ENVIRONMENTAL LAWMAKING WITHIN FEDERAL AGENCIES AND WITHOUT JUDICIAL REVIEW

ARDEN ROWELL*

A combination of institutional and disciplinary factors make U.S. environmental law unusually subject to the discretion of administrative agencies. This dependence on agency discretion heightens the impact of internal agency operations on the substance of U.S. environmental law. As a result, internal agency dynamics have a particular power within environmental law, over and above what might be expected in general administrative law contexts.

I. INTRODUCTION

In his essay on *Lawmaking Within Federal Agencies and Without Judicial Review*, Christopher Walker explores two ways that agencies operate with limited judicial oversight: through "drafting the legislation that empowers them to regulate," and through exercising "broad discretion within that congressionally delegated authority to choose how to regulate."[1] As Walker explains, the two mechanisms are interrelated because the "vast amount of agency lawmaking [that] escapes judicial review . . . suggests that it is all the more important to understand the key players *within* the agency that engage in these legislative and regulatory activities."[2]

Walker's analysis is directed towards agencies in general, and as such, his insights are meant to apply with equal helpfulness to any kind of administrative law without courts—whether that administrative law is environmental or not. Walker's emphasis on the importance of internal agency operation as a determinant of substantive administrative law is a valuable tonic to the common scholarly preoccupation with judicial review, and situates the essay

* Professor and University Scholar, University of Illinois College of Law.

1. Christopher J. Walker, *Lawmaking Within Federal Agencies and Without Judicial Review*, 32 J. LAND USE & ENVTL. L. 551 (2017).

2. *Id.* at 552 (emphasis original).

within a growing literature in administrative law exploring the importance and implications of internal agency organization.[3] Further, Walker's spotlighting of the potential role that agencies can play in drafting their own statutes is both original and illuminating,[4] and stands as an example of the power agencies can exert over administrative law in the absence of meaningful judicial review.

Walker does not explicitly focus on environmental lawmaking. Yet this response essay will suggest that internal agency dynamics like those Walker identifies have the power to play an especially important role in the operation of U.S. environmental law. That is because institutional and disciplinary factors often combine to make environmental injury unusually resistant to control by both the judiciary and the executive, leaving U.S. agencies administering environmental law with an unusually large space to exercise their discretion.

This capacious discretion forms at the intersection of U.S. legal institutions and the distinctive qualities of environmental injury. At heart, environmental law concerns itself with the management of environmental impacts.[5] I have argued elsewhere that this distinguishes it from other types of law, which tend to focus on shaping human behavior as an end as well as a means.[6] Environmental law attempts to shape human behavior as well, but it does so instrumentally, as a method for managing environmental impacts.[7]

The fact that environmental law is often concerned with dispersed, complex, and nonhuman impacts[8] creates at least three

3. *See, e.g.*, Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2322 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 428–30 (2009); Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 423 (2015); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 520 (2015).

4. Walker builds on his own prior work documenting agencies' roles in providing technical assistance in legislative drafting. *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015) (presenting the results of an original survey of agency rule drafters).

5. *See* Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703 (2000) ("What makes environmental law distinctive is largely traceable to the nature of the injury that environmental protection law seeks to reduce, minimize, or sometimes prevent altogether. Environmental law is concerned, in the first instance, with impacts on the natural environment."); ARDEN ROWELL & JOSEPHINE VAN ZEBEN, A PRIMER ON ENVIRONMENTAL LAW: THE UNITED STATES (forthcoming 2018) ("Environmental law regulates human behavior in light of its environmental impacts.").

6. *See* Arden Rowell, *Behavioral Instruments in Environmental Law*, *in* ENCYCLOPEDIA OF ENVIRONMENTAL LAW (Ken Richards & Josephine van Zeben eds., forthcoming 2018) (arguing that "environmental law is necessarily concerned with a measure of success that is (1) more dispersed, (2) more latent, (3) more causally complex, and (4) less human in its focus than most other legal fields").

7. *Id.*

8. *See* ROWELL & VAN ZEBEN, *supra* note 5 (arguing that "environmental law regulates human behavior in light of its environmental impacts", and arguing that environmental impacts are distinctively diffuse, complex, and nonhuman in character); Lazarus, *supra*

kinds of special hurdles for U.S. legal institutions, and for courts in particular. First, the causal complexity posed by the management of environmental impacts—and the concurrent relationship with science—poses information barriers for non-specialists (including generalist courts and executive political appointees) attempting to control environmental agency decisions. Second, the dispersed nature of environmental impacts pose institutional difficulties for a judicial system intent on adjudicating (only) concrete "cases and controversies," and for a political branch who is answerable to particular stakeholders. And finally, the moral and ethical puzzles created by environmental impacts on future generations and on nonhuman animals, plants, and ecosystems can make courts uncomfortable and bureaucrats intransigent.

The remainder of this essay expands on the ways that environmental law interacts distinctively with the judiciary and the executive, to result in what can be a kind of "bonus discretion" for agencies managing environmental impacts. More particularly, it argues that, as a practical matter, the special qualities of environmental injury can afford agencies even greater discretion for environmental decisions than for other types of administrative law issues. The essay concludes with some reflections on how bonus discretion afforded agencies in environmental law puts additional pressure on—or offers additional opportunity for—internal agency dynamics to shape the substance of environmental policy.

II. ENVIRONMENTAL RESISTANCE TO JUDICIAL CONTROL

Building on a long tradition in administrative law, Walker and other authors in this Symposium have noted the high level of deference that courts generally afford agencies when they are acting within the zone of their expertise—a deference that amounts to a kind of "*Chevron* space" for regulating without judicial interference.[9] Here, I want to build on that general background to suggest

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note 5, at 744–48 (2000) (arguing that environmental injury has these recurring features: "irreversible, catastrophic, and continuing injury"; "physically distant injury"; "temporally distant injury"; "uncertainty and risk"; "multiple causes"; and "noneconomic, nonhuman character").

9. *See* Walker, *supra* note 1, at 554–57 (2017) (citing Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012)); *see also* Robert L. Glicksman & Emily Hammond, A*gency Behavior and Discretion on Remand*, 32 J. LAND USE & ENVTL. L. 483 (2017); David L. Markell, *Agency Motivations in Exercising Discretion*, 32 J. LAND USE & ENVTL. L. 513 (2017); *see generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984) (establishing the famously deferential *Chevron* two-step test for whether a court will defer to an agency interpretation of a statute that it administers of (1) "whether Congress has directly spoken to the precise question at issue," and if not, (2) whether the agency's interpretation is "permissible").

that, where the injuries an agency is managing are environmental in nature, the agency often enjoys a "bonus" to the level of discretion it can exercise—an extra-large "space" that extends even beyond the normal "*Chevron* space" for regulating without judicial interference. This bonus space for supplemental environmental discretion comes from the nature of environmental injuries, which tend to be dispersed, causally complex, and nonhuman—and thus particularly difficult to manage through the judicial system, for reasons summarized below. The practical result is to provide additional insulation from judicial review—or a greater "space without courts"—for agencies managing environmental injury.

Courts are generalists; the greater the expertise needed to trace causality, and the greater the burden of technical information needed to trace multiple causes and multiple effects, the greater courts stand at an institutional and informational disadvantage to agencies, and the more willing they are to defer.[10] Of course expertise is a traditional justification for agency involvement in any type of administrative law, and concurrently a functional limit on the judicial role.[11] Yet for environmental law, this complexity interacts with its other features: particularly, with the fact that its impacts are often distant in space and time, and that they may be nonhuman in character, despite having potentially important implications for human populations.

U.S. courts adjudicate "cases and controversies," a fundamental institutional role traceable to the Constitution, and embodied most strikingly in the judicial doctrine of standing.[12] To establish standing, courts require plaintiffs to satisfy each element of a three-prong

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10. *See* Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 377 (1989) (noting that courts must defer to agencies when the dispute involves a high level of expertise); Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 103 (1983) (noting that courts should be most deferential when agency determinations involve technical issues at the frontiers of science); Lands Council v. McNair, 537 F.3d 981, 988 (9th Cir. 2008) (rejecting what the court characterized as an invitation to act as a "panel of scientists" in reviewing the scientific findings of the Forest Service, and opining that "this is not a proper role for a federal appellate court").

11. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 514 (1989) ("The cases, old and new, that accept administrative interpretations, often refer to the 'expertise' of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes. In other words, they are more likely than the courts to reach the correct result.").

12. *See* Allen v. Wright, 468 U.S. 737, 750 (1984) (explaining that standing doctrine stems from the premise that "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies'") (citing U.S. CONST. art. III.); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (articulating the thesis that modern standing doctrine—as adopted subsequently by the Supreme Court—is essential to the constitutional separation of powers); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. REV. 163 (1992) (discussing the constitutional implications of modern standing doctrine post-*Lujan*, and arguing that the modern formulation is not required by the Constitution).

test: (1) that the plaintiff has suffered a concrete and particularized injury in fact that is actual or imminent; (2) that the injury is fairly traceable to the action of the defendant; and (3) that it is likely, and not just speculative, that the injury will be redressed by a favorable decision by the court.[13] Plaintiffs unable to establish any of these elements are barred from bringing a judicial claim, regardless of the substance of that claim—even if the statute explicitly grants the plaintiff a statutory right to sue, as many environmental statutes do.[14] This functionally excludes plaintiffs who experience a general injury rather than a particularized one; who have experienced a probabilistic injury, or expect a future injury, rather than a concrete or imminent injury; who are unable to trace the causal chain of harm; or who cannot show that the harm experienced is remediable by courts.

Consider the classic *Lujan v. Defenders of Wildlife* as a case in point.[15] In the case, which concerned the extraterritorial reach of the Endangered Species Act, the Supreme Court failed even to reach the question of whether the Department of the Interior had acted within its discretion. In light of a probabilistic injury accruing indirectly to foreign endangered nonhuman animals, even a sophisticated environmental group was unable to effectively establish standing to challenge the agency action. Because even the most skeptical of judicial review standards will not overturn an agency action if there is no standing, the standard of deference offered to the agency thus became immaterial. As a result, the agency in *Lujan* had—as environmental agencies often do—functional discretion that stretches beyond even the permissive bounds of *Chevron* deference.[16]

This does not mean that plaintiffs claiming environmental injury will always be excluded from a courtroom on the basis of standing;[17] while environmental injuries may tend to be dispersed across time and space, causally complex, and nonhuman in character, not all injuries are equally these things. That said, modern

13. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992). This formulation overturned the prior and far-more-liberal formulation of the test for standing articulated in *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970), which inquired into "legal interest," and which was commonly understood to grant a "favored position" within environmental law. *See* Michael A. Perino, *Justice Scalia: Standing, Environmental Law, and the Supreme Court*, 135 B.C. ENVTL. AFF. L. REV. 135, 144–48 (1987) (describing the "favored position" environmental law enjoyed under the *Data Processing* test for standing).

14. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1543 (2016) (explaining that standing requires a "concrete and particularized" injury even in the face of statutory citizen suit provisions).

15. *See Lujan*, 504 U.S. at 560–61. For a discussion of the implications of *Lujan*, *see* Sunstein, *supra* note 122.

16. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

17. *See* Sunstein, *supra* note 122, at 224–27 (discussing "easy cases" for environmental injuries in standing).

standing doctrine categorically excludes exactly those types of injuries that are most characteristic of environmental injury:[18] injuries that tend to be spatially dispersed across a population and/or that tend to occur in the future rather than immediately will struggle to establish concrete and particularized injury in fact; injuries for which causal proof is too complicated or challenging to establish, even where causation does exist, will struggle to establish that an impact is fairly traceable to the actions of the defendant; and injuries for which the primary damage is to nonhuman plants, animals, or ecosystems will struggle to establish redressibility—and injuries that combine these qualities will struggle on all three prongs.

In sum, agency decisions regarding environmental injury enjoy even greater insulation from judicial review than non-environmental decisions, because the agency gets not only the benefit of general discretion, but also the "bonus space" from protections afforded by the fact that dispersed, causally-complex, and nonhuman injuries are often functionally excluded from judicial review. Agencies administering environmental law thus enjoy an unusually broad—and significantly court-less—policy space in which to make substantive decisions.This means that the dynamic Walker notes for general agencies—that their internal decisionmaking processes increase in substantive importance as discretion broadens[19]—applies with heightened force to environmental contexts, where agency discretion is unusually expansive.

III. ENVIRONMENTAL RESISTANCE TO EXECUTIVE CONTROL

The distinctive qualities of environmental injury also offer important barriers to substantive control of environmental policy by the executive—a dynamic that is particularly important to note given that, as above, modern standing doctrine grants agencies managing environmental impacts bonus discretion even beyond what they experience in general administrative law.

One of the key ways in which environmental law poses unusual challenges to executive control is through the mechanism of bureaucratic resistance, discussed in more detail below. The result of combined limitations of executive and judicial control is that environmental law is unusually subject to the discretion of agencies.

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18. This has led some commentators to call for a change to the doctrine, see, e.g., Sunstein, *supra* note 122 (arguing that the standing doctrine adopted in *Lujan* is not constitutionally required), and/or the development of special standards or procedures for review of environmental claims, see, e.g., Timothy C. Hodits, *The Fatal Flaw of Standing: A Proposal for an Article I Tribunal for Environmental Claims*, 84 WASH. U. L. REV. 1907 (2006), even as others continue to defend the current approach as constitutionally required, see Scalia, *supra* note 122.

19. *See supra* note 2 and attached text.

Bureaucratic resistance has a long tradition in the administrative state.[20] Resistance—or what Rosemary O'Leary picturesquely calls "guerrilla government"—arises when career public servants work against the wishes of their superiors.[21]

An important aspect of bureaucratic resistance is that it often implicates the distinctions and relationships between political appointees—who are answerable directly to the President, and who serve limited terms—and career bureaucrats, who are dischargeable only for cause, and who generally spend their careers in public service. Generally, political appointees must rely upon career bureaucrats to implement the policies that the President prefers. When bureaucrats engage in resistance, then, they are generally resisting the control of the executive.

Although legal literatures on agency information asymmetry have largely focused on the information gap between agencies and external actors,[22] there is also a pervasive information gap between political appointees and career bureaucrats. This gap is particularly wide where the issues to be regulated are highly technical; the bureaucrats responsible for implementing the regulation may have spent years, decades, or even entire careers building the scientific and technical record for a rule, whereas political appointees have only the expertise that was necessary to gain them nomination and Senate confirmation. This gap is likely to be quite large even when appointees are well-credentialed, simply because—like judges—no appointee can be a specialist in everything. Where appointees are poorly-credentialed and/or where they have only short periods to educate themselves about the agency they are directing, the information asymmetry between them and the bureaucrats they direct will be even greater. This point may prove particularly important during the Trump Administration, where in a slow transition with relatively few appointees confirmed or even

20. *See* ROSEMARY O'LEARY, THE ETHICS OF DISSENT: MANAGING GUERILLA GOVERNMENT (2013); JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC (1999).

21. *See* O'LEARY, *supra* note 20, at xi.

22. *See, e.g.*, Mathew McCubbin, Roger Noll & Barry Weingast ("McNollgast"), *Administrative Procedures as Instruments of Political Control*, 3 J. OF LAW, ECON. & ORG. 243 (1987) (providing a classic presentation of how Congress can use administrative procedures to manage the inevitable principal-agent problems involved in delegating to administrative agencies); Lisa Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007) (applying principal-agent analyses to the judicial management of agency decisions).

nominated,[23] there has nevertheless already been significant turnover,[24] and where even supporters of the President concede that many political appointees lack credentials in government.[25]

While the information asymmetry between appointees and bureaucrats can arise across agencies, the complex, dispersed, and nonhuman quality of environmental injuries mean that they often require significant information to understand, much less to control. Perhaps in part for this reason, while bureaucratic resistance exists across the regulatory state, important examples of resistance have frequently arisen within environmental agencies.[26] Strategies for resistance have included exit, as where bureaucrats resign in protest;[27] leaking, either to the media or to other parts of government, such as the Inspector General;[28] formally recording dissent;[29] building a factual record to contravene the executive's preferred policy

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23. *See* Julie Hirschfeld Davis & Sharon LaFraniere, *Trump Lets Key Offices Gather Dust Amid 'Slowest Transition in Decades*,' N.Y. TIMES (Mar. 12, 2017), https://www.nytimes.com/2017/03/12/us/politics/trump-administration.html.

24. *See, e.g.,* Senior Trump Appointee Fired After Critical Comments, FORTUNE (Feb. 19, 2017), http://fortune.com/2017/02/19/trump-fired-craig-deare/.

25. *See, e.g.,* Jim Geraghty, *The Cabinet Crapshoot*, NAT'L REVIEW (Jan. 19, 2017), http://www.nationalreview.com/article/444025/donald-trump-cabinet-nominees-qualifications-dont-guarantee-performance (suggesting that being qualified may be overrated, as "[s]ometimes the nominees who seem the most qualified fail most disastrously"); *c.f., e.g.,* Paul Waldman, *Donald Trump has assembled the worst Cabinet in American history*, WASH. POST (Jan. 19, 2017), https://www.washingtonpost.com/blogs/plum-line/wp/2017/01/19/donald-trump-has-assembled-the-worst-cabinet-in-american-history/?utm_term=.f67fb462b0a7 (criticizing Trump's appointees' lack of credentials and experience in government).

26. For a nuanced discussion of multiple examples of resistance, *see* O'LEARY, *supra* note 20. Note that three of O'Leary's four main case studies of bureaucratic resistance are at environmental agencies.

27. Although it is more common for political appointees to resign in protest, as with the recent resignation of Susan Hedman, the head of the Midwest region of the EPA in protest over the water contamination crisis in Flint, Michigan, career civil servants—bureaucrats—have also done so in unusual circumstances. For example, the Department of State's entire senior administrative team resigned less than a week after President Trump took office, presumably as a form of resistance to his policies. *See* Josh Rogin, *The State Department's entire senior administrative team just resigned*, WASH. POST (Jan. 26, 2017), https://www.washingtonpost.com/news/josh-rogin/wp/2017/01/26/the-state-departments-entire-senior-management-team-just-resigned/?utm_term=.09fff789964b. For a classic discussion of employees' option to exit, *see* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).

28. Recent leaks at the EPA have disclosed executive memoranda directing agency staffers to halt communications with the public, among other things. *See* Michael Bastasch, *Career EPA Staffers Will Undermine Trump, Leak to the Press*, DAILY CALLER (Jan. 23, 2017) http://dailycaller.com/2017/01/23/source-career-epa-staffers-will-undermine-trump-leak-to-the-press/. Other well-known recent bureaucratic leaks include that by Private First Class Bradley Manning, who leaked hundreds of classified documents to WikiLeaks, which publishes online submissions of secret information from anonymous sources and whistleblowers; and the surveillance leaks by Edward Snowden, a government contractor who leaked to the Guardian. For further discussion of leaks, see O'LEARY, *supra* note 20.

29. For example, in 2009, Alan Carlin, an EPA economist, drafted a formal report that was critical of EPA's scientific position on carbon dioxide. When he felt that the report was inappropriately ignored, he reported to Congress and issued interviews to the press. *See* John M. Broder, *Behind the Furor Over a Climate Change Skeptic*, N.Y. TIMES (Sept. 24, 2009), http://www.nytimes.com/2009/09/25/science/earth/25epa.html.

outcome;[30] and foot-dragging and intentional slow-down.[31] At the time of writing, we are just seeing the first seeds of this type of resistance unfurling against recent orders by President Trump, in the form of "alternative" social media accounts[32] and persistent leaks.[33] Perhaps unsurprisingly, this resistance blossomed first at environmental agencies, including the National Park Service and the Environmental Protection Agency (EPA),[34] and in many cases has involved the treatment of scientific information.[35]

Another important theory attempting to predict and explain when bureaucrats are likely to resist executive control—an influential account developed by political scientist Dwight Waldo—also provides reason to suspect that environmental policy may provide an unusually fruitful bed for bureaucratic resistance to executive

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30. Arguably, this was the strategy pursued by EPA staffers in resisting President George W. Bush's policy to deemphasize climate change. *See* Jennifer Nou, *Bureaucracy from Below*, NOTICE & COMMENT (Nov. 16, 2016), http://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/ (arguing that "[r]ecord-building was arguably the tactic used by EPA career staff who issued an advance notice of proposed rulemaking regarding the ability of the agency to regulate greenhouse gases under existing statutory authorities. Career officials helped compile over 600 pages outlining numerous legal paths to regulation, despite an unusual preface by the Bush-appointed EPA Administrator noting his personal skepticism. Building the record later helped pave the way for further regulatory action.").

31. *But see* BREHM & GATES, *supra* note 20, at 107–08 (finding that this form of resistance is surprisingly rare).

32. The establishment of "alternative" agency social media accounts came after the National Park Service's Twitter account was shut down, reportedly because it had posted pictures showing that crowds at President Trump's inauguration were significantly smaller than crowds at President Obama's. Soon after, the Twitter account of the Badlands National Park tweeted a reminder of the agency's statutory mandate and a number of climate-change facts before also being shut down. In the following days, a number of alternative social media accounts were created, putatively run by bureaucrats at those agencies. Although the first alternative accounts were from agencies with primarily environmental missions—the EPA @ActualEPAFacts, and the National Park Service @AltNatParkSer—other science-based agencies have now also followed suit. *See* Steve Gorman, *Defying Trump, Twitter feeds for the U.S. government scientists go rogue*, REUTERS (Jan. 26, 2017), http://www.reuters.com/article/us-usa-trump-resist-idUSKBN15A0DI.

33. *See* Bastasch, *supra* note 28.

34. Both agencies administer multiple environmental statutes, and in addition, have explicitly pro-environmental mission statements. *See Our Mission and What We Do,* ENVTL. PROT. AGENCY, https://www.epa.gov/aboutepa/our-mission-and-what-we-do (last visited Apr. 18, 2017) ("The mission of EPA is to protect human health and the environment."); *About Us*, NAT'L PARK SERV., https://www.nps.gov/aboutus/index.htm (last visited Apr. 18, 2017) ("The National Park Service preserves unimpaired the natural and cultural resources and values of the National Park System for the enjoyment, education, and inspiration of this and future generations.").

35. *See, e.g.,* Andrew Griffin, *Donald Trump plans to 'reform' the way environmental agency uses science, report claims*, THE INDEPENDENT (Jan. 23, 2017), http://www.independent.co.uk/news/science/donald-trump-plan-reform-epa-environmental-protection-agency-science-climate-change-report-a7542191.html; Elena Cresci, *National Parks Service 'goes rogue' in response to Trump Twitter ban*, THE GUARDIAN (Jan. 25, 2017), https://www.theguardian.com/technology/news-blog/2017/jan/25/national-parks-service-goes-rogue-in-response-to-trump-twitter-ban; *see also* Mindy Weisberger, *"Rogue" Science Agencies Defy Trump Administration on Twitter*, SCIENTIFIC AMERICAN (Jan. 27, 2017), https://www.scientificamerican.com/article/ldquo-rogue-rdquo-science-agencies-defy-trump-administration-on-twitter/.

control.[36] Waldo attempted to track the moral and ethical obligations that bureaucrats feel, and explains their decisionmaking by reference to this map of obligations.[37] These include obligations to "organizational-bureaucratic norms," "profession and professionalism," "public interest or general welfare," and "humanity or the world."[38] Of the latter, Waldo explains that "[i]t is an old idea, and perhaps despite all a growing idea, that an obligation is owed to humanity in general, to the world as a total entity, to the future as the symbol and summation of all that can be hoped . . . [I]t figures prominently in the environmental ethic and in ecological politics."[39] Because environmental law implicates distinctively dispersed, complex, and nonhuman injuries, environmental issues present sources of moral and ethical obligations—such as obligations to future generations, the scientific community, the global community, and/or nonhuman plants, animals, or ecosystems—that may be additive to the typical obligations that public servants feel to their country, their colleagues, and the public. Public servants who have chosen to work in environmental regulation, and/or at agencies with explicit environmental purposes, may feel these commitments particularly strongly. Such obligations may provide powerful motivation for resisting attempts at executive control, over and above the types of motivation that can arise in other more general administrative contexts.

Environmental law thus supports two distinctive but interactive challenges to executive control: its difficult subject matter makes it hard for political appointees to manage, and the ethical aspects of many of its commitments makes it subject to bureaucratic resistance. The substantial information asymmetry that commonly exists between environmental political appointees and environmental career bureaucrats weakens the executive's opportunities to effect control of environmental issues even as bureaucrats themselves may feel ethically or morally entrenched in resistant positions. Furthermore, these forms of environmental resistance to executive control can interact with the bonus discretion that

36. *See* O'LEARY, *supra* note 20 (summarizing a number of theories of when and where bureaucrats might be prone to resistance).

37. *See* Dwight Waldo, *Public Administration and Ethics: A Prologue to a Preface, in* PUBLIC ADMINISTRATION: CONCEPTS AND CASES 460, 463–65 (1996) (identifying twelve obligations: "Ethical Obligations and the Public Service:" "The Constitution," "Law," "Nation or Country," "Democracy," "Organizational-Bureaucratic Norms," "Profession and Professionalism," "Family and Friends," "Self," "Middle-Range Collectives," "Public Interest or General Welfare," "Humanity or the World," and "Religion, or to God.").

38. *See id.* at 463–65 (noting that these are not exhaustive, but are rather subject to "indefinite expansion").

39. *Id.* at 465.

environmental agencies enjoy free from judicial control. The consequence is a truly and unusually expansive space for environmental agencies to exercise their discretion.

IV. CONCLUSIONS AND IMPLICATIONS

In the framing for his essay on *Lawmaking Within Federal Agencies and Without Judicial Review*, Christopher Walker recognizes an important dynamic: that as agencies are insulated from judicial review, substantive administrative policy is increasingly sensitive to internal agency decisionmaking. Walker goes on to identify the potential substantive importance of agency organization as it relates to the drafting of agency statutes. Walker's analysis applies generally to lawmaking within agencies, but this response essay has pointed to several reasons that Walker's analysis may play a particularly heightened role in understanding the administration of environmental law.

Environmental law is fundamentally concerned with the management of environmental impacts, which tend to be nonhuman in character, causally complex, and dispersed in space and time. These qualities present particular challenges to judicial review under standing requirements that demand that injuries be particularized, causally traceable, and judicially redressible. The result is that agencies administering environmental policies enjoy a sort of "bonus discretion" that goes beyond even the deferential *Chevron* standard for agencies interpreting statutes they administer. This means that, when agencies administer environmental law, they are constrained even less by courts than is normal within our highly discretionary administrative state. Within the unusually capacious world of environmental law without courts, the internal dynamics of agency decisionmaking become increasingly central to environmental law.

Furthermore, the focus of environmental law on dispersed, complex, and nonhuman injury also presents opportunity for disconnect between agency employees and the executive. The scientific and technical nature of environmental questions sets up heightened information asymmetry between political appointees and career bureaucrats, posing a potential barrier for presidents to effectively implement environmental policy where there is a lack of buy-in from career civil servants. And the moral and ethical implications of many environmental issues may provide particularly firm ground for bureaucrats to resist executive control as well. The result is that agencies experience heightened discretion when administering

environmental issues—discretion that operates in many ways without either courts or the executive. Much of this greater discretion flows directly from the difficulty of the underlying subject-matter, which makes environmental issues legitimately challenging to address, and which heightens the importance of science and expertise in understanding and managing environmental policy. Insofar as this suggests that environmental policy may be peculiarly resistant even to aggressive judicial or executive control, it highlights still further the importance of understanding the role that internal agency dynamics play in the selection and implementation of substantive policy.