 1975), *rev'd sub nom.* Kleppe v. Sierra Club, 427 U.S. 390, 6 ELR 20532 (1976).
304. In the first of four consecutive reversals of the D.C. Circuit's combined NEPA/hard look review, the Supreme Court rejected that court's conclusion that, the U.S. Department of the Interior's protests notwithstanding, a relevant proposal for "major federal action" had materialized and required an EIS. *Kleppe*, 427 U.S. at 403-08.
305. *See* Weiner, *supra* note 115, at 68-71; Jena A. Maclean et al., *Programmatic EIS Issues*, *in* NEPA Litigation Guide, *supra* note 255, at 81, 84-90.
306. In *Carolina Action v. Simon*, 389 F. Supp. 1244, 5 ELR 20338 (M.D.N.C. 1975), the court dwelled at length on the Nixon guidelines and found that they "should be given substantial weight." *Id.* at 1246. This statement appeared in an opinion acknowledging that Congress had not vested the CEQ with jurisdictional authority of any kind, *id.* at 1246 & n.3, and which found governing U.S. Court of Appeals for the Fourth Circuit precedent decisive as to the issues raised. *See id.* at 1247. By 1977, CEQ had a collection of previously unpublished memos to agency heads counseling them on the detailed statement duties that it dumped in the *Federal Register* supposedly for informational purposes only—clothing them as "the considered views of the Council, which is the agency having the principal responsibility for providing administrative interpretation of NEPA to all federal agencies." *See* CEQ, National Environmental Policy Act: Administrative Interpretation, 42 Fed. Reg. 61066, 61067 (1977).
307. Kenneth Culp Davis, Administrative Law: Cases—Text—Problems 587 (1973).
308. *See* Anderson, *supra* note 202, at 15-18, 44-48. Section 10(e) of the APA, 5 U.S.C. §706, was supposedly intended to restate the standards of review as of 1946. *See* Attorney General's Manual, *supra* note 61, at 108. Because NEPA made no provision for suit, it has always been the default APA action that brings agencies' NEPA compliance before an Article III court. Section 702 limits the APA cause of action to final agency action only. *See* Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004); National Helium Corp. v. Morton, 455 F.2d 650, 654, 1 ELR 20478 (10th Cir. 1971). Finally, the APA action relies heavily on other statutory infrastructure for jurisdiction, venue, and procedures. *Cf.* Califano v. Sanders, 430 U.S. 99 (1977) (holding that the APA does not contain a grant of jurisdiction and that, for jurisdiction, litigants must resort to 28 U.S.C. §1331, the general federal question jurisdiction statute).
309. *See* Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1123, 1 ELR 20346 (D.C. Cir. 1971); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 1 ELR 20469 (D.C. Cir. 1971); Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1085, 3 ELR 20525 (D.C. Cir. 1973) (*SIPI*); Jones v. District of Columbia Redev. Land Agency, 499 F.2d 502, 510-14, 4 ELR 20479 (D.C. Cir. 1974); Maryland-Nat'l Capital Park & Planning Comm'n v. U.S. Postal Serv., 487 F.2d 1029, 1037-38 (D.C. Cir. 1973); Aeschliman v. NRC, 547 F.2d 622, 6 ELR 20599 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 8 ELR 20288 (1978); Natural Res. Def. Council, Inc. v. NRC, 547 F.2d 633, 6 ELR 20615 (D.C. Cir. 1976) (same); Natural Res. Def. Council, Inc. v. NRC, 685 F.2d 459, 12 ELR 20465 (D.C. Cir. 1982), *rev'd sub nom.* Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 13 ELR 20544 (1983).
310. *See* Hanly v. Kleindienst, 471 F.2d 823, 836, 2 ELR 20717 (2d Cir. 1972); Environmental Def. Fund v. Froehlke, 473 F.2d 346, 350, 3 ELR 20001 (8th Cir. 1972); Scherr v. Volpe, 466 F.2d 1027, 1032, 2 ELR 20453 (7th Cir. 1972); *SIPI*, 481 F.2d at 1095; Arizona Pub. Serv. Co. v. Federal Power Comm'n, 483 F.2d 1275, 3 ELR 20776 (D.C. Cir. 1973).
311. *See, e.g.*, Brooks v. Volpe, 350 F. Supp. 269, 278-82, 2 ELR 20704 (W.D. Wash. 1972) (examining the Transportation Department's §4(f) determination for compliance with the same legal duty at issue in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 1 ELR 20110 (1971) and using the NEPA record compiled to do so).
312. The D.C. Circuit's development of its hard look revolution began with Judge Leventhal's opinions in three FCC cases—all of which involved proceedings on the record. *See* Pike's Peak Broad. Co. v. FCC, 422 F.2d 671 (D.C. Cir. 1969); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970). The oft-cited reasoning in *Greater Boston* that law and fact mixed with one another imperceptibly in most policymaking discretion soon percolated throughout the reviewing function as the D.C. Circuit developed it. *See* Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 Geo. L.J. 2599, 2606-31 (2002). But even before Judge Leventhal's doctrine phrased things as he did in *Greater Boston*, the D.C. Circuit had demanded that action agencies "formulate in the first instance the *significant issues* faced by the agency and articulate the rationale of their resolution" and that they do so to "enable [the court] to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (emphasis supplied).
313. *See Arizona Pub. Serv. Co.*, 483 F.2d at 1280-83.
314. *See* Maryland-Nat'l Capital Park & Planning Comm'n v. U.S. Postal Serv., 487 F.2d 1029, 1039 (D.C. Cir. 1973).
315. In *Overton Park*, 401 U.S. at 420, the Supreme Court emphasized that, for agency actions without a closed-record hearing, "review is to be based on the full administrative record that was before the [agency decisionmaker] at the time he made his decision. But since the bare record may not disclose

because it conceived of NEPA's core (agency) duty as one of considered judgment.[316] That was to be NEPA Title I's practical difference in court.

Calvert Cliffs enhanced the political control of agency discretion in this connection.[317] Informal rulemakings have long been known to entail balancing competing goals, empirical uncertainties, and ambiguous statutory signals.[318] Regulatory agencies like EPA, FCC, the National Highway Traffic Safety Administration (NHTSA), and the Occupational Safety and Health Administration (OSHA) were confronting such choice situations routinely, and what the D.C. Circuit rewarded was clarity of reasoning to enable the review of what were fundamentally discretionary choices.[319] Soon, most federal courts approached the typical rulemaking as a matter of balancing competing statutory goals and viewed the agency's duties therein as one of clear exegesis, means/ends rationality, and consistency over time.[320] The D.C. Circuit even began to expect such rulemakings and to interpret underlying legislation accordingly.[321] Few courts were paying much attention to the exact weight or valence to be assigned to agency interpretations of law.[322] It was typically mixed with judicial analysis of the relevant statutory language.[323]

NEPA reinforced the fashion of the time, casting judicial review as a way to make agencies "think."[324] NEPA, the D.C. Circuit's "hard look," and the 1970s' surge in rulemakings all blurred whatever lines separated law, fact, and discretion,[325] often inviting courts to weigh the overall wisdom of the agency's choices.[326] Some of what the hard look targeted was the agency's gathered evidence,[327] some the agency's choice of procedures.[328] But much of this jurisprudence addressed what could only be called the agency's discretionary judgment: the considerations

the factors that were considered or the . . . construction of the evidence, it may be necessary for the District Court to require some explanation in order to determine if the [agency] acted within the scope of [its] authority. . . ." That dimension of *Overton Park,* combined with the presumption of reviewability in rulemakings, signaled to agencies that if they wished to avoid trials de novo in district court, they should generate some kind of record and some identification of the factors they weighed in their judgments. *See* Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 Colum. L. Rev. 721, 743-46, 762-68 (1975). Where the D.C. Circuit ratcheted the requirements upward was in the development of hybrid procedures that no statute, agency rule, or constitutional text required. *See* Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345 (1979). But it was also in the more substantive realm where policymaking judgments were being reached for less than appropriate, adequate, or transparent reasons. *See* Warren, *supra* note 312, at 2625-26, 2631-32.

316. *Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 1971), fit with and was cited in other formative hard look opinions, including *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 838 n.23, 2 ELR 20029 (D.C. Cir. 1972), and *Ethyl Corp. v. EPA*, 541 F.2d 1, 17 n.29, 6 ELR 20267 (D.C. Cir. 1976).
317. Reporting requirements had long been among Congress' favorite tools for checking administrative agencies. *See* Mashaw, *supra* note 22, at 220.
318. *See* 3 Davis, *supra* note 73, at §§5.01-6.10; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975).
319. *See*, *e.g.*, Pike's Peak Broad. Co. v. FCC, 422 F.2d 671 (D.C. Cir. 1969); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970); Environmental Def. Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597-98, 1 ELR 20059 (D.C. Cir. 1971); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850-51, 2 ELR 20116 (D.C. Cir. 1972); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 641-47, 3 ELR 20133 (D.C. Cir. 1973); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474-76, 4 ELR 20415 (D.C. Cir. 1974); *see also Ethyl Corp.*, 541 F.2d at 96 (Wilkey, J., dissenting).
320. *See* Stewart, *supra* note 318, at 1799-1800; Nathanson, *supra* note 315, at 750-62.
321. *See* National Petroleum Refiners Ass'n v. Federal Trade Comm'n, 482 F.2d 672, 677 (D.C. Cir. 1973).
322. *See* Merrill & Watts, *supra* note 4, at 949-70.
323. Natural Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 2 ELR 20029 (D.C. Cir. 1972) is illustrative. The D.C. Circuit noted preliminarily that the agency's draft EIS circulated for comment was done pursuant to §102(2)(C) and CEQ's Guidelines. *Id.* at 830. "Pursuant to" is a familiar yet all too ambiguous phrase, though. The balance of the opinion in *Morton*, where the court developed its talismanic rule of reason interpreting §§102(2)(C)(iii) and 102(2)(D)'s alternatives requirement, *see id.* at 833-38, makes no further mention of CEQ or its guidelines. The 1971 Guidelines stated that "[s]ufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects." 36 Fed. Reg. at 7725. This arguably comports with the *Morton* court's conclusion that the EIS must include an analysis of each alternative's environmental consequences, *see* 458 F.2d at 834, and surely supports the court's holding that the alternatives developed should be as broad in scope as the relevant decisionmakers' discretion. *Id.* at 837-38.
324. *See* Taylor, *supra* note 230, at 232-48. Notably, the D.C. Circuit combined its efforts to develop the hard look in cases brought against EPA, OSHA, and NHTSA in their crafting of regulatory standards from multifactor statutory mandates, *see, e.g.*, Environmental Def. Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 593-98, 1 ELR 20059 (D.C. Cir. 1971); Industrial Union Dep't, AFL-CIO, 499 F.2d at 480-88; National Tire Dealers & Retreaders Ass'n, Inc. v. Brinegar, 491 F.2d 31, 37-41 (D.C. Cir. 1974), with cases involving NEPA's action-agencies and their balancing of NEPA's policy goals against their existing missions. *See, e.g.*, Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1119-29, 1 ELR 20346 (D.C. Cir. 1971); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 786-88, 1 ELR 20469 (D.C. Cir. 1971); *Morton*, 458 F.2d at 837-38; Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 3 ELR 20525 (D.C. Cir. 1973); Maryland-Nat'l Capital Parks & Planning Comm'n v. U.S. Postal Serv., 487 F.2d 1029, 1037-38 & n.4 (D.C. Cir. 1973). *See also* Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509 (1974).
325. *See* Warren, *supra* note 312, at 2603-06; Scalia, *supra* note 315, at 362-75; James L. Oakes, *The Judicial Role in Environmental Law*, 52 N.Y.U. L. Rev. 498, 504 (1977).
326. Diverse commentary had urged the kind of court/agency relationship that D.C. Circuit Judges Skelly Wright, David Bazelon, and Harold Leventhal championed beginning in the early 1970s. *See, e.g.*, *Ruckleshaus*, 439 F.2d at 598 & n.54 ("Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion.") (*citing* Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (1969)). As has been noted about the D.C. Circuit, it is, given its unique jurisdiction, second only to the Supreme Court in its ability to affect the court/agency relationship. *See, e.g.*, Scalia, *supra* note 315, at 371; Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 Yale J. on Reg. 2 (2013).
327. *See* Wilderness Soc'y v. Morton, 479 F.2d 842, 864-67, 3 ELR 20085 (D.C. Cir. 1973) (en banc); Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 439, 3 ELR 20732 (D.C. Cir. 1973); *Industrial Union Dept.*, 499 F.2d at 479-80. On the rapid development of the norms surrounding the record in an informal, off-the-record proceeding, see Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185 (1974), and William F. Pedersen, *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38 (1975). On the norms governing agencies' selection of rulemaking or adjudication at the time, see Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication in the Development of Administrative Policy*, 118 U. Pa. L. Rev. 485 (1970). Judge Leventhal famously defended his understanding of the hard look in Leventhal, *supra* note 324, at 535-36, with an extended defense of placing the burden of proof on agencies in their rulemakings. Apparently it never occurred to the judge that whereas APA §§6 and 7 place the burden of proof on the proponent of a rule or order (typically the agency), *see* 5 U.S.C. §556(e), APA §4, governing informal, notice-and-comment rulemakings, levies no such requirement.
328. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392-93, 3 ELR 20642 (D.C. Cir. 1973); International Harvester Co. v. Ruckleshaus, 478 F.2d 615, 632, 3 ELR 20133 (D.C. Cir. 1973).

weighed, the weights assigned thereto, and whether other considerations were relevant but not weighed.[329] Indeed, the presence of such discretionary judgment is exactly what triggers NEPA §102(2)(C)'s application.[330] This was the essential nexus of the D.C. Circuit's standard-of-review revolution and NEPA.

By mid-1973, as CEQ was amending its guidelines, "Watergate was more than just the name of an expensive apartment complex"[331] in Washington. CEQ's first chair, Russell Train, was about to decamp to become EPA Administrator,[332] and CEQ's first codified version of the guidelines was being proposed and finalized. What responsible federal officials wanted most from CEQ was "detailed guidance" on "recent court decisions interpreting the Act."[333] The 1973 guidelines were, thus, an amalgam of judicial and administrative interpretation of NEPA.[334] CEQ's proposal was positioned within the *Federal Register* as an agency rule in the making.[335]

If the hearing that CEQ conducted by its notice of proposal, taking of comment, and final statement of basis of purpose published in August 1973 was meant to fulfill APA §4's requirements, it missed the mark. How could it not? If CEQ was making a rule that restated what the courts had held NEPA required, there should have been little room for participant contribution.[336] In its statement of basis and purpose, CEQ engaged no comments, mentioned no alternatives it considered, and revealed none of the supporting evidence underlying its judgments.[337] Its rulemaking would have failed a legal challenge. No preenforcement challenge ensued, perhaps because no plaintiff could have pled an Article III injury-in-fact.[338]

When they were finalized, CEQ's 1973 rules traded the sequential order of an informal guide for a hierarchical code that became the first iteration of Title 40, Part 1500, in the *Code of Federal Regulations*.[339] The rules' treatment in court thereafter changed little, if at all.[340] But the fading of the presidency from CEQ's footings as NEPA's administrator accelerated as NEPA became

329. *See* Mobil Oil Corp. v. Fed. Power Comm'n, 483 F.2d 1238, 1262 (D.C. Cir. 1973); *Portland Cement*, 486 F.2d at 399-401; Sierra Club v. Morton, 514 F.2d 856, 875-83, 5 ELR 20463 (D.C. Cir. 1975), *rev'd sub nom.* Kleppe v. Sierra Club, 427 U.S. 390, 6 ELR 20532 (1976); Ethyl Corp v. EPA, 541 F.2d 1, 24-31, 6 ELR 20267 (D.C. Cir. 1976). In Judge Leventhal's words, "a[ ] sound construction of NEPA, which takes into account both the legislative history and contemporaneous executive construction . . . requires a presentation of the environmental risks incident to reasonable alternative course of action." *Morton*, 514 F.2d at 834. "A rule of reason is implicit in this aspect of the law as it is in the requirement that the agency provide a statement concerning those opposing views that are responsible." *Id.*

330. *See, e.g.*, Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 790, 6 ELR 20528 (1976) (finding EIS not required because agency's enabling legislation left no discretion on timing of required action); Environmental Def. Fund, Inc. v. Mathews, 410 F. Supp. 336, 338, 6 ELR 20369 (D.D.C. 1976) (holding that agency enabling legislation "does not state that the listed considerations are the only ones which the Commissioner may take into account in reaching a decision" and that, therefore, NEPA provided "supplementary authority to base [agency] substantive decisions on all environmental considerations including those not expressly identified" in the agency's enabling statutes).

331. Flippen, *supra* note 216, at 137.

332. *Id.* at 138-41. Train's biographer reports from interviews that Train had had enough White House politicking and was anticipating a freer hand—"more independence at EPA and more impact on the environmental quality he valued"—in that job as compared to leading CEQ. *Id.* at 138.

333. *See* CEQ, Part 1500—Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20550, 20550 (1973).

334. *See* Stevens, *supra* note 277, at 571-73.

335. *See* CEQ, Preparation of Environmental Impact Statements—Proposed Guidelines, 38 Fed. Reg. 10856, 10865 (1973) ('[T]he Council . . . will codify these guidelines in final form in the Code of Federal Regulations, establishing a new chapter 5 to title 40 of that Code."). OFR rules then, as now, allowed for codification of any "Federal regulation of general applicability and current or future effect." *See* 1 C.F.R. 8.1(a) (1973). The prevailing OFR rules defined the term "regulation," however, as follows: "'Regulation' and 'rule' have the same meaning.'" *Id.* at §1.1. And the Supreme Court would later call the 1973 Guidelines both "regulations" and "guidelines" in the same discussion in *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 552, 8 ELR 20288 (1978). But there is surely a different connotation to *regulations* than the term *rules* has taken on, especially following the APA's inclusive definition of rules. *See* Peter L. Strauss, *The Rulemaking Continuum,* 41 Duke L.J. 1463, 1466-68 (1992); William Funk, *When Is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 Admin. L. Rev. 659, 661-63 (2002).

336. Agencies that base their actions on flawed understandings of judicial doctrine have long been at risk of reversal. *See, e.g.*, Securities & Exch. Comm'n v. Chenery, 318 U.S. 80 (1943); Negusie v. Holder, 129 S. Ct. 1159, 1163-70 (2009); Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 297, 41 ELR 20071 (4th Cir. 2011). An agency restating prevailing doctrine, thus, has good reason to avoid changes aimed at some deliberative objective.

337. CEQ's preamble for the 1973 rules was terse. In three short paragraphs it stated only that "[t]he proposed guidelines have been revised in light of the specific comments" relating to the two themes that CEQ found prevalent in the comments: increasing the opportunity for public involvement and providing the "detailed guidance" on judicial interpretations mentioned in text. 38 Fed. Reg. at 20550. Even by the relatively lax standards of the day, this statement of basis and purpose would have been an easy target for plaintiffs' lawyers. *See, e.g.*, Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968); Dry Color Mfrs. Ass'n v. Dep't of Labor, 486 F.2d 98, 105, 3 ELR 20855 (3d Cir. 1973); Morningside Renewal Council, Inc. v. U.S. Atomic Energy Comm'n, 482 F.2d 234, 240-41 (2d Cir. 1973) (Oakes, J., dissenting) (noting that rulemakings must air basic information and competing views so that agency decision-making is minimally transparent); *see* Verkuil, *supra* note 327, at 193-205.

338. By 1973, the first outlines of the Supreme Court's modern injury-in-fact doctrine implementing Article III's case or controversy requirement had been set. *See* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Sierra Club v. Morton, 405 U.S. 727, 2 ELR 20192 (1972). Paramount in the Court's doctrine was that plaintiffs must be seeking the redress or prevention of identifiable harms to them individually and not only the resolution of conflicts. *Morton*, 405 U.S. at 757 (Blackmun, J., dissenting).

339. Over their first three iterations, the guidelines evolved from 14 enumerated items in the interim 1970 version, to 12 in the1971 version, to 15 in the May 1973 proposal; most had subparts. In the August 1973 final rule, the contents remained largely unchanged from the May 1973 proposal—each had 14 substantive items—but the ordering had changed to a code-like hierarchy set within a single Part 1500. *See* 38 Fed. Reg. at 20550. Unlike the executive orders on OMB's regulatory review, which have been codified in Title 3 (the President), the NEPA regulations were codified in Title 40 (Protection of Environment).

340. If codification made any difference in the judicial treatment of the Nixon guidelines, it is impossible to detect from the published opinions. Indeed, it was just as common to note "great deference" to CEQ interpretations of NEPA embodied in its annual reports as in the guidelines codified in Part 1500. *See, e.g.*, Essex Cnty. Pres. Ass'n v. Campbell, 399 F. Supp. 208, 212, 5 ELR 20568 (D. Mass. 1975) (*quoting* Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) (referring to EEOC's Title VII enforcement guidelines and observing that "the interpretation of the Act by the enforcing agency is entitled to great deference")); Appalachian Mountain Club v. Brinegar, 394 F. Supp. 105, 120, 3 ELR 20311 (D.N.H. 1975) (same). The single most deferential treatment of CEQ's authority prior to the Carter order failed even to mention that the guidelines' 1973 codification mattered. *See* Carolina Action v. Simon, 389 F. Supp. 1244, 1246-47, 5 ELR 20338 (M.D.N.C. 1975).

so heavily litigated and the NEPA guidelines became so routinized a part of NEPA's role in court. No clear declaration parceling out the sources of particular interpretations in Part 1500 was ever achieved, though. And once President Carter ordered that CEQ's guidelines be transformed into binding regulations, CEQ's interpretations of NEPA became even less the reflection of an incumbent administration's environmental policies and even more the law of a proceduralized §102(2)(C).

IV. NEPA in the *Mead*/*Chevron* Synthesis: CEQ as Lawmaker

In the wake of the Nixon Administration's disastrous end and the White House's resulting credibility loss, President Carter's Executive Order No. 11991[341] threaded a needle between bold assertion of executive power and managerial optimizing.[342] Carter ordered all agencies to comply with CEQ's interpretations of NEPA, which he ordered to take the form of regulations.[343] Like the Nixon order before it, Carter's order signaled virtually nothing of the president's environmental priorities.[344] It merely directed that CEQ provide for the completion, improved use, and improved quality of impact statements.[345] And Carter's CEQ focused much of its energy on improving the generation and use of EISs.[346] Still, given NEPA's lack of any jurisdictional authority grant to the president or CEQ, Carter's order had to have stemmed from Article II.[347] Indeed, NRC, the Federal Energy Regulatory Commission (FERC), and other independent agencies with tenure-protected leadership[348] might have rejected the Carter order or the resultant CEQ rules for exactly this reason.[349] But they did not, at least not overtly.[350]

The regulations again combined CEQ interpretations of NEPA with a raft of judicial holdings that had filled out the NEPA canon by then to create the prophylactic procedural rules, routines, and record requirements now codified at 40 C.F.R. parts 1500-1508.[351] While no preenforcement challenge ensued in 1978, what did follow was the Supreme Court's unequivocal endorsement. As discussed below, the Court seemed to stamp the regulations with legal force normally reserved only for agencies charged by Congress with administering a statute. Section A traces those endorsements, while Section B compares them to the Court's *Mead*/*Chevron* synthesis and finds the doctrine lacking in coherence.

341. *See* Exec. Order No. 11991, Relating to Protection and Enhancement of Environmental Quality, 42 Fed. Reg. 26967 (1977). President Carter's order that CEQ issue binding rules in 1977 was a scant, two paragraph amendment of the Nixon order. The first paragraph directed CEQ to issue binding rules; the second paragraph directed all agencies to comply with those rules "except where such compliance would be inconsistent with statutory requirements."

342. *Compare* Bruff, *Presidential Power*, *supra* note 132, at 465 (discussing Carter's Executive Order No. 12044 and observing that "procedural requirements can have important effects on the substance of agency policy, but they are distinguishable from direct invasions of an agency's authority to determine the substance of its rules"), *with* Kagan, *supra* note 152, at 2298 (describing the Clinton Administration's practices of directing agency action and noting that the president's power to dismiss responsible officials means that "persuasion may be more than persuasion and command may be less than command—making the line between the two sometimes hard to discover"). Though rarely recalled, Carter's Executive Order No. 12044 instituted White House controls on regulatory agencies that were later mandated by the Regulatory Flexibility Act, 5 U.S.C. §§601 et seq., including a semiannual regulatory agenda and the requirement of a regulatory analysis used to determine the overall acceptability of a significant rulemaking. 5 U.S.C. §§602, 604. Another tool in the Carter order was the periodic review of existing rules for consistency with current Administration priorities. *See* Exec. Order No. 12044, Improving Government Regulations, 43 Fed. Reg. 12661 (1978). That has since become a staple of OIRA interactions with the regulatory agencies. *See* Sunstein, *supra* note 160, at 177-89.

343. Exec. Order No. 11991 at §2. To be sure, an executive order requiring compliance with regulations issued by an EOP office only where compliance would not be "inconsistent with statutory requirements" arguably leaves the action agency the authority to form its own judgment and interpretation of the law. *See* Kagan, *supra* note 152, at 2289.

344. President Carter's Administration was, like Nixon and Ford's, divided over its environmental priorities. *See* Samuel P. Hays, Beauty, Health, and Permanence: Environmental Politics in the United States, 1955-1985 58-59 (1987). The administration intervened quite prominently in a rulemaking by EPA to regulate particulate matter emissions. *See* Verkuil, *supra* note 205, at 945-46. And Carter's CEQ chair, Charles Warren, famously insisted that the NEPA regulations be done by consensus, something his CEQ seems to have achieved. *See* Nicholas Yost, *Streamlining NEPA—An Environmental Success Story*, 9 B.C. Envtl. Affs. L. Rev. 507, 507-08 (1981) [hereinafter Yost, *Streamlining NEPA*]. What had been environmentalist support in the fall of 1978, however, quickly turned to formidable opposition during 1979's energy and economic crises and the Carter Administration's responses thereto. *See* Hays, *supra*, at 58-60, 241-42.

345. Although the subsequent CEQ rules implementing the Carter order declared an intent that all of NEPA §102(2) was to be implemented thereby (and not simply §102(2)(C)), *see* 43 Fed. Reg. at 55978, the Carter order itself operationalized nothing from NEPA's broader, more programmatic ambitions.

346. *See* Lynton K. Caldwell, Science and the National Environmental Policy Act: Redirecting Policy Through Procedural Reform 60-64, 133 (1982).

347. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring); Kagan, *supra* note 152, at 2320-31 (arguing that congressional silence as to the president tacitly welcomes presidential influence); *cf.* Final Rule, 43 Fed. Reg. at 55978 ("The Executive Order was based on the President's Constitutional and statutory authority, including NEPA, the Environmental Quality Improvement Act, and Section 309 of the Clean Air Act. The President has a constitutional duty to insure that the laws are faithfully executed . . . ."). Neither the Environmental Quality Improvement Act nor CAA §309 mention the president. This declaration, thus, anticipated the argument made by Reagan's Office of Legal Counsel in support of Executive Order No. 12291. *See* Simms Memo, *supra* note 174, at 60-62.

348. The FPC's responsibilities over electrification and hydropower development were merged and put in the hands of the newly constituted FERC in the Department of Energy Organization Act of 1977. *See* 42 U.S.C. §7171(b)(1) (providing for tenure protection for FERC commissioners). NRC assumed the licensing and regulatory responsibilities of AEC in the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (1974). The statute provides that AEC's five members are subject to presidential removal "for inefficiency, neglect of duty, or malfeasance in office." *See* 42 U.S.C. §5841(e).

349. *Cf.* Strauss, *Overseer?*, *supra* note 146, at 745-48 (noting that express statutory vesting of authority in an agency, combined with legal requirements for the removal of agency leaders, conveys an implied congressional will to insulate the agency from the president); Bruff, *supra* note 152 at 441-49 (noting the "special status" of independent agencies stemming from the statutes creating them).

350. In *Brodsky v. NRC*, 704 F.3d 113. 120 n.3, 43 ELR 20011 (2d Cir. 2013), the court took note of an NRC lawyer's moribund claim at oral argument that CEQ's NEPA regulations were not binding on NRC (*citing* Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852, 861 (D.C. Cir. 2006)), and rejected the argument as having been conceded at an earlier stage of the proceedings.

351. *See, e.g.*, Melanie Fisher, *The CEQ Regulations: New Stage in the Evolution of NEPA*, 3 Harv. Envtl. L. Rev. 347, 350-74 (1979) (comparing court rulings on key NEPA terms to what the Carter regulations mandated and noting divergences as well as similarities).

A. Great Deference, Interpretive Authority, and CEQ's Rules as Law

Because it is the enabling statute that either requires rulemaking procedures or triggers those of the APA, and because NEPA says nothing about CEQ enacting rules, CEQ's 1978 rulemaking proceeding was not required by law.[352] Insiders have argued that CEQ conducted an exhaustive investigation and notice-and-comment process in order to clothe its rules with the legal authority that Carter's order prefigured.[353] Before publishing a proposal, CEQ held a series of hearings, circulated a 38-page questionnaire among various stakeholders, and reportedly received back "hundreds of responses which broadly and fairly represented the spectrum of interests involved with NEPA."[354]

The resulting notice of proposed rulemaking foretold a big overhaul of the detailed statement process; it took CEQ more than one year to develop.[355] A litany of new procedural steps and duties that could never have been mandated by a court purporting to interpret NEPA Title I appeared for the first time in the Carter-ordered regulations.[356] They included a strongly urged page limit for new EISs,[357] a new categorical exclusion mechanism for agencies to use in exempting whole categories of actions from the EIS duty,[358] a requirement that EISs contain an executive summary[359] and a record,[360] and the requirement that all agencies adopt new procedures to adapt to the new regulations.[361]

But the 1978 regulations ignored critical details, likely because any rule thereon would be outcome-determinative.[362] The rules listed 11 factors for judging "significance" within the meaning of NEPA §102(2)(C)[363] barely touched upon uncertainty as a pervasive facet of prediction[364] and told action agencies that our society's cumulative impact should factor into their NEPA judgments without specifying how, when, or why.[365] The regulations avoided resolving or ordering environmental priorities, avoided construing NEPA to require definite outcomes, and said nothing defining environmental quality.[366]

At finalization, CEQ summarized the rulemaking as having "three principal aims: To reduce paperwork, to reduce delays, and at the same time to produce better decisions which further the national policy to protect and enhance the quality of the human environment."[367] The U.S. Court of Appeals for the Ninth Circuit once declared that the Carter regulations were "enacted in such a way as to remove from the ambit of judicial review any agency decision which meets the requirements of the regulations."[368] To that court (and most others), the CEQ regulations became law implementing NEPA. The regulations were certainly intended by CEQ to be governing law.[369] Several

352. *Cf.* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 539-49, 8 ELR 20288 (1978) (concluding that required procedures in agency rulemakings stem from the enabling statute, the appropriate section of the APA, governing agency rules, or nothing at all).

353. *See, e.g.*, Yost, *Streamlining NEPA*, *supra* note 344, at 508-09; Yost, *supra* note 255, at 14 ("The CEQ NEPA regulations that emerged were the product of a process that is in large measure responsible for their acceptance and success. (In the three decades since their adoption only one substantive section of the regulations has been amended.)").

354. Yost, *Streamlining NEPA*, *supra* note 344, at 508. CEQ's two-year-long study of federal agency experiences with NEPA was based upon a questionnaire to agencies about the EIS process and a questionnaire about NEPA litigation. *See* CEQ, Six Years' Experience, *supra* note 287, at 1. The study was a major factor in the 1978 rulemaking. *See* 43 Fed. Reg. at 55991.

355. CEQ also announced that it was proposing the regulations to "address all nine subdivisions of Section 102(2) of the Act, rather than just the EIS provision" as had been the focus of earlier guidelines. 43 Fed. Reg. at 25230. Executive Order No. 11991 was signed in May 1977 and the CEQ proposal was published in June 1978. *See* 43 Fed. Reg. at 25230.

356. Not coincidentally, the D.C. Circuit panel's opinion in *Vermont Yankee* purported to read NEPA—or perhaps its own decisions (there is some ambiguity as to which)—to require "procedures in excess of the bare minima prescribed" by APA §4 in particularly complex actions involving battles of the experts such as in NRC's analysis of the environmental consequences of spent nuclear fuel. *See* Natural Res. Def. Council, Inc. v. NRC, 547 F.2d 633, 643, 6 ELR 20615 (D.C. Cir. 1976).

357. 40 C.F.R. §1502.7.

358. *Id.* at §§1507.3(b)(2)(ii), 1508.4.

359. *Id.* at §1502.12.

360. *Id.* at §1505.2. CEQ described the required record as "concise," but also required that the agency "specify[ ] the alternative or alternatives which were considered to be environmentally preferable."

361. *Id.* at §1507.3(a).

362. In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the U.S. Supreme Court held that federal courts did not have the power to create general federal common law when hearing state law claims under diversity jurisdiction. This is known as the "*Erie* doctrine." Justice Frankfurter's famous attempt to distinguish substance from procedure pursuant to *Erie* in *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-10 (1945), explained "substance" as all those legal norms that would be outcome determinative. If it can be said that "all lawmaking entails difference-splitting compromise," then the "'the very essence of legislative choice' lies not merely in the identification of an appropriate policy goal, but in the determination of 'what competing values will or will not be sacrificed to [that] objective.'" Manning, *supra* note 187, at 1973-74 (*quoting* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 n.4 (1994) (Scalia, J.)). The uses of ambiguity and/or silence in a "legislative" rulemaking are no less a reflection of these forces than those in the typical statute. Accordingly, it is hard to believe that it was by accident that the 1978 regulations said so little about NEPA's substantive policy priorities.

363. 40 C.F.R. §1508.25.

364. Section 1502.22 adopted a nuclear industry tool of the day—the worst-case analysis approach in the presence of uncertainty, *see* 40 C.F.R. §1502.22(b)—which became problematic in practice.

365. *Cf.* 40 C.F.R. §§1508.7, 1508.8 (defining "cumulative impact" and linking impacts and effects together as synonymous within the regulations). While the regulations required that an EIS consider direct, indirect, and cumulative impacts, *see* 40 C.F.R. §1508.25(c), they say nothing about the role of cumulative impacts in threshold significance determinations. That would eventually become a major source of discord in the rules. *See* Murray D. Feldman, *Taking a Harder Look at Direct, Indirect, and Cumulative Impacts*, 48 Rocky Mtn. Min. L. Found. J. 319, 323-25 (2011).

366. This was an especially obvious omission given the attention heaped upon substantive NEPA by the middle of the 1970s. *See* Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 Harv. L. Rev. 735, 735 & nn.2-3 (1975) (collecting sources).

367. 43 Fed. Reg. at 55978. Similarly, the Carter order simply stated that the rules should "be designed to make the [EIS] process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background date, in order to emphasize the need to focus on real environmental issues and alternatives." Exec. Order No. 11991 at §1.

368. Seattle Cmty. Council Fed'n v. FAA, 961 F.2d 829, 832 (9th Cir. 1992).

369. CEQ left no ambiguity about its intentions in 1978. "The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act." 43 Fed. Reg. at 55989, 40 C.F.R. §1500.1(a). "Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of [NEPA]." 43 Fed. Reg. at 55991, 40 C.F.R. §1500.3. "All agencies of the Federal Government shall comply with these regulations." 43 Fed. Reg. at 56002, 40 C.F.R. §1507.1). Through an erroneous interpretation of prior circuit precedent

circuits have since held that a failure to abide by the procedures set out in Parts 1500-1508 is action taken "without observance of procedure required by law,"[370] an independent basis of review named in APA §10.[371]

Shortly after CEQ promulgated its regulations, the Supreme Court declared in *Andrus v. Sierra Club*[372] that CEQ's "interpretation of NEPA [wa]s entitled to substantial deference."[373] Yet, that declaration came before the regulations had even gone into effect,[374] arguably rendering that part of *Andrus* dicta.[375] There was no mistaking the *Andrus* Court's intent, though. And although the Court had sometimes discounted agencies' interpretations that had changed over time (as had the construction at issue in *Andrus*[376]), CEQ's "reversal of interpretation occurred during the detailed and comprehensive process, ordered by the president, of transforming advisory guidelines into mandatory regulations binding on all federal agencies."[377]

Andrus raises more questions than it answered. How could a rulemaking proceeding augment the force of CEQ's interpretations of NEPA? Of what relevance was President Carter's order? The exact NEPA issue under consideration in *Andrus* had previously been adjudicated by an Article III court—contrary to the executive's position in *Andrus*. Only four years before, in *Sierra Club v. Morton*, Judge John Pratt squarely held that appropriations requests were "proposals for legislation" within the meaning of §102(2)(C).[378] By the Court's later elaboration of the *Mead*/*Chevron* synthesis on conflicts between agencies and courts, Judge Pratt's holding probably should have constrained CEQ in 1978.[379] Of course, that *Chevron* elaboration arrived years after *Andrus*. Thus, like the typical agency, CEQ was assumed to be able to change its mind about how best to effectuate a complex, multifaceted statute.[380] *Andrus* assumed CEQ had just reinterpreted an ambiguous legislative text.[381] That CEQ administered NEPA at the president's will was considered worthy of no remark.

In *Robertson v. Methow Valley Citizens Council*,[382] where the Court reiterated its great deference to CEQ's interpretation of NEPA, CEQ had amended its rules to eliminate the troublesome worst-case scenario requirement for EISs coping with uncertainty.[383] It was again an interpretation of NEPA that CEQ had changed, seemingly as a result of shifting political winds[384] (although there were bipartisan reasons

(interpreting the Nixon guidelines), the U.S. Court of Appeals for the Third Circuit once stated that the 1978 regulations "are not binding on an agency that has not expressly adopted them." Limerick Ecology Action v. NRC, 869 F.2d 719, 725, 19 ELR 20907 (3d Cir. 1989).

370. 5 U.S.C. §706(2)(D).

371. *See* Native Ecosys. Council v. U.S. Forest Serv., 418 F.2d 953, 960-61, 964-65 (9th Cir. 2005); Gerber v. Norton, 294 F.3d 173, 178-82, 32 ELR 20767 (D.C. Cir. 2002). However, at least one court treated the 1973 guidelines as similarly binding procedural law. *See* California v. Block, 690 F.2d 753, 770-73, 13 ELR 20092 (9th Cir. 1982).

372. 442 U.S. 347, 9 ELR 20390 (1979).

373. *Andrus*, 442 U.S. at 357.

374. The delay in effective date that CEQ had built into its 1978 rules rendered them inoperative at the time the Court decided *Andrus*. *See* 442 U.S. at 357-58 & n.16.

375. *But see* Sugarloaf Citizens Ass'n v. FERC, 959 F.2d 508, 512 n.3 (4th Cir. 1992) (*citing Andrus* and observing that the 1978 regulations "are binding on all federal agencies").

376. 442 U.S. at 358 (*quoting* General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976)). The irony of the *Andrus* Court's citation of *Gilbert* was apparently lost on the justices. *Gilbert* held—notwithstanding the declaration in *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), that EEOC's enforcement guidelines were entitled to substantial deference—that because Congress had not conferred "upon the EEOC authority to promulgate rules or regulations . . . courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law." *Gilbert*, 429 U.S. at 141 (internal citations omitted). Apparently, *Griggs*' notion of "substantial deference" in the Court's vernacular was less than some higher level of deference to be afforded agencies administering a statute with delegated lawmaking authority—at least according to *Gilbert*. But squaring *Gilbert*'s notion of agency authority with *Andrus*' might be beyond the powers of this author.

377. *Andrus*, 442 U.S. at 358.

378. Sierra Club v. Morton, 395 F. Supp. 1187, 1188-89, 5 ELR 20383 (D.D.C. 1975) (holding that annual appropriations requests were agency "proposals for legislation" within the meaning of §102(2)(C).). Ironically, Judge Pratt noted that the then-governing 1973 guidelines treated budget requests as proposals for legislation and that "[t]he C.E.Q. Guidelines are entitled to great weight, and constitute a persuasive interpretation of NEPA." *Id.* at 1188.

379. The Court has held that "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation . . . displaces a conflicting agency construction." National Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005).

380. *Cf.* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U.L. Rev. 1271, 1291 (2008) ("The subtle genius of Justice Stevens's *Chevron* opinion—and the reason why it endures as a landmark case in American statutory interpretation today—is that it unites disparate comprehensive theories into a consensus-based coalition favoring flexible agency administration.").

381. *Compare Brand X*, 545 U.S. at 997 (concluding that the statute's "silence suggests . . . that the [agency] has the discretion to fill the consequent statutory gap," not the courts), *with Andrus*, 442 U.S. at 357-61 (finding that CEQ's reasons for the change were rooted in the statute's values and goals and that it was, therefore, correct).

382. 490 U.S. 332, 355-56, 19 ELR 20743 (1989) (finding CEQ's change of the rules "not inconsistent with any previously established judicial interpretation of the statute," supported by a "well-considered basis for the change," and therefore entitled to substantial deference). The Court's broad declarations on flexible agency interpretation oscillated in the pre-*Mead* regime of multifactored analyses. *Compare* Rust v. Sullivan, 500 U.S. 173, 186 (1991) (declaring that agencies are entitled to *Chevron* deference even when they are reversing themselves and noting that *Chevron* itself involved such an action), *with* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 698 (1991) (declaring that the "case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views"). In *Brand X*, however, the Court ruled that only a holding declaring the unequivocal meaning of a statute could limit an administering agency's discretion to interpret that statute. *See Brand X,* 545 U.S. at 985 ("Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction.").

383. *Robertson*, 490 U.S. at 354-56. The Carter regulations originally required that EISs involving substantial uncertainties about the probable impacts of the action include a worst case scenario analysis in the body of the EIS. *See* 43 Fed. Reg. at 55984 (explaining §1502.22). The Reagan Administration first deemphasized and then, in 1986, rescinded that requirement in the single instance in which the Carter regulations were amended by notice-and-comment rulemaking. *See* CEQ, National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. 15618 (1985).

384. In rescinding the worst-case scenario requirement, CEQ took care to identify what it signaled were the governing judicial precedents establishing the baseline rule of reason as to EISs' treatment of uncertainty and available information. *See* 51 Fed. Reg. at 15621 (discussing Trout Unlimited v. Morton, 509 F.2d 1276, 1283, 5 ELR 20151 (9th Cir. 1974); Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 499 F.2d 1109, 1114 (D.C. Cir. 1973)); *see also* 51 Fed. Reg. at 15622 (discussing the term "reasonably foreseeable" in §1502.22 as a phrase with "a long history of use in the context of NEPA law" and linking its use in the amended regulations to *Sierra Club v. Morton*, 379 F. Supp. 1254, 1259, 4 ELR 20690 (D. Colo. 1974); Town of Orangetown v. Gorsuch, 718 F.2d 29, 34, 14 ELR 20049 (2d Cir. 1983); Natural Res. Def. Council v. NRC, 685 F.2d 459, 476, 12 ELR 20465 (D.C. Cir. 1982)).

to eliminate the worst-case requirement[385]). Counsel made the argument that CEQ was bound by judicial precedents supposedly requiring a worst-case analysis as an interpretation of NEPA.[386] But the Court rejected the argument.[387] Each of the precedents cited was an interpretation of the 1978 regulations, not of NEPA itself. If CEQ adopted the requirement, then CEQ could rescind it.[388] And the Court concluded that "substantial deference is . . . appropriate if there appears to have been good reason for the change."[389]

The argument in *Robertson* taps a deeper set of issues sure to resurface with a statute and implementing regulations that are the subject of more litigation—and reported precedent—than any other in environmental law: Which declarations of law in NEPA's now enormous interpretive record, if any, constrain the executive in its administration of NEPA? For one thing, NEPA, unlike some statutes, borrowed nothing from the common law.[390] Secondly, the typical NEPA judicial interpretation since *Andrus* turns at least as much on the 1978 regulations as it does on any prior judicial holding.[391] I could not locate a single precedent since 1979 that held that the literal text of NEPA dictated its outcome.[392] Finally, although the Court has sometimes signaled that one agency should not be regarded as an authority as to another agency's rules,[393] nothing was made of this difference in either *Andrus* or *Robertson*.[394] In short, it appears that NEPA will continue to mix judicial and administrative authority without clarifying their relative force.

A notable exception may be the Ninth Circuit's increasingly rigid approach to uncertainty in an environmental assessment (EA) and finding of no significant impact (FONSI). EAs and FONSIs are the preliminary tools that CEQ created in 1978 for agencies to use in determining whether or not an EIS should be prepared.[395] The Ninth Circuit has now repeatedly held that the EA/FONSI process must be the agency's hard look at its proposal and alternatives, and that if any substantial questions are raised by commenters or in factual discovery, the agency must prepare an EIS before taking action.[396] Neither of those tests is articulated in the regulations and it would be hard to conclude that they are the only permissible constructions of §102(2)(C).[397] Could they constrain the president or CEQ if/when they interpreted NEPA to free action agencies from such controls?

The (now entrenched) CEQ interpretation is that action agencies may weigh and consider 11 distinct factors in determining whether impacts will be significant,[398] only one of which is "[t]he degree to which the possible effects [of the action] are highly uncertain or involve unique or unknown risks."[399] The common judicial standard—the so-called rule of reason—requires agency perspicuity, not an aversion to uncertain risks.[400] Should a conflict harden between an action agency and the Ninth Circuit's doctrine, it may turn on the Ninth Circuit's authority to fashion its own procedural requirements—a power that the

385. *See* Charles F. Weiss, *Federal Agency Treatment of Uncertainty in Environmental Impact States Under the CEQ's Amended NEPA Regulation §1502.22: Worst Case Analysis or Risk Threshold?*, 86 Mich. L. Rev. 777, 781-809 (1988).

386. *See* Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 817 n.11, 18 ELR 20163 (9th Cir. 1987).

387. *See Robertson*, 490 U.S. at 355.

388. *See Robertson*, 490 U.S. at 354.

389. *Robertson*, 490 U.S. at 355-56 (*citing* Andrus v. Sierra Club, 442 U.S. 347, 358, 9 ELR 20390 (1979).

390. *See, e.g.*, Clackamas Gastro. Assocs., P.C. v. Wells, 538 U.S. 440, 448-51 (2003) (giving *Skidmore* deference, *see* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), *supra* note 40, to EEOC guidelines and manual on interpretation of the term "employee" in the ADA).

391. *See, e.g.*, Delaware Dep't of Natural Res. & Envtl. Control v. U.S. Army Corps of Eng'rs, 685 F.3d 259, 270-76 (3d Cir. 2012) (construing CEQ regulations); New York v. NRC, 681 F.2d 471, 476-78 (D.C. Cir. 2012) (same); Habitat Education Ctr. v. U.S. Forest Serv., 673 F.3d 518, 527-28 (7th Cir. 2012) (same). The *Brand X* doctrine (*see* National Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005), *supra* note 379) anticipates at least a functional equivalent of a *Chevron* step one holding if not necessarily its exact wording. *See, e.g.*, United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1842-44 (2012).

392. With the availability of more specific sources such as CEQ's rules, the action agency's rules, and reams of NEPA precedent—as well as the *Chevron* doctrine—it is hard to imagine such a case being litigated.

393. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 152 (1991); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696-99 (1991).

394. *See Andrus*, 442 U.S. at 353-54 & n.10 (noting that the Fish & Wildlife Service had been "[r]elying" on CEQ's guidelines then in effect in reaching NEPA determination); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-59, 19 ELR 20743 (1989). In *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373-73, 19 ELR 20749 (1989), the Court did note that the Corps' own rules were in harmony with CEQ's.

395. The 1978 regulations explicitly treat the subject of uncertainty in EISs, *see* 40 C.F.R. §1502.22, but are eerily silent on the handling of uncertainty at the threshold inquiry of whether to prepare an EIS, *see* 40 C.F.R. at §1501.4. Ninth Circuit precedent since 1982 has required the transition of an EA to an EIS if "substantial questions are raised whether a project may have a significant effect upon the human environment." Foundation for N. Amer. Wild Sheep v. U.S. Dep't of Agric., 681 F.2d 1172, 1178, 12 ELR 20968 (9th Cir. 1982); *see also* Sierra Club v. U.S. Forest Serv., 843 F.2d 1190, 1193-95, 18 ELR 20749 (9th Cir. 1988); Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149, 28 ELR 21044 (9th Cir. 1998); National Parks & Conserv. Ass'n v. Babbitt, 241 F.3d 722, 731-36, 31 ELR 20436 (9th Cir. 2001); Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846 (9th Cir. 2005).

396. *See Ocean Advocates*, 402 F.3d at 864-65.

397. NEPA's text is silent about the uncertainty surrounding whether a proposal will, may, or will not cause a significant effect in the human environment. CEQ rules suggested that action agencies should resolve their own uncertainties into pre-set categories of actions governed by agency rule. *Cf.* 40 C.F.R. §§1501.3(a), 1501.4(a)-(b) (referring to individual agency procedures and how they provide for the treatment of the action "normally"). Indeed, CEQ takes what might be called a naïve view of the EA/FONSI stage within action agencies. *See* 40 C.F.R. at §1501.4(c) ("Based on the [EA the Federal agency shall] make its determination whether to prepare an [EIS].").

398. The regulations divide the significance inquiry into two sets of considerations: context and intensity. *See* 40 C.F.R. §1508.27)(a)-(b). Context has been relatively self-explanatory, i.e., "[s]ignificance varies with the setting of the proposed action." *Id.* at §1508.27(a). But intensity (defined as the severity of the effects) includes 10 itemized factors that CEQ says "should be considered," *id.* at §1508.27(b), and is otherwise unexplained. Judgments that may balance as many as 10 different factors will entail significant discretion.

399. 40 C.F.R. §1508.27(b)(5). As discussed above, CEQ's overall approach to the significance inquiry—its listing of discrete factors to be balanced—arguably grows out of *Calvert Cliffs* and the early D.C. Circuit "hard look" opinions. But CEQ does not maintain, as does the Ninth Circuit, that any single factor's presence should require an EIS.

400. *See* Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 775-78, 13 ELR 20515 (1983); Baltimore Gas & Elec. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97-102, 13 ELR 20544 (1983); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348-52, 19 ELR 20743 (1989); Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371-73, 19 ELR 20749 (1989); Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 383 (2008) (Breyer, J., concurring in part and dissenting in part).

Supreme Court has emphatically rejected ever since *Vermont Yankee*.[401]

B. *The Synthesis Unravels:* Skidmore, Robertson, *and Substantial Deference*

Unless the president vested CEQ with what we have called jurisdictional authority in Executive Order No. 11991, *Robertson* and *Andrus* both contradict the *Mead*/*Chevron* synthesis. While *Andrus*'s declaration was arguably dicta,[402] *Robertson* had to decide CEQ's authority. Neither *Andrus* nor *Robertson* explained the precise quality of or grounds for their substantial deference, and perhaps each meant something other than *Chevron* step two.[403] Following President Carter's order and these two cases, CEQ regulations became "the bible for the federal establishment and for the reviewing courts."[404] Decades of practice by action agencies conforming their operations to the 1978 regulations have entrenched CEQ's rules in NEPA law.[405] If this is not jurisdictional authority of the *Mead*/*Chevron* sort, the Court has done a poor job settling things.

Some argue—against the Court's formalism in cases like *Chrysler* and, to a lesser extent, *Mead*[406]—that good procedures invest agency actions with the force of law.[407] They insist that the deliberative process invests "legislative" rules with their legal force, not some (perhaps undiscoverable) "fact" of delegation.[408] Congress enacts statutes through a "single, finely wrought exhaustively considered, procedure,"[409] and the notice-and-comment process is the analogue.

The chief flaw in this theory is that the Court has repeatedly rejected it, having now sewn its formalism into the fabric of our administrative law.[410] Another trouble is that a notice-and-comment process is not necessarily deliberative, procedural, or well-ordered.[411] Finally, the claim ignores the deeper foundations of our separation of powers and what courts are actually doing in deferring to an agency's interpretation of legislation.[412] Whatever *Mead*'s failings, it settled the law that strong deference is a function of Congress' authority and choices.[413] Congress did not make CEQ NEPA's administrator, and time and again courts, including the Supreme Court, have confirmed that an agency not administering a statute is not entitled to strong *Chevron*-style deference in its interpretations of that statute.[414]

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401. *See* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 546-49, 8 ELR 20288 (1978). In *Winter*, plaintiffs argued that CEQ's interpretations of NEPA were not entitled to deference because CEQ has no jurisdictional authority under NEPA. *Winter*, 129 S. Ct. at 375. While the Supreme Court bracketed that question on its way to holding that the Ninth Circuit's preliminary injunction standard was "too lenient," *id.*, the Ninth Circuit panel of Judges Betty Fletcher, Dorothy Nelson, and Stephen Reinhardt had concluded that the district court "followed established Supreme Court precedent in finding that an agency's [CEQ's] interpretation of its own regulation is not entitled to deference" under either *Chevron*/*Mead* or *Seminole Rock*/*Auer* (Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)/Auer v. Robbins, 519 U.S. 452, 461 (1997), discussed in Part IV, below). *See* Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658, 679-80, 38 ELR 20242 (9th Cir. 2008), *overruled on other grounds*, 129 S. Ct. at 381-82.

402. *Cf.* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.) ("It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."); Kastigar v. United States, 406 U.S. 441, 454-55 (1972) (declaring that "broad language in a judicial opinion" "cannot be considered binding authority"). In *Andrus v. Sierra Club*, 442 U.S. 347, 357-61, 9 ELR 20390 (1979), the Court held that CEQ's reversal of its interpretation from the 1973 guidelines to the 1978 regulations—to an interpretation that the Court on independent grounds determined to be correct—was permissible but said nothing about NEPA's delegation to CEQ or whether the rules were law.

403. One could argue that deference paid to agency interpretations short of *Chevron* (for example, *Skidmore* deference, see *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), is substantial. *See, e.g.*, Kristin E. Hickman & Matthew D. Kreuger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235, 1259 (2007). Nonetheless, the Supreme Court's vernacular is confused if *Andrus* and *Robertson* are really about *Skidmore* deference because in neither decision did the Court weigh CEQ's interpretations as it did the Department of Labor's Wage and Hour Division's in *Skidmore*.

404. Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and Peek Behind the Curtains*, 100 Geo. L.J. 1507, 1518 (2012).

405. *See* James M. McElfish Jr., *The Regulations Implementing NEPA*, *in* The NEPA Litigation Guide, *supra* note 255.

406. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) ("[T]he exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.") (*quoting* Morton v. Ruiz, 415 U.S. 199, 232 (1974)).

407. *See, e.g.*, Leventhal, *supra* note 324, at 536-41; William N. Eskridge Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution (2010).

408. *See* Eskridge & Ferejohn, *supra* note 407, at 435. The 1978 rulemaking was nothing if not public and discursive, at least for those who participated. The preamble observed that CEQ had "changed 74 of the 92 sections [proposed], making a total of 340 amendments to the regulations" in response to comments. 43 Fed. Reg. at 55990.

409. INS v. Chadha, 462 U.S. 919, 951, 13 ELR 20663 (1983).

410. Much of the Court's contemporary jurisprudence structuring the court/agency relationship has now been tied to *Chevron*, *Mead*, or both. *See, e.g.*, Mayo Found. v. United States, 131 S. Ct. 704, 712-15 (2011) (applying *Mead* and *Chevron* to Internal Revenue Service actions and ending decades of special norms for Treasury Department and IRS interpretations); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 165-72 (2007) (setting the courts' duty of deference to reasonable interpretations of agency rules within the *Chevron* model of delegation by Congress); National Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981-82 (2005) (employing the *Chevron* framework to the force of past judicial precedents construing the statute administered by the FCC); Dickinson v. Zurko, 527 U.S. 150, 154-64 (1999) (applying the APA's scope of review doctrines to the U.S. Patent and Trademark Office despite decades of special norms for the PTO and adhering to the *Chevron* doctrine for interpretations of statute).

411. In practice, the notice-and-comment process is often dominated by specially interested minorities, is perfunctory in nature, is omitted completely where expedient, and/or generates nothing but delay. *See* Colburn, *supra* note 84, at 663-66.

412. *Compare* Manning, *Constitutional Structure*, *supra* note 74, at 621 ("[B]inding deference is a function of Congress's modern authority to delegate broad "legislative discretion to administrative agencies."), *with* Kevin M. Stack, *The Statutory President*, 90 Iowa L. Rev. 539, 570 (2005) ("Judicial review of agency action is defined by a fundamental requirement that statutory authorization be traceable to an identifiable statutory source.").

413. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44, 14 ELR 20507 (1984); United States v. Mead Corp., 533 U.S. 218, 228-31 (2001). In the Court's judgment, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). And once that delegation has been made and invoked, "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise." *Mead*, 533 U.S. at 229.

414. *Chevron* deference has either been denied or deferred when the statute delegates to multiple agencies or to no agency at all. *See* Bowen v. American Hosp. Ass'n, 476 U.S. 610, 642-43 & n.30 (1986); Adams Fruit Co. v.

How could President Carter's executive order entitle CEQ to the equivalent of *Chevron* deference in NEPA's administration? Standard of review doctrine has dominated NEPA litigation since 1978 because litigation has been so common. In a series of decisions beginning with *Vermont Yankee*, the Supreme Court famously put down the hard-look revolution that the D.C. Circuit had begun with NEPA.[415] The Court relaxed the judicial review of agencies' discretionary choices, and admonished the D.C. Circuit and others that Article III gives judges no authority to commandeer the factor balancing done therein.[416] The Court was emphatic with respect to NEPA.[417] This curbing of the hard look came after Carter's CEQ had turned the NEPA guidelines into binding regulations supposedly administering all of §102(2).[418] And it came after those regulations had entrenched silence on NEPA's national policy and its pursuit. So, as the *Mead*/*Chevron* synthesis hardened, the Carter regulations and the *Calvert Cliffs* interpretation of NEPA—mandating considered judgments unaided by CEQ's substantive guidance—took on a decidedly less remedial character.[419] They tied everyone to the production of EISs and little more.[420]

A paradox is thus increasingly evident: If NEPA §102 is a delegation/mandate to the responsible official taking the agency action that occasions APA review, then it links agencies *in the aggregate* to Congress and congressional choice. As discussed above, §102 was deliberately structured to combine mission orientation with its national policy where the rubber meets the road: those making the final decisions.[421] That was no accident. The EIS was the deliberately chosen, if imperfect, tool for giving practical effect to NEPA's "essential considerations of national policy."[422] Getting NEPA's essential considerations of national policy into the driving forces of the executive branch, however, depends on their being pushed by the White House—by "Presidential administration"[423]—not their being left to a disaggregated mass. If we wish to pursue NEPA's goals, we could learn a lot from its administration to date. As argued below in Part V, CEQ's stream of guidance purporting to (re)interpret the Carter regulations, in obvious efforts to push an incumbent administration's priorities, mostly ignores those lessons.

V. CEQ the Interpreter: From *Seminole Rock* to *Appalachian Power*

NEPA's administration has interwoven the 91st Congress' questionable judgments about the federal government and its reform[424] with the Burger, Rehnquist, and now Roberts Courts' erratic scope-of-review doctrines. The presidency has been the confounding variable. Yet, with the *Calvert Cliffs* view of NEPA Title I shaping NEPA's only tangible legal duty, the equilibrium has concentrated attention on NEPA's means while virtually ignoring its ends as a goal statute. Incumbent administrations' responses since then have been guarded, given the lack of express authority in the statute; they focus increasingly upon the mechanics of EISs and on interpreting the 1978 regulations. Those administrations' CEQs have issued plenty of guidance purporting to clarify the law. Such guidance may be typical of a regulatory agency, but as discussed above in Parts III and IV, CEQ is unlike a typical regulatory agency. Lacking the kind of coercive tools that give such agencies' guidance real valence and force with regulated parties, CEQ's guidance has been mostly ineffective.

This part argues that NEPA's administration teaches a better lesson about presidential power and its uses in pursuit of long-term goals. Somewhat counterintuitively, the best uses of executive discretion—as OIRA regulatory review has also shown—may be those that trade the raw power of unconstrained extemporary choice for the routinized, ordered, judicially respected decisions guided by pre-set rules. The FRA/APA sense of rules is critical to the claim here, though. Section A shows the courts' increasing

Barrett, 494 U.S. 638, 649-50 (1990); Metro Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997); Bragdon v. Abbott, 524 U.S. 624, 642 (1998); Sutton v. United Airlines, 527 U.S. 471, 478-82 (1999); Steven Croley, *The Applicability of the* Chevron *Doctrine*, *in* A Guide to Judicial and Political Review of Federal Agencies, at 103, 107-08 (John F. Duffy & Michael Herz eds., 2005).

415. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 8 ELR 20288 (1978).

416. *See Vermont Yankee*, 435 U.S. at 554-56 & n.22; *see also* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 226-27, 10 ELR 20079 (1980); Metropolitan Edison Co v. People Against Nuclear Energy, 460 U.S. 766, 775-79, 13 ELR 20515 (1983); Baltimore Gas & Elec. v. NRC, 462 U.S. 87, 97-106, 13 ELR 20544 (1983). Though *Chevron* was not a NEPA case, it was similarly aimed at the D.C. Circuit and that court's scrutiny of EPA's CAA program.

417. *See Strycker's Bay*, 444 U.S. at 227-28 ("[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken'") (*quoting* Kleppe v. Sierra Club, 427 U.S. 390, 410, 6 ELR 20532 (1976)); Kalen, *supra* note 259, at 546 ("[T]he Court focused on . . . the proper role of courts when reviewing administrative actions under the APA. In each case decided by the Court during the first decade of NEPA, that APA focus dominated the Court's attention explicitly or implicitly.").

418. *See* American Textile Mfrs. Ass'n v. Donovan, 452 U.S. 490, 508-29, 11 ELR 20736 (1981); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 13 ELR 20672 (1983); *Baltimore Gas & Elec.*, 462 U.S. at 100-02; Global Crossing Telecomms. v. Metrophones Telecomms., 550 U.S. 45, 47-48 (2007); Entergy Corp. v. Riverkeeper, 129 S. Ct. 1498, 1505 (2009); FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1812-15 (2009).

419. *See* Bradley C. Karkkainen, *Wither NEPA?*, 12 N.Y.U. Envtl. L.J. 333, 338-43 (2004) (listing various critiques of NEPA in practice).

420. *Compare* Cortner, *supra* note 165, at 323-24, 327-30; 335-36 (finding that emphasis on procedure had indirectly encouraged agencies "to view the impact statement as a court exhibit" as early as the mid-1970s), *with* Sally K. Fairfax, *A Disaster in the Environmental Movement*, 199 Sci. 743 (1978) (arguing that EISs are necessarily marginalized from the real decisionmaking because of when they must be prepared and their information demands). This accident of timing may do more to explain why courts so readily deferred to CEQ's interpretations of NEPA than any other single influence.

421. *Cf.* 40 C.F.R. §1505.1(a) (requiring agencies to adopt "[i]mplementing procedures under [NEPA] section 102(2) to achieve the requirements of sections 101 and 102(1)").

422. 42 U.S.C. §4331(b). "In order to carry out" the policy stated in §101(a), the "Federal Government" must use "all practicable means, consistent with *other* essential considerations of national policy" (emphasis added) to pursue the six desiderata of §101(b). This oblique articulation of its national policy is the root of the Act's deepest ambiguities.

423. *See* Kagan, *supra* note 152, at 2277-2303.

424. 42 U.S.C. §4331(b).

reluctance to bow to self-interpretations like CEQ's. Section B suggests how the White House might best use its authority to turn NEPA toward its substantive goals.

A. *Abusing Interpretive Power: The Judicial Power to Say What the Law Is*

The Carter CEQ might have been motivated to the rulemaking it conducted from a desire to bind subsequent administrations.[425] Agency rules bind until they are changed in due course—whatever that entails.[426] (As action agencies adopted rules conforming to the Carter order,[427] those rules would govern more directly and specifically.[428]) This motivation—if it was the motivation—explains little. First, given the 1978 CEQ regulations' roots in Article II, it would take no more than another executive order to abrogate those regulations.[429] Changing the dozens of individual agencies' rules to reflect an incumbent administration's priorities, on the other hand, could be far more onerous, both procedurally and managerially.[430] To be sure, many of those rules are internal staff operating directives and other readily changeable tools.[431]

Further, agencies are free to *re*interpret their rules and, to whatever extent the underlying rule supports different interpretations, the maneuvering is so much the easier.[432] The real discretion here has less to do with the mechanics of EISs than with the underlying values and choices. For each of those judgments (excepting a small number that must be on the record),[433] the 1978 regulations have probably enhanced the White House's awareness of the discretion and where/how to influence it off the record.[434]

The foregoing outlines the most instructive facets of NEPA's administration. CEQ's authority has been equal parts judicial deference and presidential delegation. But in the struggle for the discretion of governing, the Roberts Court, like the Rehnquist Court before it, has proven willing to ignore past judicial precedent whenever a majority finds its preferred structural values threatened.[435] The Court has done its most searching reviews where it found executive power being denied the president,[436] adjudicative power being denied the Article III judiciary,[437] and states being denied their rightful "dignity."[438] In short, this Court cares more about having things its way than keeping them settled or simple. The example set for the lower courts is to pay less attention to doctrine than to the themes presented by particular cases. The Roberts Court's approach should be of singular importance to CEQ today as incumbent administrations urge it constantly to reinterpret the 1978 regulations, because agencies' "abuse" of their power to self-interpret has become a trigger for many courts.

Generally, an agency's interpretation of its own rule is "of controlling weight unless it is plainly erroneous" or flatly contradicts the text.[439] Should courts afford CEQ interpretations of the 1978 regulations this so-called *Seminole*

425. *See* Magill, *supra* note 79, at 1394.

426. *See, e.g.*, United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 265-67 (1954); Service v. Dulles, 354 U.S. 363, 383-89 (1957); Vitarelli v. Seaton, 359 U.S. 535, 540, 545-46 (1959). The norm governs cabinet-level officials, including the Attorney General, and probably the president as well. *See* United States v. Nixon, 418 U.S. 683, 694-97 (1974).

427. *See* 40 C.F.R. §§1507.3(a)-(b),

428. Interestingly, in *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 6 ELR 20787 (D.C. Cir. 1976), the Navy argued that NEPA should not apply to it in matters of national defense. The D.C. Circuit's first grounds for rejecting that argument were CEQ's 1973 guidelines interpreting the phrase "to the fullest extent possible" in NEPA §102 as requiring compliance "unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." *Id.* at 823 (*citing* 40 C.F.R. §1500.4(a) (1975)). But the court went on to address NEPA's applicability to Navy operations not governed by those guidelines and held that governing Department of Defense rules required the preparation of an EIS under the circumstances. *See id.* at 824-25 (*citing Vitarelli*, 359 U.S. at 539-40; Service v. Dulles, 354 U.S. 363 (1957)). Note that the Departments of Defense and Justice made this argument to the D.C. Circuit in May 1976—five months before Carter would defeat Gerald Ford in the 1976 election. The mandates in the 1978 regulations that action agencies adopt procedures to supplement the CEQ regulations, see 40 C.F.R. §1507.3(a); that such procedures "comply with [the] regulations except where compliance would be inconsistent with statutory requirements," *id.* at §1507.3(b); and that "[a]ll agencies of the Federal Government shall comply with [the] regulations," *id.* at §1507.1, no doubt aimed to have agencies bind themselves under precedents like *Accardi* and *Vitarelli*.

429. *See* Karkkainen, *supra* note 419, at 335-36. A harder question is the extent to which the substantial body of NEPA case law interpreting and enforcing the 1978 regulations would still be authoritative.

430. As of March 2013, CEQ was aware of 69 distinct agency NEPA procedures/rules. *See* CEQ, Federal Agency NEPA Implementing Procedures (2013) (copy on file with author). In its 1980 annual report, CEQ noted that "[e]ighty-nine federal departments, component bureaus, and agencies have published or are scheduled to publish final supplemental NEPA procedures" in step with the 1978 regulations. CEQ, Environmental Quality: The Eleventh Annual Report of the Council on Environmental Quality 370 (1980).

431. Such internal rules and operating norms, once called spurious rules for obvious reasons, can be adopted, amended, or abrogated at will. *See* Robert A. Anthony, "*Interpretive" Rules, "Legislative" Rules, and "Spurious" Rules: Lifting the Smog*, 8 Admin. L.J. Amer. U. 1 (1994). The Supreme Court has occasionally ignored violations of such rules notwithstanding the *Vitarelli*/*Accardi* doctrine, *see, e.g.*, United States v. Caceres, 440 U.S. 741, 753-57 (1979); American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970), leading critics like Robert Anthony to attack their use by agencies as contrary to the rule of law.

432. *See* Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 Ecol. L.Q. 657, 671-74 (2008) [hereinafter Kalen, *Transformation*]; (arguing that administrations rely on guidance to an ever-increasing extent simply to communicate administration policy priorities).

433. *See, e.g.*, Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1537-39, 23 ELR 20560 (9th Cir. 1993).

434. The Keystone XL pipeline and its absorption into presidential politics is but one example in a lineage of EIS-constrained agency actions that did more to drive decisions up the chain of command than to involve a wider public or improve the available information. *See* Elizabeth M. Brown, *The Rights to Public Participation and Access to Information: The Keystone XL Oil Sands Pipeline and Global Climate Change Under the National Environmental Policy Act*, 27 J. Envtl. L. & Litig. 499, 516-35 (2012).

435. *See, e.g.*, Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013) (Roberts, C.J., for majority); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (Roberts, C.J., for plurality); Stern v. Marshall, 131 S. Ct. 2594 (2011); Free Enter. Fund v. Public Company Accounting Oversight Bd., 130 S. Ct. 3138 (2010).

436. *See Free Enter. Fund*, 130 S. Ct. at 3151-57 (Roberts, C.J., for majority).

437. *See Stern*, 131 S. Ct. at 2608-18 (Roberts, C.J., for majority).

438. *See Sebelius*, 132 S. Ct. at 2603-07 (Roberts, C.J., for plurality); *Shelby Cnty.*, 133 S. Ct. at 2633-40 (Roberts, C.J., for majority).

439. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). *See also* Decker v. Northwest Envtl. Def. Ctr., 133 S. Ct. 1326, 1336-38 (2013); Auer v. Robbins, 519 U.S. 452, 461 (1997); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150-51 (1991).

Rock deference?[440] One objection would be that the lack of congressional delegation heightens the risk that an administration would engage in manipulative self-interpretation or authoritarianism.[441] Shortly after taking office, the Reagan CEQ issued guidance advancing interpretations of the 1978 rules that differed subtly but importantly from the previous administration's interpretations.[442] Subsequent administrations have followed suit. In the wake of the *Deepwater Horizon* disaster in the Gulf of Mexico and evidence suggesting that NEPA exemptions may have played a role in the Minerals Management Service's failings there, the Obama CEQ announced a probe into existing NEPA practices.[443] Together with other interpretive changes,[444] CEQ soon changed its counsel on the regulations covering so-called categorical exclusions, tightening its endorsement of their use.[445]

At least three Justices of the Supreme Court[446] seem as convinced as the D.C. Circuit has long been that the manipulative use of interpretive rules by agencies merits serious judicial scrutiny.[447] The 1978 regulations' relative permanence—and the substantial body of case law construing and enforcing them—arguably divides them from extemporary CEQ interpretation.[448] Is the latter closer to pure political power than routine agency administration?[449] This potential threat stands in marked contrast to the *Andrus* and *Robertson* Courts' substantial deference. But it may soon combine with judicial skepticism of "undisclosed Presidential prodding"[450] and regular calls from commentators that political influences be fully disclosed to the public record.[451] When that combination occurs, CEQ's steady stream of guidance will hit a wall.

To be sure, the gap between CEQ as the interpreter of CEQ, and CEQ as the interpreter of NEPA, is neither vast nor easily mapped.[452] And Congress can always act to check perceived abuses if it so chooses.[453] Notwithstanding

440. *See, e.g.*, League of Wilderness Defenders-Blue Mtns. Biodiversity Project v. U.S. Forest Serv., 549 F.3d 1211, 1217-18 (9th Cir. 2008).

441. *See* Manning, *Constitutional Structure*, *supra* note 74, at 645-54 (arguing that the text, history, structure, and case law construing the Constitution's separation of powers favor the separation of law making from law exposition, and that deference to agencies' interpretations of their own rules invites abuse); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449, 1459-66 (2011) (exploring several potential problems with a strong form of deference to agency interpretations of agency rules).

442. *See* 48 Fed. Reg. 34263 (1983) (Hill Memo, *supra* note 285).The Hill Memo urged action agencies to use categorical exclusions wherever possible and to avoid "excessive documentation." 48 Fed. Reg. at 34265. It also urged agencies to make better use of tiered statements to avoid duplicative treatments of the same risks. *Id.* at 34267.

443. *See* CEQ, Notice of Review and Request for Public Comment, 75 Fed. Reg. 29996 (2010). Following the Deepwater Horizon blowout, several media accounts linked lax oversight by the Minerals Management Service (MMS) of deep water exploratory drilling to its NEPA practices and, particularly, its exemption of many decisions from any NEPA detailed statement. CEQ's finalized guidance on the creation, application, and revision of categorical exclusions made no mention of MMS or of the operative categorical exclusions in use prior to the Deepwater Horizon tragedy. *See* CEQ, Notice of Availability, Final Guidance on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 Fed. Reg. 75628 (2010). But it did revise the guidance to recommend a seven-year cycle to ensure that every categorical exclusion was routinely reviewed and revised as necessary. *Id.* at 75637.

444. CEQ announced a suite of proposed guidance documents in *Federal Register* notices in February 2010. *See* CEQ, Notice of Availability, Draft Guidance, Consideration of the Effects of Climate Change and Greenhouse Gas Emissions, 75 Fed. Reg. 8046 (2010); CEQ, Notice of Availability, Draft Guidance, NEPA Mitigation and Monitoring, 75 Fed. Reg. 8046 (2010); and CEQ, Notice of Availability, Draft Guidance, Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 Fed. Reg. 8045 (2010). It proposed a fourth guidance on expediting and improving EIS and EA preparation in December 2011. *See* CEQ, Draft Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act, 76 Fed. Reg. 77492 (2011). After taking comments, CEQ went on to finalize the categorical exclusions, mitigation/monitoring, and procedural improvement guidances. *See* CEQ, Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 Fed. Reg. 75628 (2010); CEQ, Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843 (2011); and CEQ, Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act, 77 Fed. Reg. 14473 (2012).

445. After finding that categorical exclusions had become "the most frequently employed method of complying with NEPA," 75 Fed. Reg. at 75632, CEQ went on to set new precautions in their establishment, application, and review. *See* 75 Fed. Reg. at 75631-38. As to one changed interpretation—the duty to document adequately the application of a categorical exclusion—CEQ virtually adopted the Ninth Circuit's standard. *See* 75 Fed. Reg. at 75636 (*citing* California v. Norton, 311 F.3d 1162, 1175-78 (9th Cir. 2002)).

446. *See* Perez v. Mortgage Bankers Ass'n, No. 13-1041, 45 ELR 20050, 2015 WL 998535, *10-25 (U.S. Mar. 9, 2015) Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168-69 (2012); Talk America, Inc. v. Michigan Bell Tel. Co., 131 S. Ct. 2254, 2265-66 (2011) (Scalia, J., concurring) (volunteering a willingness to revisit *Seminole Rock* deference) (*citing* Manning, *Constitutional Structure*, *supra* note 74); Gonzales v. Oregon, 546 U.S. 243, 256-60 (2006) (rejecting the Attorney General's interpretation of a department rule implementing the Controlled Substances Act as inconsistent with the statute's cooperative federalist structure that left significant judgments to the states). Justice Antonin Scalia's newfound skepticism of agency self-interpretations surely underscores the porosity of the *Mead*/*Chevron* synthesis. *Cf.* Christensen v. Harris Cnty., 529 U.S. 576, 591 (2000) (Scalia, J., concurring) (arguing that informal interpretation should receive *Seminole Rock* deference under *Auer* as an interpretation of the agency's rule).

447. *See* Kalen, *Transformation*, *supra* note 432, at 677-82.

448. *See, e.g.*, Alaska Prof'l Hunters Ass'n v. FAA, 1771 F.3d 1030, 1034-35 (D.C. Cir. 1999) (rejecting the agency's interpretation of its rule in part on the grounds that its rule of long standing was understood by the regulated community for 35 years to bear a meaning other than that which the agency eventually adopted in guidance); Mortgage Bankers Ass'n v. Harris, 720 F.3d 966, 969-72 (D.C. Cir. 2013), *rev'd*, Perez v. Mortgage Bankers Ass'n, 2015 WL 998535 (U.S. Mar. 9, 2015).

449. *Cf.* Moe & Howell, *supra* note 188, at 854 (arguing that presidents have windows of opportunity in office and they generally must exercise "as much control over government and its outcomes" as possible in them).

450. Sierra Club v. Costle, 657 F.2d 298, 408, 11 ELR 20455 (D.C. Cir. 1981).

451. *See, e.g.*, Mendelson, *supra* note 206, at 1159-77; Watts, *supra* note 226, at 32-39; Kagan, *supra* note 152, at 2380-83.

452. In its guidance on improving NEPA procedurally, CEQ noted that its "guidance documents represent CEQ's interpretation of NEPA, which the U.S. Supreme Court has said is 'entitled to substantial deference.'" 77 Fed. Reg. at 14475 (*quoting* Andrus v. Sierra Club, 442 U.S. 347, 358, 9 ELR 20390 (1979)). The *Mead*/*Chevron* synthesis suggests a more careful parsing of *Andrus*, however.

453. The draft guidance on the consideration of climate change effects and greenhouse gas emissions elicited the *Sturm und Drang* of congressional Republicans. Sen. Jim Inhofe (R-Okla.) threatened to introduce a bill, to be titled the NEPA Certainty Act, which would have prohibited the use of NEPA to "document, predict, or mitigate the climate effects of specific Federal actions." *See* S. (unnumbered), 111th Cong., 2d Sess. (2010) (copy on file with author); Noelle Straub, *Senate Republicans Move to Bar NEPA Analysis of Climate Change Impacts*, N.Y. Times (Apr. 20, 2010), *available at* http://www.nytimes.com/gwire/2010/04/20/20greenwire-senate-republicans-move-to-bar-nepa-analysis-o-53404.html. For whatever reason, CEQ has yet to take any action on the guidance.

overbroad Supreme Court declarations to the contrary,[454] though, where a reviewing court decides that an agency is abusing its interpretive power by clothing its actions in the form of guidance that changes or creates the governing norm(s), the review is increasingly skeptical and searching.[455] The accusation that EPA was deliberately adopting vague regulations and then smuggling the law in later with guidance came in a derisive opinion by D.C. Circuit Judge Raymond Randolph in *Appalachian Power Co. v. EPA*.[456] Whether it reflects skepticism like Judge Randolph's[457] or merely the maturation of agency rulemaking,[458] courts are increasingly uncomfortable granting controlling weight to agencies' self-interpretations.

Should the 1978 regulations' roots in Article II affect this calculus? Take CEQ's latest interpretation of its categorical exclusions, presumably reflecting an administration priority of preventing more catastrophic oil spills.[459] Following OMB's "good guidance" practices bulletin,[460] CEQ published a *Federal Register* notice proposing the guidance, took public comment, and then finalized it (a process that, in substance if not in form, fulfilled the requirements of notice-and-comment procedures under the APA).[461] With no statutorily mandated process, the discretion at issue of CEQ's invention in the first place (NEPA says nothing about categorical exclusions), and the president's duty to "take Care" that NEPA "be" executed,[462] this particular self-*re*interpretation by the president's delegate—as urbanely domesticated in administrative law's trappings as it was[463]—could easily garner strong deference under prevailing doctrine.[464] Yet, there is at least as much of a chance that skepticism like Judge Randolph's would reject it, given the right plaintiff hitting the right theme in the right case.

The last section of this Article advances a claim about the president's power and duty to administer a goal statute like NEPA that could minimize such risks inherent in NEPA's fuller administration.

B. Presidential Administration? Delegations Creating Authority

In administering NEPA, CEQ has functioned much like the creators of the Executive Office of the President intended.[465] Its gathered expertise has come in implementing the statute (at least part of it). The twist is that CEQ has governed by guiding—serving to shape the judicial enforcement of the statute from within EOP by communicating interpretations to departmental and agency heads and putting it on them to implement CEQ rules consistent with their authority.[466] CEQ has administered NEPA §102(2) by giving its interpretations the maximum feasible *publicity*[467]

454. *See, e.g.*, Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); Udall v. Tallman, 380 U.S. 1, 16-17 (1965); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988); Auer v. Robbins, 519 U.S. 452, 461-62 (1997); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171-72 (2007).

455. *See, e.g.*, Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168-69 (2012); Gonzales v. Oregon, 546 U.S. 243, 256-60 (2006); Coalition for Common Sense in Gov't Procurement v. Secretary of Veterans Affairs, 464 F.3d 1306, 1317-18 (Fed. Cir. 2006); Hemp Industries Ass'n v. DEA, 333 F.3d 1082, 1087-91 (9th Cir. 2003); Shell Offshore. Inc. v. Babbitt, 238 F.3d 622, 627-30 (5th Cir. 2001); Caruso v. Blockbuster-Sony Music Entm't Ctr., 193 F.3d 730, 736-37 (3d Cir. 1999); Troy Corp. v. Browner, 120 F.3d 277, 287, 27 ELR 21548 (D.C. Cir. 1997); *see also* Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 Yale L.J. 782, 785 (2010). Finding empirical evidence of such strategic action has proven extremely difficult, though. *Id.* at 821.

456. 208 F.2d 1015, 30 ELR 20560 (D.C. Cir. 2000).

457. Judge Randolph's opinion for the panel in *Appalachian Power* also accused EPA of seeking advantage over regulated parties by using guidance to "immunize" its substantive positions from judicial review for a lack of finality. *See* 208 F.2d at 1020; *see also* Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1033-35 (D.C. Cir. 1999) (requiring that FAA reverse a field office's long-standing interpretation of agency rules by notice-and-comment rulemaking to allow regulated parties the opportunity to block the rule).

458. *See* Kevin M. Stack, *Interpreting Regulations*, 111 Mich. L. Rev. 355, 356-58 (2012).

459. *See* National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Report to the President: Deep Water—The Gulf Oil Disaster and the Future of Offshore Drilling 82 (2011) ("MMS performed no meaningful NEPA review of the potentially significant adverse environmental consequences associated with its permitting for drilling of BP's exploratory Macondo well. MMS categorically excluded from environmental impact review BP's initial and revised exploration plans . . . .").

460. *See* OMB, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (2007). OMB's bulletin, after quoting at length from Judge Randolph's opinion in *Appalachian Power*, provided that agencies should allow for public comment on all guidance and that, for "economically significant guidance documents," they should conduct the essentials of a notice and comment routine through the *Federal Register*. *Id.* at 3440.

461. After having published a notice of availability of the draft guidance and inviting public comment thereon (in the *Federal Register*'s Notices section), *see* 75 Fed. Reg. at 8045, CEQ published another notice of availability (of the final guidance that was lettered to heads of departments and agencies) in the *Federal Register* Rules and Regulations section—but no final rule or statement of basis and purpose. *See* 75 Fed. Reg. at 75628.

462. U.S. Const., art. II, §3.

463. The Good Guidance Bulletin (to which CEQ's guidance adhered procedurally), although based in part on the now-rescinded Executive Order No. 13422, *see* 72 Fed. Reg. at 3433, extended underlying policies of the APA, the FRA, and the judicial hard look. Thus, compliance with the bulletin is a good proxy for these other cognate statutes and principles.

464. While the 2010 categorical exclusions guidance may depart from the Hill Memo of 1983 regarding categorical exclusions, most members of the Court are clear that an agency is free to change its mind, so to speak, as long as it provides a reasoned explanation why "'it now reject[s] the considerations that led it to adopt that initial policy.'" FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1822 (2009) (Kennedy, J., concurring) (*quoting* Breyer, J., dissenting). Given that the arbitrary and capricious hurdle is surmounted by CEQ's justification for the 2010 change rooted in the Deepwater Horizon tragedy and other developments, the most relevant standard would be *Seminole Rock*/*Auer,* assuming Justices Scalia, Thomas, and Alito cannot form a majority supporting its overthrow.

465. The scholars who proposed it, President Franklin D. Roosevelt, and the 76th Congress supposedly intended to rescue the presidency from "the babel and bedlam of the modern state" by freeing the president from the rigors of administration, saddling administrators with those duties, and allowing the president the "additional hours . . . for the exercise of his obligations as commander-in-chief, director of foreign relations, leader of Congress, and head of his party." Clinton L. Rossiter, *The Constitutional Significance of the Executive Office of the President*, 43 Amer. Pol. Sci. Rev. 1206, 1212 -13 (1949).

466. The very proviso featured in every executive order on regulatory review—that its content govern only to the extent permitted by law—is stated expressly in the 1978 regulations. *See* 40 C.F.R. §1507.3(b) ("Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements . . . ."). The doctrine of *Environmental Def. Fund v. Thomas*, 627 F. Supp. 566, 16 ELR 20250 (D.D.C. 1986), thus seems to have been no more nor less a constraint on CEQ than on OMB/OIRA.

467. *See* Lon L. Fuller, The Morality of Law 39, 49-51 (1969) (declaring eight criteria for the identification of a legal system, finding the promulgation and publication of the applicable rules among them, and arguing that laws should be "given adequate publication so that they may be subject to public criticism, including the criticism that they are the kind of laws that

and clothing them with the tangible attributes of legality in our administrative state. It has commandeered judicial precedents to the president's ends even while remaining a distinct APA agency that is, if not independent of the president, at least separate from and more legally bound than the president.[468]

Notwithstanding the statute's failure to delegate in terms, all of these qualities of CEQ's have combined to make its interpretations appealing to the judiciary by reducing the risk that judicial reliance thereon will contaminate or pollute its judicial power.[469] While none of it necessarily constrained the president, it constrained those around the president—which was precisely how administrative authority evolved in our tradition.[470] And it raises the prospect that the president can enhance his or her practical power by delegating to others who are more legally constrained.[471]

All of this could inform a more energetic[472] administration of NEPA §§101-102, pursuing NEPA's substantive goals. Although the Supreme Court has repeatedly declared that "NEPA itself does not mandate particular results, but simply prescribes the necessary process,"[473] these declarations all respond to arguments long made to courts that NEPA somehow implies that an environmentally preferable action be taken. They address no more than the judicially enforceable constraints on agency discretion then in force. Were CEQ, on the president's order, to issue a directive to the heads of federal departments and agencies instructing them to guide their discretionary NEPA judgments with discrete factors and specified weights or priorities, for example, the "law" as our administrative law conceives it would change. The Court has consistently kept the authorized exercise of pure executive discretion out of Article III adjudication in order to protect the integrity of the judicial power.[474]

Courts must still sort out the authorized from the unauthorized,[475] much as they have to sort out statutes with their own legal valence from those lacking it.[476] That much is no different for the president's involvement,[477] because even the president is bound by governing agency rules. And because a goal-oriented statute that fails to identify its administrator is nonetheless one the president must "take Care" that it "be" executed, there is nothing unlawful in ordering CEQ to put the balance of NEPA into effect by guiding action agencies into doing so through their own rules.[478] If, even in court, the key to NEPA's applicability is the existence of discretion, and the core goal of NEPA as judicially construed is a duty of considered judgment, it will matter little whether such an executive order is ultimately grounded in Article II, §3, in NEPA, or in some other facet of our "statutory President."[479]

ought not be enacted unless their content can be effectively conveyed to those subject to them").

468. CEQ's efforts to promulgate its interpretations arguably combine managerial with legal intentions. *See* Fuller, *supra* note 467, at 208. But CEQ, unlike the president, is fully bound by modern administrative law including statutes such as the APA, FRA, FOIA, and the Government in the Sunshine Act.

469. U.S. Const., art. III, §1.

470. *See* Mashaw, *supra* note 22, at 301-08 (linking the gradual judicialization of administration to the latter's gradual severance from Congress and the president). Indeed, even in cases where a president has exercised raw Article II power—to fire a subordinate, for example—courts have held that others in the administration remain subject to suit for executing the orders. *See, e.g.*, Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).

471. *Cf.* Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. Econ. Hist. 803 (1989) (arguing that the Glorious Revolution and the reforms of Crown prerogative it wrought allowed England credibly to commit to upholding property rights, which enabled capital markets to grow its wealth and, thus, its ability to wage wars on the French).

472. *See* Alexander Hamilton, The Federalist No. 70, *in* The Federalist 471 (Jacob E. Cook ed., 1961) ("Energy in the executive is a leading character in the definition of good government.").

473. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350, 19 ELR 20743 (1989).

474. *See, e.g.*, Hayburn's Case, 2 U.S. (2 Dall.) 408, *Rprtr's n.* (1792) (refusing to hear veteran's pension appeal on the grounds that the judgment could be reversed by Congress or the Attorney General); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803); Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113014 (1948) (refusing to review orders that "embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate"); Baker v. Carr, 369 U.S. 186, 217 (1962) (setting out criteria for identifying a political question that is not justiciable, including "an unusual need for unquestioning adherence to a political decision already made"); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 409-14, 1 ELR 20110 (1971) (finding that where there is law to apply, the APA exception from review of matters committed to agency discretion is inapplicable and review is presumptively available); Goldwater v. Carter, 444 U.S. 996, 1003-04 (1979) (vacating lower court judgment reviewing the president's termination of a treaty on the grounds that no law supported such review and that it was therefore a matter of the president's unfettered political discretion); Heckler v. Chaney, 470 U.S. 821, 832, 15 ELR 20335 (1985) (finding agency decisions not to institute enforcement proceedings presumptively unreviewable because of the futility of review).

475. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 528-35, 37 ELR 20075 (2007); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160-61 (2000).

476. *Compare* Rubin, *supra* note 19, at 377 ("[L]aw and legislation are overlapping, not congruent, categories."), *with* Levin, *Unreviewability*, *supra* note 107, at 694 ("Despite its importance . . . the presumption favoring judicial review of administrative action is just a presumption.").

477. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-87 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). Not even the president, whether reviewable or not, will proclaim open hostility to valid governing law. *See* Pildes, *supra* note 149, at 1416-24. "Presidents rarely proclaim in public their outright defiance of law, but they (and their legal advisors) at times push the boundaries of legal compliance by embracing tendentious legal position not widely shared among legally knowledgeable interpreters but that nonetheless enable Presidents to pursue their policy aims." *Id.* at 1424. Pildes concludes that "a close relationship exists between Presidential credibility and effective power. In the United States, that credibility is bound up with perceptions about whether Presidents are complying with domestic law. Law, politics, and public opinion are not separate domains hermetically sealed off from each other." *Id.*

478. *Cf.* Free Enter. Fund v. Public Company Accounting Oversight Bd., 130 S. Ct. 3138, 3154-55 (2010) (invalidating protections from presidential removal as contrary to the Vesting Clause and the "basic principle" that the president must be able to supervise, even if only indirectly, those who execute the law).

479. *Cf.* Stack, *Statutory President*, *supra* note 412, at 597 ("The fact that the President decides to put his command in the form of an executive order indicates the order's authoritative quality. . . . Executive orders purport to bind those to whom they apply with the force of law."). The president's standing authority under the so-called Subdelegation Act, Pub. L. No. 248, 65 Stat. 713 (1951), to "designate and empower the head of any department or agency in the executive branch . . . to perform . . . any function which is vested in the President by law," see 3 U.S.C. §301, conveys specific statutory authority to the president. The right delegation to CEQ by executive order would not necessarily change who is administering NEPA for *Chevron* purposes. *See, e.g.*, Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 925, 22 ELR 20001 (D.C. Cir. 1991).

CEQ's directing other officers of the United States to set certain environmental priorities would eventually necessitate some sorting out in future cases.[480] But there is no reason to doubt that CEQ could work with such a substantive NEPA precisely as it has in administering §102(2)(C).[481] Insofar as the courts are legally precluded from substituting their own judgments for an agency's balancing of competing factors,[482] and there remains some residue of NEPA's substance still unexecuted after four decades, it is difficult to see how the judicial power could rightly keep the president from putting that rest of the statute into effect.

VI. Conclusion

CEQ has administered NEPA by deftly combining delegated Article II power with the modern principles of administrative law and the scope and standards of judicial review of agency action. The president's power to ensure that the laws be faithfully executed filled a vacuum left by the 91st Congress when it failed to specify who was to administer NEPA. Executive orders from Presidents Nixon and Carter tasked CEQ with doing so. Other goal-oriented statutes have bridged similar gaps, but few (if any) have been marked by NEPA's differentiation into substantive and procedural selves with only one-half being put into effect as law. Administering NEPA to pursue its primary goal—making America a more sustainable civilization—would be a most significant environmental legacy for a president to author.

480. There is reason to doubt that plaintiffs would fare any better in fulfilling the requisites for a lawsuit challenging such CEQ guidelines at adoption today than they would have in 1978. *Cf.* Raven-Hansen, *supra* note 135, at 329-36 (finding that reviewability of Exec. Order No. 12291 would have been a significant hurdle to judicial review); *see* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732-37, 28 ELR 21119 (1998) (rejecting a facial challenge to rulemaking as not ripe for review); National Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 812, 33 ELR 20204 (2003) (same); Salt Inst. v. Leavitt, 440 F.2d 156, 158-59 (D.C. Cir. 2006) (finding lack of standing to support a challenge to guidelines issued to implement the Information Quality Protection Act by the Department of Health and Human Services because the statute conferred "no legal rights in any third parties").

481. One potential hurdle might be the president's authority to order the so-called independent agencies to comply with CEQ directives implementing §§101 and 102(1). I leave this question to future work for a few reasons. First, unlike other statutes that have been administered from within EOP over the last several decades, NEPA expressly commands "all agencies of the Federal Government," with no exceptions. Second, the independent agency category itself is open to doubts that are beyond our scope. *See, e.g.*, *The SEC Is Not an Independent Agency*, 126 Harv. L. Rev. 781 (2013). Finally, for any divergence to arise between such an agency's actions and CEQ's interpretation, the agency would first have to reach the (independent) judgment to depart from CEQ's directive(s) and that eventuality, without specifics, is speculative.

482. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 13 ELR 20672 (1983).