DIALOGUE

ANNUAL SUPREME COURT REVIEW AND PREVIEW

SUMMARY

The U.S. Supreme Court's October Term 2024 again had major implications for environmental and administrative law, as do an extraordinary number of cases both decided and still pending on its emergency docket. On September 30, 2025, the Environmental Law Institute hosted a panel of experts who provided an overview of key rulings and major takeaways from the Court's term, and discussed cases that have been granted review or are likely to be considered by the justices in the upcoming term. Below, we present a transcript of that discussion, which has been edited for style, clarity, and space considerations.

Jay Austin (moderator) is a Senior Attorney at the Environmental Law Institute and Editor-in-Chief of the *Environmental Law Reporter*.
Gerald Torres is Professor of Environmental Justice at the Yale School of the Environment and a Professor of Law at Yale Law School.
Sharon Jacobs is a Professor of Law at Berkeley Law School.
Patrick Parenteau is a Professor of Law Emeritus at Vermont Law School.

Jay Austin: Welcome to our 2025 edition of the *Annual Supreme Court Review and Preview*. I'm here with a couple of regulars: first, Sharon Jacobs, a professor of law at Berkeley Law School, where she teaches energy law, environmental law, and administrative law. Then, Gerald Torres, who's professor of environmental justice at the Yale School of the Environment, as well as professor of law at Yale Law School. This year, we also have Patrick Parenteau, professor of law emeritus at Vermont Law School and another expert Court watcher.

Each panelist will start out by highlighting one or more decisions from the Court's past term. We'll then turn to a preview of the upcoming term and some petitions and other matters that are pending before the Court. We'll also take some audience questions.

This year, I want to add that while we generally try to focus on environmental and energy issues, the current Supreme Court docket raises extraordinary questions about the scope of executive authority, the separation of powers, and the nature of interim judicial relief. If there are any real themes for this upcoming term, it's those, and in many ways they are happening well above our world of environmental law. We can't cover all of those cases, but we will try to highlight some that affect our field or the overall functioning of the federal government, which obviously remains important.

That said, we'll kick off the review round by talking about some of the core environmental statutes. Gerald, last year you previewed for us the *Seven County* National Environmental Policy Act (NEPA) case,[1] which is maybe the biggest environmental decision from last term. Can you update us on what the Court held this spring?

Gerald Torres: Sure. One of the things that the Supreme Court did in the *Seven County* opinion is to clarify what NEPA requires of agencies and what NEPA requires of courts. The judgment was unanimous. Justice Neil Gorsuch did not participate in the case. Of the justices who participated, Chief Justice John Roberts, Clarence Thomas, Samuel Alito, and Amy Coney Barrett joined Justice Brett Kavanaugh's opinion. Justice Sonia Sotomayor filed an opinion concurring in the judgment, which Justices Elena Kagan and Ketanji Brown Jackson joined.

There are some differences regarding the reasoning, but the holding is simple to state. What Justice Kavanaugh made clear is that "NEPA imposes no substantive obligations or restrictions. NEPA is a purely procedural statute . . . ."[2] And that's the framing of it.

Kavanaugh says early on that there was confusion in the lower courts over how to handle NEPA cases. For him, the key principle that courts need to take into account or keep at the front of their minds when they're reviewing NEPA is to give substantial deference to the agencies, so that the courts may not impose additional requirements on the agencies. Especially where the statute that the agency is interpreting lays out what the agency is supposed to consider.

This case involved the extension of a railroad line that would have the potential to join some oil fields to the

1. Seven Cnty. Infrastructure Coal. v. Eagle County, No. 23-975 (U.S. May 29, 2025).
2. *Id.*, slip op. at 1.

national oil network. One of the complaints was that the permitting agency did not take into account the ancillary effects of the oil development, as well as the effects of the railroad extension. The Court made clear that the agency considered the direct environmental effects of the railroad extension. Then, it went out of its way to stress that, because any oil development, permitting, or drilling, or anything for which the railroad extension was being created was outside the purview of the agency, the agency wasn't required to take the environmental impacts into account.

The deference then is over the definition of what the agency must consider and whether it adequately considered that in light of NEPA's obligations. The agency filed a preliminary environmental impact statement (EIS), received a voluminous number of comments, synthesized the comments, and then issued the permit. So, in some ways, the bottom line is something we all knew in advance: NEPA is primarily a procedural statute.

The thing that the Court added here was to underline the requirement that substantial deference be given to the agencies in their assessment of the environmental issues that they have to take into account when considering the commands of NEPA, and that NEPA has no substantive obligations. It is merely designed to improve the decision-making of the agency. Once the agency has made a decision consistent with both its organic statute and NEPA, the courts' roles are quite limited. That's what the Court wanted to clarify.

The Court is reaching down to what Justice Kavanaugh characterized as confusion in the courts of appeal over the extent of the deference that should be given to agencies. What Justice Kavanaugh clearly wanted to underline was that NEPA requires a set of procedures for the agency to follow, consistent with the statute it has applied. Once it does that, the court merely has to apply the Administrative Procedure Act (APA) and ask whether the agencies fulfilled their statutory duties. That's where we are. In many ways, it's not a surprise that this is where the Court came out. The unanimity in the judgment underlines that fact.

Jay Austin: Thanks, Gerald. We've got an audience question already that is consistent with one I wanted to ask because I know you all have thoughts about this case. The question asks, what will the lasting legacy of the decision be? The way I'd phrase it is, how well does this decision sit with some of the other administrative law cases we've discussed in past years?

Last year, we spent a lot of time talking about *Loper Bright*,[3] where the Court said no deference to the agency for questions of statutory interpretation, the judge's reading is what matters—judges do law. That gets underscored here by Kavanaugh, who says that's still true, but NEPA is largely a factual matter, and where a factual record is concerned, deference is still due to the agency.

The quote that caught my eye was where Kavanaugh says, to illustrate this distinction, the statute requires that there should be a detailed EIS and that "the meaning of 'detailed' is a question of law to be decided by a court."[4] But he then goes on to say that *which* details need to be included in a given EIS is a "factual determination for the agency."[5] I've sat with that language for a few months now trying to make sense of it. Is that a line that can really be policed in the lower courts going forward case-by-case? Or to address the audience question, what is the legacy of that kind of language?

Sharon Jacobs: I think there's a way to read this case as supporting one of the views about *Loper Bright*, which is that *Loper Bright* left open broad areas of agency discretion. So, even though the Court was restricting agencies' discretion when it came to interpreting their own statutes, there was this exception for the kind of broad language that we see in NEPA, where the Court says it will read in a delegation by Congress to the agency. In those cases, agencies will be allowed much more discretion to choose from among possible alternative ways to implement the statute.

You could read this case as reinforcing that view—that where we have broad statutory language like a "detailed statement," that's where the agency's discretion is at a maximum. I think all of that emphasis on deference, and the institutional role, and courts not intervening provides some support for that hypothesis.

On the other hand, the Court does have some very definitive things to say in this case about what NEPA *doesn't* require in terms of looking at upstream and downstream emissions and its view that courts got too involved in earlier cases. The Court seems to have a very definite sense of what some of the parameters are for looking at environmental impacts. So, I think you could read this case in both of those ways.

Gerald Torres: I think that's exactly right. When talking about the upstream and downstream environmental impacts, Kavanaugh was very clear. He said there may be upstream and downstream impacts, but that wasn't at issue in this case. What's at issue is what the environmental effects of this railroad extension are. He tries to put it in the context of *Loper Bright* by saying, as a general matter, when an agency interprets a statute, judicial review of the agency's interpretation is de novo.

Then, the question that you and Sharon just put on the table is, well, what about the detailed review? Who says what that is? Part of the question is when the statute gives the agency discretion to decide, we turn to the APA, and we yield substantial deference to the agency's interpretation.

There is going to be that tension, but Sharon got it right. I think the way in which the facts of this case were outlined, Kavanaugh wanted to cabin what the obligations of the reviewing agency were in applying NEPA. Even though environmentalists or critics of the agency's decision might say, the only reason this railroad extension is being con-

3. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

4. *Seven Cnty.*, slip op. at 9-10.
5. *Id.* at 2.

structed is to permit the linkage of the northern oil fields to the national oil pipeline.

I think that's true, but it's not what the permitted agency is looking at. The agency is essentially foreclosed from considering the environmental consequences of those actions. I don't know whether there's wiggle room in Kavanaugh's opinion around that, but I think that's pretty much where they left it.

Pat Parenteau: I have some experience with the Surface Transportation Board (STB), unfortunately, and I think the salient point is that STB's organic statute makes crystal clear it's not entitled to take into account the commodities being transported. The whole idea of trying to force STB to look at upstream and downstream impacts from drilling and burning fossil fuels is frankly beyond its authority. Thus, I wasn't at all surprised with the Kavanaugh rationale that, where an agency has absolutely no authority to deal with those kinds of impacts, what is the point of forcing it not only to consider them, but to consider them to the degree of detail that the circuit court is demanding?

Second, on the deference question, that's a mixed bag because *Loper Bright* was clear that courts must still give deference to agency fact-finding. All of these issues, to me as a litigator, are always mixed questions of fact and law. There are very few that are purely legal. Statutes that set deadlines for action are an example of those, but most of these environmental issues that get to the courts are mixed. So, the idea that the court should defer to agency fact-finding doesn't offend me at all. I think that's right. How that deference is applied in individual cases will be the key going forward.

Jay Austin: We've got a number of other questions about *Seven County*, but have to move on. I'll just point to the Environmental Law Institute's Breaking News webinar that we held at the time the decision came out, where a lot of these questions were covered.[6] Pat, there were also a handful of Court decisions on traditional pollution control statutes, the Clean Water Act (CWA) and Clean Air Act (CAA).

Pat Parenteau: Of course, we have another CWA decision, *City & County of San Francisco v. Environmental Protection Agency*.[7] It's pretty clear that there's a contest in this Supreme Court between which environmental statute is hated the most, NEPA or the CWA. In *San Francisco*, I thought this was the city of love and ecology, but apparently not when it comes to dealing with combined sewer overflows.

It's another issue that I have some experience with. I argued the *City of Portland* case,[8] which established the enforceability of narrative standards. It turns out the decision in *San Francisco* did not invalidate narrative standards, which San Francisco was arguing for, but it did invalidate what Justice Alito—who wrote the 5-4 decision—called the end result conditions or requirements of National Pollutant Discharge Elimination System (NPDES) permits.

The case turned on the interpretation of CWA §301(a)(1)(C), which states that the U.S. Environmental Protection Agency (EPA) has authority to set not only effluent limitations—which of course we understand to be primarily technology-based standards, but at least quantitative standards in most cases. Also, though, any more stringent limitations to meet water quality standards.

The Alito opinion then decides to parse each of the words of that text and to conclude that "limitations" means something from without. This reminds me of the infamous water transfer rule in my brief but unspectacular attempt to regulate dams in *National Wildlife Federation v. Gorsuch*.[9] In that instance, the court decided that the word "addition" in the CWA means from the "outside world." So, when dams discharge sediment or chewed-up fish or the like, there is no addition because they're actually part of the river.

Now, we have a decision that any more stringent limitation doesn't actually mean any more stringent limitation. It means something from "without." That means something that requires spelling out in detail what the permittee must do to comply with the narrative standards or the "any more stringent limitation" conditions that are put in permits. Again, with Justice Alito in particular, it reminds me of "words mean what I say they mean." And I'm reminded of the *Sackett v. Environmental Protection Agency* decision[10] when Justice Alito said adjacent wetlands doesn't mean adjacent wetlands. It means bordering wetlands. It means wetlands that are indistinguishable from the waters that they touch or border.

Once again, we have an interpretation by the Supreme Court of the CWA that doesn't seem to be purely textual. Alito makes the argument that it is, but it doesn't strike me as being purely textual. Nevertheless, it is now the law. Remarkably, in this case we had a dissent by Justice Barrett, which wasn't the first time she's parted company with her more conservative colleagues, but it was an interesting decision where she aligned herself with her more liberal sisters on the Supreme Court.

Her dissent is a more accurate statement of the law. It's a fairly sophisticated understanding of how the CWA tries to balance technology-based standards and water quality-based standards to achieve the overall goals of the Act to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

6. Environmental Law Institute, *The Future of NEPA Review: Unpacking the* Seven County Infrastructure Coalition *Decision*, https://www.eli.org/events/future-nepa-review-unpacking-seven-county-infrastructure-coalition-decision (last visited Nov. 11, 2025); Justin Pidot et al., *The Future of NEPA Review: Unpacking* Seven County, 55 ELR 10473 (Oct. 2025), https://www.elr.info/articles/elr-articles/future-nepa-review-unpacking-seven-county.
7. No. 23-753 (U.S. Mar. 4, 2025).
8. Northwest Env't Advocs. v. City of Portland, 56 F.3d 979 (9th Cir. 1995).
9. National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982).
10. 598 U.S. 651, 676 (2023).

It's clear that Justice Alito, not surprisingly, was concerned about the fairness aspect of conditions like the ones in *San Francisco*, where EPA did not spell out what San Francisco needed to do to deal with combined sewer overflows. It's one of the most difficult problems, obviously, of the CWA because it's a toxic soup. There's no one standard or technology that can deal with combined sewer overflows, so you have a legitimate concern about what exactly the permittee is supposed to do.

In *San Francisco*, it was more complicated than that because EPA had been trying for years to get San Francisco to provide more information about its combined sewer systems and alternatives to reduce the impairment of the receiving waters, including beaches on the Pacific Coast. Alito said, if you're having trouble getting the information you need, then you can use §308 letters to request that information. That's fine.

But the point is that those letters oftentimes get ignored. If they aren't complied with, you have to go to court to enforce them, which means litigation, and cost, time, and staff resources to do that. I'm not sure that demanding information through information letters is really going to address the problem that EPA has when it's not getting the information it needs.

Beyond that, Alito was concerned about the impact on the permit shield provision of the CWA—again, a legitimate issue. But the point there is, as Justice Barrett pointed out in her dissent, there is no problem with the shield provision. If you're in compliance with the permit, you are immunized from enforcement.

And if you have a permit condition that you claim is unreasonable and you can't figure out how to comply with it, what's the answer to that? Challenge the permit on the grounds that it's arbitrary and capricious. Don't take the permit and then later say, I don't know what the permit requires me to do. That's not the way to run the program, in my view, but that's where we are with the *San Francisco* decision.

To the question posed earlier about legacy effect, it may be that, as Justice Alito says, EPA has the resources and the authority needed to carry out the program in the way that Alito thinks it should be carried out. But then, when you look at EPA's resources and what's happening to the Agency, not just budget but staff, you have to wonder, does it really have the kinds of resources it needs to get the information to spell out in detail what permittees should do?

In the case of combined sewer overflows, the solutions are pretty simple—but very expensive. Do either what Chicago did, which was build an underground tunnel system to contain all the stormwater runoff, or do what Portland did after our lawsuit, which is to separate the combined system and build a billion-dollar treatment plant and phase out the pipes that are discharging the combined sewer overflow. We'll see what happens. I wouldn't say the decision in *San Francisco* is akin to the decision in *Sackett* by any means. That decision guts the CWA in my view, but *San Francisco* doesn't go that far.

For the CAA cases, there are a bunch of them. We've got *Diamond Alternative Energy v. Environmental Protection Agency*, a 7-2 decision.[11] This is a case brought by biofuel producers challenging the now defunct California waiver decision—the approval by EPA of California's waiver, which, of course, would have installed the new Clean Cars Rule promoting electric vehicles, which biofuel producers don't favor.[12] The amazing thing about this decision, as pointed out by Justice Jackson in her dissent, is that an environmental organization would never have had standing to do what the biofuel producers were able to do here.

Their argument is that there's going to be more electric vehicles on the road and less vehicles that need their biofuel product. Maybe that's true. There's a lot of intervening actions that have to take place before that happens. It's rather attenuated.

But if the biofuel producers that are downstream of the actual decision that EPA reached have standing, then maybe environmental groups will be happy to see a decision like this and renew some of the arguments they've made for standing in similar circumstances where they're not directly affected. We know in Justice Scalia's famous formulation in *Lujan v. Defenders of Wildlife*[13] that regulated communities automatically have standing. Whereas environmental communities that are affected by either the pollution or the negative consequences of agency decisions may not have automatic standing and have to basically crawl through broken glass to get standing.

That's basically *Diamond Alternative Energy*. The underlying issue, of course, of the California waiver is now moot since Congress has repealed the California waiver calling it a rule—which it isn't, never has been—and has repealed it under the Congressional Review Act (CRA).[14] That seems to resolve that dispute, at least for now.

Then, we have *Environmental Protection Agency v. Calumet Shreveport Refining*.[15] This is another 7-2 decision involving which courts of appeal have jurisdiction to review EPA rules under the CAA. It turns on whether EPA's rules have national effect or localized effect. If they're national in scope, then they go to the D.C. Circuit. If they have some local implications, there's another test in the CAA, which says that, if EPA's rationale for adopting the rule takes into account national economic considerations and other nationwide implications of the rule, then that trips it back into the D.C. Circuit. In the *Calumet* case challenging the renewable fuel standard, the Court decided that basically EPA's rationale for that rule did have nationwide effect and therefore had to go to the D.C. Circuit.

The other related case is *Oklahoma v. Environmental Protection Agency*.[16] It went the other way. That was a chal-

11. No. 24-7 (U.S. June 20, 2025).
12. Biofuel producers oppose clean car rules primarily because they feel the rules unfairly favor electric vehicles and disregard the potential of biofuels to reduce emissions.
13. 504 U.S. 555 (1992).
14. On June 12, 2025, President Donald Trump signed three CRA recissions of the EPA waiver of preemption for California's Advanced Clean Cars II, Advanced Clean Trucks, and 'Omnibus' Low NO_x regulations pursuant to the CRA.
15. No. 23-1229 (U.S. June 18, 2025).
16. No. 23-1067 (U.S. June 18, 2025).

lenge to EPA's disapproval of state implementation plans (SIPs). EPA tried to group SIPs together to give more of a national scope, but the Supreme Court said, no, that doesn't really do it. The nature of SIPs is obviously very specific to individual states, their pollution problems and the types of sources that have to be regulated, and so forth. The Court said those really are local and regional, and therefore they can go to the regional courts of appeal. The preferred court of appeal, of course, is not the D.C. Circuit for entities wishing to challenge EPA rules. It would be the U.S. Court of Appeals for the Fifth Circuit whenever you can get there.

The outcome of the *Oklahoma* case is that disapproval of a SIP goes to the appropriate regional courts of appeal. I will say be careful what you wish for, because the Fifth Circuit just recently denied a petition to review a Texas SIP provision purporting to excuse Texas from compliance with EPA's good neighbor policy concerning downwind impacts on other states that are preventing those states from achieving their air quality standards. You never know what's going to happen in litigation until you actually litigate the case.

Jay Austin: Thanks, Pat, ending on a good practice note there, since "where to file?" is always an important threshold question. Sharon, cleanup duty this year after several years in a row where admin law cases were making the big headlines, maybe a little quieter on that front this time around?

Sharon Jacobs: At least when it comes to the merits docket. I know we'll talk about the emergency docket. But yes, "cleanup duty" is an interesting choice of words because I want to talk about *Nuclear Regulatory Commission v. Texas*,[17] which is about what we do with the problem of nuclear waste.

Last year, we talked a bit about this case. This is the case challenging the Nuclear Regulatory Commission's (NRC's) issuance of a permit to a private company to store waste from nuclear reactors on a temporary basis in East Texas. It's an important case for energy and environmental law, but it also raises an interesting jurisdictional question.

The quick background refresher is that this private company applied for a license from NRC to build this facility, in part because our progress on siting nuclear waste has really stalled out. The federal government is under a statutory obligation to find a permanent repository for that waste, but the site it selected, Yucca Mountain, isn't going anywhere. So, we need to figure out some way of storing the waste. This was a plausible solution to store some of that waste.

During the licensing proceeding, a group of mineral leaseholders from the area wanted to intervene (because East Texas is in the Permian Basin where there's a lot of oil and gas extraction), but NRC didn't allow them to do so. The Commission has a fairly stringent test for when someone can intervene in a licensing proceeding. However, the mineral leaseholders did comment on the EIS. The state of Texas also submitted a comment on the EIS that was considered during the licensing, although Texas didn't try to intervene in the proceeding.

The license was granted—this was several years ago now—but it was challenged. This lawsuit is a challenge brought by the mineral leaseholders (Fasken and others) and the state of Texas, and it's about whether or not NRC actually has statutory authority under either the Atomic Energy Act or the Nuclear Waste Policy Act of 1982 to license a private firm to store this high-level waste away from the site of a nuclear reactor. The Fifth Circuit agreed with the challengers that there was no statutory authority for NRC to grant a license like this. That created a circuit split, and the Supreme Court granted certiorari.

There were two questions before the Court. The first was a threshold question. It's actually the question on which the Court resolved the case, which is whether the plaintiffs could bring the lawsuit at all. They brought it under a statute called the Hobbs Administrative Orders Review Act, which I sometimes refer to as the "other" Hobbs Act, not the criminal statute. To bring a challenge under that statute, you have to be a party aggrieved. So, the question is, were they actually parties since they were not interveners in the licensing before NRC?

The Fifth Circuit found that you don't actually have to be a party. There's a special exception in the Fifth Circuit. You can still bring these kinds of claims as ultra vires claims, which means that you allege the agency had no statutory authority to act as it did. According to the Fifth Circuit, that gets you around the challenge of being a party aggrieved under the Hobbs Act.

So, the Fifth Circuit thought the case could go forward. The first question for the Supreme Court was whether that was right. The second question, if they could bring the case, was the statutory one of whether NRC has authority to issue licenses like this to private entities for off-site storage of nuclear fuel.

The Supreme Court held that neither Texas nor Fasken could seek judicial review of the decision because they were not parties to the Commission's licensing proceeding. There was no exception for this ultra vires type of case, and they weren't parties because they hadn't intervened; to be a party in this type of proceeding, you have to have successfully intervened in the proceeding. That means the Court didn't actually get to the merits question about NRC's authority, but you'd never know it given how much time both the majority written by Justice Kavanaugh and the dissent written by Justice Gorsuch spent talking about the merits question.

Here, the majority—Justice Kavanaugh joined by the Chief Justice and by Justices Barrett, Sotomayor, Kagan, and Jackson—spent quite a bit of time talking about why they thought NRC actually *did* have the authority to site the facility. That was because the dissent spent most of *its* time talking about why it thought the statutes clearly precluded the Commission from siting this kind of storage facility.

17. No. 23-1300 (U.S. June 18, 2025).

So, we actually got quite a bit of merits discussion. It seems pretty clear the majority of the Court thinks that there is authority for NRC to site facilities like this. I'm happy to get into the details of the statute if anyone's interested. But this is good for NRC. I would argue it's good for the nuclear industry in general because this problem of where to put nuclear waste is a significant stumbling block when it comes to the build-out of nuclear power.

Right now, there's a lot of interest in the build-out of nuclear power because it's an area of rare bipartisan compromise between at least some members of the Democratic party and the Republican party, it is a relatively clean source of firm baseload power, and there's a lot of interest from large loads like data centers in co-locating with nuclear facilities. So, it's ultimately a win for NRC in that case.

I'm going to talk briefly about a few administrative law cases. This was not the blockbuster term that we had last year on administrative law, at least when it comes to the merits docket. But I want to briefly mention the *Food & Drug Administration v. Wages & White Lion Investments* case that we talked about last year.[18] That was decided this term in an opinion by Justice Alito.

This was the case about the stringency of arbitrary-and-capricious review under the APA. It's back to what we were talking about in the *Seven County* decision. There are important questions about where pockets of discretion remain for agencies after *Loper Bright* says that the courts are the ones responsible for determining the meaning of even ambiguous statutes in the first instance.

There are legitimate questions about whether the Court wants to take a similar approach to arbitrary-and-capricious review or whether this is an area where agencies will maintain their traditional discretion. I don't think there's anything about this case that suggests the Court wants to take a stricter approach to the review of agency action under the arbitrary-and-capricious standard.

This was a case where the Food and Drug Administration (FDA) rejected applications to market flavored e-cigarettes. It was a blanket rejection of a large number of these applications. FDA is concerned that these products don't adequately protect the public health. The agency had given manufacturers specific instructions about what to submit with their applications, including marketing plans that would be critical to their evaluation. It said one particular type of study was not required, and that another kind of study could be substituted.

Then, when FDA ultimately denied all of the applications, the e-cigarette companies cried foul. They said, you changed the game on us. You told us certain types of studies would be adequate, certain types of documentation would be crucial. Now, you're admitting that you didn't even look at the marketing plans we submitted. Which is true. Also, you said you needed this other kind of study. They essentially argued that the decision was arbitrary and capricious because FDA changed the rules of the game on them.

The Fifth Circuit agreed with them. It found that there was no fair notice of the basis on which FDA would actually evaluate the marketing petitions. This is too good not to repeat: the Fifth Circuit said that "[i]t was the regulatory equivalent of Romeo sending Mercutio on a wild goose chase—and then admitting there was never a goose while denying he even suggested the chase."[19]

The Fifth Circuit had a little bit of fun with this one, but the Supreme Court vacated the decision. It found that FDA's orders were sufficiently consistent with agency guidance. There was no unlawful change in position that led the manufacturers astray. FDA had said this one type of study could support the application if sufficient. The Court ultimately found FDA's conclusion that the studies submitted were *insufficient* was neither arbitrary nor capricious. It left open the possibility that FDA changing its position on marketing plans was an error. But the Court suggested any such error might be harmless and sent the case back to the Fifth Circuit to decide that.

The bottom line here is that I don't think there's a strong appetite on the Court—at least we can't see it in this decision—to make arbitrary-and-capricious review more searching or stringent. There's still a fair amount of deference to the agency in these reviews.

The last one for our review is *Federal Communications Commission v. Consumers' Research*.[20] This is a case about an administrative law issue that seems to be having something of a renaissance, the nondelegation doctrine. The nondelegation doctrine essentially states that Congress may not delegate legislative power or its own powers to administrative agencies. The question asked was, what are the limits on Congress' ability to do that?

We know that Congress delegates powers all the time, some of which look more legislative than others, rulemaking for example. The Supreme Court's doctrine on this is that, as long as there's an intelligible principle to guide the agency's exercise of discretion under the delegation, then there's nothing unconstitutional about it.

This is a case involving telecom service. Carriers are required to contribute to a universal service fund, which helps to pay for universal service for those who might not otherwise have access to it or be able to afford it. To determine how much carriers have to pay into this fund, the Federal Communications Commission (FCC) appointed a private nonprofit as the fund's chief administrator. The nonprofit manages the day-to-day operations and plays a role in creating the projections that end up determining how much the carriers have to contribute.

The nondelegation challenge was essentially that Congress needs to be more precise when it delegated to FCC to set a limit for how high those contributions could go. The argument was that this is a special kind of statute, a

18. No. 23-1038 (U.S. Apr. 2, 2025).

19. Wages & White Lion Invs., L.L.C. v. Food & Drug Admin., 90 F.4th 357, 362 (5th Cir. 2024).

20. No. 24-354 (U.S. June 27, 2025).

tax statute. When we're talking about a taxation statute that requires the payment of monies to the government, the challengers argued, Congress has to say more. Under the intelligible principle test, it actually has to set a limit on how much money can be collected. The Supreme Court rejected that. It said there's no special tax statute test. The test is just the regular intelligible principle test to guide the exercise of discretion.

There was also a separate challenge here that was what we could think of as a private nondelegation argument or a private nondelegation challenge, which is that you certainly can't delegate legislative power to private actors. Was this in fact a delegation of power to private actors, the nonprofit that administered the fund? Here again, the Court said no because—and this is the key test—the private actors weren't actually making the decisions in the final analysis. They were making recommendations to the agency. The commission here is overseeing this private body and making the final decision about contribution factors. That is actually sufficient.

There was an emergency docket case last year about private delegations of power as well. This one was about delegations of executive power, the *National Horsemen's Benevolent & Protective Ass'n v. Horseracing Integrity & Safety Authority*,[21] which has been remanded to the Fifth Circuit in light of *Consumers' Research*. So, the implications for environmental law here on the private nondelegation side are fairly limited.

If the Court expands this private nondelegation doctrine, that could limit the ways in which Congress can authorize agencies to make use of nongovernment entities to support their activities. But the ways in which environmental agencies tend to use these nongovernment actors fall comfortably within the doctrine. Advisory boards are certainly safe because they're just making recommendations. The incorporation of private standards into rules, as long as the agency is the one that ultimately adopts the rule, is probably safe.

I think the bigger issue here is the actual nondelegation doctrine. There are lots of ways in which a reinvigorated nondelegation doctrine could create problems for environmental regulation, for example by tightening the intelligible principle standard. That could open the door to any number of challenges to air, water, or other types of regulation as being too broad and lacking a sufficient intelligible principle to guide implementation.

We could also see a move away from the intelligible principle standard altogether. That would create even more confusion. Either situation creates a litigation nightmare for federal agencies, but I don't think the Court appears interested in revisiting the doctrine, for now. It's still worth keeping an eye on the area because Justices Gorsuch, Thomas, and Alito have all expressed willingness to reconsider the nondelegation doctrine in an appropriate case.

Jay Austin: I'm going to turn now to the preview round. As far as we could tell, the Court has only docketed one environmental case so far through the traditional path of appeal and petition for certiorari. Pat, can you tell us about the *Chevron USA, Inc. v. Plaquemines Parish* case,[22] which I believe is still being briefed, and its potential relationship to other kinds of environmental and climate issues?

Pat Parenteau: The legal question is whether a contractor can remove a state-court lawsuit to federal court when being sued for oil production activities undertaken to fulfill contracts with the federal government. In this case, it's for refined products, not the crude oil itself. This is a World War II-vintage contract we're talking about. It's the same issue, in some respects, that got litigated with the climate liability cases against the oil companies.

For background, all of the circuit courts that have considered the question have concluded that the liability cases initiated in state court against the oil companies don't belong in federal court. They've all been remanded to state court. There are almost 40 of them. The Supreme Court in *American Petroleum Institute v. Minnesota*[23] declined to review whether the circuit court decision saying they belong in state court was correct.

The difference with the *Plaquemines* case is that in the climate cases, the theories of liability all had an element of deception, false advertising, failure to warn, and the like. That's not involved in the *Plaquemines* case. What's going on with Louisiana, of course, is that it's rapidly losing its coastal wetlands. There are a variety of reasons for that. It's a combination of sea-level rise and subsidence but also, regarding oil and gas production, these massive canals that are drilled through the mosaic of coastal wetlands.

What happens when you create these canals to move your barges and oil rigs, and you're going back and forth out to the Gulf to service the oil and gas production activities, is that these canals keep growing exponentially over time. The latticework of all these canals has really torn apart coastal Louisiana, and there are about 41 lawsuits against the oil companies.

Louisiana has a love-hate relationship with oil and gas. It brought lots of jobs and lots of money to the state, but it also destroyed large areas of coastal wetlands. The gravamen of the cases against the oil companies is that the companies didn't comply with Louisiana coastal protection mechanisms, including restoring wetlands that their construction activities destroyed. There's also an element that a lot of the wastewater being discharged in these processes further deteriorated the wetlands and caused coastal loss.

That's what the cases are about. Chevron has a good reason to move these cases to federal court because they just lost the $745 million award in the first case to a jury in Plaquemines Parish. So, there's a strong motivation to get the Supreme Court to move the case to federal court.

21. 145 S. Ct. 2837 (2025).

22. No. 24-813 (U.S. cert. granted June 16, 2025).
23. No. 23-168 (U.S. cert. denied Jan. 8, 2024).

By the way, I'm not sure that's right. I mean, the jury pool you're talking about is Louisianans. They certainly know what's going on with their coastal resources. But the technical question here gets down to the federal officer removal statute, 28 U.S.C. §1442. It basically turns on the question of whether Chevron and other oil companies were acting under contracts with the federal government to provide refined products from oil and gas. These high-octane products are what these contracts are talking about. So, there's this question of what "acting under" means. This is a cert petition from the Fifth Circuit's decision.

There was a 2-1 decision by the Fifth Circuit with a very strong dissent from Judge Andrew Oldham. The majority acknowledged that it's arguable that the production activities were under these contracts. But when it comes to the second part of the calculation or the analysis, were the challenged activities (e.g., the canals and failed restoration efforts) either connected to or associated with the production of refined products covered by the contract? On that, the majority said, no, they really weren't.

The thinking here is that it can't just be that any contract with the federal government immunizes the companies from lawsuits brought for a tortious conduct. In the climate cases, courts have repeatedly said the contracts didn't tell the companies to lie to the public about what they are doing. The contracts said to produce valuable products for the war effort or national security, but lying is not part of it.

This case is more complicated because it gets down to how closely associated the production of oil in the Gulf of Mexico is to the refining of products over in Texas. Again, the Fifth Circuit said not close enough, not related enough. The fact that the Supreme Court has taken this case probably means there's four votes for overturning the Fifth Circuit. Or maybe five. Time will tell.

In a nutshell, this is a case about where these lawsuits are going to be tried. It's not a determination that they won't be tried. Again, I'd have to say to the industry lawyers to be careful what you wish for. Removal to federal court is no guarantee of victory.

Jay Austin: Sharon, as you say, there are any number of cases that have come up on the nontraditional emergency docket. Some of those now have oral arguments scheduled on the merits. Some of them are still pending in a procedural posture with orders stayed or lifted. Quite a few of those raised some big administrative law issues. It's a real thicket. I'm going to hand it over to you and let you lead us through the ones you think are most relevant to energy and the environment.

Sharon Jacobs: I will do my best. I want to start with a case that the Court will hear this term. That is, surprisingly perhaps, the tariff case, *Learning Resources, Inc. v. Trump*,[24] along with a companion case, *Trump v. V.O.S. Selections*, out of the U.S. Court of Appeals for the Federal Circuit.

There are a couple reasons I want to mention the tariff case. One is that, of course, it is important for presidential power issues. It's important for economic issues. How much authority does the White House have to issue tariffs unilaterally? The tariff power has been a key source of authority the White House has invoked. But it's also a case that has implications for the energy industry and energy policy. Tariffs have hit the energy industry in a number of ways. It'll also be an interesting case to think about questions of statutory interpretation.

The quick version of this case is that there have been challenges to the president's authority under a statute called the International Emergency Economic Powers Act to issue broad tariffs. In both the D.C. District Court and the Federal Circuit, there's some question about where these cases should actually be, but both of those courts have found that the statute does not grant the president powers to unilaterally impose, revoke, pause, or reinstate tariffs to reorder the global economy. It's just a statute that talks about regulation of imports and the like.

One of the interesting things about both of these decisions is that they invoke the major questions doctrine, which is something we've talked about in these previews before, because of its implications for environmental law and interpretation of our environmental law statutes. The major questions doctrine is this idea from *West Virginia v. Environmental Protection Agency*[25] (although the Chief Justice in that case suggested it has much deeper roots) that we require a clear statement from Congress when an agency proffers an interpretation that would represent either an expansion of its powers or present a question of deep economic and political significance central to the statutory scheme.

Both of the lower courts here invoked that doctrine against the Donald Trump Administration and said that this kind of authority that the Trump Administration is claiming for the president to issue these broad tariffs unilaterally under this statute is a real departure from how that statute's been implemented in the past; there's never been, to their knowledge, use of the statutory provision in this way.

It brings up that kind of major question; therefore, we need clear direction from Congress. Congress did not provide that in this statute, so there is no authority to tariff. Obviously, this is a case that the president, the White House, and the Administration care a lot about because they've been relying on tariffs. There are other ways to impose tariffs, but this is one of the key ways to do it.

It'll be really interesting to see what the Supreme Court says about the major questions doctrine in this context. Justice Kavanaugh has suggested the major questions doctrine shouldn't apply perhaps when national security is implicated. We probably don't even need the major questions doctrine in this case to do an interpretation of the statute and find that it does not allow for presidential tariff

24. No. 24-1287 (U.S. cert. granted Sept. 9, 2025).

25. No. 20-1530 (U.S. June 30, 2022).

authority, but it's an opportunity for the Court to tell us a little bit more about the doctrine.

Let me move from there to what I think of as a whole cluster of cases that are all about the president's authority to remake or restructure the Administration. I'm going to use this broad frame that Jody Freeman and I introduced in an article several years ago, discussing what we called "structural deregulation."[26] That refers to the tools of a presidential administration to diminish the capacities of agencies not through what we might think of as the standard deregulatory process of rolling back rules or eliminating guidance, but by actually eliminating agency capacity through things like the removal of agency heads, the firing of civil servants, the elimination of an agency's budget, the placing of funds out of reach, or undermining an agency's reputation.

There are a variety of ways in which presidents can make administrative agencies less effective. We have seen an awful lot of that behavior from the current Administration. It has made no secret of its intentions here. Russ Vought, the head of the Office of Management and Budget, has made it an overt project to scale back administration through any available mechanism.

A lot of the cases this year on the so-called emergency docket have involved challenges to those kinds of actions. Lower courts in many cases have stayed those actions, and the Supreme Court has jumped in on an emergency basis in many cases to stay the lower court stay of those actions. In other words, to allow those actions to go forward.

The emergency docket goes by many names. Sometimes it's called the shadow docket, with a nod to Will Baude at the University of Chicago. Justice Kavanaugh has suggested it should be called the interim docket. I've also heard equity docket. I've heard short-order docket. But essentially, these are cases in which the Supreme Court issues orders without decisions, although even that is starting to change. We're starting to get more text when the Court takes these actions.

In the emergency context, there's some sense of urgency. The Court has to make decisions quickly. Again, there's a lot of debate around how quickly these decisions actually need to be made. But there is no question that the Court's use of this docket has shifted in recent years; this Court has become more inclined to use it to intervene in cases involving the Administration, for example, and actions taken by the Administration.

Historically, the most common use was for death penalty appeals. Requests to stay executions are quite infrequently granted. But notable in this past term is that the use of this docket has been increasing, and the Court has been more inclined to intervene in disputes making their way through the lower courts using this docket. I'll provide some examples to give you a sense of the breadth of its use.

I do want to note before I get into the administrative law cases that, perhaps, after the success in using this docket to get stays in the original Clean Power Plan case[27] and in cases like *Ohio v. Environmental Protection Agency*,[28] I think we see challengers trying for more emergency docket stays in environmental cases. There were requests for stays on an emergency basis of methane standards for oil and gas, of power plant mercury and toxic standards.[29]

Those efforts were unsuccessful. The Supreme Court declined to block the standards pending litigation, so now agencies are working on rolling back those standards the old-fashioned way. But there is at least a sense that the Court might be more open to these types of requests for stay pending litigation.

On the administrative side, one of the things that we have seen is, of course, the Trump Administration and the president specifically removing the heads of what we classically thought of as independent multimember agencies. There have been a lot of examples of this. One of them is actually going to come before the Court in its merits docket in December, involving the removal of a Federal Trade Commission (FTC) commissioner. That's the *Trump v. Slaughter* case.[30]

All of these cases involve an effort to overturn or narrow a 1935 decision called *Humphrey's Executor v. United States*,[31] which was a Supreme Court case where the president tried to remove a member of the FTC without any kind of cause cited. What makes these agencies different is that there are generally provisions restricting the removal of their heads except for some kind of cause, such as negligence and malfeasance in office.

In the 1935 case, President Roosevelt said, I don't have one of those reasons, I just don't think our policies align, and I'm going to remove this individual. The Court said, no, you can't. That's contrary to the statute and the statutory removal restrictions are constitutional. They do not represent an unconstitutional infringement on the president's Article II powers, in part because these agencies are not classic executive actors—they do other things that look more quasi-legislative, quasi-judicial—and in part for other reasons.

That has been the law of the land for almost 100 years. There is a real sense that could be changing. I think that's being tested by this Administration. The Administration has removed an FTC commissioner. The Administration has removed a Merit Systems Protection Board (MSPB) commissioner. The Administration has removed a National Labor Relations Board (NLRB) commissioner, a Consumer Product Safety Commission (CPSC) commissioner, and now a Federal Reserve board member, although that's slightly different. All of this has been done, I think, with the idea that *Humphrey's Executor* should be overturned

26. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 Harv. L. Rev. 585 (2021).

27. Murray Energy Corp. v. EPA, No. 15A778 (U.S. stay granted Feb. 9, 2016).
28. No. 23A349 (U.S. June 27, 2024).
29. Oklahoma v. Environmental Prot. Agency, No. 24A213 (U.S. stay denied Oct. 4, 2024); Continental Resources, Inc. v. Environmental Prot. Agency, No. 24A215 (U.S. stay denied Oct. 4, 2024).
30. No. 25-332 (U.S. cert. granted Sept. 22, 2025).
31. 295 U.S. 602 (1935).

and the president should be able to remove the heads of all of these agencies at will.

The district courts have stayed many of these removals and have ordered the reinstatement, for example, of Gwynne Wilcox at NLRB, Cathy Harris at MSPB, Mary Boyle at CPSC, and Rebecca Slaughter at FTC, because the law on the books is *Humphrey's Executor* and the president is acting in a way that's in tension with that case.

However, these cases were brought to the Supreme Court on the emergency docket. On the emergency docket, without an opinion and without giving us the kind of reasoning we would normally expect from the Court on the merits docket, the Court said it's going to stay the district court orders and not require that those people be reinstated, effectively allowing their removal on at least a temporary basis while the cases work their way through the courts. That is one use of the so-called emergency docket that we've seen.

There is a pending application on the emergency docket that's a little bit different from the others involving Federal Reserve Governor Lisa Cook. In that case, the president did not simply say he can remove a Federal Reserve governor for any reason, and instead has said he has cause to remove *this* governor because of an alleged error that the Administration says occurred on a mortgage application. This was well before she was a governor. But the case is really about whether that constitutes cause under the statute to remove a governor.

There are all these questions rolling around on the president's removal authority. This, of course, has obvious impacts for energy law especially, but for environmental regulation as well. EPA's head can already be removed by the president for no reason. But the Federal Energy Regulatory Commission and NRC have kind of shielded boards. Any decision overturning *Humphrey's Executor* would allow the president to simply remove the heads of those energy agencies at will and remake those agencies that we've classically considered more independent.

I'll cover a few more items from the emergency docket. Agency employees: I know we have a lot of people calling in today who work in administrative agencies, federal administrative agencies. I don't have to tell you that there have been a number of efforts to remove agency officials from their positions, or to remove civil servants from their positions, starting with the firing of probationary employees and continuing with efforts to encourage voluntary retirements that have been coupled with some sort of threat about reductions. In some cases, there were the "Fork in the Road" e-mails and then actual reductions in force.

With a government shutdown coming up, there are new questions about the president's authority to achieve further reductions during the shutdown, though many of these efforts have been challenged. In many cases, district courts have required reinstatement of employees because the district courts say the firings were not done correctly or were not done lawfully.

There had been a number of cases that had been brought to the Supreme Court on the emergency docket in which the Court again barred the lower court judgments from going into effect, therefore effectively allowing the firings to continue: *McMahon v. New York*,[32] *Trump v. American Federation of Government Employees*,[33] and *Office of Personnel Management v. American Federation of Government Employees*.[34]

The last bucket I want to talk about here has to do with funding decisions. The Trump Administration has withheld grant funding and the disbursement of aid funds and other types of funds. There have been challenges to those efforts as inconsistent with the laws and violating the Impoundment Control Act. There have been a number of other legal arguments made. Again, several district courts have ordered that those funds continue to flow.

On the emergency docket, the Supreme Court has stayed those lower court decisions, thereby allowing that money to be withheld. *Department of Energy v. California*,[35] *Trump v. Global Health Council*,[36] and *National Institutes of Health v. American Public Health Association*[37] are a few examples, but I think you get the idea. We live in an unusual era for Supreme Court decisionmaking, in which courts are being asked to essentially work year-round on the clock overseeing the decisions of lower courts on these vital questions of government authority and separation of powers.

Jay Austin: Thanks, Sharon. That's a whole lot, although it's very consistent with the pace of the news these days, or with the times.

I want to pull Gerald and Pat back in. It's back to this top-level question we got about lasting legacy implications. On the one hand, one take on the emergency docket that you still hear is that most of these cases are precisely that, interim. It's relief based on a moment in time, or preserving a "status quo" that may or may not be the one we all thought it was. But on that view, there's nothing to see here until the Court has decided things on the merits.

At the same time, you seem to be suggesting the Court has signaled very clearly where it's going on the merits of things like *Humphrey's Executor*, since the new FTC case is directly on point. It's a 90-year-old precedent that is very likely to be overturned.

My question for Gerald and Pat is what's your take on, or what does it mean to live in, this world if we do start seeing merits decisions? Start with that one, what does the world look like without independent agencies, or equally where all control of appropriations and spending ends up in the White House, or where any reorganization whatsoever or paring down of agencies to the bone is somehow allowable?

Gerald Torres: I feel like we're at the culmination of a generational movement to change the administrative state profoundly. With the nondelegation doctrine, those cases

32. No. 24A1203 (U.S. stay granted July 14, 2025).
33. No. 24A1174 (U.S. stay granted July 8, 2025).
34. No. 24A904 (U.S. stay granted Apr. 8, 2025).
35. No. 24A910 (U.S. vacatur granted Apr. 4, 2025).
36. No. 24A227 (U.S. stay withdrawn Aug. 29, 2025).
37. No. 24A103 (U.S. stay granted Aug. 21, 2025).

started percolating probably 35 years ago. Most of them were swatted down. But when you put those in the context of this kind of robust unitary executive theory, it means that the structure of the administrative state is unstable right now. That's going to have profound impacts on the way in which we govern.

For those who work in government, when executive orders were issued, independent agencies would respond saying, well, that doesn't really apply to us. If you're inside the Administration, you think, well, wait a minute. But Congress set up these structures for a reason, and they go directly to the question of separation of powers. Directly to the question of whether there's a kind of bedrock structure emanating from the U.S. Constitution that directs the various powers of government to be used one way or the other.

We're in a tumultuous time in which things that we thought we knew are unstable, and it calls into question whether we can be governed in a way that addresses the complexity of the issues in front of us. The government has to be able to get its hands around these issues for its own efficiency, but also for the regulated communities that are out there. So, I'm concerned. But I thought your encapsulation of it, Sharon, was incredible. It gave us a lot to chew on.

Pat Parenteau: I don't know how negative we want to get on this, but there's a doctrine of political nihilism. It comes out of Russia, interestingly enough. It basically says, when you have an authoritarian government in power, its central rationale is to destabilize—as Gerald was just describing—and basically to destroy the institutional capacity of government not with the view to replacing it, not in ways that these legitimate societal objectives can be achieved—public health, a stable climate, air quality, water quality, and so forth.

Whatever the social objective is, it's not a movement or a time in our political history where constructive alternatives are being proposed with details and content. That's really not what's going on. It isn't as if there aren't better ways to do the things that our environmental laws have been doing. We haven't updated any environmental laws significantly, other than the Toxic Substances Control Act (TSCA), since the 1990 CAA Amendments.

We could be doing better on all the things that environmental law is trying to do, but that's not what we're seeing. We're not seeing thoughtful ideas that deserve debate. It's a tragedy frankly, for the country and for the world, that the United States of America is in the position that it's in right now. All we can hope is that we keep trying to improve on the body politic and get people to engage in a more constructive way. I wish I had more wisdom than that to share, but that's my view.

Sharon Jacobs: This is how I'm choosing to think about it. I'm going to try to pitch this in a way that resonates with folks both who are embracing the moves that the federal government is making and those who are concerned about them and disagree with them. I think the Trump Administration is posing an important question to the American people. In this context, the question it is posing is, what should administration look like? What is the role of administration in a democratic society? What is the role of administration in *this* democratic society?

Again, if you look at Vought's past comments, he has been quite upfront and quite clear about the intention here. The intention is to roll back administration to diminish its capacity at least in particular areas, including environmental regulation and some forms of energy regulation, to give it less of a role in society, and to disable agencies not just now but into the future. He has said he wants to diminish agency capacity in such a way that agencies are not able simply to rebound in the next administration. This is a long-term intellectual project at least for some members of the Administration.

It's a question to all of us. What role do we think administration needs to play in our society? For those of us that work in environmental law, energy law, and related fields, what work has administration done at the federal level over the past half-century or 100 years? Do we think we can do without it?

If the answer to that question is no, I think it's time for us to revisit arguments in favor of administration. As Pat just said, administration is far from perfect. It is an ongoing project to improve it, to make it more just, to make it more efficient, whatever your goals and criteria are. But we all need to take a moment and reflect on why we think administration may be important (or not) to what we do and then to find ways of making that case.

Gerald Torres: I completely agree. I think one of the questions is, if you look at Congress as the representative body of the nation that is going to pass statutes in service of things that the people want, what mechanism do we want to see in place that is going to translate what Congress says we need to actually work on the ground so that people on the street in every town, city, and village in the United States can appreciate how it's going to reach them?

Look, they say, you have all these "unelected bureaucrats," and we want to eliminate the power they have. The criticism of being "unelected" is designed to tar them with the label of being unresponsive to what people need. But they're responsive to the elected officials who are creating the statutes that then have to be executed by the executive. What's the mechanism that the executive is going to use to execute the objectives that Congress has laid out?

Sharon, your point is exactly right. What do we imagine the government to look like so that it is both representative and effective? We're at that point where if it is disabled in such a way that it can't be resuscitated, what is put in its place? Is it a direct instruction to the executive, who then can issue executive orders to implement the statute?

Sharon Jacobs: I think we all need to become administrative law experts in this era. Most of the people who practice in this area are already administrative law experts. I'm always telling my students that to become an environ-

mental lawyer, administrative law is crucial. I think that is one of the reasons why we've spent so much time on this panel talking about administrative law, because it is the medium through which so much environmental law is implemented.

Gerald Torres: One way to think about administrative law is that it's not just the law of agencies. It's the law that circumscribes how the powers of the government are executed in the service of the things that people need. I completely agree with you; we all need to be experts in administrative law.

But one of the questions we have to ask is, what is the administrative law we want to see? We have the APA. We all learned that. We have the statutes, and every agency has its own structure. What do we want the guiding principles to be?

Jay Austin: I think that's really well-framed in terms of both sides of the ongoing project or the policy initiatives going forward.

I've got one last question we can try to end on. It goes back to the role of the Court and addresses an audience question about precedent, where that project is concerned when we're looking at a 90-year-old or even older statute that hasn't changed. A 90-year-old precedent that's still on the books and an agency that's still essentially in the same form as it was in 1935. What does it say about this Court's role if that does get overturned? Is this just simply a paradigm shift that we have to live with? Is it a gradual evolution in jurisprudence that the Court's interim decisions have set up, or is it just a question of holding a number of seats on the Court?

Sharon Jacobs: When I teach my students about the cases that are coming down in any given term and the direction that the law has taken, I always try to set it in some kind of historical context. Because seeing things in the lens of the present and a precedent being overturned or reversed or a new direction taken can feel much more jarring than looking at how a certain doctrine has evolved over time and how implementation of a statute has evolved over time.

So, looking at something like *Humphrey's Executor*, try to put it in the context of other decisions before *Humphrey's Executor* and since *Humphrey's Executor* to look at how law has changed, and try to understand why. It is some of the forces that you identified, and other forces. As we try to understand the place that we're in today doctrinally and democratically, try to think about what it is we want as a society. I do think looking to the past and the context in which some of these statutes were written, some of these decisions were taken, is a vital part of what we do as environmental lawyers. I think we ignore the past right now at our peril.

Gerald Torres: I couldn't agree more. There's no question that cases can be overruled. There's no question that precedents can be changed. What's critical, though, is the way in which they are changed and the reasons that are given for deviation from something that was settled law—like *Humphrey's Executive*, which has a long lineage.

One of the questions would be, well, if you're going to change it, what are the reasons that support that change? I want to be able to think about how to situate the change within the idea that there is a stable rule of law that governs the way decisions are made. Which is not to say they can't be changed, but I want to feel like I understand why and agree with the justification for a particular change, even if I disagree substantively with the outcome. That's all I can hope for right now.

Pat Parenteau: I agree with what's been said and on Gerald's point about rationale. The Supreme Court's *State Farm* doctrine,[38] a "reasoned explanation" for when you decide to abruptly depart from a long-standing policy, is the core concept that I think should be fleshed out. In the lawsuits we're seeing against what the Trump Administration is doing, every one of them has a core element of, please explain what you're doing, why you're doing it, and why it's better.

Administrative Law 101 is explaining what you're doing. It seems to me that we can all do more to encourage that kind of thinking and go to the source of principles and norms that resulted in these earlier decisions. Do they still hold true today or not? If not, why? Where do we go from where we are right now? I'll leave it at that.

38. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).