



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Law Review

Volume 6 | Issue 2

3-2019

Strategic Institutional Positioning: How We Have Come to Generate Environmental Law Without Congress

Donald J. Kochan

Chapman University School of Law, kochan@chapman.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Environmental Law Commons](#), [Government Contracts Commons](#), [Supreme Court of the United States Commons](#), and the [Water Law Commons](#)

Recommended Citation

Donald J. Kochan, *Strategic Institutional Positioning: How We Have Come to Generate Environmental Law Without Congress*, 6 Tex. A&M L. Rev. 323 (2019).

Available at: <https://doi.org/10.37419/LR.V6.I2.1>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Law Review by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

ARTICLES

STRATEGIC INSTITUTIONAL POSITIONING: HOW WE HAVE COME TO GENERATE ENVIRONMENTAL LAW WITHOUT CONGRESS

by: *Donald J. Kochan**

TABLE OF CONTENTS

I. INTRODUCTION.....	323
II. THE FRAMERS AND SEPARATION OF POWERS	325
III. CONGRESS AND THE UNILATERAL DISENGAGEMENT STRATEGY	326
IV. AGENCY INCENTIVES TO TAKE THE POWER THEY ARE ALLOWED.....	330
V. SELECTED ENVIRONMENTAL LAW CASE STUDIES IN STRATEGIC INSTITUTIONAL POSITIONING	332
A. <i>Example 1: National Monuments</i>	332
B. <i>Example 2: Waters of the United States</i>	338
VI. WHY THESE PROBLEMS ARE ACUTE IN ENVIRONMENTAL POLICY	341
VII. CONCLUSION	342

I. INTRODUCTION

The administrative state has emerged as a pervasive machine that has become the dominate generator of legal rules—despite the fact that the U.S. Constitution commits the legislative power to Congress

* Parker S. Kennedy Professor in Law and Associate Dean for Research & Faculty Development, Chapman University Dale E. Fowler School of Law, J.D., Cornell Law School, 1998; B.A. Western Michigan University, 1995. This Essay is adapted from remarks made as a panelist at the Federalist Society National Lawyers Convention, Washington, D.C., November 18, 2017, on a panel titled: “*Environmental Law without Congress: Are Alternatives to Legislation Eclipsing the Congressional Role in Setting Policy Priorities for Environmental Protection?*” Video is available at <https://fedsoc.org/events/environmental-law-without-congress-are-alternatives-to-legislation-eclipsing-the-congressional-role> (Kochan presentation at 32:30) [<https://perma.cc/76A8-6GED>]. An introductory video summarizing my presentation is available at <https://www.youtube.com/watch?v=hRn6Ee2Aqa0> [<https://perma.cc/KM5H-HFLM>]. Many thanks to Professor Jonathan H. Adler (Johan Verheij Memorial Professor of Law, Case Western Reserve University School of Law), Professor Michael P. Vandenberg (David Daniels Allen Distinguished Chair of Law Director, Vanderbilt Law School), and Professor Robert V. Percival (Professor of Law and Director Environmental Law Program, University of Maryland School of Law). I appreciate the valuable research assistance of Bethany Ring and the helpful comments of Jennifer Spinella.

alone. When examining legislation authorizing administrative agencies to promulgate rules, we are often left asking whether Congress “delegates” away its lawmaking authority by giving agencies too much power and discretion to decide what rules should be promulgated and to determine how rich to make their content. If the agencies get broad authority, it is not too hard to understand why they would fulsomely embrace the grant to its fullest. Once agencies are let loose by broad grants of rulemaking authority and they are off to the races, we are also often left scratching our heads wondering why Congress fails to intervene *ex post* to alter the law, to check administrative agency overreach, or to clarify its intent and preferences. This Essay seeks to explain why none of the institutional dynamics we observe in administrative law should be surprising, with particular emphasis on environmental laws and rules. It will explain why both Congress and agencies have strategic interests at stake that cause them to position their activities in manners that make each complicit in expansion of the regulatory state and the collapse of the containment walls designed to keep lawmaking inside Congress.

This Essay specifically critiques Congress for its abdication of responsibility in the natural resources and environmental space—a place where the problem of congressional acquiescence in the demise of its own power is particularly acute. This Essay will begin by discussing the necessity of legislative clarity and intervention in these fields, but it will also contemplate why we often see neither. It will then proceed to some specific examples that illustrate these points.

Part II introduces fundamental ideas of separation of powers and the Framers’ design for adherence to that separation. Part III identifies motivations for Congress to legislate broadly and to disengage from a supervisory role over agencies, despite contrary intentions in the Framers design. Part IV discusses agencies as self-interested actors that will accept legislative-like authority if it is offered to them. Part V uses case studies on National Monuments and the Waters of the United States (“WOTUS”) Rule as demonstrative of the strategic positioning phenomenon. And, Part VI explains why environmental law is an area in which we can predict a high frequency of these problems of congressional abdication that enables administrative overreach.

By revealing these realities of strategic positioning by both Congress and the Executive, it can be better understood why an environmental law generated without optimal (or even fully constitutional) engagement by Congress is increasingly developing. The goal is to expose the threat these institutional interests pose to preserving the separation of powers and to begin identifying the areas to target, if the current allocation of authority for generating the core requirements of environmental law is to be realigned with greater fidelity to original constitutional design.

II. THE FRAMERS AND SEPARATION OF POWERS

The Framers relied on institutional self-interest as a *feature* of a well-functioning system of separated powers.¹ If you have not read *Federalist No. 9* lately, I highly recommend revisiting it, especially the very optimistic and enthusiastic vision for our Federal Republic in its first three paragraphs. Among those words written over 230 years ago, Hamilton noted that “[t]he regular distribution of power into distinct departments . . . are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.”²

Similarly, James Madison observed, particularly in *Federalist Nos. 48* and *51*, there must be “auxiliary precautions” built into the system—beyond mere “parchment barriers”—that recognize realities of human nature and that control against that nature’s tendency toward aggrandizement of individual power and influence.³ The Framers sought to craft a Constitution that would use human nature against itself—creating incentives for each branch of government to jealously guard its constitutional prerogatives from attack.⁴ Thus, Madison explained in *Federalist No. 51* that “[a]mbition must be made to counteract ambition.”⁵ Indeed, counteracting institutions must be established because “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.”⁶

Were the Framers wrong or naïve? This system of reciprocal guarding seems to have broken down—the administrative state has grown⁷

1. See THE FEDERALIST NO. 48, at 333–34 (James Madison) (Jacob E. Cooke ed., 1961) (“But in a representative republic . . . where the legislative power is exercised by an assembly . . . it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.”).

2. THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 1, at 51; see also *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring) (noting that the three branches need not be “entirely separate and distinct . . . [b]ut as to the particular divisions of power that the Constitution does in fact draw, we are without authority to alter them, and indeed we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them.”).

3. THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 333; THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 349.

4. See generally THE FEDERALIST NOS. 47–51 (James Madison), *supra* note 1.

5. THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 349.

6. *Id.*

7. See LIBERTY’S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 4–9 (Dean Reuter & John Yoo eds., 2016); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 8 (2014) (“[A]dministrative law revives a sort of power that constitutions were emphatically designed to prohibit.”); Robert J. Samuelson, *The Administrative State is Huge, and It’s Only Getting Bigger*, WASH. POST (Mar. 5, 2017), https://www.washingtonpost.com/opinions/the-administrative-state-is-huge-and-its-only-getting-bigger/2017/03/05/bb388e28-003a-11e7-99b4-9e613afeb09f_story.html?noredirect=on&utm_term=.a0c39ea897a3 [https://perma.cc/56FF-GE4E]; Steven F. Hayward, *The Threat to Liberty*, 17 CLAREMONT REV. BOOKS 53 (2016–17).

while Congress has, in a variety of ways, either passively allowed this distortion without resistance or, at times, even encouraged a power shift where certain “laws” (including environmental ones) could be generated *without* Congress.⁸ Rather than immense power being drawn into Congress’s “impetuous vortex”—as Madison worried could be the case in *Federalist No. 48*⁹—or that the legislature would “absorb every other” if not controlled—as feared in *Federalist No. 71*¹⁰—we see something quite different.

This Essay focuses on an institutional-interests model to explain how and why strategic positioning by both Congress and the Executive have aligned to facilitate and encourage lawmaking without Congress. Present conditions set the dynamics for mutually reinforcing and destructive incentives, both for invasions into the province of the legislature, and for the legislature’s surrender or abdication along the way.

III. CONGRESS AND THE UNILATERAL DISENGAGEMENT STRATEGY

Agencies are regularly criticized for making laws under the guise of administering legislation. Even when only promulgating rules to advance a relatively clear will of Congress, when such clarity exists, agencies are making discretionary decisions over details that involve policy choices. Despite agency “lawmaking” in these senses diminishing the sphere of Congress’s legislative prerogative, Congress sometimes embraces a larger administrative role because it can generate gains from passing broad legislation, while avoiding internalizing the costs of the law’s application.¹¹ In the end, the administrative agency is often the focus of criticism by any side that dislikes the regulatory outcome.

Much of this criticism concerns optics and accountability-avoidance. Assuming it is true that agencies get blamed for disliked regulatory decisions more than Congress, and that placing the blame on Congress is the outlier, not the norm, this leaves Congress insulated from criticism and unmotivated to act as an effective check on agency action.

8. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 535 (1992) (“[W]hen it fails to make clear its policy choices in statutes delegating lawmaking to agencies, Congress has violated a most fundamental rule and policy in Article I of the Constitution.”); J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J.L. & POL. 239, 241 (2017) (“Agencies have grown in part because Congress simply wished to avoid hard questions.”); James R. Rogers, *Why Congress Cedes Power to the Administrative State*, LAW & LIBERTY (Jan. 8, 2018), <http://www.libertylawsite.org/2018/01/08/why-congress-cedes-power-to-the-administrative-state/> [<https://perma.cc/Z3BV-8HFC>] (“[F]or their own reasons (avoiding accountability and reducing decisions costs among them), legislators did not want to make the necessary policy decisions.”).

9. THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 333.

10. THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 1, at 483.

11. Wilkinson, *supra* note 8.

Consider how it might look if things were different. If the blame for “bad” environmental law—whichever way “bad” is defined—shifted its frame, the narrative could equally be, for example, that harsh environmental law or environmental law “rollback”—take your pick—are each Congress’s fault because: (1) Congress created the executive discretion to do either category of thing (over- or under-regulation); and (2) Congress has not taken new legislative action to force the executive to change position away from its preferred path.

For example, consider those that want a more aggressive regulatory approach, perhaps those who cast aspersions on the Trump Administration for its mindset of regulatory restraint.¹² As a result of the captive narrative of the powerful administrative state, executive decisions to exercise discretion *not* to act, get blamed on the executive—when a different “framing” of the same phenomenon could be that: (1) Congress deserves the blame for giving agencies enough discretion to *choose not* to act; and (2) Congress deserves the blame because it has *not* legislated to *force* the preferred administrative action even when it may be within its constitutional powers to do so.

Now consider those that want a restrained regulatory approach, including those that frowned upon aggressive President Clinton- or President Obama-era efforts.¹³ An agency’s choice to use discretion to interpret broad and often ambiguous statutory language to *enlarge* its mandate again gets blamed on the executive agency—when a different “framing” of the same phenomenon could be that: (1) Congress deserves the blame for giving agencies enough discretion to *choose to act*; or (2) Congress deserves the blame because it has not legislated to clarify that the agency *does not have* such statutory authority to act and to discipline the agency as *ultra vires*.

12. Danny Vinik, *Trump’s War on Regulations is Real. But is it Working?*, POLITICO (Jan. 20, 2018, 6:26 AM), <https://www.politico.com/agenda/story/2018/01/20/trumps-regulatory-experiment-year-one-000620> [<https://perma.cc/CG44-F53G>]; Oliver Milman, *Trump’s Alarming Environmental Rollback: What’s Been Scrapped So Far*, GUARDIAN (July 4, 2017, 6:00 AM), <https://www.theguardian.com/environment/2017/jul/04/trump-environmental-rollback-epa-scrap-regulations> [<https://perma.cc/KV8V-BH3Y>].

13. E.g., Clyde Wayne Crews Jr., *Obama’s Legacy: 2016 Ends With a Record-Shattering Regulatory Rulebook*, FORBES (Dec. 30, 2016, 9:25 AM), <https://www.forbes.com/sites/waynecrews/2016/12/30/obamas-legacy-2016-ends-with-a-record-shattering-regulatory-rulebook/#26ff52601398> [<https://perma.cc/39DA-Q84P>]; Timothy Noah, *Obama Pushing Thousands of New Regulations in Year 8*, POLITICO (Jan. 4, 2016, 5:21 AM), <https://www.politico.com/agenda/agenda/story/2016/1/obama-regulations-2016> [<https://perma.cc/BTC9-8N3G>]; *contra* Patrick McLaughlin & Michael Wilt, *The Long Road to Regulatory Reform*, U.S. NEWS (Aug. 28, 2017, 11:35 AM), <https://www.usnews.com/opinion/economic-intelligence/articles/2017-08-28/trumps-executive-orders-are-a-good-start-to-regulatory-reform> [<https://perma.cc/C8FA-33FA>]; Binyamin Appelbaum & Jim Tankersley, *The Trump Effect: Business, Anticipating Less Regulation, Loosens Purse Strings*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/us/politics/trump-businesses-regulation-economic-growth.html> [<https://perma.cc/L7A2-57ME>].

From the perspective of separation of powers purists, these accountability results and failures to focus on what Congress has or has not done to deserve blame for the regulatory outcome should seem incredibly distorted.¹⁴ However, from the expedient perspective of Congress (a body that increasingly proves itself as an ineffective guardian of the separation of powers), this is brilliant.¹⁵ Congress, as an institution, and congresspersons avoid blame under this alternative lens—because, “it is not our fault, the agency did it.” Or they are well-positioned to selectively take credit. Individual members of Congress can rail against either agency action or inaction, explaining that Congress has already done its job by interpreting the congressional authority granted from a lens friendly to their own (or their constituents’) preferred policy. Alternatively, they can explain a popular agency decision (on action or inaction) as the result of their heroic and wise efforts to guide the agency when the congressperson’s preferences are aligned with the agency choice. That also leaves them open to take credit for a good law, while allowing them to lambast a rogue agency’s deviant interpretation of the prior congressional good deeds.

Furthermore, legislating broadly and purposefully abandoning legislative authority to retain greater control over the details of regulatory policy enables individual congressmen to stake out a constituent-friendly position by criticizing or supporting the administrative approach.¹⁶ Congress can take credit for past environmental legislative

14. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). The U.S. Supreme Court has explained:

James Madison, writing in the Federalist No. 47, defended the work of the Framers against the charge that these three governmental powers were not *entirely* separate from one another in the proposed Constitution. He asserted that while there was some admixture, the Constitution was nonetheless true to Montesquieu’s well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct.

Id. at 120.

15. See Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 *ST. LOUIS U. L.J.* 931, 1006 (1999) (“[M]embers of Congress . . . find it more convenient to acquiesce and avoid criticism.”); John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 *VA. L. REV.* 833, 855 (1991) (“In recent decades there has developed something approaching a consensus among political scientists and other observers that Congress has essentially lost the ability to function as a policy-making alternative to the executive.”); Wilkinson, *supra* note 8 (“What sometimes makes the passage of controversial legislation possible is congressional punting on some of the most volatile issues”); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & ECON.* 875, 878–82 (1975) (arguing there are powerful reasons behind a legislative body’s desire to see its works endure).

16. See Editorial, *The Politics of Anti-Politics*, *N.Y. TIMES*, Sept. 26, 1990, at A24 (“Ed Jenkins, Democrat of Georgia: ‘We are simply afraid to make any difficult decision. We’re afraid we’ll make someone mad at us.’”); Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 *DUKE L.J.* 1933, 1979–80 (2008) (“Legislators are directly elected. If they stray too far from the preferences of their constituents and supporters, they will not likely be reelected.”).

successes (including when regulation implementation gains popular support and can be claimed as resulting from past legislative wisdom) while shifting blame to agencies when certain outcomes are unfavorable or when desired actions are not taken.

Moreover, when lawmaking without Congress becomes the norm, Congress is shielded from particularized accountability. Under such conditions, Congress is not forced to internalize the costs of gridlock—i.e., it is not forced to overcome gridlock and other barriers to legislation because it is called to account for, or correct the flaws of, its vague and incomplete laws at a sub-optimal level. When the public or others claim that agencies have gone too far, legislators can claim that they have already done their job and that any perversion of the congressional will is the result of non-compliant administrators. Because it is not regularly blamed for the lack of success in the environmental realm—or at least is not the primary culprit in much of popular opinion—Congress lacks proper motivation to overcome gridlock and pass new or amended environmental laws¹⁷ or act to correct or direct agency actions.

Congress also escapes blame or seemingly anti-environmental action during certain administrations when the executive branch is receiving incoming fire about the President's environmental policies. This happens because members of Congress can claim they have done their job by passing general legislation, with the popular narrative crediting Congress for the law but blaming presidential administrations for perceived deficiencies in substance on-the-ground.¹⁸ More often than not, it is seen as the agency's fault or claimed that the administration overseeing the agency is to blame for regulating or for not regulating. That narrative benefits Congress. Why would Congress want to disrupt it?

Thus, in environmental law and elsewhere,¹⁹ we see a distinct kind of congressional ambition to shield Congress from accountability by strategically abdicating lawmaking authority—supplanting the Framers' anticipated ambition to erect strong fences around their claim on

17. This gridlock is often blamed for congressional inaction. See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2217–19 (2013).

18. Bill McKibben, *A Bad Day for the Environment, with Many More to Come*, NEW YORKER (Jan. 24, 2017), <https://www.newyorker.com/news/news-desk/a-bad-day-for-the-environment-with-many-more-to-come> [<https://perma.cc/F75Y-PJ3V>] (bemoaning President Trump's reversal of environmental protections); Timothy Cama, *EPA Chief: Obama Was No 'Environmental Savior'*, HILL (May 11, 2017, 1:25 PM), <http://thehill.com/policy/energy-environment/332958-epa-chief-obama-wasnt-an-environmental-savior> [<https://perma.cc/RQ97-6GVM>]; Suzanne Goldenberg, *The Worst of Times: Bush's Environmental Legacy Examined*, GUARDIAN (Jan. 16, 2009, 10:45 AM), <https://www.theguardian.com/politics/2009/jan/16/greenpolitics-george-bush> [<https://perma.cc/M9DL-J66F>].

19. Fisher, *supra* note 15, at 1006; *The Politics of Anti-Politics*, *supra* note 16, at A24.

exclusive legislative authority. Of course, it works all the better when the agencies become complicit in the process by themselves finding benefits in this altered allocation of power and control, as the next Part details.

IV. AGENCY INCENTIVES TO TAKE THE POWER THEY ARE ALLOWED

At the same time that Congress is willing to step back, agencies are willing to step in. There is strategic acceptance of enhanced lawmaking authority on the part of ambitious administrative agencies, willingly taking advantage of the opportunity to aggrandize its power. As Madison counseled, ambition counteracts ambition.²⁰ But make no mistake, ambition is all around, incentivizing strategic self-preservationist behavior. Sometimes actors might decide that self-preservation is best served by not grabbing all the power they might be able to access or assert. Yet when that happens, other actors with ambition for power (and seeing a way to enlarge their position) will fill the void. The authors of *The Federalist* understood this dance and that one branch will gladly lead and seize power when another branch demurs.

It is easy to beat up on administrative agencies for being too big and assertive—but can we really blame them? Are they not just acting like human beings—as rational power, influence, or wealth maximizers? Should we be surprised that they wish to position themselves for job security and perpetuate their existence?

Agency officials who take the openings that Congress is willing to give are rational power and influence maximizers within a competitive separation of powers arena. Alexander Hamilton observed in *Federalist No. 73* that agency restraint is directly proportional to the level of anticipated congressional reaction.²¹ Hamilton explained, “When men, engaged in unjustifiable pursuits, are aware that obstructions may come from a quarter which they cannot controul, they will often be restrained by the bare apprehension of opposition, from doing what they would with eagerness rush into, if no such external impediments were to be feared.”²²

Agencies benefit from this constitutional distortion too. Agencies get both the power and ability to implement their policy preferences through discretionary authority to act, to refrain from acting, and to reverse or alter course. Agencies and agency officials can champion whichever of those positions best suits their institutional and personal interests, yet they face much less political risk due to the insulation of their activities from direct electoral control.

20. THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 349.

21. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 1, at 498.

22. *Id.*

Further, agencies have self-interested incentives to do so. Resistance mechanisms develop within agencies and agency officials to guard agency turf. Preferences for the status quo emerge that make agencies self-interested in erecting barriers to change. Government agencies and bureaucracies have demonstrated substantial capacity to resist adaptation in order to preserve or expand their core functions, structure, and identity. Bureaucracies and bureaucrats are self-interested. Studies conclude that bureaucracies exhibit tendencies to perpetuate themselves. Bureaucrats want to preserve job security; will work to justify their own existence; wish to capitalize on their developed, sometimes monopolistic expertise in a certain regulatory field (*i.e.*, they are the ones that know all the code to the regulatory machine); wish to expand their budgets; hope to expand personnel and thereby gain allies; desire an ever-broadening scope of authority; and otherwise wish to entrench themselves and solidify their reason for existence.²³

More regulation equals more work, which expands the need and justification for the agency and its officials. Within such a framework, there is seldom an incentive to change regulatory structure and certainly even less so to change in a way that shrinks the size of the regulatory apparatus. Arnold and Gunderson recognize that there is a “bias in environmental law to protect presumed static economic efficiencies and to ignore dynamic relationships between economics and the environment,”²⁴ concluding that “[a]t times, the legal system seems to operate as if its primary function is to promote the resilience of the legal system itself.”²⁵

William Niskanen and other economists and political scientists are not alone in recognizing this general human tendency. Take just one offbeat example. Internet technology expert Clay Shirky set off a buzz of discussion throughout the tech world in 2010 after uttering the words: “Institutions will try to preserve the problem to which they are the solution.”²⁶ He was not speaking about government bureaucra-

23. See generally, *e.g.*, WILLIAM NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (examining the tendency for bureaucracies to seek to maximize their budgets and otherwise perpetuate their existence); William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617, 618 (1975); William A. Niskanen, *The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293, 293 (1968); see also LUDWIG VON MISES, *BUREAUCRACY* 18–19 (1944) (comparing the relative efficiency of institutions driven by profit motives versus ineffective institutions driven by bureaucratic motives).

24. Craig Anthony (Tony) Arnold & Lance H. Gunderson, *Adaptive Law and Resilience*, 43 ENVTL. L. REP. 10426, 10429 (2013) (citing DAVID M. DRIESEN, *THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW* (2003)).

25. *Id.*

26. This phrase was apparently first recorded, and therein dubbed “The Shirky Principle,” by a columnist for the magazine *Wired* in Kevin Kelly, *The Shirky Principle*, *TECHNIUM* (Apr. 2, 2010), <http://kk.org/thetechnium/2010/04/the-shirky-prin/> [<https://perma.cc/PPD2-WZ88>]; see also Mike Masnick, *Institutions Will Try to Preserve the Problem For Which They Are the Solution*, *TECHDIRT* (Apr. 9, 2010, 7:33

cies,²⁷ but the point is powerful all the same. The issue is really a general one about tendencies in human nature. The point is that if the problems are solved or done more efficiently, or if Congress reins in agency discretion or authority, there will be less need for those tasked with solving the problem. Indeed, their usefulness may entirely disappear if the problem is completely eliminated or removed from their jurisdiction. Thus, officials who have the power within their grasp need to find a way to grab as much as they can and hang on, yet they also need the problem with which they are tasked to persist lest they outlive their usefulness.

The literature is rife with details about these stories on institutional dynamics. For this Essay's purposes, several examples from the environmental law and natural resources fields add to the mix of examples. Part V will include case studies that fit the strategic institutional positioning paradigm sketched in this Essay, while also using these examples to demonstrate additional lessons regarding the trend toward environmental policy without—or at least beyond—Congress's authority.

V. SELECTED ENVIRONMENTAL LAW CASE STUDIES IN STRATEGIC INSTITUTIONAL POSITIONING

This Part will turn to examples where natural resources and environmental policy illustrate these constitutional distortions. Section A will discuss more than a century of material regarding Congress's consideration of heightened protective status of public lands as National Monuments. Part B will look at the whirling world of word games associated with defining "waters of the United States" under the Clean Water Act ("CWA").

A. *Example 1: National Monuments*

One of the most controversial environmental issues straddling the Obama and Trump Administrations has been related to National Monuments, pursuant to the congressional authorization for their declaration under the Antiquities Act of 1906.²⁸ President Obama's monuments encompassed more than 550 million acres of federal land and

AM), <https://www.techdirt.com/articles/20100404/2112388868.shtml> [<https://perma.cc/BK9N-B9W3>].

27. Kelly, *supra* note 26 (relating to media, industry, and perhaps unions).

28. See, e.g., Donald J. Kochan, *Midnight Monuments*, HILL (Oct. 3, 2016, 9:15 AM), <https://thehill.com/blogs/congress-blog/energy-environment/298916-midnight-monuments> [<https://perma.cc/W2YM-E3BC>]; Donald J. Kochan & Charles Wilkinson, *Midnight Monuments: The Antiquities Act and the Executive Authority to Designate National Monuments—Podcast*, FEDERALIST SOC'Y (Sept. 23, 2016), <https://fedsoc.org/commentary/podcasts/midnight-monuments-the-antiquities-act-and-the-executive-authority-to-designate-national-monuments-podcast> [<https://perma.cc/6KRT-GETL>] (summarizing some of the key issues and the debates on legal authority over monuments).

water, double the amount of any preceding President.²⁹ There is no doubt this was an extraordinary use of the Antiquities Act's authority, but those who lodge complaints sometimes blame President Obama too quickly.

I contend that massive executive public lands withdrawals or National Monument designations are less concerning as acts of administrative excess than they are as troublesome examples of congressional failure. Even now, as the Trump Administration and Secretary Zinke have reconsidered and altered some of these monument designations,³⁰ the entire blame/credit story in both the popular media and in most sophisticated policy debates is on how the Executive views its role and uses its authority—not on what Congress *has done* to empower such executive declarations with a long statutory leash and not on what Congress has *not done* to shorten the leash.

With the exception of some calls for executive restraint—for example, calls to let the Public Lands Initiative handle Utah issues³¹—most debates are over whether the Obama Administration went too far and whether the Antiquities Act is a one-way ratchet which the Trump Administration may use to undo or modify past-designated National Monuments.³²

Many members of Congress cried foul against President Obama for his monument designations,³³ and some others now cry foul against

29. The Editorial Board, *Monuments Man*, N.Y. TIMES (Dec. 31, 2016), <https://www.nytimes.com/2016/12/31/opinion/sunday/monuments-man.html>; see also Juliet Eilperin & Brady Dennis, *Obama Names Five New National Monuments, Including Southern Civil Rights Sites*, WASH. POST (Jan. 12, 2017), https://www.washingtonpost.com/national/health-science/obama-names-five-new-national-monuments-including-southern-civil-rights-sites/2017/01/12/7f5ce78c-d907-11e6-9a36-1d296534b31e_story.html?utm_term=.57bf99c1ad83 [<https://perma.cc/AA9D-KTWD>].

30. Juliet Eilperin & Darryl Fears, *Interior Secretary Recommends Trump Alter at Least Three National Monuments, Including Bears Ears*, WASH. POST (Aug. 24, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/08/24/interior-secretary-recommends-trump-alter-a-handful-of-national-monuments-but-declines-to-reveal-which-ones/?utm_term=.5fff37962a7d [<https://perma.cc/D4NG-T4AA>].

31. Robinson Meyer, *Obama's Environmental Legacy, in Two Buttes*, ATLANTIC (Dec. 30, 2016), <https://www.theatlantic.com/science/archive/2016/12/obamas-environmental-legacy-in-two-buttes/511889> [<https://perma.cc/3GTG-HP4D>]; Shawn Regan, *A Monumental Mistake*, NAT'L REV. (Feb. 14, 2017, 9:00 AM), <https://www.nationalreview.com/2017/02/antiquities-act-outdated-progressive-law-bears-ears-national-monument> [<https://perma.cc/5XUT-VFBR>].

32. See generally, e.g., Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473 (2003) [hereinafter Squillace, *Monumental Legacy*]; see generally Mark Squillace, et. al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55 (2017) [hereinafter Squillace et al., *Abolish or Diminish*]; John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. REG. 617, 618–19 (2018).

33. Steve Sherman, *Scale Back President's Power to Create National Monuments*, WASH. EXAMINER (Aug. 12, 2017, 12:01 AM), <https://www.washingtonexaminer.com/scale-back-presidents-power-to-create-national-monuments> [<https://perma.cc/Y6EM-2SP8>].

the Trump Administration for its willingness to consider altering them³⁴—yet very few have looked in the mirror and done anything to draft a new statute that would complete the work necessary to facilitate their preferred policy outcome that would constrain either category of presidential inclination. There have been momentary exceptions with some bills introduced in Congress, although one must question whether these have ever been considered serious efforts. For example, H.R. 3990, the “National Monument Creation and Protection Act,” passed out of the Natural Resources Committee on October 11, 2017 by a twenty-three to seventeen vote.³⁵ Beyond promising a report to the full chamber recommending it for further consideration, not much further progress has been made.³⁶ Among its most significant changes to the Antiquities Act, it specifically would have excluded “natural geographic features” from the definition of objects of antiquity capable of justifying a designation and identifies (and I would say limits over the status quo) when a President may reduce the size of a monument (in a likely unconstitutional manner). I am skeptical that this bill would solve all of the monument problems even if it, or something like it, passed into law. More fundamentally, I am skeptical it could ever pass. There are traditionally high hurdles posed for high visibility moves that could be labelled anti-environmental—these provide opponents with good, effective soundbites while separation of powers principles are not well-suited to sound bite politics.

Perhaps H.R. 3990 was a recognition of congressional responsibility, at least among the twenty-three that voted for it. Nonetheless, the focal point for debate remains largely on administrative authority or abuse, despite the fact that the fault for this fiasco lies mostly with the U.S. Congress (of 1906) for delegating near plenary authority to a President to unilaterally convert normal public lands into high-level protected zones.

The problems with the initial enabling legislation begin with its text. The Antiquities Act of 1906 provides, in part, that “The President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.”³⁷ Presidents have interpreted this language as permitting proclamations

34. Julie Turkewitz & Lisa Friedman, *Interior Secretary Proposes Shrinking Four National Monuments*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/us/bears-ears-utah-monument.html?login=email&auth=login-email> [https://perma.cc/HA8Y-H36D].

35. National Monument Creation and Protection Act, H.R. 3990, 115th Cong. (2017).

36. H.R. 3990: *National Monument Creation and Protection Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/hr3990> (last updated Oct. 6, 2017) [https://perma.cc/NUR6-7QMK].

37. 54 U.S.C. § 320301 (2014).

of monuments for the preservation of places of *natural significance*, often the most controversial ways the Act is used.³⁸

Congress primarily *intended* the Antiquities Act to be an anti-looting statute that would allow the President to prevent the plunder and irreparable loss of artifacts and other national treasures. But the loose and poorly drafted language of the Antiquities Act does not compel such a limited mandate.³⁹

We should not be surprised that presidents interpret the authority broadly and that President Obama used it to designate as much as he did. *Most* presidents have similarly felt unconstrained by the Act's original purposes, instead accepting the invitation to preservationist power afforded by the ill-drafted text.⁴⁰

With the massive Obama-era monuments, popular outcry did not blame Congress for creating the Antiquities Act, and few blamed Congress for not passing laws to *limit* the Antiquities Act. Instead, the blame went to President Obama for his interpretation of Congress's poorly drafted words.⁴¹

Some have refrained from the temptation of the national monument grant, such as Richard Nixon, Ronald Reagan, and George H.W. Bush.⁴² It is likely that these Presidents saw more benefit and expansion of their influence from receiving support from their base voters by not using their power. But Teddy Roosevelt set the practical precedent by robustly invoking his newfound power as soon as it passed Congress.⁴³

There is a strong argument that Congress lacks the authority to delegate its power as broadly as some have construed the Antiquities Act.⁴⁴ The U.S. Constitution's Property Clause commits to Congress

38. Squillace, *Monumental Legacy*, *supra* note 32, at 485–99.

39. *See id.* at 482.

40. *See id.* at 490–514.

41. Andrew O'Reilly, *Ranchers Spar with Obama Over National Monuments in Utah and Nevada*, FOX NEWS (Jan. 5, 2017), <http://www.foxnews.com/politics/2017/01/05/ranchers-spar-with-obama-over-new-national-monuments-in-utah-and-nevada.html> [https://perma.cc/F7MH-NLUP] (“Obama’s Monument proclamations . . . do not represent the interests of the people.”); H. Sterling Burnett, *Obama’s Dangerous Use of the National Monument Law*, FORBES (Oct. 12, 2016, 10:00 AM), <https://www.forbes.com/sites/realspin/2016/10/12/obamas-dangerous-use-of-the-national-monument-law/#39fff5274122> [https://perma.cc/PTC2-L2XN] (“The Antiquities Act is one of the most ill-considered laws ever written Many presidents have used [the Act], but none have done so more often or with such recklessness as Obama has.”); Gregory Korte, *Obama’s National Monuments Are About More Than Conservation*, USA TODAY (June 26, 2016, 4:19 PM), <https://www.usatoday.com/story/news/politics/2016/06/26/obamas-national-monuments-more-than-conservation/82931356> [https://perma.cc/W8WC-GHR6] (claiming an Obama designation “exemplifies the president’s complete disregard for the legislative process”).

42. Korte, *supra* note 41.

43. Squillace, *Monumental Legacy*, *supra* note 32, at 490.

44. *See* Squillace et al., *Abolish or Diminish*, *supra* note 32, at 56; Robert T. Anderson, *Protecting Offshore Areas from Oil and Gas Leasing: Presidential Authority*

the “power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁴⁵ When the Antiquities Act is broadly construed, it lacks any discernible, intelligible principle that would constrain the executive branch’s exercise of monument designation power.⁴⁶ Congress thus abdicates its responsibility to manage federal lands. That should make the broad interpretation unconstitutional, but courts to date have not taken such a stance in the few cases that have challenged monument designations. Furthermore, each new Congress has largely acquiesced in the generous interpretation. If the power of the President were constrained by the motivating purpose rather than the text of the Antiquities Act, we might see fewer, more thoughtful designations.

The lack of congressional or even normal agency involvement in monument designations sacrifices beneficial deliberation and makes them a less transparent means of preserving natural resources. Notable examples where this charge has been levied include the controversial 1.9 million-acre Grand Staircase-Escalante monument designated by President Clinton and the Bears Ears Monument designated by President Obama.

Deliberative processes are designed to better appreciate the complexities involved in federal land management. Blanket, broad-based protective status for large, uninterrupted chunks of property is not always the wisest way to balance competing policy objectives.

Saying no to a broad presidential authority to proclaim national monuments does not mean saying no to conservation. Public lands statutes already authorize executive agencies to manage lands according to democratically-established standards.⁴⁷ These include the ability to install limits on certain uses of the federal lands portfolio to accomplish preservation and conservation goals, subject to public participation requirements and judicial review. Moreover, when areas truly need high-level protective status, Congress may (and has) exercised its Property Clause power and shown the competency to confer special protective status when prudent, such as through the creation of national parks and wilderness areas.⁴⁸

But Congress has not shown a propensity to exercise this highly-specific constitutional responsibility and has not guarded against the creation of de facto national parks by near executive fiat under cover

Under the Outer Continental Shelf Lands Act and the Antiquities Act, 44 *ECOLOGY L.Q.* 727, 746 (2018).

45. U.S. CONST. art. IV, § 3, cl. 2.

46. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001) (articulating the “intelligible principle” standard for nondelegation doctrine regarding the requirement that congressional delegations of authority need to include such guidance).

47. *See, e.g.*, Federal Land Management Policy Act (FLPMA), 43 U.S.C. § 1701 (2012).

48. National Park System, 54 U.S.C. §§ 100101–104907 (2012); National Wilderness Preservation System, 16 U.S.C. §§ 1131–36 (1964).

of the Antiquities Act. A substantial number of parks have been created by “upgrading” designated national monuments. This is arguably because the marginal change in status comes with less disruption to other productive users of land who have already seen their uses curtailed by the executive action. The protection/development or use equilibrium has already shifted, such that the notch up to National Park status has only marginal impact over the new monument-based status quo.⁴⁹ This is unlike an immediate change to a National Park from general public or private lands by Congress—something which would involve much larger pools of political capital because it would be a far greater change away from the status quo and bring with it the costs generally suffered when Congress must make and defend a choice.

Until the Antiquities Act is repealed or amended, we must rely on Presidents to exercise self-restraint and see the wisdom of more participatory mechanisms to achieve conservation aims. But given our human nature to exercise whatever authority we are given or can get away with,⁵⁰ those worried about the excess of presidential power to proclaim national monuments should direct less attention at changing the decisions of the individual, and more at Congress to change the law that permits—indeed invites—those proclamations.

From the strategic institutional positioning perspective, the National Monuments story is predictable. For those in Congress whose preferences are aligned with broad National Monument designations, they can claim that they gave the Executive authority to so designate and share in the political advantages of a designation should they wish to do so. Or, those whose constituents oppose national monuments can claim that the administrative action has failed to honestly adhere to the limits of the congressional legislation and tell their constituents that the President is to blame. The less-immediately-accessible reasons to blame Congress for creating the opening for the President, and the behind-the-clouds fact that Congress could close the door on the presidential authority if it really wished to fix the problem, stay obscured.

49. Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, NAT'L PARK SERV. (Aug. 1989), <https://www.nps.gov/parkhistory/hisnps/npshistory/righter.htm#2> [<https://perma.cc/PZC5-AWRQ>].

50. See, e.g., Ronald Reagan, A Time for Choosing, Address on Behalf of Senator Barry Goldwater (Oct. 27, 1964) (transcript available at Ronald Reagan, *A Time for Choosing*, AM. RHETORIC, <https://www.americanrhetoric.com/speeches/ronaldreaganatimeforchoosing.htm> [<https://perma.cc/U9XF-N4G3>]) (“No government ever voluntarily reduces itself in size. Governments’ programs, once launched, never disappear. Actually, a government bureau is the nearest thing to eternal life we’ll ever see on this earth.”).

B. *Example 2: Waters of the United States*

Although this Essay could catalog many examples that fit into the strategic abdication frame, it will limit its analysis to just one other example—the CWA⁵¹ and the meaning of the phrase “Waters of the United States,”⁵² or WOTUS as it has become its popularly used acronym.

The CWA gives the Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) jurisdiction to regulate discharges and other activities related to “navigable waters,” a phrase which the CWA—in a manner far from a fount of clarity—defines as “waters of the United States.”⁵³ “Waters of the United States” is thereafter not defined in the CWA. Hence, courts and the relevant agencies have struggled to define its meaning, and its malleability has allowed for agencies to inject substantial policy preferences.

Across the past forty-plus years, the U.S. Supreme Court has generated a convoluted ping pong match of opinions, volleying between wide and narrow interpretations of “waters of the United States” but ultimately driven by the agencies themselves politicizing the term.⁵⁴ Yet Congress has not intervened with corrective amendments that assert its authority to define such a critical term. Rather than retake its authority, most members of Congress critique the agency decisions as deviant or consistent, depending on the baggage they want the term to carry.

In a 2015 rulemaking, the EPA and Corps happily exploited the judicial uncertainty of meaning by adopting a dramatically broad, new administrative definition of WOTUS.⁵⁵ Amongst numerous challenges in different courts,⁵⁶ the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule.⁵⁷ But in January 2018, the U.S. Supreme Court

51. Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251–1388 (2012).

52. *Id.* §§ 1311(a), 1344(a), (d), 1362(7).

53. *Id.*

54. *Rapanos v. United States*, 547 U.S. 715, 722–24 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162–64 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123–24 (1985); see also Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 VA. J. SOC. POL'Y & L. 299, 314–15 (2008).

55. Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37054, 37054-101 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

56. See, e.g., *North Dakota v. U.S. E.P.A.*, 127 F. Supp. 3d 1047, 1047 (D.N.D. 2015) (enjoining applicability of the 2015 WOTUS Rule in 13 States).

57. *In re E.P.A.*, 803 F.3d 804, 805, 809 (6th Cir. 2015), *vacated sub nom.*, *In re United States Dep't of Def.*, 713 F. App'x. 489 (6th Cir. 2018).

ruled that the Sixth Circuit lacked jurisdiction,⁵⁸ and the Sixth Circuit vacated its stay.⁵⁹

Whatever “waters of the United States” means under the CWA, it cannot possibly mean what the Obama Administration defined it to mean in its 2015 WOTUS Rule. The Trump Administration EPA and Corps are now undergoing rulemaking to rescind the 2015 rule and conducting “a substantive re-evaluation of the definition of ‘waters of the United States.’”⁶⁰

Although the Trump Administration is engaged in rulemaking to volley with a new administrative interpretation once again, the problem cries out for legislative clarification.⁶¹ Even a brief glimpse at the regulatory and judicial dockets reveals why. Indeed, the regulatory waves in the years since the onset of the Trump Administration are dizzying. The comment period on the Trump Administration’s proposed Step One Rule—the repeal rule with recodification of the pre-existing rules, themselves problematic—closed on September 27, 2017;⁶² but the EPA and Corps issued a supplemental notice seeking additional comments on the repeal rule in July 2018, with the comment period closing in August 2018.⁶³ Step Two—a new definition of “waters of the United States”—is still to come. In November 2017, the EPA and Corps also issued a press release announcing that they would publish a new, separate proposal to amend the effective date of the 2015 rule, separate and apart from the rulemaking process to formally repeal the 2015 rule—with a very short twenty-one-day comment period.⁶⁴ That “suspension rule” was finalized and published in the Fed-

58. *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 634 (2018) (“Ultimately, the Government’s policy arguments do not obscure what the statutory language makes clear: Subparagraphs (E) and (F) do not grant courts of appeals exclusive jurisdiction to review the WOTUS Rule.”).

59. *In re U.S. Dep’t of Def.*, 713 F. App’x. 489, 490 (6th Cir. 2018).

60. Dep’t of Def., Dep’t of the Army Corps of Eng’rs, *Definition of “Waters of the United States”—Recodification of Pre-Existing Rules* (June 27, 2017), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwik-M3MhtTcAhXmjFQKHdAlCEIQFjAAegQIABAC&url=https%3A%2F%2Fwww.epa.gov%2Fsites%2Fproduction%2Ffiles%2F2017-06%2Fdocuments%2Fwotus_prepublication_version.pdf&usg=AOvVaw30Jq62L82gfA7ZBuIoIGOK [<https://perma.cc/E6W9-6YTX>].

61. For more details on the 2015 WOTUS Rule, see Daren Bakst, et al., *Restoring Meaningful Limits to “Waters of the United States”*, REG. TRANSPARENCY PROJECT (Sept. 26, 2017), <https://regproject.org/wp-content/uploads/RTP-Energy-Environment-Working-Group-Paper-WOTUS.pdf> [<https://perma.cc/AK87-CTDL>].

62. ENVTL. PROT. AGENCY, *Supplemental Notice: Definition of “Waters of the United States”—Recodification of Preexisting Rule*, <https://www.epa.gov/wotus-rule/supplemental-notice-definition-waters-united-states-recodification-preexisting-rule> (last updated July 12, 2018) [<https://perma.cc/E3FF-5BVQ>].

63. Definition of “Waters of the United States”—Recodification of Preexisting Rule, 83 Fed. Reg. 32227, 32227 (proposed July 12, 2018) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

64. ENVTL. PROT. AGENCY, *EPA and the Army Propose to Amend the Effective Date of the 2015 Rule Defining “Waters of the United States”* (Nov. 16, 2017), <https://>

eral Register in February 2018.⁶⁵ But the rule was challenged in court and the U.S. District Court for the District of South Carolina invalidated the suspension rule in August 2018.⁶⁶ As of this writing, that case is on appeal. Suffice it to say, it will be a long time before the waves calm enough to see where the WOTUS Rule settles and what the current definition of “waters of the United States” will be. Yet the very occurrence of so much litigation and attempted administrative solutions is clear proof that this is congressionally-created chaos intensified by Congress abstaining from passing clarifying intervening legislation.

For decades now, the phrase “waters of the United States” in the CWA has been a catalyst for debates that implicate countless pressure points in our system of law and policy. Most directly, the debate is about the meaning of WOTUS. Related is whether a definite meaning for those words can be found at all in the CWA using ordinary methods of statutory interpretation.⁶⁷ This leads to questions about the appropriate methodology courts should employ for interpreting statutory text, an exercise which necessarily entails broad administrative and constitutional law questions of what to do in the face of ambiguity, including how much deference to afford administrative agencies. The resulting confusion surrounding statutory interpretation also invites the question—where is Congress? Why is it forcing the courts to struggle through all those steps? Why has it hardly passed any serious environmental legislation since the 1970s? And why has it not updated and clarified statutes that are filled with unclear mandates susceptible to abusive administrative interpretations that generate substantial uncertainty? Should Congress be able to pass the buck by legislating in such vague terms so that agencies have almost unlim-

www.epa.gov/newsreleases/epa-and-army-propose-amend-effective-date-2015-rule-defining-waters-united-states [https://perma.cc/B243-QDN7].

65. Definition of “Waters of the United States”—Addition of an Applicability Date to 2017 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

66. S.C. Coastal Conservation League v. Wheeler, No. 2:18-cv-00330-DCN, slip op. at 2, 18 (D.S.C. Aug. 16, 2018).

67. See, e.g., *Rapanos v. United States*, 547 U.S. 715, 734 (2006) (“In applying the definition to ‘ephemeral streams,’ ‘wet meadows,’ storm sewers and culverts, ‘directional sheet flow during storm events,’ drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term ‘waters of the United States’ beyond parody. The plain language of the statute simply does not authorize the ‘Land of Waters’ approach to federal jurisdiction.”); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 170–71 (2001) (“‘Beyond Congress’ desire to regulate wetlands adjacent to ‘navigable waters,’ respondents point us to no persuasive evidence that the House bill was proposed in response to the Corps’ claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction.”); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (“We cannot say that the Corps’ conclusion that adjacent wetlands are inseparably bound up with the ‘waters’ of the United States . . . is unreasonable.”).

ited power to fill the gaps? Again, this is a convenient and strategic position for Congress. And despite the Framers' belief that Congress would want to preserve its final decision-making authority on issues near to its institutional purpose,⁶⁸ human nature has taken us along a different path.

VI. WHY THESE PROBLEMS ARE ACUTE IN ENVIRONMENTAL POLICY

This final Part offers a few additional thoughts on what makes environmental policies prone to these perversions in constitutional power dynamics. Quite simply, these problems are acute in the environmental realm because environmental policy involves highly transparent, hot-button issues, generating unique optics through narratives that are accessible to almost anyone, not just experts.⁶⁹

Environmental issues are presented in a particularly potent frame—and one that individuals regularly view as a binary choice between environmental protection and *not* environmental protection. In fact, the EPA's name is one example where the agency seems to be boxed into a uni-directional imperative that constrains the universe of acceptable initial policy positions. For example, once the EPA has set a course definitionally in the direction of environmental protection through regulatory intervention, any move by that same agency or Congress that reverses direction becomes optically challenged as *against the direction of protection*. Congress is very sensitive to this delicate dance and exploits it through engaging in the strategic abdication discussed at the outset of this Essay.

There is one other issue worth mentioning regarding why Congress is particularly willing to allow environmental agencies to aggrandize. As the federal administrative state promulgates more environmental regulations, it further legitimizes a larger federal role generally. Thus,

68. See THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 333; see also THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 1, at 483.

69. Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433, 440 (2008) (“While environmental debate is hardly alone among hot-button topics in eliciting emotionally charged public debate, environmental law is particularly vulnerable to behavioral anomalies”); Charles Gottlieb, *Regional Land Use Planning: A Collaborative Solution for the Conservation of Natural Resources*, 29 J. ENVTL. L. & LITIG. 35, 38 (2014) (“Environmental policy is often controversial because environmental impacts transcend governmental boundaries.”); A. Dan Tarlock, *Who Owns Science?*, 10 PA. ST. ENVTL. L. REV. 135, 136 n.3 (2002) (“The tension between expertise and democratic control traces back to Plato and Aristotle, but it is a particularly troublesome problem for environmental law, which is an unstable mix of the rational and emotional.”); Robert F. Blomquist, *The Beauty of Complexity*, 39 HASTINGS L.J. 555, 566 (1988) (reviewing WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER) (“Such is the lot of environmental law: As it has grown older, it has become stranger, its pattern more complicated. Indeed, the idea of complexity is essential to understanding the meaning and operation of environmental law and policy.”).

Congress's institutional interest in a larger scope of *legislative* authority is served by the validation of federal *administrative* authority because such validation tends to erode limits on federal authority generally. This enlargement of federal jurisdiction results because environmental harms present powerful narratives for justifying federal reach. Those favoring environmental regulation can easily offer claims that the problems they seek to address implicate transboundary issues and generate ecosystem effects necessitating nationwide policies and uniform federal control. As a result, environmental cases pave the path to precedents that interpret general federal regulatory authority broadly. A disproportionate number of cases in administrative law textbooks and in the commerce clause section of constitutional law textbooks, for example, are environmental regulation cases.

Congress gets to piggyback on broad administrative reach to set precedent for broader federal legislative reach. Therefore, from a strategic institutional perspective, an enlarged administrative state becomes a gateway that helps justify a broader reach of federal legislative authority too. As this process plays out, Congress is able to gradually and incrementally benefit with each new expansion of federal authority effected by the aggregation of validated administrative actions, while simultaneously evade the blame for what by direct legislative means would appear as highly visible, transparent power grabs away from the states.

VII. CONCLUSION

Revealing how and why strategic positioning by both Congress and the Executive have aligned to facilitate and encourage lawmaking without Congress is an important step toward change. By understanding these institutional incentives and the inter-branch interplay they support, we can better appreciate just how difficult it can be to re-channel primary responsibility for developing and overseeing the adaptation of environmental law back to Congress.

The acceptability of agency gap-filling in environmental and other regulatory statutes has perhaps made Congress less important as a detailed-legislative institution (although one with wider federal jurisdiction, as noted in Part VI). In addition, agency gap-filling allows Congress to shift the political costs of many decisions onto the agencies as Congress tries to distance itself from the detailed decisions that most directly affect individuals. The complementary forces discussed here ensure the enlargement of the administrative state far beyond what the Framers could have imagined. Congress is self-interested, as the Framers expected. But it turns out its self-interest, or the self-interest of its individual members, do not always coincide with retention of legislative power and jealous guardianship of their own prerogatives.

These conditions have real consequences for the separation of powers but also for effective environmental policy. The dynamic nature of the ecosystem makes regular policy changes necessary in the environmental law field,⁷⁰ but the legislature is not one to pursue an aggressively adaptive theory of legislative responsibility. The optical entrenchment of existing laws makes environmental laws some of the most difficult to change, despite being an area most in need of—and most deserving of, from a good governance standpoint—regular legislative adjustment as ambiguities are discovered, as new facts are learned, as new scientific knowledge is gained, as ecosystems themselves change, and as technological understanding and the capacity to address problems of all types emerges.

70. See, e.g., Donald J. Kochan, *Economics-Based Environmentalism in the Fourth Generation of Environmental Law*, 21 J. ENVTL. & SUSTAINABILITY L. 47, 51 (2015) (discussing, *inter alia*, the polycentric nature of environmental law and the need for regular updating).

