DOJ/ENRD Symposium on The Future of Environmental Law

Summary

On November 4, 2016, DOJ's Environment and Natural Resources Division convened an extraordinary group of legal scholars and practitioners to discuss "The Future of Environmental Law." Speaking before the presidential election but mindful of the transition possibilities, the symposium panelists identified and discussed cutting-edge issues in administrative law, natural resources law, and environmental enforcement that will be crucial going forward for both government lawyers and the environmental law profession as a whole. Here, we present transcripts of these discussions, which have been edited for style, clarity, and space considerations.

John Cruden is the former Assistant Attorney General of the Environment and Natural Resources Division at the U.S. Department of Justice.
James Bruen is a partner at Farella Braun + Martel LLP and President of the American College of Environmental Lawyers.

John Cruden: Welcome to the Environment and Natural Resources Division (ENRD) of the U.S. Department of Justice (DOJ). We in the ENRD are litigators on behalf of the United States. Each day, we are taking positions and filing legal briefs that help establish our body of laws. To do so we rely on statutes and case law as they exist today. But that's not the focus of this symposium. This symposium is looking to the future to figure out trends, ideas, or theories that may actually affect our planning for the future.

When we decided to do this symposium, we wanted to consider the future of both environmental enforcement and natural resources law. Rapidly, however, we decided we needed to have a third component; we needed a separate panel on administrative law, because it is so integrated into our daily practice. Once we chose the areas of our legal focus, we needed speakers. To make that selection we spoke to many law professors, judges, and practitioners. We wanted to have academic presentations, with one notable exception, and we wanted to have the very best in each discipline. Amidst all of these extraordinary academicians, we thought we needed at least one practitioner in the group, and we thought it would be reasonable to bring a friend of the ENRD who has argued a number of our leading cases. Donald Verrilli, welcome back to DOJ, and thank you for your extraordinary public service.

To open the symposium, I want to introduce the President of the American College of Environmental Lawyers, James Bruen. James has an extraordinary history. He was an assistant U.S. Attorney and then became Chief of the Civil Division for the U.S. Attorney for the Northern District of California. Since then, he's been a partner in a leading environmental law firm in San Francisco. James is well known for his scholarship and as one of the nation's leading practitioners.

James Bruen: Thank you, John. It's very exciting for me to welcome you to this historic symposium on the future of environmental law. I'm here as the President of the American College of Environmental Lawyers. As you may know, the College is young, but very active. We have environmental pro bono initiatives in China, Haiti, Cuba, and East and South Africa. We hope this year to go into India.

We provide environmental counsel upon request to the Environmental Council of the States. We've testified before the United Nations. We've testified before the legislative body of a foreign country that has asked that we not identify it. We also provide educational forums, a connection with the Environmental Law Institute, the American Law Institute, and other respected institutions. It a great privilege for me to be here.

We're very interested in the future of environmental law because, as you know, in case you may have missed it, there's an election. And the election is not only for the president, but also for members of the U.S. Congress. In the election rhetoric that has come up, there has been a lot of talk—which in my view affects the integrity of the principle of law. We are a nation of laws. The rule of law gives stability and stabilizes our democracy. But laws are subject to change, as we all know. They're subject to challenge by amendment, by obfuscation, and by ignorance.

One of the things that Timothy Egan of the *New York Times* alerted me to in one of his August editorials was a stunning set of facts. Thirty million Americans cannot read. Most Americans cannot name the three branches of our government. Most Americans cannot name a single justice on the U.S. Supreme Court. The future of our laws and the challenges that face it are very critical. The comments of these panels will stimulate and interest all of us, and provide us with greater insight into the future of environmental law.

The Future of Administrative Law

Matthew Oakes (moderator) is a Trial Attorney in the Environment and Natural Resources Division of the U.S. Department of Justice.
Donald Verrilli is the former Solicitor General of the United States.
Richard Pierce is the Lyle T. Alverson Professor of Law at George Washington University.
Jody Freeman is the Archibald Cox Professor of Law at Harvard Law School.

Matthew Oakes: This first panel will address the future of administrative law. Before we begin, I'd like to introduce the panelists. First is Donald Verrilli, who was the Solicitor General from 2011 until June 2016. He has participated in hundreds of U.S. Supreme Court cases and has argued dozens of cases before the Court. He is currently a Partner at Munger, Tolles & Olson.

Next is Professor Richard Pierce, the Lyle T. Alverson Professor of Law at George Washington University. He has written more than 20 books and 130 articles on administrative law and regulatory government.

Finally, Professor Jody Freeman, the Archibald Cox Professor of Law at Harvard Law School. She has served as the White House counselor for energy and climate change, and has written extensively in the fields of administrative and environmental law. Together, Professors Pierce and Freeman are two of the three most-cited administrative law professors in the country.

I'll open by asking Mr. Verrilli a question: You argued both *King v. Burwell*[1] (the Obamacare case) and *Utility Air Regulatory Group*[2] (the second greenhouse gas regulation case) in the Supreme Court. Even though in *Massachusetts v. Environmental Protection Agency*[3] the Supreme Court read the Clean Air Act's (CAA's)[4] statutory definition of the term "air pollutant" broadly, in *Utility Air Regulatory Group*, the Supreme Court read the statutory term "any air pollutant" more narrowly based on the context of the particular regulatory program at issue.[5]

Chief Justice John G. Roberts Jr. stressed this same contextual approach in *King*, stating that when deciding whether your language is plain, you must read the words in their context and with a view to their place in the overall statutory scheme.[6] Do you think that these cases signal an increase in the importance of context with respect to statutory interpretation?

Donald Verrilli: It's wonderful to be here. I think the idea of focusing on the future of administrative law is really critical, because it's pretty clear, and I think likely to be even clearer in the upcoming months and years that administrative law is going to be a matter of surpassing importance. That will be true in the environmental area and elsewhere.

The reason for this is what I've come to think of during my time as Solicitor General and looking at things now as "the new normal," which goes something like this: Congress does nothing and, as a result, the executive branch, feeling pressure to try to address the problems that confront the country, looks to existing statutory authority and tries to find ways, sometimes through creative readings of statutory authority, to identify sources of power to deal with the serious problems confronting the country.

Then, the executive branch acts on that through administrative action, and then those actions are challenged in court. So the courts, and ultimately the Supreme Court, are becoming the arbiters of public policy by deciding when the executive branch has gone too far and when it hasn't, and whether it's dotted every I and crossed every T as it's going through its administrative procedures.

If you think about the past few years, the immigration case on which the Supreme Court ended up 4-4 last term was a case like that.[7] You can think about the Clean Power

1. *King v. Burwell*, 135 S. Ct. 2480 (2015), began as a lawsuit challenging U.S. Treasury regulation 26 C.F.R. §1.36B-2(a)(1) (2016), issued under the Patient Protection and Affordable Care Act. Challengers argued that the Affordable Care Act allowed for federal tax credits only in states with state-established health insurance exchanges. The U.S. Supreme Court disagreed, holding that the Affordable Care Act authorized tax credits for health insurance purchased from federally established exchanges.
2. In the Tailoring Rule, 75 Fed. Reg. 31514, 31548 (June 3, 2010), the U.S. Environmental Protection Agency (EPA) interpreted the Clean Air Act (CAA) to require stationary sources to obtain CAA prevention of significant deterioration and Title V permits based on the potential of each source to emit greenhouse gases. In *Utility Air Regulatory Group v. Environmental Prot. Agency*, 134 S. Ct. 2427, 2442-44, 44 ELR 20132 (2014), the Supreme Court held that this interpretation was not required, and went on to find that such an interpretation was not reasonable.
3. *See* Massachusetts v. Environmental Prot. Agency, 549 U.S. 497, 506, 528, 37 ELR 20075 (2007) (characterizing the CAA's definition of "pollutant" as both a broad one and "sweeping").
4. 42 U.S.C. §§7401-7671q; ELR Stat. CAA §§101-618.
5. *See Utility Air Regulatory Group*, 134 S. Ct. at 2443-44.
6. "But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the Court must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King*, 135 S. Ct. at 2483, quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).
7. *United States v. Texas*, 136 S. Ct. 2271, 2272, *reh'g denied*, 137 S. Ct. 285, 196 L. Ed. 2d 206 (2016), concerned the constitutionality of the Deferred Action for Parents of Americans program. That program, based on an executive action by President Barack Obama, allowed certain unauthorized immigrants who were parents of citizens or of lawful permanent residents to apply for a program that would allow them work permits and to avoid deportation. *See* Memorandum from Jeh Charles Johnson, Secretary of the U.S. Department of Homeland Security, to U.S. Immigrations and Customs Enforcement et al. (Nov. 20, 2014). On Feb. 16, 2015, U.S. District Judge Andrew S. Hanlen issued a preliminary injunction against that executive action. *See* Memorandum Opinion and Order, Civil No. B-14-254 (S.D. Tex. Feb. 16, 2015). A divided U.S. Court of Appeals for the Fifth Circuit affirmed the preliminary injunction and ordered the case to trial. Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *cert. granted*, 136 S. Ct. 906, 193 L. Ed. 2d 788 (2016). The entirety of the Supreme Court's opinion in *United States v. Texas* reads

Plan case in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit as a case like that.[8] You can think of lots of cases like that, including the cases you mentioned.

In a different world, I think the issue that was before the Supreme Court in *King* would have been fixed as a routine matter in the give-and-take of the legislative process, with clarifying language added to some appropriations bill or something. However, because of the kind of gridlock and conflict we have, there was no way that was going to happen, therefore, that issue was forced before the court.

Sometimes, it's going to be issues like that. One category of issues is going to be like that where under normal circumstances, questions of statutory authority would get worked out through the legislative process and clarified, and there would be no need for the judiciary to have the last word on it. Other times, it will be situations where there is genuine policy gridlock, and the executive branch is going to make an effort.

That shouldn't surprise anybody. I'm not advocating this as a state of affairs. It would be a lot better if Congress actually played the role it's supposed to play in our constitutional system. But given that it's not, it's unrealistic to think that an executive branch is going to sit on its hands rather than try to confront the problems of the country. And I think that's probably true of an executive of either party.

As a result, I think the cases that are going to be the most important cases before the Supreme Court, now and in the upcoming years, are going to be cases that raise fundamental administrative law questions like the kind we're going to talk about.

Jody Freeman: That is a perfect segue to the topic of doctrines of judicial review and questions about how they will evolve in the future. There has been a lot of provocation about *Chevron*[9] recently, for example. Likewise, what is known as *Auer* deference may be in for some changes.[10] There is a lot of talk, as well, about cases like *Sackett*[11] and *Hawkes*,[12] which raises the question of whether preenforcement review of agency compliance orders will have significant ripple effects for the agencies. All of these things are in the mix at the moment—very much alive in the courts and also of considerable interest to scholars, and I am imagining of concern to the audience here. I think in the coming years, as the agencies do precisely what Solicitor General Verrilli predicted they will do, which is be a productive source of policymaking in the country, we'll see a lot of pressure on these doctrines of deference.

No one has missed that *Chevron* deference has come in for some shoddy treatment of late—in cases like *King*, *Utility Air Regulatory Group*, and *Michigan v. Environmental Protection Agency*.[13] Lone judges or justices railing against *Chevron* is nothing new. For example, Justice Clarence Thomas seems to have declared war on *Chevron*, building on an earlier opinion he wrote in the *American Trucking* case in which he assailed *Chevron* deference as an unconstitutional transgression of the separation of powers.[14] This is slightly odd, if only because Justice Thomas also authored the opinion in *Brand X*, which is perhaps the height of modern judicial deference.[15] These more recent decisions suggest that *Chevron*'s stability and durability may be in for a greater test. The Supreme Court is either finding ways not to apply *Chevron*, or applying it in name only, and granting very little deference compared to what one might expect.

If we look more broadly, we see attacks against *Chevron* everywhere, from individual judges to legislators in Congress. Judge Neil Gorsuch, on the U.S. Court of Appeals for the Tenth Circuit, issued a recent and striking concurrence in the *Gutierrez-Brizuela* case in which he inveighed against *Chevron* and its progeny, particularly *Brand X*, at great length, reviving an unreconstructed view of the administrative state and the separation of powers that would unwind most of modern administrative law.[16] At the same time, we now routinely see regulatory reform bills like the Separation of Powers Restoration Act introduced in Congress, which, if passed, would override both *Auer* and *Chevron* deference in one fell swoop.

Now, one can regard all of this as political noise, and not take it too seriously. It is surely true that when a party doesn't possess the White House, it isn't likely to be much of a fan of *Chevron*, which allows the executive branch some flexibility to adapt statutes to their policy prerogatives. Those same vehement opponents of *Chevron* will become its biggest fans if the White House changes hands. So, you could say that *Chevron* is being bandied about like a political football, but it doesn't matter too much because deference is here to stay.

But I do think there's reason to take seriously what the Chief Justice did in a mere two paragraphs in *King*, which was to take his dissent in *City of Arlington*[17]—a case that

as follows: "The judgment is affirmed by an equally divided Court." *United States v. Texas*, 136 S. Ct. at 2272.

8. The "clean power" case refers to the consolidated set of actions challenging EPA's Clean Power Plan rule. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64661 (Oct. 23, 2015). Challenges to the Clean Power Plan are currently being considered by the U.S. Court of Appeals for the D.C. Circuit. *See* West Virginia et al. v. Environmental Prot. Agency, No. 15-1363 (D.C. Cir. 2015).
9. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984).
10. Under *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997), an agency's interpretation of its own ambiguous regulation is generally entitled to deference unless "plainly erroneous or inconsistent with the regulation."
11. Sackett v. Environmental Prot. Agency, 132 S. Ct. 1367, 42 ELR 20064 (2012).
12. U.S. Army Corps of Eng'rs v. Hawkes Co. Inc., 136 S. Ct. 1807, 46 ELR 20102 (2016).
13. 135 S. Ct. 2699, 2711, 45 ELR 20124 (2015).
14. In *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 487, 31 ELR 20512 (2001), Justice Thomas, in dissent, argues that the parties failed to address a "genuine constitutional problem"—the failure of the parties to address the constitutional grant of "'[a]ll legislative Powers' to Congress."
15. In *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005), Justice Thomas writes that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."
16. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143-49 (10th Cir. 2016).
17. City of Arlington, Tex. v. Federal Communications Comm'n, 135 S. Ct. 1863, 43 ELR 20112 (2013).

held that agencies are entitled to *Chevron* review, even when they interpret their jurisdiction, but in which he dissented vehemently—and try to turn his dissent into a majority view.

I think it's striking that in *King*, the Chief Justice didn't just say, well, we're not deferring because the Internal Revenue Service (IRS) is the wrong agency to implement the Affordable Care Act—there is no indication that Congress delegated these interpretive decisions to the IRS and no reason to presume an implicit delegation either, because the IRS lacks the relevant expertise. Instead, he went much further than necessary, and said that the case presented questions of such deep economic and political significance that *Chevron* was inapposite. He made a point of saying prominently that while *Chevron* "often" applies, it does not always apply. And I think that language, that extra effort by the Chief, is an indication of something. Of course, he was writing for a six-Justice majority, so they all signed on to that language.

The question then is what happens to *Chevron* as *King* gets applied in subsequent cases? There is certainly good reason to think it can be limited, but what I want to emphasize is that it will be necessary to do so. It takes some work to continue to press the case that, in the normal course, *Chevron* is the appropriate framework to use. I find that striking because I thought that was already settled by the Court's decision in *City of Arlington*.

At least for now, the Court seems to have resurrected the idea that there are extraordinary cases of enormous political and economic significance, in which normal rules of deference should not apply. Justice Sandra Day O'Connor adopted this rationale in the *Brown & Williamson* case, for example, but it seemed not to get much traction.[18] The Court notably failed to apply it in *Massachusetts*, a case that easily might have called for it.

Yet, it seems to have been revived in cases like *Utility Air Regulatory Group*, where Justice Antonin Scalia repeated that the Court would look skeptically at agency interpretations that portend significant economic and political implications. There was *King*, too, as I noted earlier. The Clean Power Plan case, now before the D.C. Circuit, could provide an opportunity to see how this newly revitalized "major questions" canon might play out.[19]

The problem is that it is hard to find a principled way to apply the major questions canon. If you look at the line of cases in which it has been deployed—from the *MCI* case,[20] to *Brown & Williamson*, through *Massachusetts*, through *Utility Air Regulatory Group*, to *King*—and if you add cases like *Gonzales v. Oregon*,[21] and even *Babbitt v. Sweet Home*,[22] which some consider "major questions" cases, it's very hard to discern a clear rationale for when to deploy the canon and when not to.

It was no wonder to me that Judge Patricia Millett, in the Clean Power Plan marathon argument in the D.C. Circuit, kept asking counsel, "Tell me why we should or shouldn't use the major questions canon? Why is this case different or not different from other cases?" One reasonable approach is to say that the question of the U.S. Environmental Protection Agency's (EPA's) authority to regulate greenhouse gases from the power sector has been settled in prior cases, like *Massachusetts* and *American Electric Power Co. v. Connecticut*,[23] and it is too late now to say *Chevron* doesn't apply because the case is extraordinary. The authority question is settled, and now all that's left is the matter of the scope of what might be included in the definition of the "best system of emissions reduction."

I thought the government struggled a bit to handle this, but it's hard to fault them for it because drawing this line is unmanageable. I don't see the authority question as so different from the matter of scope. But in any event, whether a regulatory question is "major" enough to exempt it from *Chevron* review is in the eye of the beholder.

The final thing on this topic worth mentioning is that Justice Anthony Kennedy is a notable proponent of the major questions canon, which I think is significant, given his importance as the swing vote, especially in environmental cases. He was with Justice O'Connor in *Brown & Williamson*, with the Chief in his *City of Arlington* dissent, with the Chief in his majority opinion in *King*, and he wrote the opinion in *Gonzales*. This tells you that you may find an audience in Justice Kennedy for a major questions argument in some very important cases, especially where federalism concerns arise.

The other topic that I think is worth discussing is the future of *Auer* deference. As many of you know, something of a movement has been building to limit *Auer*. This movement has gained the support of four Justices in the past five years, although one of those, Justice Scalia, has been lost to us, of course.

Nevertheless, the Court recently granted certiorari in *Gloucester County*, a case involving transgender accommodation, which presents an opportunity for the Court to reconsider the limits of *Auer*.[24] The Court did not grant certiorari on whether to overrule *Auer*, but it could well come in for some cabining. It's entirely possible that the Court will decide that *Auer* deference should be constrained in a *Mead*-like[25] way—that is, limited largely to situations in which the agency has used more formal procedures to issue its interpretation.

18. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
19. *See* West Virginia et al. v. Environmental Prot. Agency, No. 15-1363 (D.C. Cir.).
20. MCI Telecomms. Corp. v. American Tel. & Tel. Co., 512 U.S. 218 (1994).
21. 546 U.S. 243 (2006).
22. The Endangered Species Act provides that it is unlawful to "take" any endangered species of fish or wildlife. The term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or any attempt to engage in any such conduct." 16 U.S.C. §1532(19). U.S. Department of the Interior regulations implementing the statute define the statutory term "harm" broadly. 50 C.F.R. §17.3 (1994). This regulation was challenged, and upheld, in *Babbitt v. Sweet Home Chapter of Communities for a Greater Or.*, 115 S. Ct. 2407, 25 ELR 21194 (1995).
23. 564 U.S. 410, 41 ELR 20210 (2011).
24. Gloucester County Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 369 (2016).
25. United States v. Mead Corp., 533 U.S. 218 (2001).

All of this leads me to think that informal agency decisionmaking, in its various forms, is increasingly under pressure, and may come in for greater judicial scrutiny. Another line of cases to watch is *Sackett*[26] and *Hawkes*,[27] which may well have ripple effects in the lower courts, and which may wind up complicating agency enforcement. Now that compliance orders from the agencies are subject to preenforcement judicial review, there may well be pressure to subject other informal agency decisions—like guidance documents, policy statements, and interpretive letters—to preenforcement review as well. This is already happening in district courts, although it's too early to tell how these cases will come out on balance. Still, agencies may well be under pressure to formalize decisions they would not otherwise have formalized, and the implications of the ensuing sclerosis could be significant.

This takes me back to something the Solicitor General said about Congress being so unproductive. In a world in which Congress rarely passes new legislation to address pressing problems, and routinely fails to update obsolete regulatory schemes, it is reasonable to expect that the executive branch will try to do so. The fact that many important regulatory statutes are old and quite outdated creates the inevitable need for agency discretion to adapt these statutes to new problems, which opens the door to novel and potentially far-reaching interpretations.

In that world, whether *Chevron* continues to be treated shoddily very much matters. It may be true that the Supreme Court is inconsistent in applying *Chevron*, but the question is how the Court's signals about when to discard *Chevron* and when to apply it will be received by the lower courts. I still think *Chevron* matters in this sense, and so for government lawyers, my claim is that it is worth thinking about these issues strategically, and being alert to how they play out in the coming years.

Richard Pierce: To me, the two most important things that have happened in the world of administrative law in recent decades happened in a four-day period in February 2016. On February 9, the Supreme Court issued its unprecedented stay of the Clean Power Plan.[28] Four days later, Justice Scalia died.

Let me begin with Justice Scalia's death. He had more impact in shaping administrative law than any other Justice in history, probably any other person in history. His departure definitely foreshadows changes, major changes, in administrative law. The president is going to be naming almost certainly between two and four new Justices to the Supreme Court, and that's going to have an enormous effect. We lost the person with the greatest impact in history and he will be replaced with who knows—two to four new voices of some sort. I'm leery of making very many bold predictions about the future at this time.

Returning to the stay, the stay is to me really significant. It might foreshadow a new world in which the real battles in administrative law are going to be fought entirely at the preliminary relief—stay and temporary injunction—level. If you want to see what that looks like, look at the law of mergers. There has not been a final decision in a merger case in at least 30 years. All the battles are fought out at the preliminary injunction stage. We may be headed in that direction in administrative law, at least when it comes to major rules. I don't look forward to that, but it beats the heck out of the bill that was passed by the U.S. House of Representatives in August 2016 that would have imposed an automatic statutory stay on every major action.[29]

On the future of deference, I actually have somewhat different views from Jody. I don't think the Court's going to overrule either *Chevron* or deference. I don't see that happening. Or *Auer*. I don't see that happening either. I think what's far more likely is we're going to see a lot more qualifications of both of the doctrines. So on *Auer*, take a look again at *Christopher v. SmithKline Beecham*[30] and then at the end of last term, *Encino Motors*.[31] I think you're

26. *Sackett v. Environmental Prot. Agency*, 132 S. Ct. 1367, 42 ELR 20064 (2012), was litigation by landowners, who received an EPA compliance order alleging that they had violated the Clean Water Act, challenging EPA's conclusion that the property was subject to Clean Water Act jurisdiction. Landowners challenged the EPA compliance order under the Administrative Procedure Act (APA), which allows for judicial review of "final agency action." *Id*. at 1371. *See also* 5 U.S.C. §704. The United States argued that the compliance order was not final, and thus was unreviewable. The Supreme Court disagreed, holding that EPA's Clean Water Act compliance order was final and reviewable. *Id*. at 1374.

27. *U.S. Army Corps of Eng'rs v. Hawkes Co. Inc.*, 136 S. Ct. 1807, 46 ELR 20102 (2016), involved challenges to a U.S. Army Corps jurisdictional determination. The United States argued that the Corps jurisdictional determination was not "final agency action" and was not reviewable under the APA. *Id*. at 1813. The Supreme Court disagreed, holding that Corps jurisdictional determinations satisfied the two conditions that establish an agency action is final. *Id*., citing Bennett v. Spear, 520 U.S. 154, 177-78, 27 ELR 20824 (1997).

28. Supreme Court Order Granting Application (15A787) for a stay pending petitions for review in *Chamber of Commerce et al. v. Environmental Prot. Agency et al.*, Case No. 15-1363 (2016).

29. On Sept. 8, 2016, the House Judiciary Committee approved the "Require Evaluation Before Implementing Executive Wishlists Act of 2015 (REVIEW Act)," H.R. 3438, by a vote of 18-13. This Act would amend the APA to issue an automatic 60-day stay of all "high-impact rules" (rules costing more than $1 billion annually).

30. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), the Supreme Court held that pharmaceutical sales representatives were classified as "outside salesman" and were exempt from the U.S. Department of Labor's regulations regarding overtime pay. The Department of Labor filed an amicus brief in the Supreme Court arguing that the pharmaceutical employees at issue were not exempt outside salesman. *Id*. at 2165. The Supreme Court did not accord this position deference, finding that the Department of Labor did not articulate their position until after the challenged behavior took place, that the interpretation would create significant liability, and to defer would create an "unfair surprise." *Id*. at 2166-67.

31. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), addressed whether certain employees of automobile dealerships, "service advisors" who suggest repair services, are entitled to overtime pay. The Department of Labor had initially established a position on this issue in 1970, finding that service advisors were exempt from overtime pay requirements. *Id*. at 2122. In 1978, the Department changed its opinion, and in 2008 and 2011 the Department changed its interpretation again. *Id*. The U.S Court of Appeals for the Ninth Circuit, applying *Chevron*, upheld the Department's 2011 regulatory interpretation and held that service advisors were not covered by the statutory exemption. *Id*. *at* 2024. In *Encino*, the Supreme Court held that *Chevron* deference would not be applied to the 2011 Department of Labor regulation because that regulation "was issued without the reasoned

going to see a lot more cases of that type that emphasize the qualifications on the deference doctrines.

On *Chevron*, I actually want to give Matt credit for something I'm about to say. We've been exchanging e-mails, and in one of them, he said, I look out there at the universe, and what I see is increasingly a whole lot of courts applying *Skidmore*[32] dressed up like *Chevron*. And that's the way I look at the world, too. That's the only way I can interpret the wonderful Kent Barnett and Christopher Walker empirical study of 1,330 circuit court opinions that applied *Chevron* over the past decade.[33] I think what the courts are doing in a high proportion of cases is they're applying *Skidmore*, and if the government wins, then they cite *Chevron*. That's the world in which I believe we are now functioning, and I don't think it's a bad world at all.

I've always been a strong proponent of *Chevron* and *Auer* deference. But I have to say, as I look at the incredible political polarity that we have today, and, unfortunately, I don't see it leaving any time soon, those doctrines of deference just don't look as pretty in that world as they once did.

As an example, I'm a strong proponent of the Clean Power Plan. But unlike Jody, I do not want it to be upheld through application of *Chevron* deference. I want it to be firmly planted and protected by the doctrine of *stare decisis*. I do not want it vulnerable to somebody coming in later and saying, if you combine *Brand X*[34] and *Fox*,[35] then it's all over. That would be very easy to do when all you need is the right personnel and the right institutions.

In any event, I would much rather see an opinion that makes no reference whatsoever to *Chevron* and upholds it, and then *stare decisis* is much, much more powerful than something that has been upheld through use of *Chevron* deference. You combine *Brand X* and *Fox*, and it's a piece of cake to write an explanation for the opposite interpretations that a court would be hard-pressed to say are not reasonable explanations under *Chevron* and *Fox*.

I'm also really interested—and here I certainly join Jody completely—in seeing what happens in this new world of final agency action after *Sackett* and *Hawkes*. It's obvious that the Court is much more willing to let people into court to review agency actions at various stages in litigation than it was in the past.

I don't know what this portends in the future. I don't know what the circuit courts are going to do. I've seen a lot of people relying on those cases, and some courts relying on them as a basis to make changes, and not just to final agency action, but to ripeness and exhaustion, as well. This might portend a broader movement to allow greater access to the courts, but I don't really know, as in so many other things. The only thing of which I'm absolutely confident is that we will continue to live in interesting times.

Matthew Oakes: Mr. Verrilli, we heard Professor Freeman and Professor Pierce talk about *Chevron* deference and the future of deference. What are your views on that?

Donald Verrilli: I guess this is where the litigator separates from the academics a little bit; there's no doubt that the developments that you've heard described to you are real. They're on the page in the cases.

I have a little bit more of a realpolitik view about how you add up *King* and *City of Arlington*[36] and a couple of the other cases. And I don't think there's any doubt that what the Chief Justice was doing in those two paragraphs that Jody mentioned in *King* was an effort to convert the principles he articulated in his dissent in *City of Arlington*[37] into the basic principle of administrative law.

I also have no doubt that four of the Justices who joined that opinion in *King*, who were also in the majority in *City of Arlington*, did not change their minds between *City of Arlington* and *King*.[38] I think that *King* was a case of such high salience politically and jurisprudentially that there would have been a real cost to writing a concurring opinion for anybody on the Court who wanted the outcome that the Court landed on. And so I think they refrained from writing a concurring opinion, but I don't think they agree with those two paragraphs.

I do think, as Richard said, the question of who replaces Justice Scalia will be of extreme importance in determining the future of *Chevron*, because it was Justice Scalia, of course, who wrote the majority opinion in *City of Arlington*. Right now, it's completely unclear as to how that is going to unfold. But I really don't see the four *City of*

explanation that was required in light of the Department's change in position and the significant reliance interests involved." *Id*. at 2126.

32. In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court stated that: "The weight [given an agency judgment] in a particular case will depend upon 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."
33. Kent H. Barnett & Christopher J. Walker, Chevron *in the Courts*, 115 Mich. L. Rev. (forthcoming 2017).
34. In *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), the Supreme Court held that *Chevron* deference applies to statutory interpretations even where the current agency interpretation is a reversal of a prior agency interpretation, and even where the current agency interpretation is inconsistent with judicial precedent.
35. In *Federal Communications Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009), the Supreme Court held that there was no basis in the APA or Supreme Court precedent to impose a heightened standard of review where an agency reverses a prior interpretation.
36. In *City of Arlington, Tex. v. Federal Communications Comm'n*, 135 S. Ct. 1863, 1874, 43 ELR 20112 (2013), the Supreme Court held that courts must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's jurisdiction.
37. Chief Justice Roberts, joined by Justice Kennedy and Justice Samuel Alito, dissented in *City of Arlington*, arguing that courts need not defer to an agency until a court determines that deference is appropriate. *Id*. at 1877-86. This dissent was concerned that administrative agencies had too much unfettered discretion, and discussed concern that the accumulation of the powers of the legislative, executive, and judicial branch in the same hands "may justly be pronounced the very definition of tyranny. *Id*. at 1877, citing The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961).
38. Those four Justices are Justices Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and Stephen Breyer. In *King*, Chief Justice Roberts delivered the opinion of the Court, in which Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan joined. In *City of Arlington*, Justice Scalia delivered the opinion of the Court, in which Justices Thomas, Ginsburg, Kagan, and Sotomayor joined. Justice Breyer filed an opinion concurring in part and concurring in judgment in *City of Arlington*.

Arlington majority Justices, in addition to Justice Scalia, having changed their views about *Chevron*.

Now, that's all well and good in the Supreme Court, of course. But the courts of appeal have got to follow those two paragraphs in *King*. So, that's going to be quite significant as it works its way through the system. And in terms of the future of *Chevron* in the Supreme Court, there's a big dose of realpolitik in two ways, both on how you read *King* and *City of Arlington* together, and then who's going to occupy that now-empty seat.

Jody Freeman: I want to be clear. I never suggested, nor do I believe, that *Chevron* will be overruled. I don't think that *Auer* will be overruled either. I concur completely with the idea that there may be limitations and constraints imposed on *Auer*. And I concede the Solicitor General's point that the Justices who had been in the majority in *City of Arlington* didn't suddenly change their minds about *Chevron* when they signed the majority opinion in *King*.

But even if it's true that joining the Chief Justice's opinion was the price of getting through *King* with a strong, coherent, unified majority, I still think the practical result is an invitation to petitioners to make the argument in virtually every instance that *Chevron* shouldn't apply because whatever case they are litigating is extraordinary for some reason. And of course most high-stakes cases are at least plausibly very significant, whether economically, politically, or socially. The government and intervenors will have to beat back the major questions argument more often, and be careful to do so in a principled way that suggests why one case is not like the other case and does not hamper them too much down the line. And doing so will be, at a minimum, time-consuming and distracting.

Now, *King* was unique in the sense that the IRS was the agency claiming deference to interpret a health care law, something that sounds odd and unlikely at first blush. This situation is certainly distinguishable from the Clean Power Plan case, for example, because EPA has explicitly been delegated the authority to implement the relevant provisions of the CAA. Most cases can be distinguished from *King*, but I think nevertheless we will see challengers invoke the major questions canon more often, simply because they have been invited to do so by cases like *Utility Air Regulatory Group* and *King*, and where that ultimately leads in the lower courts, I do not know.

Of course, there are lots of ways to deny an agency deference if a court wants to—whether by invoking the major questions canon or by invoking constitutional avoidance, or simply by discerning a compelled meaning that preempts the agency's view at step one. This latter strategy was Justice Scalia's technique, as everyone knows, and as he himself admitted.[39] He essentially said, I don't really have a problem with *Chevron*. I'm a fan of it, because it's a more rule-like approach that will give lower courts guidance. But I usually find the text clear. So, it doesn't really get in my way.

The question is whether the other Justices, including the liberal wing, also begin to do that more often. In *Federal Energy Regulatory Commission v. Energy Power Supply Ass'n*, in which the Supreme Court held that the Federal Energy Regulatory Commission (FERC) possessed expansive authority to regulate matters affecting wholesale electricity markets, Justice Elana Kagan wrote an opinion a lot like that: "Well, it's clear, so we don't especially need *Chevron*."[40] Or there may be more cases where the Court denies deference at step two, along the lines of the *Michigan* case, which to many people was an astonishing decision. To see language in the statute that tells the agency to set a standard when "necessary and appropriate" and to have the language interpreted as *requiring* a cost consideration is quite a change. It flips on its head the traditional presumption—that ambiguous language entitles the agency to choose whether to consider cost.

The point I'm making is that this recent batch of cases, considered together, sends a signal that *Chevron*'s essential presumption—that Congress meant for the responsible agency to fill gaps and silences, and that when in doubt, the benefit of the doubt goes to the agency—is under some pressure. That's all I'm claiming. It is worth thinking strategically about how best to buttress that presumption of deference and encourage those Justices still committed to it to come back and forcefully say so. Many observers thought that battle was fought and won in *City of Arlington*, but the Chief Justice is not going quietly into the night, and there has been some backtracking of late.

Richard Pierce: I think there's way too much emphasis on *Chevron*. And there's a big difference between deference and *Chevron*. Let me illustrate that by pointing out that the only Justice who really, until the last two years of his life, was strongly supportive of *Chevron* was Justice Scalia, who was the least deferential Justice. And the Justice who despised *Chevron*—he and I debated it several times back when he was *Professor* Stephen Breyer—he despises it, and he's the most deferential of the Justices.

I think the linkage between *Chevron* and deference is extremely weak, and really unfortunate. It's really proven to be tremendous bait for a bunch on the right who are out there saying, the world is coming to an end because of *Chevron*. Well, my answer is, *Chevron* hasn't done much of a damn thing to anything. It's cited when the government wins and not when the government loses.

39. Justice Scalia stated:

> One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 521.

40. Demand response is the ability of a consumer of electricity to change its demand in response to optimize the operation of the electric grid. In *Federal Energy Regulatory Comm'n v. Energy Power Supply Ass'n*, 136 S. Ct. 760, 46 ELR 20021 (2016), the Supreme Court held that FERC had power to regulate demand-response transactions at the wholesale level.

Matthew Oakes: Professor Pierce, do you think there's any value in the framing of *Chevron*, though? It does enable the agency to frame the issue in a way that can be persuasive, especially in the lower courts.

Richard Pierce: I have to confess that I am among those who had put way too much emphasis on *Chevron*. I probably wrote a dozen articles extolling its virtues, talking about how it was going to increase consistency, clarity, and coherence. I think it had that potential, but it never realized that potential. For a little while, it realized that potential in the circuit courts.

But once the Supreme Court went through the trilogy of *Christensen*,[41] *Mead*,[42] and *Barnhart*[43]—the 2000-2002 trilogy of cases where the Court gutted *Chevron*—the potential benefits of *Chevron* in circuit courts disappeared. In the final opinion, written appropriately by Justice Breyer, the Court morphed *Chevron* into *Skidmore*. Justice Breyer said: well, I'm going to apply *Chevron*, and here's what it says. And then what he says is a restatement of *Chevron* as a paraphrase of *Skidmore*.

Once the Court did that, it was all over in the circuit courts. *Chevron* never had the beneficial effects I hoped for in the Supreme Court. It was, after all, clearly committed to an inferior category once Justice John Paul Stevens wrote his 1987 opinion in *Immigration & Naturalization Service v. Cardoza-Fonseca*,[44] where he said, well, there's this funny *Chevron* opinion that I wrote, and I'm going to put *Chevron* footnote nine up in big letters, and then everything else I wrote in the text, that's a footnote, you can ignore that. *Chevron* never had strong support from any Justice, except Justice Scalia, who didn't defer under any doctrine.

Donald Verrilli: As a follow-up on that, I have a somewhat different view based on *City of Arlington*, because I think the fight in that case was whether to finish off *Chevron*. I think what you saw there is that the liberal Justices joined with Justice Scalia to say no to that, and that Justice Breyer, believing what he believes, as you accurately described it, actually joined the opinion because he knew he was the deciding vote, and he wanted to make sure that they weren't going to finish it off. I think that is what the fight was about in that case, and to me, that has some significance going forward.

Jody Freeman: There are two things I vowed when I became a law professor. One is I would never write an article about *Chevron*, because too many pages have been spent on it. And the other was that I wouldn't talk about the Supreme Court so much. I wanted to talk about what agencies do. They make so many policy decisions that never find their way to the Supreme Court, and I wanted to emphasize the impact that agencies have on social and economic life, compared to the relatively minimal role, in the most practical sense, that the Supreme Court plays.

I took this as my mission early in my career, but now here I am, back where I'm not supposed to be. Even if we think *Chevron* doesn't matter in the Supreme Court, it certainly matters in the circuits. I want to read to you a few statistics that come from the article by Barnett and Walker, coming out in *Michigan Law Review*, the empirical study of 10 years' worth of circuit decisions involving deference that was referenced earlier.

According to the study, there is a 25% difference in the agency win rate when circuits apply *Chevron* versus when they don't. Agencies win most of the time, but they win that much more with *Chevron*. They win 77% of the time with *Chevron*, 56% of the time with *Skidmore*, and 38.5% of the time with de novo review. Further, when courts resolve *Chevron* at step one, which happens about 30% of the time, the agencies only win 38% of the time. When they go to step two, which happens 70% of the time, the agencies win a whopping 93.8% of the time. These are big numbers, and those are big differences.

Now you could say, well, this just understands it backwards: judges decide the outcome and then they attach the standard of review—they slap the label *Chevron*, *Skidmore*, or de novo on the decision after the fact—which I take to be Dick's argument. I don't think about it that way. I think it is important in the framing of the argument, to convince the court about the appropriate standard of review, which determines the level of deference. I believe that doing that effectively can have an impact.

There's also an interesting difference among the circuits in how often they apply *Chevron* and in the win rates when they do. In addition, there are winner agencies and loser agencies. You all intuitively know this already, but it's helpful to have an empirical study confirming our sense about these differences. It turns out, for example, that if you're the Federal Communications Commission or the U.S. Department of the Treasury or the National Labor Relations Board, you're the big winners when *Chevron* is applied. If you are the Equal Employment Oppor-

41. In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court held that *Chevron* applies only to some agency statutory interpretations, and that *Skidmore* applies to statements in agency manuals, enforcement guidelines, and policy statements that lack the force of law.
42. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Supreme Court held that a tariff classification issued by the Court of International Trade was not entitled to *Chevron* deference, but was entitled to *Skidmore* deference.
43. A year after *Mead*, the Supreme Court addressed deference to a decision made by the Social Security Administration in *Barnhart v. Walton*, 535 U.S. 212 (2002). The Court considered a Social Security Administration policy that was initially adopted through less formal means, but was eventually adopted through notice-and-comment rulemaking. *Id.* at 219. The Court did not employ the "force of law" distinction drawn in *Christensen* or *Mead*, instead focusing its analysis on Congress' grant of authority. The *Barnhart* decision set out several factors for a court to consider in determining whether to apply *Chevron* deference or *Skidmore* deference. The primary factor is whether "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27. Courts may also consider (1) the interstitial nature of the legal question; (2) the importance of the question to administration of the statute; (3) the complexity of that administration; and (4) the careful consideration an agency has given to the question over a long period of time. *Barnhart*, 535 U.S. at 222.
44. Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987).

tunity Commission or the U.S. Department of Energy or the Department of Housing and Urban Development, you're in some trouble because you lose a lot. So, I think this study confirms that, at least in the circuits, the choice whether to apply *Chevron* or some other test, and whether the court gets to step two or not, especially for certain agencies, makes a measurable difference.

Donald Verrilli: To restate the point, I think that *City of Arlington* was kind of an under-the-radar case, but for me, I thought it was quite important because of something that Jody said; I thought it was a signaling event to the courts of appeals. That this is the right structure to think about these issues.

Now, whether this analytical construct produces a difference in outcomes, there's pretty good evidence that it does. Beyond that, it's just hard to know, and it's hard to read the minds of judges, but it does seem to me that that was what the fight was about in that case. As I said, much more about what the courts of appeal are being instructed to do.

Matthew Oakes: Richard, we've been talking a lot about *Chevron*, and I thought I'd shift things to *Auer*. What do you think is the current status of *Auer*, especially given the certiorari grant that Jody mentioned in her initial comments?

Richard Pierce: Well, first of all, *Auer* doesn't mean what it says. A lot of people believed once that *Auer* meant what the Supreme Court said it meant when it originally announced the doctrine under a different name in 1940. Has anybody ever figured out why the Court changed the name?

Jody Freeman: Because *Seminole Rock*[45] was pre-Administrative Procedure Act (APA) and *Auer* is post-Administrative Procedure Act.

Richard Pierce: Well, when *Auer* was *Seminole Rock*, the Court described it in a way that suggested that the government always wins, and it was never that. It produced a situation in which the government won about 75% of the time and lost about 25% of the time. That percentage has gone down since the Court decided *SmithKline Beecham*.[46] It's down to something like 71% in the latest studies. What they did in *SmithKline* is added five qualifications, some of them were preexisting, but they put a big emphasis on each of those qualifications.

Then, the Court issued its opinion in *Encino Motors*, which is another wage and hours case. There's a professor at the University of Florida who wrote an article in 2013.[47] It's an empirical study in which she found that every time the White House changes hands, everything changes about who gets overtime. In a Democratic administration, everybody gets overtime. In a Republican administration, nobody gets overtime. That's only a slight exaggeration. The U.S. Department of Labor changes everything, and the courts have just been buying it. They've just been applying *Auer*, and saying, all right, what the hell? Now, we've got a Republican, so the answer's no. And now, we've got a Democrat, so the answer's yes.

In *Encino Motors*, I think the Justices are sending the message that you've got to give us a reason. You can't just get away with another of these political flip-flops. I know the Chief Justice is concerned about this, but I think a lot of Justices share my concern about the relationship between political polarity and *Chevron* and *Auer*, and the potential that we'll live in a world where the law changes every time the White House changes hands. I was happy when *King* was decided without citing *Chevron*. Now, I can be confident that it is the law, and that it won't be changed when a Republican takes office. I feel much more secure now that at least one important provision of the Affordable Care Act is protected by *stare decisis*.

Jody Freeman: I think the motivating concern about *Auer* deference is that agencies will essentially promulgate a rule that doesn't further define a statute, but parrots the statute, which is the issue in the *Gloucester County* case, where Title IX says, you can't discriminate on the basis of sex.[48] And then the rule promulgated by the agency says, basically, we can't discriminate on the basis of sex, followed by the informal document, which actually contains the substantive requirement that a transgender person must have access to a bathroom if their gender identity matches the designation of the bathroom.

The worry is that agencies make such consequential policy decisions at this third level down, and get deference for interpreting their own intentionally vague regulations, without having gone through any process or providing anyone opportunity for input. This has been the law since the pre-Administrative Procedure Act *Seminole Rock* case and was reaffirmed in *Auer* in 1997, a case in which Justice Scalia wrote the majority opinion.

In the past few years, however, we've seen growing concern about this problem among at least four Justices, one of them being Justice Scalia, who may have been moved in part by a compelling critique of *Auer*'s implications written by his former clerk and my wonderful colleague, John Manning. This culminated in *Perez v. Mortgage Bankers*, where Justices Scalia, Samuel Alito, and Thomas each wrote separately to suggest that *Auer* be reconsidered or overruled.[49] Even Justice Kagan took note in *Perez* of the mood of anxiety about deference under *Auer*, saying that she has a sense that agencies use interpretive rules and guidance documents more and more, and doing so is an end-

45. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
46. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012).
47. Deborah Thompson Eisenberg, *The Department of Labor's Policy Making in the Courts*, 65 Fla. L. Rev. 1223 (2013).
48. Gloucester County Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 369 (2016).
49. *See* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 45 ELR 20050 (2015).

run around notice and comment. The Chief Justice, too, echoed this sentiment when he said it may be appropriate to reconsider *Auer* in the right case. That was in *Decker* in 2013, and Justice Alito joined him there.[50]

This history gives you a sense what might be brewing behind the certiorari grant in the *Gloucester County* case. I would be shocked if—in a case where they could tie 4-4 unless we see a ninth Justice confirmed soon—it turned out that the votes are not there to do something to cabin *Auer*. Most likely, as scholars have proposed, is that the Court will require *Mead*-like formal agency processes for developing interpretations of their own rules if those interpretations are to be eligible for deference.

It is not clear how far these limitations will go, but I think the trajectory is fairly clear, and that is toward more, not less, constraint on informal agency action. The same story seems to be true on the enforcement side, due to cases like *Sackett* and *Hawkes*, which Dick mentioned. Agencies use administrative compliance orders as an incremental step in the enforcement process—as a threat of enforcement, without making the decision to litigate. From the agencies' perspective, this is an important intermediate tool. If this option disappears because a regulated party can force the agency into court, it would require the government fairly early on to decide whether to litigate or not, cutting off an avenue of informal incremental enforcement.

I don't want to overstate these trends, which are still emerging. But I do think they are worth tracking, and approaching strategically.

Matthew Oakes: Richard, Jody mentioned *Sackett*. That's the Supreme Court case where the court held that EPA Clean Water Act compliance orders could be challenged under the APA, and *Hawkes*, where the Supreme Court held a jurisdictional determination can be challenged under the APA. Basically, making challengeable these determinations that the Agency saw as informal. How does that combine with the trends on *Auer*, and what do you think the impact is?

Richard Pierce: That's a good question. I don't know. Jody suggested that *Sackett* and *Hawkes* might well be foreshadowing opinions that say that interpretative rules and policy statements are reviewable. Sri Srinivasan in the D.C. Circuit has issued a couple of opinions in which he said they can never be subject to review, because by definition, they have no force of law.[51] I'm frankly a bit bewildered about where to go on that one.

Jody Freeman: There are three circuit cases[52] in 2016 alone that say advisory letters, interpretive rules, and guidance documents are reviewable, and there are three district court cases[53] saying the same. Now, that's a pretty small handful of cases, but the fact they exist is very surprising.

Richard Pierce: Frankly, even if you can get review, it's much harder to win a case like that when you challenge a guidance document because there's no record. When you challenge something that comes out of a notice-and-comment rulemaking process, it's a whole lot easier to launch the challenge, because you've got all the comments and responses to comments. You've got typically no record in the context of interpretative rules and policy statements. So usually, if you can get it to court, you lose.

I'm not sure how that's going to wind up playing out. It would not surprise me if we see a case—I think the Texas immigration case was about to be this case, if Justice Scalia had not died just before the Court considered it—in which the Court draws a new line between policy statements and interpretative rules that are exempt on one side and substantive rules that require notice and comment on the other side. That's the other way that you can reduce the scope of *Auer* deference, by drawing a clear line that requires—has the effect of requiring—agencies to use notice and comment in a higher proportion of cases. I wouldn't be crazy about that result, but I think it's quite plausible we'll see an opinion like that.

Matthew Oakes: Jody, I'll ask one more question before we open it up to the floor for audience questions. We've

50. Decker v. Northwest Envtl. Def. Ctr., 133 S. Ct. 1326, 1338, 43 ELR 20062 (2013) (Roberts, C.J., concurring).

51. *See* Union Neighbors United, Inc. v. Jewell, 831 F.3d 564, 579-80, 46 ELR 20133 (D.C. Cir. 2016):

> The Handbook itself makes clear that it is only a guide, stating that it establishes "detailed but flexible guidelines" that are not "intended to supersede or alter any aspect of Federal law or regulations pertaining to the conservation of endangered species." As a result, it is akin to "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law [and] do not warrant *Chevron*-style deference."

(internal citations omitted); National Mining Ass'n v. McCarthy, 758 F.3d 243, 251, 44 ELR 20153 (D.C. Cir. 2014) ("Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not. *See* 5 U.S.C. §553. Legislative rules generally receive *Chevron* deference, but interpretive rules and general statements of policy often do not.").

52. Rhea Lana, Inc. v. Dep't of Labor, 824 F.3d 1023 (D.C. Cir. 2016). Judge Cornelia Pillard's opinion for the panel applied *Sackett* and *Hawkes* to hold a Department of Labor advisory letter (informing an employer that it was violating the Fair Labor Standards Act) to constitute final agency action, because it "transmitted legally operative information with a 'legal consequence' sufficient to render the letter final"; Stovic v. R.R. Ret. Bd., 826 F.3d 500, 505 (D.C. Cir.), *cert. denied* (U.S. Oct. 31, 2016). Judge Brett Kavanaugh's opinion for the panel applied *Sackett* and *Hawkes* to hold "final," and hence reviewable, the Railroad Retirement Board's denial of request to reopen a prior decision calculating a retiree's benefits; Texas v. Equal Employment Opportunity Comm'n (EEOC), No. 14-10949, 2016 WL 5349249, at *1 (5th Cir. Sept. 23, 2016). Judge E. Grady Jolly's majority opinion cited *Hawkes* on the way to holding an EEOC guidance document to be final agency action reviewable under the APA.

53. Bimini Superfast Operations LLC v. Winkowski, 994 F. Supp. 2d 106 (D.D.C.), *appeal dismissed* (June 24, 2014). Judge Colleen Kollar-Kotelly applied *Sackett* to hold that a preenforcement letter from U.S. Customs and Border Protection qualified as final agency action; Pharm. Research & Manufacturers of Am. v. United States Dep't of Health & Human Servs. (HHS), 138 F. Supp. 3d 31, 32 (D.D.C. 2015). Judge Rudolph Contreras applied *Sackett* to hold an HHS interpretive rule to be a final agency action subject to challenge as arbitrary and capricious; Texas v. United States, No. 7:16-CV-00054-O, 2016 WL 4426495, at *8 (N.D. Tex. Aug. 21, 2016). Judge Reed O'Connor cited *Hawkes* and the U.S. Court of Appeals for the Fifth Circuit's EEOC decision, above, in holding that U.S. Department of Education guidelines—the same transgender guidelines at issue in Gloucester County—constituted final agency action.

talked briefly about *Michigan* and the consideration of cost.[54] You mentioned that in your opening statements. What effect does *Michigan* have on agencies? The statutory language at issue in that case did not expressly say that EPA was required to consider costs. The Court interpreted the statute to require consideration of costs—and every Justice indicated the consideration of cost was appropriate in that case. How does that impact agencies?

Jody Freeman: Well, many of the agencies are here, so they can speak to this more accurately than I can, but here's what I think. We have a line of cases evolving from the *American Trucking* case.[55] In that case, cost is definitely not a consideration when setting air pollution standards under CAA §109. Then comes *Entergy*, in which the Court construes ambiguous language to allow the agency latitude—that is, an agency may choose to consider cost or not.[56] In *Entergy*, EPA had wanted to consider cost in setting standards for cooling water intake structures at power plants.

But *Michigan* effects quite a change. After *Michigan*, ambiguous language *requires* consideration of cost. To me, that's a dramatic shift. Just to refresh everyone's recollection, under the CAA provision at issue in *Michigan*, EPA was first to conduct a public health study of the residual health risks of mercury exposure after all the other requirements of the CAA had been implemented. The statute authorizes EPA to set a standard for mercury if they conclude that doing so, after considering that study, is "appropriate and necessary."

Applying step two of *Chevron*, I'm amazed that there is not enough ambiguity here for an agency to say it will not consider cost, especially when everybody agrees that cost will be considered later, when EPA actually sets the standards, which is the moment of establishing the emissions limitations themselves. To read this provision so as to require EPA to consider cost at the threshold stage, when they are choosing *whether* to set the standards, not establishing their stringency, is a very significant shift. I would speculate that the agencies are now looking at their ambiguous provisions and making sure they do a cost analysis where they otherwise may not.

Now, of course the agencies are doing the regulatory impact analyses anyway for the regulatory review process in the White House, which is overseen by the Office of Information and Regulatory Affairs (OIRA), but it's different entirely to read such a requirement into the statute. At a minimum, it removes one source of resistance against the White House because agencies can no longer say to OIRA, you're making us do this, but you realize that's not how we read the statute. If anything, the decision strengthens the hand of OIRA to push back against what the agency views as legally required regulation. So, I think that the impact of *Michigan* in practice could be very significant.

The final thing I'll say is that there was an indication in *Michigan* that the Court now believes that considering cost is a fundamental dimension of *State Farm*[57] arbitrary or capricious review. In other words, it would be arbitrary or capricious not to consider cost as an essential requirement of rational decisionmaking in all cases. Never before has that been true. If this is right, it is quite a victory for strong advocates of cost-benefit analysis, and it could be a setback for public health and environmental regulation, where fully monetizing benefits has proven challenging, which is in fact part of the reason why Congress passed these statutes. As a result, I think it has real implications for the agencies.

Richard Pierce: Well, this may not shock you, but we differ on that. I think this is a perfect opportunity for EPA to shift gears and start using cost-benefit analysis to support the actions it takes. It's very rare when EPA takes any major action where the benefits do not exceed the costs, usually by a very large amount.

I've testified now four times before various congressional committees on various versions of what is called the Regulatory Budget Act.[58] What the opponents of EPA are arguing is that we need a regulatory budget that ignores benefit and considers costs only. My defense every time is, no—cost-benefit analysis should be the basis for decisionmaking. Cost-benefit analysis is now on the left end of the political spectrum. Nobody is talking about ignoring costs. The question is, do you ignore benefits? I think it's a good opportunity for EPA to shift gears and take a position that I think will strengthen its hand in many, many cases and say, here is the cost-benefit analysis that supports the action we've just taken.

Jody Freeman: But they already do that? I mean, look at the carbon rules. The benefits of greenhouse gas regulation dwarf the costs, partly because the agency is considering benefits more rigorously. They're looking at the social cost of carbon, and that changes the cost-benefit analysis.

The problem is that agencies are now running into judicial skepticism about ancillary or "co-benefits." These are benefits that accrue as a result of the rule, but are not the purpose of adopting the rule. The question is whether these can be legally relevant to support the rule. They are certainly economically relevant, and a conventional cost-benefit analysis would consider them so, especially since these analyses consider indirect or ancillary costs.

This issue arose in *Michigan,* but the Court left it for another day. Still, there was no missing the fact that the co-benefits of controlling mercury were very significant, and dwarfed the quantifiable benefits, and the Court noticed. Of course, the reason for this imbalance is largely because

54. In *Michigan v. Environmental Prot. Agency*, 135 S. Ct. 2699, 2711, 45 ELR 20124 (2015), the Supreme Court held that EPA unreasonably deemed costs irrelevant when it regulated hazardous air pollutants emitted from power plants.
55. Whitman v. American Trucking Ass'ns, 531 U.S. 457, 31 ELR 20512 (2001).
56. Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 39 ELR 20067 (2009).
57. Motor Vehicle Manufacturers Association v. State Farm, 463 U.S. 29, 13 ELR 20672 (1983).
58. H.R. 5319, 114th Cong. (2010).

we simply lack the data necessary to fully quantify the benefits, not because they are not significant. Lacking the data is what got EPA into trouble, but it is not for lack of trying—there are real problems trying to quantify certain health benefits that are real but not especially monetizable. But this difficulty is what allowed Judge Brett Kavanaugh to write that fantastic line in his dissenting opinion from the D.C. Circuit decision upholding the rule—"that's billion with a b," he said, not millions, to underscore what he saw as the rule's extravagant costs.[59] Dick is right that the benefits of environmental rules vastly outweigh their costs. Studies have shown that CAA rules, while being very costly, are also by far justified by their benefits, and they are also the most beneficial of all federal rules.

It can be very challenging for the agencies to quantify all the benefits of their proposed rules, certainly compared to quantifying their costs. It will be even harder to justify these rules if the Court squarely addresses the matter of ancillary benefits and decides they cannot be legally relevant. This issue will unfold, I am quite certain, in future cases, but a marker seems to have been laid down in *Michigan*.

Matthew Oakes: I would like to take a few audience questions.

Audience Member: Thanks for a really interesting panel discussion. As Professor Freeman noted, the question as to where the line is when the major questions doctrine should be applied or not is hardly clear-cut from the case law. It seems clear that if the doctrine were to be expanded and applied more liberally it would really weaken the executive branch, and would perhaps open the door to judicial activism where a judge could selectively apply the doctrine whenever it seemed convenient to strike down a policy the judge didn't like. I would like to ask, if you were in our shoes as an advocate defending the executive, where would you propose to courts that they principally draw that line so as to hopefully preserve *Chevron* as much as possible?

Jody Freeman: This is the hard question. This is the Judge Millett question, which is, how do I know when it's a major question or not? I'm not sure how helpful I can be, but I think I would start by looking at the major questions cases and trying to differentiate among them a little more carefully.

For example, I think cases like *Gonzales*[60] and *King* are "wrong agency" cases. *Chevron* doesn't apply because the agency doesn't possess the expertise and there's no reason to think Congress would have implicitly delegated this kind of authority to the agency. I think *King* was a "wrong agency" delegation case, and we didn't need all the language about the major questions canon, and how *Chevron* often but not always applies. That was all an unnecessary effort to get *City of Arlington* resurrected, as we said earlier.

Then, there are cases like *Brown & Williamson*[61] and *Utility Air Regulatory Group*, which are what I would call "agency aggrandizement cases," and in order to differentiate these, you may be required to show that in your case, the agency is not seeking to aggrandize itself in the same way. Then there are what we might call "elephant-in-mousehole" cases like *MCI*[62] and the Clean Power Plan case, where the agency is alleged to have located a significant amount of authority in an obscure, little-used, or seemingly limited provision. It might be helpful, as a start, to sort out whether a given situation presents an elephant-in-a-mousehole problem or a wrong agency problem or an aggrandizement concern so that you can then address that question head on.

As I said earlier, I have heard people say the major questions canon only goes to the threshold question of whether the agency possesses the authority, like in *Brown & Williamson* where the question was, is nicotine a drug? Or as in *Massachusetts* in which the question was, does the agency have authority over greenhouse gases? The idea is that the canon is only relevant at that stage. Later, when the agency sets a standard, the question of whether the standard presents a major question is inappropriate. That is one way to approach the Clean Power Plan case, as I said earlier, which is to say that *Massachusetts* settled the threshold issue of authority, and *American Electric Power Co.* settled whether the Agency may use §111 to set greenhouse gas standards for power plants.

When we are over the major questions canon, and the question is: what's the definition of "best system of emission reduction"? That question has been delegated to the Agency. The scope of the best system is not a major question, in this view. The only issue is whether the Agency can look across the whole grid for emissions-reduction opportunities when setting the standard, or must be limited to setting standards based on measures that are available on-site at the source. That issue is a classic *Chevron* question, in this view. I am not sure about the persuasiveness of this argument though, because some of the cases, like *MCI*, are not threshold questions. They go to the scope of the standard-setting.

It is a very sticky wicket. This is very tricky. I don't believe the major questions canon can be applied in a principled way, just as distinguishing between "jurisdictional" and "non-jurisdictional" questions cannot be coherently done. I'm struggling to try to find some differentiation, but Dick is going to disagree.

Richard Pierce: I can't imagine it being applied in a principled way, but I have difficulty with the way the question was framed because it suggests that judges have some shortage of means to say no to agencies—they don't. There

59. White Stallion Energy Center v. EPA, 748 F.3d 1222, 44 ELR 20088 (D.C. Cir. 2014).
60. Gonzales v. Oregon, 546 U.S. 243 (2006).
61. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
62. MCI Telecomms. Corp. v. American Tel. & Tel. Co., 512 U.S. 218 (1994).

are a dozen ways of saying no to an agency, no matter what the doctrines are.

If you want to say no to the agency, you'll come up with a way of saying no. Major questions is one of them, and I can give you a whole bunch of others. Any judge who wants to say no to an agency will find a way. It doesn't matter whether they use an unprincipled tool like whether it's a major question, or some other unprincipled tool.

Jody Freeman: But their job is to make that harder to do, isn't it?

Richard Pierce: I'm actually coming back to the argument that I had initially with then-Professor Breyer in 1984. I now confess, he was right, *Skidmore* is great. There's not a thing wrong with *Skidmore*. The only real difference between *Chevron* and *Skidmore* is that *Skidmore* takes into account how long the agency interpretation has been in effect, as you can see in the study by Barnett and Walker.

The most robust finding is that the most important factor in predicting whether an agency interpretation will be upheld is whether it's long-standing or new. If it's long-standing, it's almost certainly going to be upheld. If it's new, it probably won't be. That's *Skidmore*. That doesn't have a thing to do with *Chevron*. It's the opposite of *Chevron*.

Jody Freeman: This gets us back to the fundamental problem, which is, how do you have a workable government in which agencies can solve new problems, respond to new technology, new market trends, new innovation, new thinking about regulation, and deploy their experience and learning gained over the years? How do they solve big problems, in a society that has big challenges, without a working partner in Congress?

The implication of what you're advocating when you say *Skidmore* is great and we don't need *Chevron* is that the courts should stop using it and just make a decision, and then the law will be locked in place by a one-time judicial interpretation. The problem with locking in ambiguous statutory meaning is that agencies need some flexibility. Lately, the branch driving policy forward in the regulatory domains of concern to this audience—environment, climate, energy, and public lands—is not Congress, but the executive branch and certain independent agencies like FERC. The court then decided what to tolerate. The essential partnership has been between the courts and the agencies, with Congress out of the action.

If you think deference makes no sense, there's no coherence to it, and you'd rather have the court decide in all instances, then you've chosen your favorite institution, and it is not the expert agencies, which Congress charged with policy implementation. I say the same thing to my students—what you think of these questions of deference forces you to recognize that you have a favorite institution. Your favorite institution could be the agencies, it could be the courts, or it could be Congress, but you have one, and it's informing your view of how these doctrines of deference should come out.

Richard Pierce: Actually, what I have as a favorite is the institutional relationship that is prescribed in the U. S. Constitution—the institutions have to work together. If they won't work together, our system of government won't work. No institution can solve it unilaterally.

The Future of Natural Resources Law

Andy Mergen (moderator) is the Deputy Section Chief at the Appellate Section, U.S. Department of Justice, Environment & Natural Resources Division.
Holly Doremus is the James H. House and Hiram H. Hurd Professor of Environmental Regulation, University of California Berkeley School of Law
Charles Wilkinson is a Distinguished Professor and Moses Lasky Professor of Law, University of Colorado Law School.
Dave Owen is a Professor of Law, University of California Hastings College of the Law

Andy Mergen: This panel is focused on natural resources law, very broadly defined. I would like to start by quoting Chief Justice John Roberts, who said a few years ago, "Pick up a copy of any law review that you see and the first article is likely to be, you know, *The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria*, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."[63]

I think that the Chief Justice's comment there was a quip, as they say, and not intended to be taken seriously. All the members of the U.S. Supreme Court and the advocates before the Court take scholarship very seriously. But the great thing about the program that John Cruden and the folks at the Law and Policy Section have put together is that we have found people, as demonstrated by the prior excellent panel, whose work is profoundly relevant to the work that we do.

63. *See* Orin S. Kerr, Final Version of *"The Influence of Immanuel Kant . . ."—and What the Chief Really Said*, Wash. Post, June 25, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/25/final-version-of-the-influence-of-immanuel-kant-and-what-the-chief-really-said/.

The three academics on the panel have lived incredibly engaged lives in terms of the practical impacts of their research making a difference in the real world. Holly Doremus from Berkeley Law has a Ph.D. in plant physiology and has done a lot of important interdisciplinary work, engaging ecologists and wildlife biologists in thinking about natural resources law.

Charles Wilkinson is a legend in public land law and federal Indian law. He has written multiple books that are accessible to a general audience and has profoundly informed people about the history of the West, the importance of public lands law, and federal Indian law. He has been committed to the development of these doctrines in very positive ways.

Dave Owen is doing incredibly exciting work on the Endangered Species Act (ESA),[64] and he's going to talk about the Clean Water Act (CWA),[65] which is profoundly important and relevant to the work of the Environment and Natural Resources Division of the U.S. Department of Justice (DOJ). With that, we will start with Holly.

Holly Doremus: Thank you, Andy, and all the folks here at DOJ who have been involved in putting this panel together. My good friend Dave Owen said to me a little bit earlier that he thinks this is the first time he's seen me in a suit, and it just goes to show what a profound honor it is to be here. I may not wear a suit again for the next 20 years, or at least until I get another opportunity like this one.

This panel is supposed to discuss the future of natural resource law. I want to touch on three themes, all of which fall under the general category of confronting uncomfortable realities. I think of this problem as similar to that depicted in a cartoon of a therapist listening to a patient, who is saying "I want you to put me in touch with reality, but be ready to break the connection fast." That's a great summation of the typical human reaction to confronting an uncomfortable reality: I at least think I want to know what reality is, but I don't really want to have deal with it if I don't like it.

Although that's a human reaction, it's not an adaptive one. If we don't see reality clearly, we are likely to run into serious trouble. My favorite illustration of this problem comes from a great project by photographer Miranda Brandon. She took the bodies of birds killed in collisions with buildings and posed them in ways that might represent their final moments. If resource managers don't face up to the uncomfortable reality that there's an impenetrable object in front of them, they may smash into it like a bird hitting a window it doesn't see.

The first theme I want to bring up in terms of a reality that we need to recognize is anything but new. It's long been true, but it's becoming more dominant and apparent: In order to do effective natural resource management, we have to be able to cross boundaries, because the threats to our natural resources absolutely do and will cross boundaries.

For example, pollution from sources, such as power plants, outside the Grand Canyon National Park readily travels across the park boundary to cause haze, which is sometimes so severe that it's difficult to make out the Park's iconic geologic features. Artificial boundaries that resources don't recognize or respect complicate our attempts to build effective management institutions.

In addition to the obvious boundaries of protected lands, there are boundaries between federal or state agencies with different missions, and boundaries between federal jurisdiction and state jurisdiction. Both the resources we seek to protect and the threats to those resources are unaware of and do not obey any of those boundaries. As an example of the institutional complexity such boundaries bring, consider the Channel Islands, which lie just off the coast of southern California. Within a small geographic area, the Islands and surrounding waters host a national marine sanctuary, a national park, and a California state marine protected area, all with different goals, different managers, and different management standards.

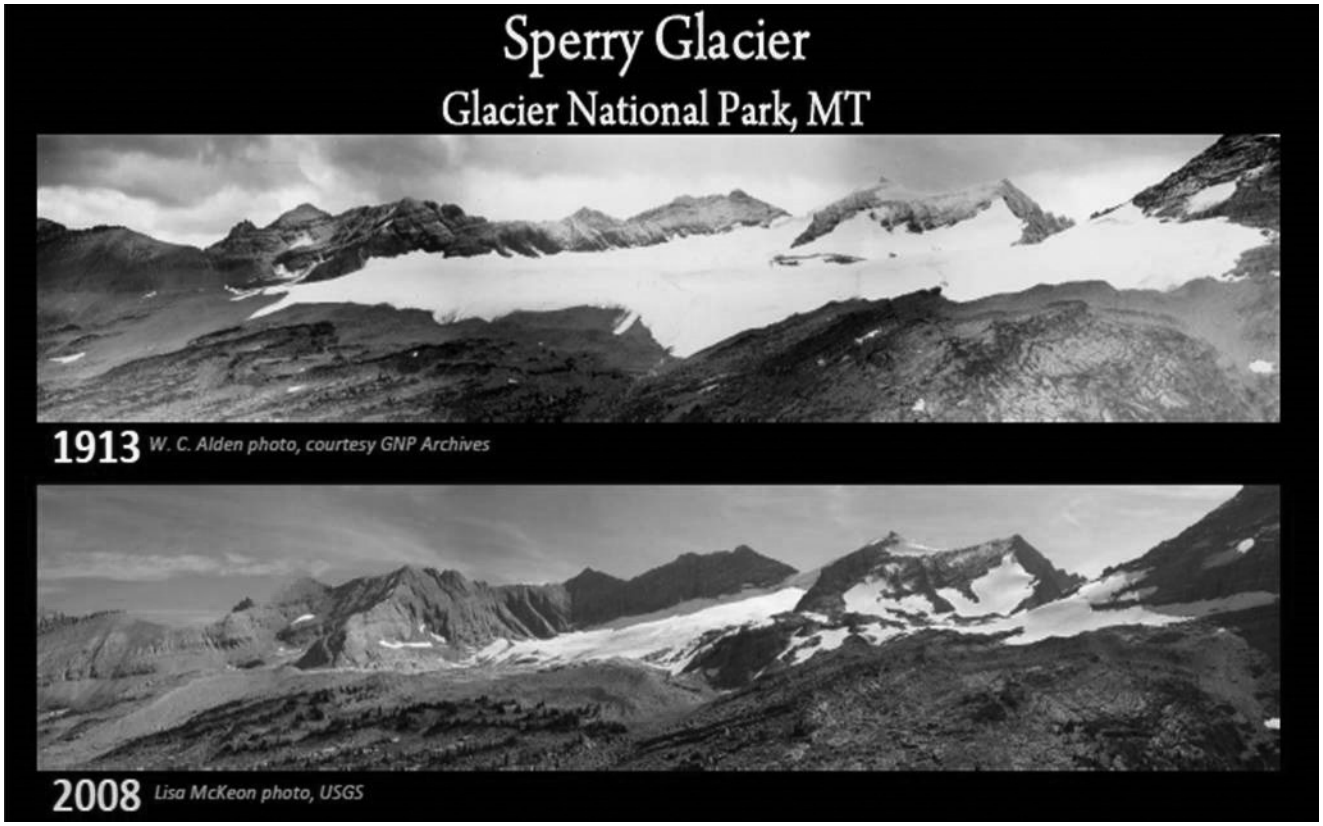
Climate change is the ultimate boundary crosser. Photographs of the Sperry Glacier taken from the same point of view in Glacier National Park in 1913 and 2008 show there was a lot less ice in 2008. Things happening outside the boundaries of Glacier National Park are having obvious effects inside the park. These sorts of transboundary impacts can't be managed by a fortress institution that focuses solely on setting and fortifying boundaries, then managing within those boundaries. Instead, we need institutions that are as capable of crossing boundaries as threats are.

We do have such institutions today, although they are still not common. Boundary-straddling institutions include Landscape Conservation Cooperatives, which involve partnerships between federal agencies like the U.S. Fish and Wildlife Service, the U.S. Forest Service, the Bureau of Land Management, and the Bureau of Reclamation, as well as states, tribes, and private parties, in order to get a handle on key impacts affecting the system as a whole.

Another boundary-crossing institution is the Northeast Regional Planning Body for ocean planning, which engages the six New England states, a number of tribes, a number of federal agencies, and the New England Fishery Management Council. All of those entities deal with activities that affect the resources of the ocean in this area. None of them alone can manage the ocean's resources effectively, but together they are more effective than the sum of their parts.

We don't always need new institutions. We may just need new ways of engaging across institutional boundaries. For example, the Channel Islands National Marine Sanctuary is managed by the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Sanctuaries office. But the sanctuaries office consciously and

64. 42 U.S.C. §§7401-7671q; ELR Stat. CAA §§101-618.
65. 16 U.S.C. §§1531-1544; ELR Stat. ESA §§2-18.



deliberately works with the National Park Service, other parts of NOAA, California's Natural Resources Agency, California's Department of Fish and Wildlife, the State Lands Commission, The Nature Conservancy, the U.S. Coast Guard, and Sea Grant.

So, one thing we need in the modern world of natural resource management is the ability to work across boundaries in a way that didn't seem necessary when we created our resource management institutions.

The second uncomfortable reality we have to confront is that the U.S. Congress is not likely to provide much help as we move to the future of natural resource management.

I do want to note that natural resource law at the federal level has a very long history. Congress has been busy, from 150 years ago to about 40 years ago, creating natural resource programs and institutions. Since I live in California, I have to point out that the Yosemite Grant Act[66] preceded the setting aside of Yellowstone as a national park, representing perhaps the first congressional effort at landscape preservation. Yosemite Valley was conveyed to the state of California on the understanding that it would be permanently protected for public use and recreation. California later decided it didn't want to pay the costs of that protection, so it returned the valley to federal ownership.

Congressional engagement continued in the late 19th and early 20th century, producing numerous federal statutes protecting natural resources and wildlife. There was another wave of legislation in the 1970s, in parallel with the most active era for pollution legislation. We haven't had much coming out of Congress since then other than a little tweaking around the edges. We did get the National Wildlife Refuge System Improvement Act in 1997.[67] Since then, we've had some important amendments to the Magnuson-Stevens Act,[68] and some small modifications to the Lacey Act.[69] But for decades now, Congress has been more or less out of the business of helping managers by creating new paradigms or programs for managing our natural resources.

The executive branch can take up some of the slack, filling some of the gaps left by Congress. President Barack Obama, for example, faced with a Congress that had failed to declare an ocean policy despite more than a decade of efforts by legislators, blue-ribbon commissions, and nongovernmental organizations (NGOs), acted on his own. He signed an executive order that created the National Ocean Policy.[70] Among other things, that Executive Order laid the foundation for ocean planning in the Northeast and for the creation of the Northeast Regional Planning Body.

States can also fill some gaps, but they face real boundary-crossing difficulties. Consider, for example, California's network of marine protected areas, which was created

66. Yosemite Grant Act, Pub. L. No. 159, 13 Stat. 325 (1864).

67. National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57 (1997).

68. The Sustainable Fisheries Act of 1996, Pub. L. No. 104-297, and the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, both strengthened the conservation provisions of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§1801-1884.

69. The Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234 (2008), expanded the Lacey Act's import prohibitions to a broader range of plants and plant products.

70. Exec. Order No. 13547, 3 C.F.R. §121 (2010).

years before the federal government launched a formal ocean policy. Because California's boundaries only extend three miles seaward from its coast, state preserves can't be the only tool for managing ocean resources.

The third uncomfortable reality we're facing may be the most challenging. We are, with respect to natural resource management, facing the end of history—or as some have called it, the "no-analog" world.[71] Most of our key conservation goals, both those dating to the 19th century and those that are more recent, are grounded in history. Our resource management laws tell us to restore, maintain, preserve, and conserve unimpaired our various resources. All of these phrases are directing managers to take a snapshot of history and make sure that's what we have for the future.

The principle that we should not change or should restore the world as we found it (at some designated point in time) is the principle behind a lot of our natural resource laws. Of course, history has always been an unreliable goal, one which has tended to hide the true dynamism of nature. The westslope cutthroat trout (WCT), a species that was rejected for listing under the ESA in 2000 and again in 2003, provides a good example of this concept. The WCT readily hybridizes with introduced, non-native trout. That hybridization is, in one sense, entirely natural; when the species co-exist, they can and do interbreed. But that interbreeding violates history, turning the fish into something they didn't used to be. It's not conceptually clear whether hybridized fish should be considered the same entity as "pure" or historic WCT for ESA purposes, or whether the ESA should be invoked to protect the historic species against hybridization.

As that example shows, there have always been problems with history as a conservation goal, but change used to be slow enough that we could deal with it. History was a workable goal in most contexts. It's also proved to be a politically useful goal, because it appears to offer an objective basis for deciding what and how much to save. Appeals to history obviate the need to argue about what we value or why. We just have to point to what was here when we arrived, or first decided to conserve. Today, however, we are faced with very rapid change. Saving historic nature is, if not actually impossible, at the very least far more problematic than we used to think.

If we can't use history as a viable goal, what do we do? Are there principles we can look to? If we try to cling to history in today's rapidly changing world, we may end up with some pretty crazy resource management ideas. For example, should we transport polar bears to Antarctica if they're not going to do well in the Arctic anymore? One obvious response to that suggestion is to worry about the penguins that the polar bears might learn to eat, or more generally, to worry about the impacts of moving species we want to save on the receiving ecosystems. But if we let history go, are there principles we might look to that produce somewhat less dizzying goals? I think the answer is yes, but it's complicated and requires a lot of creative thinking.

One thing we need to think hard about is what we want from nature and why. There are at least a couple of visions of nature that appeal to us in different ways. One is the idea of garden nature, which imagines people as the architects of all of nature across the world. That's a vision articulated by Emma Marris in her book *Rambunctious Garden: Saving Nature in a Post-Wild World*.[72] If the world around us cannot be kept like it was when we got here, perhaps we should explicitly take charge of all of nature. Indeed, we currently do take charge of nature in some pretty aggressive ways. For example, some wolves are collared so that managers can track them, and move them if they get into an area where we've decided they shouldn't be. Indeed, some collars allow remote injection of a tranquilizer, so if a wolf gets out of line, its managers can turn it off quickly, and from a distance.

A different version of nature is featured in Carolyn Merchant's book *Autonomous Nature: Problems of Prediction and Control From Ancient Times to the Scientific Revolution*.[73] I would call her vision "wild nature," nature that is unpredictable, surprising, that we recognize we either cannot or should not control. The representation of that view is an uncollared wolf, one that is not managed by human beings directly and in real time. I think both of those visions of nature can and should be part of our natural resource goals in the future.

There are also different visions of humanity that we ought to incorporate more directly into resource conservation. One is that people are the stewards of the world. That goes along with garden nature. We are in charge, but we should be responsible about it. Another is that we're the stewards of ourselves, and we should limit the effects of our intervention. I think we're going to need a portfolio of strategies. Perhaps the most difficult to incorporate is wild autonomous nature, where we consciously let go, even at the cost of perhaps losing some things that we do in fact care about.

To sum up, if we look at the three challenges I've articulated together, the people who are implementing natural resource law today and in the future need three things. They need creativity, because they're going to have to come up with non-traditional ways of doing things. They need courage, because they likely will have to implement those new approaches without explicit congressional blessing. In our hyperpolarized world, that suggests they will face challenges, in both judicial and political fora. Finally, they will need persistence and patience, which the Chicago Cub's victory in the 2016 World Series reminded us, can sometimes pay off after a very long time.

In a world of two-year and four-year election cycles, though, we have to acknowledge that it can be incredibly

71. The future created by climate change has been called "no-analog" because many aspects of it, including many ecological communities, are expected to be novel or to fall well outside the historic range of variability.

72. Emma Marris, Rambunctious Garden: Saving Nature in a Post-Wild World (2013).

73. Carolyn Merchant, Nature: Problems of Prediction and Control From Ancient Times to the Scientific Revolution (2015).

difficult to exercise creativity, courage, or, perhaps especially, persistence. Our civil servants, and their political appointee bosses, will need the help of academics of many different stripes, and the encouragement of the public if they are to succeed.

Charles Wilkinson: I am honored to speak at this event, and it is particularly an honor because my son is an assistant U.S. attorney in the Western District of Washington. I am very proud of him. He reminds me that one of the greatest contributions of this department is to provide the purest and most vivid image of what being an officer of the court should be. That is what DOJ attorneys do in the field, day in and day out. I am uplifted by this image and feel inspired to be here in front of this audience.

My topic is the place of Indian tribes in the future of natural resources law and policy. To begin, and for comparison, two generations ago, Indian tribes essentially had no role at all in natural resources law and policy. From our perspective today, we can see that tribes have become leaders or co-leaders in many major events in this field. Tribes now manage, and manage well, large segments of land. They regularly participate, often with other governments and parties, in complex land and resource management, research, policymaking, litigation, and advocacy.

At the center of the modern tribal revival is the groundbreaking case *United States v. Washington*.[74] Although the Supreme Court affirmed the lower court opinion in 1979, the case is commonly referred to as the Boldt Decision, because of District Judge George Hugo Boldt, the judge who authored this great ruling. He handed down his remarkable decision on February 12, 1974, chosen because it was President Abraham Lincoln's birthday.

Leading up to the Boldt Decision, the so-called "Fish Wars" in the Pacific Northwest had become a major issue in northern California, Oregon, Washington, western Idaho, and western Montana. Those states had been cracking down on Indian fishers, claiming that the treaties were invalid and that the tribal fishermen were violating state law. There were arrests and beatings. The tribes responded with marches and fish-ins. The violence continued—it was ugly.

In the mid-1960s, Oregon tribes approached Sid Lezak, the U.S. attorney for Oregon, and asked him to bring a case on behalf of the tribes, since the United States is a trustee for the tribes. Lezak came back to this very same DOJ building and then went to the White House to obtain authority to file suit against Oregon. *United States v. Oregon* resulted in a district court holding that treaties of the 1850s granted the tribes the right to take a "fair share" of the salmon runs.[75] In the tribes' minds, this was progress, a very good start, but they wanted the term "fair share" expressed numerically.

So, the conflict shifted to Washington, where the fish wars were much more contentious than in neighboring Oregon. The tribes in Washington approached Stan Pitkin, U.S. attorney for the state of Washington, an appointee of President Richard Nixon. He was a young man and an activist. Pitkin also made a visit to this building and the White House, and got approval to bring *United States v. Washington*. Individual tribes intervened in these cases, and, as remains tradition today, the tribes and DOJ worked arm-in-arm.

United States v. Washington went to trial. The trial lasted six weeks in front of Judge Boldt, a tough but fair judge. He immersed himself in a mountain of evidence and argument presented over those six weeks.

Judge Boldt handed down a comprehensive decision exhaustive in both facts and law. He ruled that treaty language saying that tribal fisherman had the right to take fish "in common with" the residents of the territory meant the tribes could take 50% of the harvestable runs. He also held that the treaties continued to be fully valid, and that the tribes were sovereign governments who could manage the harvesting practices of their own citizens. This extended even beyond reservation boundaries, because the treaties specifically provided for off-reservation fishing rights on historic fishing grounds.

The importance of this 50% share granted to tribal people—who previously harvested less than 5% of the runs in the face of state crackdowns—is obvious. But the decision is larger even than that, since it caused a massive relocation of a northwest Washington economy that at the time was commonly referred to as being based on "timber, salmon, and Boeing." Judge Boldt also provided for continuing jurisdiction over the case, which continues today. Now, 42 years after the decision, disputes over marine resources in the region are still heard by the same district court and decided based on Judge Boldt's precedent.

On an even larger scale, the Boldt Decision rekindled the tribes' passion to be sovereigns and run their own governments. Chief Justice John Marshall had long ago found tribes to be sovereigns: one of the three sources of sovereignty in our constitutional system. Yet, tribes had not historically been given a chance to exercise that sovereignty to manage Indian country.

Importantly for the birth and development of modern tribal governments, on-the-ground application of the Boldt Decision required codes, courts, enforcement capabilities, plans, and scientists. The tribes in the Northwest leapt on this opportunity to manage. Within a matter of three or four years, the tribes had their own scientific staffs. Federal money helped support these new tribal institutions by virtue of the trust relationship between the federal government and the tribes.

Buoyed by successes in this area of resource management, tribes expanded other areas of government and developed other administrative agencies and programs. Now, the majority of tribes have hundreds of tribal government employees—not including gaming or other enterprises, but strictly governmental. Indeed, many tribes have governments larger than the nearby counties.

74. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).
75. United States v. Oregon, 302 F. Supp. 899 (D. Or. 1969).

The historic, cultural commitment of Indian people to the natural world is not some romantic construct, but a working philosophy and worldview that translates into persistent commitment of tribal resources to natural resources and environmental concerns.

Over the four decades of continuing jurisdiction in the Boldt Decision, the tribes have steadily increased the scope of their harvesting and management. Court rulings have expanded the reach of the original decision to extend beyond salmon, and it now includes essentially all marine resources and encompasses, for example, halibut, clams, oysters, and crabs. In fact, Dungeness crabs are now considered a more valuable commercial resource in the Northwest than salmon. Now, in both law and actual, ongoing management, tribes are considered co-managers of the marine resources of the Pacific Northwest along with the federal agencies and the states.

Tribes are also deeply involved in dam removal in the Pacific Northwest. The Lower Elwha Klallam Tribe started a movement to decommission two major dams on the Elwha River, which flows north out of Olympic National Park into the Strait of San Juan de Fuca. Historically, Chinook salmon runs with fish larger than 100 pounds charged up into that rich habitat. Then, in the early 1900s, the dams were constructed and choked off the runs. Those dams pained the Lower Elwha Klallam people, but their stories of the original runs stayed alive.

Both of those dams have since come out—the first major dam removals in the United States. The next big dam to come out was on the White Salmon River in Washington. The Yakama Nation was the leader in achieving this goal. Also, there is a major restoration effort on the Klamath River, a great salmon river that has its mouth in northern California, but that winds through Oregon to the Pacific Ocean.

But the Klamath is a complicated watershed. Four major dams on the river have had an enormous impact on the salmon. They used to get up into Oregon, but they don't anymore. Their numbers are way down in California. Those four dams are slated to come out, and there is an elaborate and excellent restoration plan, now pending in Congress, that will accompany the dam removal. This would be the largest dam removal project in global history.

There are many other instances where tribes have recorded notable achievements in the area of resource management. They have procured legislation in Congress. In most of the environmental statutes, tribes are treated as states, and so they have the same responsibilities as state agencies in terms of regulating pollution of air and water. And gradually, because this is a complicated process, tribes have taken over the regulation and management of their reservation lands and resources after more than a century of Bureau of Indian Affairs control.

Tribes are also accumulating land, so they are not only doing more to manage land, they are also managing more of it. In the early 1960s, the all-time low point for tribal sovereignty and land ownership, the tribes in the lower 48 states had 50 million acres. They have since added a net of 8 million acres. That is land almost twice the size of the state of Massachusetts that has been added to reservations. There is a perception that tribes are losing land, but they're not. They're gaining it. Today, Indian country is comprised of about 66 million acres, which is nearly the size of Oregon.

To conclude, DOJ has carefully developed an approach toward Indian natural resource matters that recognizes the legitimacy of tribal sovereignty and the trust relationship between the United States and the tribes. This is absolutely the right approach; the idea that tribes are sovereigns capable of managing their own resources and of participating in comprehensive, intergovernmental natural resources policy, is here to stay. And it will mean better health for the land, rivers, and air as well.

Dave Owen: For me, too, it's an honor to be here. It's also a daunting task to tell you all about the future of environmental law. The last time I gave a talk at DOJ, I realized partway through that basically every case cited in the paper I was presenting had been litigated by somebody in the room. At that point, I became very nervous.

I'm going to focus a little more narrowly than the whole future of environmental and natural resources law, and will instead talk about lessons drawn from some of my own recent research. The core conclusion that emerges from that research is that some of the old debates of environmental and natural resources law are leading us astray, and that it's important for you, as litigators, to do something about that.

Which classic debates am I referring to? You know them well. One is the classic debate between prescriptive regulatory approaches and market-based, or incentive-based, systems. This is a debate some people refer to as markets versus command-and-control. Then the other debate, which is arguably even more classic, involves federalism.

These debates have always been somewhat ideological. That's partly why we love them so much, and why we can't keep away from them. Lawyers love a good ideological fight. You all know that very well, of course, with federalism. Expressing a conventional view, Supreme Court Justice Lewis F. Powell Jr. once remarked that "federal overreaching . . . undermines the constitutionally mandated balance of power . . ., a balance designed to protect our fundamental liberties."[76] Clearly to Justice Powell, as to so many other legal thinkers, federalism is not just about ensuring competent governance.

The same is true with the debate about incentive-based regulation. This debate was never just about finding an efficient way to protect the environment. Instead, in the eyes of many academics, this debate has always been at least partly about liberty and freedom. Take, for example, this quote from a prominent academic advocate of incentive-based regulation: "The same problems that have plagued

76. Garcia v. San Antonio Transit Auth., 469 U.S. 528, 572 (1985) (Powell, J., dissenting).

the Soviet effort at central management of the economy hamper American efforts to plan selected aspects of the economy through centralized regulations."[77] The ideologically loaded analogy is hardly accidental.

Those are the terms of the classic debates. But for the past several years, I have been researching streams, wetlands, and their regulatory protection by the U.S. Army Corps of Engineers (the Corps)—and, to a lesser extent, the U.S. Environmental Protection Agency (EPA)—under CWA §404. From that research, I've drawn lessons on many subjects, including where the cutting edges of these federalism and markets-versus-prescriptive regulation debates currently ought to lie.

I'll start with federalism. The §404 program, as many of you know, is not really a traditional cooperative federalism program. It does allow for states to assume some delegated authority, but only two states—Michigan and New Jersey—have done that, and only to a limited extent. For the most part, it is a program implemented by the federal government.

In many people's view, that conjures up images of Washington-centered, top-down, procrustean, one-size-fits-all solutions coming from Washington, D.C. After all, the conventional wisdom about federal employees is perhaps best summarized in another quote from Justice Powell: "These [federal] employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they are hardly as accessible and responsive as those who occupy analogous positions in state and local governments."[78] This is just one statement from one judge, but prominent judges, politicians, and law professors say things like this all the time.

The reality is quite different. The §404 program actually has only a very tiny number of staff who work here in Washington. Most of the program's staff work at division, district, and field offices, which are spread out across the country. This means that many Corps staff members are working in places where they live, where they're familiar with the local politics, and where they're embedded in their communities. Often, they are working in places where they grew up and have been living for years.

That matters in a number of different ways. For example, a staff member in the Pacific Northwest told me how much of a difference it made that she had grown up around the tribal issues that Charles spoke about, and that she understood them more than just professionally. Another staff member, a Corps district chief in the eastern United States, explained much of my research in a single paragraph. Describing the importance of working in an area where she had grown up, she said:

> When you deal with the mom-and-pop applications, it certainly matters, because a lot of times we help them with site drawings and things like that. It allows a built-in understanding and empathy, because you know the culture, you were raised there, and know the challenges that people are having. You want to help them as much as you can.

We routinely credit local, and sometimes state, officials with that level of understanding, but those are the words of a federal employee.

The geographic distribution of federal employees matters in ways that go beyond just understanding local conditions. I heard, over and over, about ways in which the §404 program is tailored to local needs, and in which states are actively involved in that tailoring. To provide one important example, state and federal staff routinely work together to develop consistent permitting requirements, and sometimes even to create joint permits. To provide another example, district and field staff from the Corps routinely work with their state counterparts (and with other federal agency staff) on interagency review teams, which routinely meet to review mitigation banking proposals. Often, that means putting on boots and getting out, together, to go walk around in the mud.

When you argue a case, I'm fairly confident that a group of people standing in their blue jeans next to a swamp is not what the judge pictures when he thinks about the present or future of federalism. But that is the real world. And it is a good real world, and one that we want to nurture and grow.

As that last example suggests, my research on the Corps also required attention to environmental trading systems. Compensatory mitigation is now a very big part of the §404 program. In a nutshell, the program allows developers to destroy wetlands, if they can't avoid or minimize that destruction, so long as you compensate for it by protecting, enhancing, constructing, or restoring wetlands someplace else.

In practice, much of this mitigation is done by mitigation banks, which are private, entrepreneurial, often for-profit companies that generally restore wetlands or streams and then sell credits on an open market. Despite a very rocky beginning, the system increasingly seems to be one that works. It's by no means perfect, but independent studies from entities I trust, like the Environmental Law Institute, have found that these mitigation banks tend to do a better job with mitigation than any of the other entities involved. It is also big business. Dozens of banks are operating in the state of Florida alone, and millions of dollars are changing hands.

One might look at this situation and think it's the triumph of markets over the bad, old, leftist, 1970s, centrist regulatory systems of the past. But part of the reason that mitigation banking works as well as it does is that banks are very heavily regulated—including regulation by entities like the interagency review team I mentioned earlier. Again, the old debate doesn't really describe what's going on. In the real world, we're dealing with hybrids.

These trends, it turns out, are highly intertwined. I'll give you two examples.

77. Richard B. Stewart, *Madison's Nightmare*, 57 U. Chi. L. Rev. 335, 343 (1990).

78. *Garcia*, 469 U.S. at 576-77 (Powell, J., dissenting).

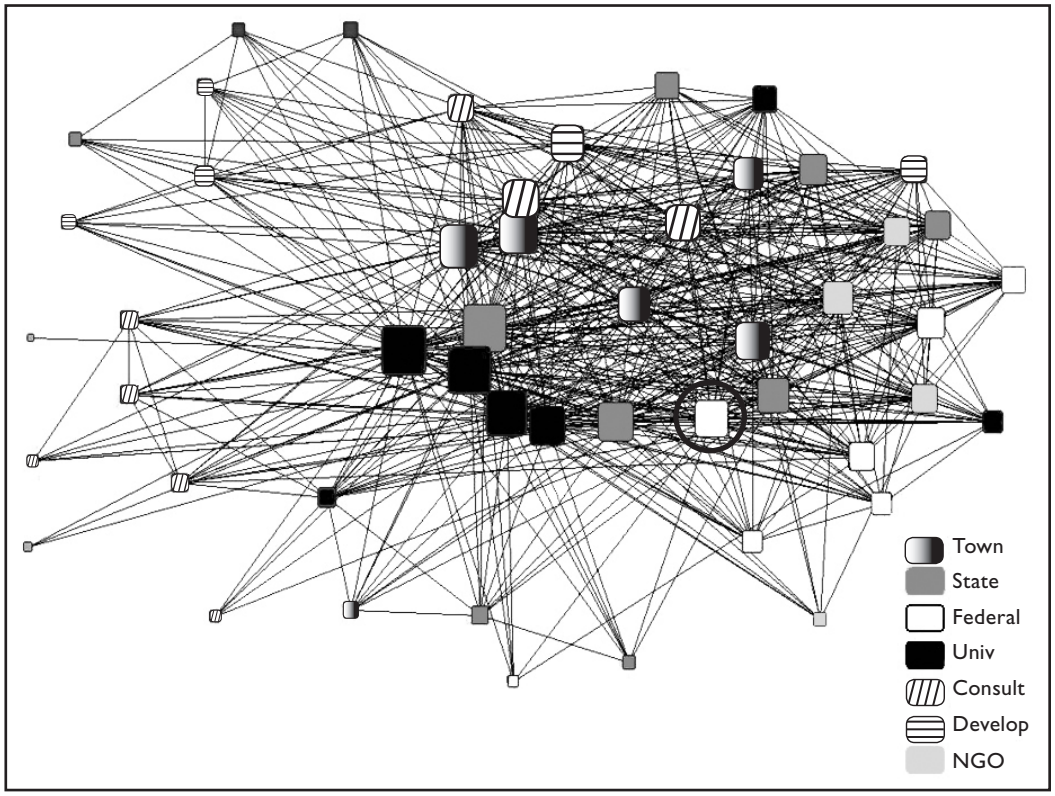
The first example involves the emergence of compensatory mitigation for streams. About 20 years ago, mitigation for streams didn't really happen. Compensatory mitigation was all about wetlands. If your project involved impacting streams, you could get a permit for those fills. But no regulator was going to ask you to compensate for them. In the late 1990s, at a place called Hanes Mall Boulevard in Winston-Salem, North Carolina, all that began to change. At that time, North Carolina state environmental staff were worried about the ways in which development in the state was impacting streams, but they weren't quite sure what to do about it. They didn't have state-law levers to stop those impacts. They also didn't want to stop development. That wasn't politically palatable, and they wanted economic growth just like anybody else does.

The solution they turned to was compensatory mitigation. Legally, they invoked CWA §401, which allows state agencies to impose conditions on actions subject to federal discharge permits. The state regulators used their §401 authority to require that any §404 permit for stream impacts in North Carolina include requirements for compensatory mitigation. Initially, as some state employees put it, the Corps was a little bit bemused, and EPA was a little bit puzzled. Eventually, both agencies came to support compensatory mitigation for streams and the practice has become increasingly prevalent nationwide.

The way in which this happened is interesting. The spread of stream mitigation was not driven by top-down dictates from Washington, D.C., even though the §404 program is a federal program implemented by federal agencies. Instead, the practice spread by a process of osmosis from regional federal office to regional federal office, and from state to state—or often, through both federal and state offices working together. In other words, complex federalism networks transformed an incentive-based, but heavily regulated, system of environmental protection, from a localized innovation into a national trend. And that is federalism and incentive-based environmental regulation in the real world.

The second example involves vernal pools in my former home state of Maine. Several years ago, researchers at the University of Maine helped launch an initiative to allow local governments to oversee wetlands trading for vernal pools within their boundaries. The local governments wanted to allow increased filling of vernal pools in their core growth areas. These also happened to be areas where, because of surrounding development, the vernal pools often had very little biological value. In return for allowing streamlined development in these growth areas, local governments would increase protection of vernal pools in the less-developed areas, where the pools often had much more biological value.

The key legal mechanism for accomplishing this was something known as a special area management permit (SAMP), which delegates authority from the Corps and from the Maine Department of Environmental Protection to local governments. But it was very much a team process (and, I should say, a team process in which I was a very minor participant), as you can see from this figure.[79] The chart is busy, but the basic concepts are simple. Each square on the chart is a person. Each line on the chart is a connection; it indicates that two people have developed a professional relationship. The size of the squares indicates the number of other people within this network that each individual person knows.



I've circled one square, and that's Ruth. She's a district office staff member who played a very key role in this process. As you can see here, Ruth is not an isolated bureaucrat

79. This figure originally appeared in Vanessa R. Levesque et al., *Turning Contention Into Collaboration: Engaging Power, Trust, and Learning in Collaborative Networks*, 30 Soc'y & Nat. Resources 245, 251 (2016). I thank Vanessa Levesque for permission to reuse the figure.

in Washington. She is deeply embedded in a network of state and local government staff, private-sector employees, and university researchers, all working together to help a heavily-regulated, market-based, policy instrument succeed. This, again, is what real-world federalism and incentive-based regulation look like in the real world.

So, why does this matter to you? As promising as some of these initiatives are, they have their opponents, and their opponents have lawyers. And a classic lawyer's move is to take all of the messy complexity of the real world and shoehorn it into an objectionable story, and then use that objectionable story to knock some promising initiative down. In other words, we cram a complex reality into a simplified ideological straitjacket, and then we complain about the way that straitjacket looks.

You all know this tactic. You often confront it. And you need to respond. Sometimes, an important part of the response is just to describe what is really going on, to let the judges before whom you appear, and the political staff to whom you talk, know that the world is much more interesting than our old rhetoric and our old debates would suggest. Sometimes, we need reminders that our ideological straitjackets just don't fit. This is one of those times. Beyond the caricatures with which legal debates often start and end, there are far more positive and functional versions of federalism, and of incentive-based regulation, at play in the world. If you can explain that effectively, then you, as litigators, can help secure a more positive future for environmental and natural resources law.

Andy Mergen: I'll start with a question for Holly on the distinction between the garden and the wild. Based on your experience as a natural resources teacher, how do you think our statutes break down in terms of whether we're dealing with a garden or the wild? I'll give you an example of what I mean. We frequently defend U.S. Forest Service (the Service) decisions to cut down trees because of the fire risk related to beetle infestation.

Sometimes, opponents will say, beetles are part of the natural landscape, too, and it's disrespecting the Service's mission in terms of honoring the wild. I wonder what you think about this, having suggested that we need a balance, that it's not an all-or-none paradigm. How do you think our laws break down in terms of honoring that balance?

Holly Doremus: That's a great question. I do think that we value both garden nature and wild nature. I would say the Service has a great deal of discretion in how it balances those things. It clearly is expected to garden, to some extent, to grow trees for harvest, and that's always been part of its mission. That's becoming quite complicated not just in terms of beetles, but in terms of species of trees, which are suitable in places now where they didn't used to be, and vice versa.

Other statutes, such as the ESA, lead us to think of wild nature. But they may now be seen as about gardening, as well. I think this is one of the things we're going to have to sort out, because things that are being proposed in order to conserve endangered species include moving them to places where they've never been, or genetically modifying coral to encourage them to be more resistant to high temperatures. That's not autonomous nature. That's us gardening the wild, if you will.

And I think we don't have a clear sense either of where the boundary lies between wild and garden nature. Plants and animals can be domesticated to different extents. I think we don't yet have a clear sense of which aspects of wildness are most important, or why. I think if you consider a law like the ESA, we're trying to protect a range of values. Some of those might call for gardening in particular circumstances. Others might be offended by gardening. So, I think that's something that's going to take a while to work out.

The national parks are another place where we are doing gardening these days, although one might think that conserving wildlife unimpaired is all about the wild in these areas. Surely an issue that we will have to deal with over the next couple of decades is how we serve the different values provided by garden nature and wild nature, and where we focus on one or the other. Our current statutes don't provide much guidance on those questions, but may inhibit creativity.

Audience Member: This question is for Dave. With regard to compensatory mitigation and off-site mitigation, one of the stories we hear from our opponents now is that it's really just an attempt by big government to grab land that it wants by putting conditions on permits, right? And that it's a taking. I'm wondering if after the *Koontz* decision,[80] which said that it can be a taking if there's not a sufficient relation, it has become more difficult to do that from what you've seen. And what's a good counter-story that one can tell to rebut that?

Dave Owen: I haven't looked enough to know the impact of *Koontz* on the ground, but it seems to me like we're going to need some more decisions before any of us really understands *Koontz*. It's a hard decision to make much sense of, but, with that said, it hasn't come up in conversations that I've had.

I think if we look back to the impact of *Nollan*[81] and *Dolan*,[82] which are sort of the predecessors to *Koontz*, they didn't stop compensatory mitigation. All that they seemed to have done is convince people to look a little bit more carefully at the causal relationships between what you're compensating for and what the compensation actually is—the nexus and the proportionality.

In any good compensatory mitigation program, you would be looking at those things anyway. So, I guess I'm making a prediction here that what you're hearing is sort of ideological blustering that, in most cases, is not going to matter very much. But that's a very speculative answer.

80. Koontz v. St. John's River Water Management, 570 U.S. 2588, 43 ELR 20140 (2013).
81. Nollan v. California Coastal Commission, 483 U.S. 825, 17 ELR 20918 (1987).
82. Dolan v. City of Tigard, 512 U.S. 374, 24 ELR 21083 (1994).

The Future of Environmental Enforcement

John Cruden (moderator) is the former Assistant Attorney General of the Environment and Natural Resources Division at the U.S. Department of Justice.
Joel Mintz is a Professor at Shepard Broad College of Law at Nova Southeastern University.
Michael Vandenbergh is the David Daniels Allen Distinguished Chair of Law at Vanderbilt University.
Robert Percival is the Robert Stanton Professor of Law at the University of Maryland.

John Cruden: Our third and final panel is on environmental enforcement. We've brought together three unique scholars with three different perspectives to talk about three different legal developments.

Joel Mintz is a professor at Shepard Broad College of Law. He's written the defining books on environmental enforcement and has interviewed more people involved in environmental enforcement than anyone else in the academic environment.

Michael Vandenbergh is the David Daniels Allen Distinguished Chair of Law at Vanderbilt and is the co-director of their energy and environmental program. He has also been a successful practitioner and chief of staff of the U.S. Environmental Protection Agency (EPA). Michael is probably the foremost scholar in the nation right now on the concept of private environmental governance.

Robert Percival is the Robert Stanton Professor of Law at the University of Maryland and the director of their environmental program. He has written the nation's leading casebook on environmental law. Robert is a scholar of enormous reputation, but he has also been spending a lot of time in China trying to bring that country into the rule of law.

Some of you have heard me describe the world of environmental enforcement like a gigantic triangle of activity—criminal enforcement is at the top, and next would be federal civil judicial cases. But the heart of the triangle, which is cooperative federalism, would be state, federal, and citizen enforcement. The triangle now needs to add another dimension, which is the concept of private governance. It is a great privilege to call on Professor Vandenbergh to lead our first discussion.

Michael Vandenbergh: Thank you, John. It is a real honor to be here. The fact that you all are able to be here and that John is helping us think about the future of environmental law is a real testament to the strength of the U.S. Department of Justice (DOJ) and to its management.

The first panel discussion, in addition to being really vibrant, was a remarkably strong setup for what I want to talk about. The discussion during the first panel centered around one core question: what can government do? I agree that's exactly the right question if you're an administrative law scholar. And it was exactly the right question if you were an environmental lawyer in 1970, or 1980, or even 1990. But it's not the right question anymore if you are an environmental lawyer. Today, the right question is: what can any institution do?

I want to give you a sense of what's going on outside of government that is relevant to government environmental lawyers. Nothing in my remarks is designed to suggest that public environmental law and public environmental law enforcement aren't essential. In addition to my work on private governance, I have spent more than a decade researching corporate and individual compliance with public environmental laws, working with economists, sociologists, and political scientists. Despite all of this work, I have found nothing that is more insightful than a comment made by Chester Bowles, the head of the Office of Price Administration during the Franklin D. Roosevelt Administration. He essentially said, 2% or 3% of the regulated community are inherently dishonest and are going to do the wrong thing if they can get away with it, 20% are going to do the right thing no matter what, and the remaining 75% will act based on what you do to that 2% to 3%.

My first question is: why is someone who ran the Office of Price Administration not able to have his percentages add up to 100%? But put that aside for a moment. I believe that government and public environmental laws are incredibly important, and the enforcement of these laws is essential, particularly when directed against that 2% to 3%.

In the past, we have relied on the 20% to do the right thing when it comes to the environment. We looked to government to take enforcement actions against the 2% or 3% in order to drive compliance by the remaining 75%, but what has begun to happen in the past two decades is that the 20% is having a greater effect on the 75%. This is occurring through new developments in the marketplace of ideas and the actual marketplace itself.

Let's begin examining the growing role of private governance by asking a question: which national or subnational governmental entity made the following announcement? "We're announcing a goal to eliminate 20 million metric tons of greenhouse gas emissions." It's actually a trick question. It wasn't any kind of governmental entity. It was Walmart. In conjunction with the Environmental Defense Fund, Walmart announced that it was making those emissions reductions from its supply chain, including its supply chain in China, where it has more than 10,000 suppliers. Did it achieve those reductions? If a recent announcement is correct, the initiative achieved roughly 28 million metric

tons in emissions reductions. To me, that's a great example of private environmental governance.

Of course, public environmental laws are incredibly important, as we heard from the prior panels. But here's an important phenomenon: We added more than a dozen major pollution control statutes between 1970 and 1990, but since then, we've only had one. We've had a quarter-century without a major statutory reform, with the exception of the Toxic Substances Control Act (TSCA) Amendments in the summer of 2016.[83] We live in a different world now than when most of us went to law school. When I was taught environmental law, it was a subfield of administrative law. My argument to you is that this is no longer a full description of what environmental law is.

So, what's happened? What's filled that gap? There are now more than 400 eco-labels, and many of them are private eco-labels. In a traditional view of environmental law, the actor is some form of government at the international, national, or subnational level. And the action is an international agreement, a law, a regulation, etc.

I want to argue that private governance is growing more influential over time and is something you all should be accounting for. Who are the actors? They might be corporations. They might be advocacy groups. They might be an emerging new form of standards and certification organization, or they might be civic groups or religious organizations.

What are the actions? They are not public laws or regulations, but various forms of initiatives. I use the term private initiatives because there isn't really a good vocabulary to describe these activities. But private organizations are doing the traditionally governmental things—reducing negative externalities, managing common pool resources, affecting the distribution of environmental amenities. So, they are playing traditional governmental roles, but they involve private actors using private tools.

I also want to talk about what private governance is not. It's not public regulation of private markets. So, I'm not talking about U.S. Securities and Exchange Commission disclosure and things of that nature. It's not public creation of private market mechanisms like Title IV of the 1990 Clean Air Act Amendments,[84] which created a market in sulfur dioxide emissions. It's not common-law torts. Common-law tort actions rely on a strong government role to enable private actors to bring actions, including the use of public courts. It's not the privatization of public services like private prisons and things of that nature. It's also not explicit delegation of standard-setting authority. Nor is it hybrid programs, such as any of the programs that have been developed over time at EPA, the U.S. Department of Energy, and other agencies. Nor is it the form of public-private hybrid that arises when a government agency negotiates a permit or compliance agreement with a private entity.

So, what's left? What's going on out there, and why does it matter to you? Roughly 10% of all the fish caught for human consumption in the world today are caught under a sustainability standard established by a private organization formed after an effort to adopt an international agreement was unsuccessful. Instead, private companies and nongovernmental organizations (NGOs) got together because they had a common interest: to set a sustainability standard for fisheries. Likewise, 15% of all the temperate forests in the world are similarly regulated, and more than 20% of all the bananas.

I could go through product after product and sector after sector in this way. For example, private banks representing roughly 90% of all the project finance lending around the world have signed up for private standards. These "Equator Principles" look a lot like the National Environmental Policy Act[85] in terms of their environmental assessment and disclosure requirements regarding the environmental effects of project finance investments around the world. Several years ago, I looked at the 10 largest firms in 8 sectors ranging from industrial- to consumer-focused sectors. What I found is that more than one-half of the firms in those sectors were imposing environmental supply-chain contract requirements on their suppliers. In many cases, these private initiatives were not designed to induce firms to simply comply with public environmental law, they're adding some additional requirement on top of the public requirements.

In the toxics area, there was a recent comment from an industry trade leader stating, "[T]he loss of public confidence [in the public scheme means] we're going to increasingly have retailers that are regulators, like Walmart and Target."[86] I would argue that, in fact, the increasing role of Target, Walmart, and other corporations and advocacy groups in regulating toxics actually helped contribute to the 2016 reform of TSCA. There's an interplay that goes on here, and in some cases, private governance stimulates public governance.

Similarly, investment funds worth more than $100 trillion are held by investors who are insisting that the companies they invest in disclose their carbon emissions. This creates pressure for emissions reductions, and this pressure sometimes gets transferred through supply-chain contracting requirements.

These private governance activities also affect what lawyers do on a day-to-day basis. For example, I looked at the 50 largest law firms in the country in terms of profits per partner and found that almost all of them are engaging in a private environmental transactional practice of some sort. More money is spent on private environmental investigations every year than the entire EPA enforcement budget.

Let's take a look at a couple of examples of emerging new areas of private environmental governance. Informa-

83. Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016); 15 U.S.C. §§2601-2629 (1976).
84. Pub. L. No. 101-549, 104 Stat. 2468 (1990).
85. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
86. *Upcoming Lautenberg Bill Could Be Key Test for TSCA Reform This Congress*, Inside EPA Weekly Report, Apr. 1, 2011, at 6 (quoting Ernie Rosenberg of the American Cleaning Institute).

tion is much easier to find now and it is driving some forms of private governance. So, we see, for example, that a firm like GoodGuide produces ratings on more than 250,000 products that consumers can access. We then see that organizations like GoodGuide are coordinating with Target to impose supply-chain requirements through their vast number of suppliers. Walmart and other firms are doing similar things.

What I'm hearing from practicing lawyers is that the standard for being able to sell a product in some cases is not based on a government regulatory standard, but is based on whether or not you can sell it to Walmart or Target. And that, in turn, depends on whether you comply with their chemical regulatory requirements—again, not displacing government, but acting alongside it.

Let's turn to internal corporate carbon prices. More than 400 companies already have adopted them, and more than 400 are planning to do so. Once they adopt an internal corporate carbon price, their internal planning will account for the carbon impact of their decisions, and in some cases, that can be expected to influence their corporate behavior.

This is particularly important in southeastern states that are in many cases litigating against the Clean Power Plan. Major companies like Google are going into southeastern states and are saying, "We will locate in your state, but we want low-carbon power." So, now we have industrial buyers driving interest in renewable power, and, in some cases, organizing with other companies to try to create lower regulatory barriers and greater market demand for that low-carbon power.

Let's turn to challenges. First, will this solve the problem? That's a question people often ask. Economist Elinor Ostrom called this perspective the "panacea bias." Clearly, private governance isn't going to solve the climate problem on its own. In fact, it's not going to solve most of the problems it addresses. But what it does bring to the table is a new option that can bypass gridlock. It forces us to move away from comparing a particular government program or a particular response to the ideal alternative. Instead, the availability of private governance options forces us to compare the viable alternatives that are out there and determine which is the best response or best combination of responses.

Another challenge arises from the concern that private governance may undermine public governance. We think of that in our research group as "negative spillover." Of course, private governance can create negative or positive spillover. For example, if you look at what happened with chemical regulatory issues, what you find is no amendment to TSCA between 1976 and 2016. You see things like the *Corrosion Proof Fittings v. Environmental Protection Agency*[87] decision leading to difficulty in promulgating new chemical regulatory standards, and then you see the growth of private governance in the past decade. You see industry having to comply with more stringent private standards than it faces in the public realm.

This is an example of positive spillover. It shows how the growth of private governance can give industry new incentives to come to the table, making it easier for government to act. And if you look at some of the public comments on the reasons why industry and advocacy groups supported the TSCA Amendments, it looks as though one of the influences that made the TSCA Amendments possible was the growth of these private standards over time.

A last question is: is this just greenwashing? Is this just about happy talk that doesn't yield real change? I would argue that there are many new influences on the behavior of corporations and other organizations that we might not otherwise account for if we just use a public governance model of environmental law. In the public governance model, we think of companies as having several principal motivations: to reduce government regulation, to shape government regulation, or to raise a rival's costs. Those are common points in the literature and are still all happening, of course.

But now, if you look across the realm of different influences on corporate behavior through the lens of private governance, you see the massive importance of reputation. You see a desire to increase efficiency, which often leads to reductions in carbon emissions. You see the desire to maintain the supply of natural resource inputs over the long term despite a changing environment. You also see the importance of manager norms and employee norms, lender pressure, and investor pressure as well.

So, you see a whole range of more complex incentives on corporate and other behavior. If you are a manufacturer right now, you might be facing pressure from a retailer, which in turn is facing pressure from regulators, but also from advocacy groups, investors, retail customers, lenders, and employees. And if you're that manufacturer, you're going to turn around and pass the pressure along to your suppliers, who may pass it along to their suppliers.

Now you've created an entire private governance regime that is paralleling the public regime and reflecting it at the same time. Of course, government plays an incredibly important role here, and I'll give you one example. Many of you are likely to be involved in climate mitigation regulatory efforts. But the federal government is also taking steps that will promote private climate governance. An example is the recent decision to encourage federal suppliers to disclose their carbon emissions through CDP (formerly the Carbon Disclosure Project). This will provide information in the marketplace that will then allow private governance initiatives to harness motivations for efficiency and emissions reductions throughout society.

To close, I want to raise a couple of more specific questions. Why might private environmental governance matter if you're an environmental enforcement attorney at EPA or here in the Environment and Natural Resources Division of DOJ? First, as to staffing, are you hiring people who understand that private environmental governance is going

87. 947 F.2d 1201, 22 ELR 20304 (5th Cir. 1991).

on? Are you giving continuing legal education or training to lawyers so that they understand what's going on in the private sector and how government can react in the ways we might want it to?

Second, are we designing rules, policies, and programs in the ways that harness the aspects of private environmental governance that we want to encourage, and that are discouraging the parts we might want to discourage?

Third, when we're deciding where to allocate enforcement resources, should we put those resources in an area that isn't subject to a vibrant, effective private standard? Or should we take enforcement actions in ways that support those standards? Or, if we're worried about the effectiveness of those private standards, should we undercut them? In short, knowing about private environmental governance can affect the allocation of enforcement resources.

Fourth, as to remedies, when we're resolving a case, either through settlement or otherwise, are we taking steps to promote the most successful forms of this kind of environmental governance? Are we taking steps to discourage the parts that we might worry about?

Finally, I would argue for a rough Hippocratic Oath analogue: we should make sure we do no harm. For example, if we are enforcing antitrust laws and if our goal is to reduce threats to competition, let's make sure we do that in light of the benefits of private environmental governance. We want many companies and advocacy groups to get together to set private standards in certain areas if the outcome is greater net social welfare through greater environmental protection, even if that raises some risks on the competition front. The key is to think about the net effect of the activity, including the environmental benefit.

Similarly, when we're taking enforcement actions against companies for misstatements or misleading product comments in the marketplace, we want to think about the optimal blend of enforcement actions that will encourage firms to make public statements and commitments on environmental issues and will promote green consumerism without promoting greenwashing at the same time.

Joel Mintz: I am grateful to everyone at DOJ who put together this symposium. I'm honored to be part of it as well. My topic is the future of environmental civil enforcement, and I'll focus primarily on the civil enforcement activities of EPA. My remarks will touch on what I think are some of the current strengths and shortcomings of EPA enforcement, with emphasis on what I think is the most significant problem facing EPA's civil enforcement program—an acute shortage of human resources to pursue enforcement work. I will also try to offer some educated guesses as to what the future may hold for environmental civil enforcement.

Let me begin by sharing a couple of assumptions. The first is that to pursue civil environmental enforcement in an effective fashion, EPA needs generally adequate budgetary resources and a sufficient number of qualified enforcement personnel.

Second, I believe that the nature and quality of the institutional relationships that EPA's enforcement program has with other government entities, particularly DOJ, individual states, the White House, and the U.S. Congress, greatly affects the successfulness of federal, civil, and environmental enforcement.

Third, I assume that even though civil and environmental enforcement is inherently a professional activity that one might hope would be free from political involvement, partisan politics does and will have an impact on the scope and direction of civil environmental enforcement.

My last premise is that effective deterrent enforcement is critical to the overall success of environmental protection. I'm happy to hear the trends in private environmental enforcement that Mike discussed. Those are heartening, but I think what's unique about the public enforcement programs is that they focus almost exclusively on what Mike relayed about Chester Bowles: the 2% or 3% of regulated companies who are inherently dishonest and do the wrong thing. That has a ripple effect down the road.

Where regulated firms perceive that public enforcement is vigorous, and that they themselves might become defendants in an enforcement action if they are in noncompliance, their incentive to comply with environmental laws is that much greater. What companies like Walmart are doing with their suppliers is certainly very beneficial. Nonetheless, not all large companies take the same approach to policing their suppliers. Thus, as Mike acknowledged, public enforcement is of continuing utility.

I also have some skepticism regarding the eco-labeling that Mike mentioned. Undoubtedly some of that is entirely legitimate. Nonetheless, it takes little imagination to envision fraudulent eco-labeling that some companies might employ to camouflage environmental misdeeds. I would feel far more confident about it if there were some independent, truly impartial entity looking over the shoulders of eco-labelers and attesting to the integrity of their work.

In any event, turning to the current state of EPA's enforcement program, I think there's now both some cause for celebration and some cause for concern. On the positive side, in general, I think EPA has a competent and dedicated interdisciplinary professional staff. For the most part, that staff seems to have sufficient expertise to handle the technical and legal issues that pervade environmental enforcement, some of which are quite complicated. EPA also has an able set of mid-level managers and, at present [under the Obama Administration], it also appears to have a knowledgeable group of top-level political appointees who seem largely supportive of EPA's enforcement work.

However, notwithstanding those important assets, the Agency's enforcement program also faces some obstacles, the most significant of which is a severe shortage of resources needed to implement a robust and responsible enforcement program. Unfortunately, over the past several years, the totality of resources available to EPA has declined rather precipitously. When adjusted for inflation, the Agency's overall operating budget for 2016 was

below the level of funding provided to EPA in fiscal year 1977. And from a historical high level of 18,110 full-time employees in fiscal year 1999, EPA's full-time staff has now dwindled to approximately 15,000 people. These agency-wide staff decreases have clearly had a negative impact on EPA's enforcement program, both at headquarters and in the 10 regional offices. According to EPA's internal records, from 1999 to 2015, the number of full-time employees who do enforcement work at EPA fell to 2,880 in fiscal year 2015, an approximately 20% reduction overall.

Regrettably, as manifested in several EPA documents, this recent decrease in EPA enforcement personnel has led to a notable falloff in the overall volume of EPA enforcement cases. For example, EPA's 2014 to 2018 strategic plan, which is the current plan, projected large cutbacks in the number of EPA facility compliance inspections, and in both new civil enforcement cases and the conclusion of pending enforcement cases. This is especially clear when one compares the current plan's projections with EPA's strategic plan for the period of 2005 to 2009. The Agency's latest five-year plan indicated that EPA expects to initiate and conclude an average of 1,100 fewer civil cases annually than EPA had pledged to do during the 2005 to 2009 period, and it also projected that EPA would conduct an average of 6,200 fewer facility inspections per year.

EPA's most recent enforcement accomplishment report indicates that EPA actually conducted about 15,400 inspections of regulated facilities in 2015, well below the nearly 20,000 inspections the Agency had conducted in fiscal year 2012. Moreover, the number of civil enforcement cases initiated by the Agency fell sharply from 3,300 cases in 2011 to about 2,400 such cases in fiscal year 2015.

As it happens, this decline in EPA's enforcement resources and levels of activity has taken place simultaneously with large cutbacks in the budget and enforcement capabilities of a number of state environmental agencies. Notwithstanding increased financial needs at the state level, EPA's own budget woes have considerably reduced the Agency's ability to help individual states fund the operation of their environmental programs, including their environmental civil enforcement efforts.

To make matters worse, EPA and the states are now responsible for regulating a much larger universe of pollution sources than was true in previous years. Moreover, increased pressure to enforce the new TSCA and the Safe Drinking Water Act—post-Flint, Michigan—along with the impending need to enforce likely future regulations on fracking and on the emission of greenhouse gases, may well pose additional burdensome responsibilities on EPA's under-resourced enforcement program, and also on under-resourced state agencies.

With regard to its external relationships that concern enforcement, EPA's enforcement managers and staff now appear to have a mostly constructive cooperative relationship with DOJ. That has not always been true, and there are always personality conflicts between and among particular individuals that cloud the picture. Nonetheless, cooperative relationships between EPA and DOJ seem to be much more the norm than the exception today.

EPA has had a highly variable set of relationships with individual states and a reasonably good relationship with the White House, particularly if one leaves EPA's relationship with the Office of Management and Budget and the Office of Information and Regulatory Affairs out of the picture. On the other hand, though, EPA's overall relationship with Congress—including its enforcement office relationship—has obviously been stormy and contentious.

How likely are things to change with the advent of a new administration and a new Congress? Well, I think at least in the very short run, the routine enforcement of EPA's staff, and the volume and nature of civil judicial enforcement referrals that come over to DOJ, is not likely to change. And that pattern may persist over some time. It is very hard to predict how long.

However, in the medium and longer terms, I think the two most important unanswered questions for the future of environmental civil enforcement will be, first, will there be any increase in funding to support EPA's enforcement work and to increase federal grants to state environmental agencies, which, after all, shoulder a lot of the load in civil enforcement? And secondly, to what extent will EPA continue to be a target for Congress' wrath? Well, for better or worse, I think the answers to these questions will significantly depend on the outcome of our rather long and peculiar 2016 elections.

Hillary Clinton's overall attitude toward environmental protection and the enforcement of environmental laws—and how much priority she will give to restoring EPA's paltry budget, in the face of opposition from a Republican-dominated U.S. House of Representatives—is hard to judge. In terms of future priorities for EPA civil enforcement, I think that based on her campaign statements and her record as a senator and Secretary of State, a Hillary Clinton EPA may emphasize the enforcement of three things: environmental requirements that particularly affect the health of children, especially the Clean Air Act requirements concerning urban pollution; the imminent and substantial endangerment section of the Safe Drinking Water Act in continuing response to the events in Flint, Michigan, and other threats to drinking water; and Clean Water Act requirements pertaining to sewage treatment plants. And, assuming it eventually passes judicial muster, the Clean Power Plan and the enforcement of that will become a major enforcement priority as well.

EPA enforcement under a Donald Trump Administration, combined with a Republican majority Congress, seems likely to be quite different. Mr. Trump has promised to "make America great again." Nonetheless, it seems unlikely that our country's future greatness will include a needed increase in EPA's budget or a renewed emphasis on the federal enforcement of environmental regulations. During his campaign, Trump publicly denied the existence of climate change and promised to renounce the recent Paris Agreement regarding global emissions of greenhouse

gases. He has also indicated a preference for the devolution of regulatory authority from federal to state agencies.

In a federal government whose executive and legislative branches are controlled by Republicans, federal civil environmental enforcement would face numerous threats. Aside from the possibility of an outright repeal of all major federal environmental statutes—a politically hazardous and thus unlikely scenario—EPA's overall budget (and its internal allocation of resources for enforcement work) may suffer even more cuts. Congress might pass riders in its budget bills that prohibit EPA from spending money on the enforcement of particular requirements, and a new Trump-appointed EPA administrator (together with a new assistant administrator for enforcement) might institute a states-first enforcement policy that minimizes or even eliminates any federal role in the enforcement of environmental requirements.

Such actions would very probably result in an uneven pattern of environmental protection in the United States—with some states "racing to the bottom" by decreasing their environmental enforcement, and relaxing their environmental requirements, as a way of attracting new manufacturing plants to the state. Ultimately, these steps seem unlikely to engender the boom in employment that Donald Trump has promised to coal miners, factory workers, and residents of rural areas. However, they will almost certainly increase the level of environmental pollutants that affect Americans, and do very significant harm to the health of many people.

Robert Percival: We've all heard the critics talk about how environmental regulation is strangling the economy, that enforcement officials are out of control. As a result, as Joel said, Congress cut the EPA budget. I have one simple answer to the critics: get out your passport and travel outside the United States. You will find that throughout the world, and particularly in developing countries, our legal system and our environmental laws are the envy of the world. You people are the envy of the world for your ability to contribute to the enforcement of those laws.

I'm going to talk about three general trends I see emerging around the world. First, countries throughout the world are strengthening their systems of environmental law and environmental enforcement. Second, there is increased global cooperation between NGOs, private groups, and enforcement officials to improve implementation and enforcement of the environmental laws. Third, there's increased interest in criminal enforcement of the environmental laws against those who intentionally violate them.

Lots of countries around the world have laws that are not enforced very well. When I started working on a global basis in environmental law, the most important issue that always came up was enforcement. There are many reasons for this. Developing countries often lack the capability and the resources to do enforcement well. In my academic writing, I've tried to explain why U.S. environmental laws have been much more enforceable than Chinese environmental laws. I think this stems in part from the process by which our laws are adopted.

U.S. environmental laws are the product of fierce debates, compromise, and controversy in Congress. Our basic environmental laws were all adopted by overwhelming bipartisan majorities many years ago and they have withstood repeated efforts to roll them back. In China, the Communist Party will ask a legal academic who's an expert in the field to draft a proposed law and to obtain input from some government agencies. But there's virtually no public input. New laws come down from on high when the People's Congress meets each March and rubber-stamps whatever the party wants.

In 2005, I participated in a symposium in China, where the focus was on what environmental laws China should borrow from the rest of the world. At the end of the symposium, I introduced the conference organizer, who worked for the National People's Congress (NPC), to a Chinese environmentalist working for an NGO who had arrived to pick me up for dinner. The environmentalist, who had not been invited to the conference, told the NPC official that the next conference should focus on how to make the environmental laws more enforceable. The conference organizer replied that enforcement is not the job of the NPC; we just write the laws, we should not have to pay attention to enforcement.

One major enforcement problem in China was that the maximum penalties for violations of the environmental laws were ridiculously low. Last June, when I spoke at the National Judges College in Beijing, Xie Zhenhua, the former head of the State Environmental Protection Administration (SEPA), told a story to illustrate this point. He related how when he was head of SEPA prior to 2006, he decided to impose the maximum penalty on a company that had violated the environmental laws. The fine came to 100,000 renminbi, which is about $16,000. He reported that the chief executive officer of the company just laughed at him and said, let me write out a check for a million renminbi to cover in advance our next nine violations.

This has changed in recent years. In 2014, for the first time since it was adopted in 1989, China's basic environmental law was amended. One of the big controversies at the last minute that spilled into the open was whether or not penalties for environmental violations should be calculated on a daily basis. The Standing Committee of the NPC objected that this was way too harsh. The Ministry of Environmental Protection argued that this is what is done in the United States, so they were asked to prove it. With some help from abroad, they ultimately were able to prove it, and the law was amended to authorize daily penalties. Now the system has changed dramatically because they can impose fines that get companies to really pay attention.

China has also established an extensive system of green courts. They have more than 500 environmental judges in China now. When I spoke at the National Judges College last June, I was taking part in a week-long workshop to train those judges in environmental law. China also

has a new law that authorizes public interest litigation. This law allows groups, without having to meet any standing requirements, to sue in the name of the environment. Such lawsuits can only be brought by groups who have been in existence for five years, but it certainly is a step in the right direction.

You might ask, why is the Communist Party opening up the courts to public interest litigation? I think one explanation is that the creation of environmental courts helps cabin the opening of the courts to environmental interests, where the Communist Party itself is very interested in putting pressure on the local governments to clean up the environment because their system of law is so decentralized. By cabining public interest litigation to environmental cases and limiting it to groups that have been in existence for five years, the party doesn't have to worry about new NGOs bringing human rights cases.

The trend to adopt green courts is going on around the world. India has created an extensive set of environmental courts called the National Green Tribunal. These courts have been very active in enforcing the law against those who illegally mine coal. Chile has adopted a system of environmental courts. There, private industry was scared that these courts would be too green, so they made the process of judicial selection and confirmation so elaborate that it's harder to get confirmed as an environmental court judge than it is to be a Supreme Court justice in Chile. Chilean law also requires that one of the judges on each of the three regional courts be a scientist, and not just a lawyer. Australia also has a specialized environmental court, called the Land and Environment Court, which has issued some significant decisions.

In the early 1970s, DOJ did a study of whether or not we should have green courts in the U.S. federal court system. I actually think the United States made the right call in deciding that that's not something we needed to do. Some U.S. environmental laws, such as the Clean Air Act and the Resource Conservation and Recovery Act, give the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit exclusive venue to hear challenges to national air and hazardous waste regulations. This seems to have worked well, as illustrated by the quality of the judges' questions in the Clean Power Plan oral argument and the recent argument over EPA's new definition of solid waste.

Some states are now experimenting with environmental courts. Vermont has had, for a long time, an environmental court that deals with land use issues, and Hawaii just last summer created an environmental court.

The second trend I see is greater cooperation between NGOs and enforcement officials around the world. An excellent illustration of this is the growth of the International Network for Environmental Compliance and Enforcement. This is a partnership of government enforcement officials and NGOs who focus on environmental compliance and enforcement. The group has members from 150 countries who participate in programs to train enforcement officials and to share information about environmental violations around the world and how to prosecute them. It has had a real impact.

Judges around the world are now also engaged in efforts to improve the judiciary's capacity to handle environmental cases. Last April, John and I were in Rio for the first World Congress on Environmental Law, where the Global Judicial Institute for the Environment was launched. One of the moving forces behind this is Brazilian Supreme Court Justice Antonio Benjamin, who's also been very active in the International Union for Conservation of Nature Academy of Environmental Law, a global network of hundreds of environmental law professors from more than 60 countries that is part of this global trend. The 2008 amendments to the Lacey Act[88] has been one way in which U.S. law, through domestic enforcement, has been a remarkable vehicle for improving compliance with environmental and natural resources laws in developing countries, by making it a federal crime to import timber that's been illegally harvested in other countries.

The third trend is increased interest in using criminal enforcement to deter intentional violations of environmental law. My colleague Rena Steinzor has written a book called *Why Not Jail?* that makes a very powerful case for increased use of criminal sanctions against corporations.[89] Now, of course, you can't actually put a corporation in jail, but criminal sanctions against top corporate executives can be an incredible deterrent to intentional violations of the law.

Brandon Garrett from the University of Virginia Law School has written a book, *Too Big to Jail*, that makes a similar argument, and claims that we've been too prone to compromise with corporate executives when faced with criminal charges.[90] The corporation may pay a big fine that comes out of the shareholders' pocket, but doesn't necessarily penalize the moving forces behind corporate violations of environmental law.

I have high hopes that there is one particular case that will demonstrate that when top corporate officials of a major multinational corporation decide to intentionally violate the environmental laws, they eventually will go to jail. It involves a certain automobile manufacturer based in Germany, but we'll have to stay tuned for that.

There's a big debate in Congress about whether or not to actually make it more difficult to prosecute corporations criminally by requiring specific intent. I would suggest that this is not the time to be moving in the direction of making it more difficult to impose criminal sanctions for environmental violations.

China increasingly is bringing criminal cases against environmental violators. Their law now allows regulators to be prosecuted criminally if they're not doing their job. Long years ago, the head of China's equivalent of our

88. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (2008).
89. Rena Steinzor, Why Not Jail?: Industrial Catastrophes, Corporate Malfeasance, and Government Inaction (2015).
90. Brandon L. Garrett, Too Big to Jail: How Prosecutors Compromise With Corporations (2016).

Food and Drug Administration was sentenced to death for having taken a bribe to approve a drug. Foreign observers thought the sentence would be suspended, but it was quickly carried out. I certainly am not advocating that the United States should emulate China in imposing death sentences for white-collar crimes.

I want to conclude by noting that today is the day that the Paris Agreement takes effect. Every country in the world now agrees that it is important to take action to combat climate change. It is more important than ever for us to work cooperatively with countries all around the world. No matter how dark things may have seemed at times with an anti-EPA majority in Congress, I love what 96-year-old retired U.S. Supreme Court Justice John Paul Stevens said yesterday. When contacted at his Florida residence, Justice Stevens said, "I've been a lifelong Cubs fan . . . if you wait long enough, really good things can happen."

John Cruden: This would be my summary of our panel discussion: private governance is up, EPA's budget is down, green courts are up, and we should be looking more at criminal enforcement. Any questions?

Audience Member: One blessing and challenge of DOJ is that, even with budgets going up and down, and even with private governance, generally our agency partners are able to send us enough things, whether it's EPA or the U.S. Coast Guard or others, that we have to make some choices about—which things we should do first for enforcing. So, just keeping in mind the trends that you've talked about, at least at the margin, if we're going to apply pressure someplace, where should it be? Is it on the 3%? Is it on the big cases that make a big general deterrence message, or is it something else?

Joel Mintz: I think a combination of the things that you mentioned is the most prudent approach. EPA has recently taken the approach of really focusing on the big sources, the most complicated sources. And I think that makes sense, but I think a more balanced approach makes sense as well. I mean, there's been quite a cutback in administrative orders and also in the focus on small to mid-sized companies.

Particularly, mid-sized companies are very often in violation of the law. I mean, many of them aren't, of course, but there's some pollution there that isn't being addressed. And I think that having a presence that's across the board sends a message to companies that are not the Fortune 500 corporations, a message that they're being looked at and something needs to be done to comply. I would rather see a bit more of that and also a focus still on the large sources. That's inevitable, but I don't want to keep harping on the point that more resources would make it more easy to do more things. It's obvious.

John Cruden: Michael or Bob, anything on priorities?

Michael Vandenbergh: I have one or two thoughts. One is a really important feature of the Bowles quote and is demonstrated by the social psychological literature: don't let the other entities that are complying feel like they're dupes. That works both as to individuals and as to corporations. It's hard to assess what that means precisely, but I think that's a really important aspect of enforcement strategy. I would say that one other feature I see in the private governance area is that companies sticking their neck out too often get their heads chopped off. It's an odd phenomenon, but if a company articulates that it is going to meet a certain private or voluntary standard, and if it's one of the largest in a particular sector, and then it fails to meet that standard, it typically gets whacked by environmental advocacy groups.

So, here's the challenge if you are a corporate manager: do you want to make that public environmental commitment or not? What if you made that commitment and you fell a little short, but the bottom half of your entire sector didn't make a commitment at all?

So, again, I have no one strategic focus for you, but I would emphasize the importance of thinking about the psychology of the managers of the firm when you take an enforcement action. How do I induce them to make private commitments for which there can be accountability, because of public disclosure and reputational pressure? And how can we make sure that those managers who make commitments don't feel like dupes if the bottom half, in terms of the compliance of the sector, is just flying below the radar screen, making no commitments, but also not particularly complying with the law or acting in a way we might want them to?

Robert Percival: Just one anecdote, talking about dupes. Many years ago, the Virginia General Assembly did an audit of its state environmental agency during the administration of Governor James Gilmore. The audit discovered that the agency had levied only two fines for environmental violations in a year for a total of $4,000. When I heard that I thought, "Whoever paid the two fines must be really upset."

Audience Member: My question is for Michael. I came into this very skeptical about private governance and your talk has moved the needle for me. But what about competition? Isn't this just a mechanism for Walmart to get a bigger market share and crush their competition, and how do we safeguard those things?

Michael Vandenbergh: Sure, I think it can be, and I think we have to be careful about that. I think, though, that if you look across the broad range of different influences on corporate behavior, and if you look at the broad range of different initiatives that are underway out there, I think it's hard to say that there's simply a "crush the competition" motivation that dominates in this area. So, if Walmart decides to only buy Marine Stewardship Council-certified

fish for sale in its North American grocers—which it has—is part of the motivation potentially to increase the cost of selling fish by its competitors? It might be. I can't tell you; I don't know specifically what's going on there.

My thought on this, though, is, let's do a complete analysis. That way we're not just thinking about whether it's raising costs. Instead, we are asking: what are the net welfare effects of a combination of having raised those prices, which we may not like, with having had the largest grocer in the United States, essentially, only selling sustainable fish? What would the alternative have been? In other words, what's the viable alternative?

Next, there are many motivations that are driving firms, and clearly raising rivals' costs is something we have to worry about. But in many cases, there is a complex set of motivations. There's a comment in the public media from a Walmart executive who says, look, we're worried that we can't keep our share price up over time if we can't sell fish 10 years from now, 20 years from now, 30 years from now. And we're getting to the place with some of these industries where they realize that they need a sustainable supply for many years. So, that, too, is a piece of the analysis.

The last thing I would say is, I tend to be skeptical when I just see a unilateral corporate announcement on something. I look for some kind of accountability. Is there an NGO involved? Is there public disclosure in a form that can provide accountability? And when there is, then I'm a little bit less worried about the overall impact of a particular private initiative.

John Cruden: Michael, you talk about private governance. Can it co-exist with traditional government enforcement? This audience is full of federal prosecutors and enforcers that every single day are looking at the law and trying to apply it, and you're talking about people who are doing something completely different. Can they co-exist?

Michael Vandenbergh: Yes. I don't think you could even be talking about private governance if you didn't have strong public governance. That is a piece of why companies are doing what they're doing, because they're concerned about what the regulatory environment is going to look like. In some cases, they're trying to get ahead of the curve, and in some cases, they're probably trying to undermine support for public governance. I think that's something we have to keep an eye on.

I don't think the private side is likely to even emerge unless there is a strong public side in this area. But I think it's a mistake to assume that there's always going to be negative spillover or always going to be positive spillover. In other words, I think the TSCA example is just one of a number where you can see that there are times when, if Congress doesn't act or if the Agency is shackled in some way, private governance will emerge—because public preferences for safer products exist whether Congress acts or not. The private marketplace is going to find a way to respond to that. In a situation like that, the private action then enables public action whether through new legislation or stronger attention to enforcement on toxics.

I think we see the same thing again in the southeastern United States, where you don't see the states rushing to try to find a way to reduce carbon emissions. But you do see, as recently as the past couple of years in states like Tennessee, major data centers coming into the state saying, look, we're searching for sites with low-carbon power. So, I think you see a supportive role there. It may be that some of those states wouldn't be able to comply fully with the Clean Power Plan in the absence of this private pressure. In fact, one of the questions I get sometimes is about additionality. Are these private issues simply going to be taken advantage of by the existing governmental entities? And frankly, if it means that we get the goals we want to get to, I'm OK with that.

John Cruden: Robert, you have examined international enforcement more than any other professor I know. Don't we also have to be concerned in trade agreements with other countries? It isn't just a foreign country law, but the enforcement of their law that matters. Doesn't that have to be an important part of our domestic equation?

Robert Percival: Well, that was one of the reasons why, when the North American Free Trade Agreement (NAFTA) came up, the environmental community was really quite split. President George H.W. Bush's Administration negotiated the agreement. It was then shepherded through Congress by President Bill Clinton, who pledged that the Commission on North American Environmental Cooperation would be created. Some environmental groups saw that as at least giving them a lever to complain about what Mexico was doing with respect to environmental enforcement.

I think a lot of people have been disappointed by the NAFTA side agreement just creating an informational device and not something that's had any real clout. But the trade agreements I've seen successively seem to have gotten a bit better in dealing with environmental issues. I know both presidential candidates have disavowed the Trans-Pacific Partnership (TPP). But the one thing that's in TPP that I think a lot of people have not focused on, is that for the very first time, the tobacco industry is completely cut out of any ability to challenge any regulations applied by the United States or any of the developing countries in the context of trade. That, to me, seems like at least some progress. We'll see what happens if TPP is renegotiated, and what impact that will have on the Transatlantic Trade and Investment Partnership negotiations between the United States and the European Union.

John Cruden: Joel, like I said before, you've probably interviewed more enforcement officials than anybody else. What about new technology? What impact is that going to have in the future?

Joel Mintz: As you know, John, EPA has focused quite a bit on improved technology and on the benefits of improved technology in its Next Generation Compliance initiative. I think that will have a positive effect overall. But my concern is that they've oversold that a bit. That really, they've acknowledged that they can do less now because their budget is less. But they're saying, we'll make up for it with the technology and with better monitoring. Well, better monitoring is a good idea. But when monitoring is done, when self-reports come in, you need people to respond to them and follow up with some enforcement action, and to get, where appropriate, some referrals over to DOJ, which can do its job of ferreting out what to follow up on. I really think that's important. There have been significant advances in monitoring technology. There's no question about that, and that's all positive, but you need people to enforce the law.

Robert Percival: One great thing China has done is to require the largest emitters of air pollutants to provide publicly available, real-time monitoring data. Many Chinese now have on their iPhones or other cell phones apps that report what the air quality is each day in hundreds of Chinese cities. You can also monitor who's doing the polluting. Some Chinese NGOs, particularly in the days before they could do public interest litigation, would get on Chinese social media and organize campaigns encouraging the public to e-mail the local environmental protection boards and complain if enforcement action had not been taken against companies that are clearly violating the laws. That has had a remarkable impact.

John Cruden: Robert, didn't that result from the U.S. embassy putting out fine particulate matter ($PM_{2.5}$) data?

Robert Percival: Yes. The reason China ended up regulating $PM_{2.5}$ was because of a Twitter feed set up by the U.S. embassy in Beijing. U.S. embassy employees actually get hardship pay in Beijing, not because it's a developing country, but because of the air pollution. One of the staffers there set up a real-time Twitter feed of the monitor for $PM_{2.5}$ at the embassy. The Chinese government was so upset they asked the embassy to stop it. But the United States refused, noting that it's on Twitter, which is behind the "Great Firewall of China," so only people back in the United States are supposed to be able to see it.

But of course, there's enough sophisticated Chinese who can set up their virtual private networks and get around the firewall. Once the Chinese public started seeing that the $PM_{2.5}$ data was so much worse than what they were being told by the government, the Chinese government gave in. Now everyone's focused on $PM_{2.5}$ because the Chinese realize it's among the most deadly types of pollution.

John Cruden: I have one last question, and we'll start with Michael. I'm taking you out of enforcement for a second. Can you give me one thing that the new president should be thinking about for environmental progress for the United States?

Michael Vandenbergh: I had a physicist give the climate lecture in my class. He's a co-author of a book I have coming out called *Beyond Politics*. Even if we meet all of the voluntary commitments in Paris, we will, at best, be at 2.7°C, and maybe well into 3°C, despite the goal being 2°C in terms of the global average future temperature increase. What this physicist said was so powerful to me, about a decade or so ago, that I put down almost all of the other things that I was working on. I boxed them up in my office.

So, my first answer would be, what are the opportunities you have, whether it's the budget and the initiatives using federal funds through the General Services Administration, etc., whether it's finding new regulatory authority—what are the opportunities you have to induce the United States and the other countries to do something about this problem? From my perspective, this is different than any other problem I've ever dealt with. There is no other problem I know of which is essentially irreversible and will continue for hundreds and maybe thousands of generations. So, I would say, in your heart, take this seriously. There is no other issue you deal with that is more important, despite the immediacy of almost every other issue.

Joel Mintz: I'm being the One Note Charlie here, but I've pretty much telegraphed that I would urge a President Hillary Clinton to use her political capital to boost EPA's budget and to take a hard look at that. Also to remember that her husband Bill Clinton had successfully fought off an attempt to drastically cut EPA's budget in the 1990s, and if she will, in a different situation with the budget now down, do a similar thing. I would very much urge her to defend EPA, and perhaps also increase resources at DOJ in a complimentary way.

John Cruden: Any person who is advocating raising our budget is a hero in my eyes.

Robert Percival: A few years ago, I was speaking at a Federalist Society event in the U.S. Capitol and the audience was entirely Republican staffers. My big pitch was: you guys are making a historical mistake if you're throwing in your lot with the climate change deniers because it's becoming more and more apparent that that's absolutely wrong. After I was done speaking, one of them quietly pulled me aside and said, "Just between you and me, I'd get fired if I said this publicly. I know you're right. But what can I do to convince my boss that we should help?" And I said, "Well, pick Republican issues like cutting subsidies. Cut subsidies to fossil fuel industries. You'll help with the budget deficit."

But regardless of who wins the presidential election, it is critical that we combat the polarization of environmental policy discourse. We need to figure out how to build creative coalitions to broaden the environmental movement. We have become so polarized that some people really

believe these fantastic tales about EPA and the United Nations coming in black helicopters to take away their guns and property. Despite the fact that our schools are really emphasizing environmental education, our political process has so distorted what people believe. This will place more importance on institutions like the Environmental Law Institute, which John used to lead, that are truly non-partisan organizations that can help try to build consensus, whether it's a Clinton or a Trump Administration.