The Dangers of Agency Doublespeak: The Role of the Judiciary in Creating Accountability and Transparency in EPA Actions

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Since their inception, administrative agencies have played a critical role in setting the trajectory of national regulatory schemes. Over the last several decades, agencies have become increasingly responsive to executive policy positions. Though executive control of agency action has long been accepted as a desirable system of accountability, the increasingly partisan and politicized nature of executive policymaking has consequences, including a lack of transparency and a departure from the legislative purpose for agency regulation. These consequences are exacerbated by the super deferential standard employed by the courts when reviewing an agency's nominally science-based decisions. Together, strong executive control and super deferential judicial review allow agencies to disguise their politically motivated decisions in deliberately ambiguous and evasive reasoning—"doublespeak." The dangers of doublespeak were particularly notable in Environmental Protection Agency actions under the Trump administration, which engaged in starkly deregulatory behavior by abruptly reversing former, more protective Clean Air Act regulations. By moving away from super deferential review and towards a "fidelity model" that transparently interrogates the underlying motivations for agency action, courts can counteract the negative consequences of agency doublespeak.

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"Doublespeak is language which pretends to communicate but really doesn't. It is language which makes the bad seem good, the negative appear positive, the unpleasant appear attractive, or at least tolerable. It is language that shifts or avoids responsibility, language which is at variance with its real or its purported meaning. It is language which conceals or prevents thought."[1]

INTRODUCTION

In 2017, three men armed with golden shovels prepared to break ground on a ten-billion-dollar Foxconn factory in Racine, Wisconsin: Donald Trump, President of the United States; Scott Walker, Governor of Wisconsin; and Terry

1. William Lutz, *Fourteen Years of Doublespeak*, 77 ENG. J. 40, 40 (1988).

Gou, Chairman of Foxconn.[2] One year later, as Governor Walker was engaged in a competitive battle for reelection, the Trump Environmental Protection Agency (EPA) reversed course on a critical Clean Air Act decision that would have placed federal limits on smog emissions in southeastern Wisconsin.[3] In contradiction to an Obama EPA determination that the region's air was too polluted to meet the standards of the Clean Air Act,[4] the Trump EPA would designate a substantial portion of Wisconsin's lakefront as compliant with the Act—thereby exempting the state from implementing costly and time-consuming pollution controls in the area.[5] Included in this new, 'clean' jurisdiction was the Foxconn construction site that both President Trump and Governor Walker had touted as a boon to the economy and an example of their political success.[6]

Some career EPA officials and scientists expressed "disbelief" at the policy reversal and believed it was "being demanded by top Trump administration officials" against formal scientific recommendations.[7] Unsurprisingly, nonprofit environmental organizations and local governments sued on behalf of Racine residents, as well as residents in dozens of other counties across the United States whose air quality status had been abruptly and inexplicably changed by the Trump EPA.[8] The D.C. Circuit consolidated these lawsuits in the case *Clean Wisconsin v. EPA*, where the court held that because there was no reasonable explanation for the EPA's actions with respect to southeastern Wisconsin, the revised air quality designations were arbitrary and capricious.[9] Missing from the court's discussion, however, was any mention of the political and economic backdrop that contributed to the EPA's policy reversal and lax enforcement of air pollution standards. This was a surprising omission, given the obvious significance of such factors in influencing agency decision-making, especially the decisions of the Trump EPA.[10]

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2. Valerie Bauerlein, *Foxconn Tore Up a Small Town to Build a Big Factory – Then Retreated*, WALL ST. J. (April 29, 2019, 1:07 PM), https:// www.wsj.com/articles/foxconn-tore-up-a-small-town-to-build-a-big-factorythen-retreated-11556557652.

3. Lisa Friedman*, EPA Experts Objected to Misleading' Agency Smog Decision, Emails Show*, N.Y. TIMES (May 24, 2019), https://www.nytimes.com/2019/05/24/climate/epa-pruitt-wisconsin-foxconn.html.

4. 42 U.S.C §§ 7401–7402.

5. *See infra* Subpart III.A (discussing the *Clean Wisconsin v. EPA* decision).

6. *See* Bauerlein, *supra* note 2, at 2 ("'I had this incredible company going to invest someplace in the world—not here necessarily,' Mr. Trump said. 'And I will tell you they wouldn't have done it here, except that I became president.'"); Friedman, *supra* note 3 (noting Scott Walker's campaign involved "trying to bring a Foxconn factory, and thousands of new jobs" to Wisconsin).

7. Friedman, *supra* note 3.

8. The final D.C. Circuit decision consolidated petitions from "several environmental organizations, municipal governments, and the State of Illinois." Clean Wis. v. EPA, 964 F.3d 1145, 1152 (D.C. Cir. 2020).

9. *Id*. at 1170.

10. *See* Talia Buford, *How the Trump Administration Is Reshaping the EPA*, PBS (Dec. 19, 2017, 11:30 AM), https://www.pbs.org/newshour/politics/how-the-trump-administration-is-reshaping-the-epa (describing the unprecedented changes to the EPA under President Trump and Administrator Scott Pruitt).

Despite the stark contrast between the Trump and Obama administrations, a general lack of transparency in agency actions transcends these differences in political ideologies.[11] There are two major reasons for the notable absence of political or economic discussion in both this EPA decision and in environmental regulation more broadly: (1) strong executive control over agencies, and (2) a standard of judicial review that defers to superficial scientific explanations at the expense of critical inquiries into other relevant factors.

Together, strong executive control and deferential judicial review are shortcomings that cloud the decision-making process and enable the EPA to use deliberately ambiguous language —"doublespeak"—that obscures some of the underlying motivations for its decisions and allows it to "shift or avoid responsibility" for its actions.[12] First, the EPA justifies its choices under the guise of objective science, often despite overt influence from both the executive and high-powered economic interest groups.[13] Second, when evaluating agency decisions, the judiciary employs a substantially deferential standard of review that explicitly precludes it from considering crucial variables—including, in the case of setting air pollution standards, cost. Any balancing that involves such variables by the agency is therefore hidden from the public or recast so as to appear objective by conflating fact with judgment—and is never illuminated by the court.[14] As a consequence, the EPA does not discuss, and courts subsequently cannot review, the actual policy justifications underlying agency action.[15] EPA decisions that appear clearly motivated by political or economic interests, such as those at stake in *Clean Wisconsin*, are therefore passed off as either 'good' or 'bad' science.[16] Courts like the D.C. Circuit can remand a case to the lower courts for a 'better' scientific justification but have no judicial tools to comment on the other underlying variables or the policy determination that resulted.[17]

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11. It also extends beyond EPA action, most notably into economic policies that favor wealthy incumbents and monopoly power. *See* Matt Stoller, *How Democrats Became the Party of Monopoly and Corruption*, VICE (Oct. 22, 2019, 5:00 AM), https://www.vice.com/en/article/evjkwj/how-democrats-became-the-party-of-monopoly-and-corruption ("The Clinton administration organized this new concentrated American economy through regulatory appointments and through non-enforcement of antitrust laws. Sometimes it even seemed they had put antitrust enforcement up for sale.").

12. *See* Lutz, *supra* note 1.

13. *Infra* Part IV; *see also* Friedman, *supra* note 3.

14. *See* Joel Yellin, *Science, Technology, and Administrative Government Institutional Designs for Environmental Decisionmaking*, 92 YALE L.J. 1300, 1321–22 (arguing that the standard of deference introduced in *Baltimore Gas* hinders appropriate consideration of factors in risk estimates and does not "contribute to the balance among institutions essential to a healthy administrative system").

15. In the words of current Attorney General Merrick Garland, "as long as the court declines to examine the substance of the agency's consideration and explanation, an agency that dutifully jumps through the quasi-procedural hoops will survive review regardless of its actual motives." Merrick Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 554 (1985).

16. *See* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 749 (2011); *infra* Subpart II.B.

17. "In such circumstances, there is nothing left for the agency to 'consider' or 'explain'; vacating and remanding would be not a logical response to agency failure, but an invitation to an endless charade—

A solution to this cycle of "doublespeak" would ideally create transparency while also ensuring fidelity to the agency's statutory purpose. In the case of the Clean Air Act, this requires reconciling Supreme Court precedent and executive policy goals with Congress's clear legislative intent to "promote the public health and welfare" of the nation.[18] I propose that the courts have a crucial role in solving this problem, especially given the last few decades of hyper-partisan politics that have stagnated congressional action.[19]

When reviewing EPA action, courts should move away from substantial deference to agency science and towards a strong "fidelity model" of review that emphasizes interest balancing with an eye towards public health and welfare.[20] Under this model, the court could prompt government agencies to submit evidence that goes beyond solely 'objective' findings of fact, and also explains the social and economic rationales that already implicitly underpin their decisions. With this foundation, courts could more holistically examine the EPA's position, explicitly acknowledge the political nature of agency records, and outline broadly acceptable policy goals that align with the statutory intent of the Clean Air Act.[21] By highlighting the interdisciplinary complexities of environmental action, courts could make EPA decision-making a more transparent, and ultimately more legislatively faithful, process. In light of the increasingly urgent environmental threats facing the nation, it is necessary to reevaluate the judiciary's role in facilitating productive and purposeful action by the EPA.

This Note will proceed in four Parts. The first Part will provide background on the development of the 'substantial deference' standard of judicial review and describe in more detail the way it is currently implemented by the courts. It will also provide background on the current system of presidential control over agency action. Part II will detail the legislative history and purpose of the Clean

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a kind of absurdist theater in which the court sends the agency back to try again each time the agency reaches a result other than the one the court believes reasonable." Garland, *supra* note 15, at 571.

18. 42 U.S.C. § 7401(b)(1).

19. *See* Teresa B. Clemmer, *Staving Off the Climate Crisis The Sectoral Approach Under the Clean Air Act*, 40 ENV'T L. 1125, 1133 ("The news media and blogosphere thus appear to agree that the future looks grim for any meaningful legislative solution to the climate crisis in the near term and perhaps in the longer term as well."). Other scholars have noted the unique importance of the courts in this process. As Professor Emily Hammond Meazell put it, "judicial review of agencies implicates all three branches [of government] because courts not only check executive power, but must also be mindful of legislative preferences." Meazell, *supra* note 16, at 735.

20. *See* Garland, *supra* note 15, at 586, 590. Garland suggested that the "fidelity model" of review described "recent trends" in the late 1980s, but did not express confidence that it would "prove any more lasting than its predecessor." *Id.* at 590. His skepticism was warranted, as the executive model of control replaced the interest representation model in the early 1990s. *See infra* Subpart I.A.

21. This Note specifically focuses on the way these arguments and solutions apply to the Clean Air Act, as the Clean Air Act is explicitly protective of public health and welfare—as demonstrated by both its statutory language and the legislative history detailing its enactment. While the hope is that these solutions could be generalized to increase transparency, accountability, and broadly progressive environmental policy, this Note does not attempt to tackle the full scope of those issues. I explore the court's role in policy evaluation more fully in Subpart IV.B, *infra*.

Air Act so as to properly set a frame of reference for policies enacted under the statute. It will also detail the system of setting National Ambient Air Quality Standards (NAAQS) and the states' role in implementing these standards so as to contextualize the debate in *Clean Wisconsin*. Part III will provide more detail on the case itself, including what was and was not argued in front of the D.C. Circuit and what the court's ultimate holding meant from a practical standpoint. Finally, Part IV will propose a solution to these shortcomings, apply it to the facts of *Clean Wisconsin*, and address the criticisms of this solution.

I. THE CURRENT SYSTEM OF ADMINISTRATIVE ACTION AND JUDICIAL REVIEW

Given its hugely influential role in regulatory function and policy making, there is debate over which branch of government (if any) should control the administrative state and to what extent. In order to define the role of the judiciary in environmental regulation, it is necessary to contextualize that role in relation to the roles of the executive and the legislature, as well as describe the systems of review available to the judiciary when evaluating administrative action.

Administrative agencies began in the late nineteenth century as "transmission belts" whose purpose was to execute congressional directives.[22] The policy positions of the sitting president were largely immaterial to agency action, and agency action occurred only within spaces where Congress had clearly outlined its purpose and scope.[23] As the need for broad regulation increased in the United States, the independent authority of administrative agencies increased as well. Such authority, though challenged by some as unconstitutional,[24] was justified in large part by the need for specialized, expert knowledge in many areas of regulation.[25] This system, too, faded away as a third era came to bear on administrative action: the era of interest group representation.[26] This abridged history goes to show that the administrative state, often dubbed the fourth branch of government, has been, in turns, primarily influenced by and accountable to Congress, itself, and the public.[27] Now,

22. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253 (2001) (citing Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975)).

23. Kagan, *supra* note 22, at 2253.

24. *See, e.g.*, Field v. Clark, 143 U.S. 649 (1982) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."); *but see* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (noting the nondelegation doctrine "has had one good year, and 211 bad ones (and counting)" as a tool for challenging executive authority).

25. Kagan, *supra* note 22, at 2253.

26. During this time, agencies were largely influenced by the advocacy and efforts of various interested parties, from civilians to industry players—who themselves may be subject to regulation by the given agency. *See id.* at 2264.

27. The primary challenge to the constitutionality of administrative action is the Nondelegation Doctrine, a theory that Congress cannot delegate too much of its legislative power to executive agencies under Article II. *See id*. at 2254 (explaining in detail the ways in which these eras and challenges "bleed into each other").

however, administrative decision-making and agency action are controlled by the president.[28]

Scholars largely agree that the United States is in an era of strong executive control over the administrative state and, in fact, has been since President Reagan took office in 1981.[29] Beginning with Reagan, presidents have exerted control over agencies in several substantial ways. Presidents have used their appointment power to "staff the agencies with officials remarkable for their personal loyalty and ideological commitment"[30]—indeed, this was a notable feature of the Trump presidency.[31] Presidents have also issued executive orders to greatly expand the scope of their oversight and review of agency rule making.[32] Finally, presidents have used their supervisory powers "to trigger, not just react to, agency action."[33]

As the scope of executive control over agency action expanded, presidents incorporated regulatory policy as part of their political platform with increased frequency.[34] Justice Elena Kagan summarized the extent of this transformation on the executive branch, saying that "[the President] emerged in public, and to the public, as the wielder of 'executive authority' and, in that capacity, the source of regulatory action . . . . [T]he 'public Presidency' became unleashed from the merely 'rhetorical Presidency' and tethered to the 'administrative Presidency' instead."[35]

Kagan also offered several justifications for presidential control as a preferred model of agency oversight. First, the president is, in theory, accountable to the electorate, which increases the likelihood that agencies will be acting in line with the public's preferences.[36] Second, executive control helps to avoid regulatory "ossification" because administrations are more "dynam[ic]" when held accountable to an elected institution; this relationship could spur dynamism in other areas of government by "calling public attention" to issues and encouraging subsequent legislative action.[37] Third, and most importantly, executive control of administrative agencies increases transparency in decision-

28. *See id*. at 2248.

29. *See id.* at 2250, 2277 (explaining that a system of "presidential administration" was built on "the foundation of President Reagan's regulatory review process"); Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 49 (2019).

30. Kagan, *supra* note 22, at 2277.

31. *ProPublica* documented the extent to which President Trump staffed his administration with loyalists. Of the 3,858 appointees to the administration, 263 worked form Trump campaign groups, 150 worked at conservative think tanks, and 281 are or were lobbyists for interest groups. Derek Kravitz et al., *Trump Town*, PROPUBLICA, https://projects.propublica.org/trump-town/ (updated Oct. 15, 2019).

32. Kagan, *supra* note 22*,* at 2276.

33. *Id.* at 2282.

34. *See id.* at 2281–82 ("Clinton came to view administration as perhaps the single most critical—in part because the single most available—vehicle to achieve his domestic policy goals.").

35. *Id*. at 2300.

36. Roesler, *supra* note 29, at 508.

37. Kagan, *supra* note 22, at 2312, 2341.

making by "enabling the public to comprehend more accurately the sources and nature of bureaucratic power."[38]

However, Kagan qualified the efficacy of executive control, and the resulting transparency in agency action, by noting that "the integrity of the government's exercise of legal authority partly depends on the maintenance of a distinction between politics and law, far greater than any thought to exist between politics and policy."[39] She was especially concerned about executive oversight of administrative decisions that were "[the] most scientific or otherwise technical in nature and, as such, least connected to political judgment"—a category of decisions that includes environmental regulations such as air pollution standards.[40] Other scholars have expressed similar concerns over whether it is possible to maintain the integrity of administrative action when the "single-minded advancement" of a presidential agenda conflicts with scientific or technical determinations.[41]

The executive branch has exerted significant political influence over agency action since the Reagan administration. More so than any prior executive administration, however, the Trump administration seemed willing to "flout" the line between "politics and law" and therefore undermine the critical assumptions upon which Justice Kagan built her defense of presidential control of administrative action.[42] This level of executive control over agencies was especially evident in the environmental space, as President Trump promoted extensive environmental deregulation as a key part of his policy platform.[43]

But fallacies in executive control are not unique to President Trump's particularly flawed style of governance; a highly partisan political climate increases the risk that any president will put electability above effective and

38. *Id*. at 2331–32.

39. *Id*. at 2357.

40. *Id*. at 2352, 2353 n.410 (citing air quality regulation as a particular instance in which there is a "need to incorporate in administrative decisionmaking [] scientific, technical, and other kinds of professional knowledge").

41. Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1640 (2008).

42. *See* Peter Stone, *Top Trump Administration Figures Flout Law Banning Partisan Campaigning*, GUARDIAN (Oct. 15, 2015), https://www.theguardian.com/us-news/2020/oct/15/trump-administration-partisan-campaigning-hatch-act ("[Senator] Perdue is hardly an isolated example of top Trump officials mixing their work with political activities that critics and watchdogs say is a worrying breach of laws and regulations designed to stem corruption.").

43. *See, e.g.*, Sharon Lerner, *As the West Burns, the Trump Administration Races to Demolish Environmental Protections*, INTERCEPT (Sept. 19, 2020, 6:00 AM), https://theintercept.com/2020/09/19/wildfires-trump-election-epa-environment ("Throughout his presidency, Donald Trump has presided over the rollback of more environmental rules and regulations than any other president."); Nadja Popovich et al., *The Trump Administration Is Reversing More Than 100 Environmental Rules*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html (last updated Nov. 10, 2020) (describing the "weaken[ed] environmental requirements" as "fulfill[ing] President Trump's promises").

thoughtful regulation.[44] Concerns regarding presidential control of administrative decisions are particularly salient in the environmental context where agency action is often highly politicized.

Despite the potential benefits of dynamism and electoral accountability, there are shortcomings and weaknesses in this current system of administrative decision making, specifically in the context of environmental regulation under the Clean Air Act. Many of the hypothetical concerns recognized by Justice Kagan two decades ago, including increasingly partisan political action and undue executive intrusion into highly technical areas of regulation, are now realities. Addressing these flaws requires an attempt to reconcile the influence and control of the executive branch over agency decisions with the desire for transparency and accountability, and a reevaluation of the judicial role in remedying improper administrative decisions.

II. HISTORY, IMPLEMENTATION, AND REVIEW OF THE CLEAN AIR ACT'S NATIONAL AMBIENT AIR QUALITY STANDARDS

Congressional intent and statutory language are foundational to guiding judicial review of administrative action.[45] This Part investigates the purpose of the Clean Air Act, specifically, in regard to National Ambient Air Quality Standards (NAAQS) designations. Understanding this purpose is relevant not only to determining an agency's statutory mandate but also in understanding the reasoning behind existing Supreme Court precedent and what it means for NAAQS-related action. Further, in order to contextualize the discussion of *Clean Wisconsin v. EPA* in Part III, this Part will provide technical background on the process of setting ozone standards and a state's role in implementing those standards. It will provide a broad overview of the purposes of the Clean Air Act and the NAAQS setting process, specifically focusing on ozone. Finally, this Part will discuss the system of judicial review of agency actions taken pursuant to the Clean Air Act.

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44. This kind of reflexive policy position switch was on display in the 2020 election. Though Biden had previously expressed his willingness to implement a fracking ban, his campaign reversed course when it appeared he could have lost voters in Pennsylvania as a result. *See* Daniel Moore & Anya Litvak, *Biden's Oil Comments Fuel Long-Burning Debate Over Pa. Energy Jobs*, PITTSBURGH POST-GAZETTE (Oct. 24, 2020, 7:34 AM), https://www.post-gazette.com/news/politics-nation/2020/10/24/Joe-Biden-comments-on-oil-stoke-political-energy-jobs-Donald-Trump-fracking/stories/202010240029 ("Let's be really clear about this: Joe Biden is not going to ban fracking.").

45. *See* Chevron v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984) (citing United States v. Shimer, 367 U.S. 374, 382 (1961) ("If [an agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.")).

A. Legislative History and Purpose of the Clean Air Act

The Clean Air Act "is generally viewed as the most complex of the federal environmental statutes" and comprises "a dizzying array of regulatory strategies."[46] Passed in 1970, the Act attempts to regulate hazardous and nonhazardous air emissions from both stationary and mobile sources to "promote the public health and welfare."[47] Over the decades, the Act has been amended twice to account for new goals and for the delay some states encountered in attempting to reach the high standards the Act imposed.[48]

In *Whitman v. American Trucking Ass'ns*, a seminal 2001 Supreme Court decision regarding the Clean Air Act, Justice Stephen Breyer argued in his concurrence that Congress did not intend for costs to be considered in implementing air quality standards, as evidenced through the legislative history of the Act.[49] But further perusal of the legislative history, as well as the opinions of scholars writing pre-*Whitman*, indicates that this is not entirely the case.[50] During the Senate subcommittee hearings in 1977 to revise the Clean Air Act, Senator Ed Muskie, an early and prominent champion of the bill, explicitly addressed the cost-benefit analysis in setting ambient air quality standards. He contradicted the notion that NAAQS are "clean air standards," saying instead that they are "the minimal burden we could impose upon the dirty air areas of the country to clean up without bringing their economies to a screeching halt."[51] The "minimal burden" language indicates that Congress did consider a balancing test when setting air pollution standards, with the regulation intended to walk a line between economic impact and improved air quality.

Muskie further acknowledged that often, this balancing test would weigh heavily against economic interests. "[W]e are not talking about no growth. But if the alternative is no control over dirty air, to those who think that ought to be the result, then it is maybe no growth . . . . I think that many people don't focus sufficiently [on this point] when they are evaluating the act."[52] Separately, a Senate report indicated that costs were explicitly considered in determining the Senate's position in favor of stricter ozone standards.[53] The report noted that "[a]lthough quantification of these damages [from ozone pollution] is more difficult than ascertaining the costs of pollution control equipment, billions of

46. Clemmer, *supra* note 19, at 1138–39.

47. 42 U.S.C. § 7401.

48. *Summary of the Clean Air Act*, EPA, https://www.epa.gov/laws-regulations/summary-clean-air-act (last visited June 26, 2021).

49. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 495 (2001).

50. *See* Garland, *supra* note 15, at 552 n.272.

51. *Clean Air Act Amendments of 1977 Hearing Before the Subcomm. on Env't Pollution, Bills to Amend the Clean Air Act,* 95th Cong. 37 (1977) (statement of Sen. Muskie).

52. *Id*.

53. S. REP. NO. 101-228, at 3395 (1989).

dollars each year would be saved from better protection of valued resources from ozone-induced damage, alone."[54]

Additionally, scholars such as then-D.C. Circuit Judge Merrick Garland have evaluated the history of the Clean Air Act and found other indications that Congress had a balancing test in mind when enacting the legislation.[55] Under this analysis, Congress envisioned that undertaking the protection of human health and welfare would involve balancing multiple variables, one of which would be economic costs.[56] Its intent did not appear to absolutely forbid cost consideration but was mindful that economic interests would almost always strongly oppose regulatory interests.[57] This is important to make explicit because the alternative, to ban cost consideration entirely, ultimately means that parties will look for other ways to reasonably justify their objections to regulation, confusing what should be a holistic balancing test with an arbitrary weighing of "reasonable scientific determinations."[58]

B. Setting NAAQS Under the Clean Air Act

1. NAAQS in General

NAAQS determinations and enforcement are integral to the protective function of the Clean Air Act. The process of setting NAAQS is complex and involves many regulatory steps, some of which are beyond the scope of this Note. This Subpart will focus narrowly on the purpose of NAAQS as stated in the Clean Air Act, the current NAAQS for ozone (the pollutant at issue in *Clean Wisconsin*), and the process of designating states as either in compliance with the limit (in "attainment") or in noncompliance with the limit, with pollutant concentrations above the NAAQS limit (in "nonattainment").[59]

Sections 108 and 109 of the Clean Air Act govern the determination and standard-setting process for NAAQS.[60] In these sections, the Clean Air Act authorizes the EPA to (1) identify air pollutants that may "reasonably be anticipated to endanger public health or welfare"—these are called "criteria pollutants"—and (2) set standards limiting the permissible concentration of

54. *Id.*

55. *See* Garland, *supra* note 15, at 552 n.272 (citing H.R. REP. NO. 95-294, at 211 (1977) ("allow[ing] reasonable economic growth to continue in an area while making further reasonable progress to assure attainment of the [air quality] standards").

56. *See* H.R. REP. NO. 95-294, *supra* note 55.

57. *See id*.

58. *See* Wendy Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1617 (1995) ("[A]gencies exaggerate the contributions made by science in setting toxic standards in order to avoid accountability for the underlying policy decisions.").

59. Occasionally, there is insufficient data for the EPA to reach a decision, in which case the area is designated "unclassifiable." *NAAQS Designation Process*, EPA, https://www.epa.gov/ground-level-ozone-pollution/ozone-national-ambient-air-quality-standards-naaqs (last updated Sept. 10, 2020).

60. 42 U.S.C. § 7408.

criteria pollutants in the air.[61] Professor Daniel Farber succinctly summarized Section 109's main thrust, saying "[t]here are two types of standards: primary standards that are 'requisite to protect public health' and secondary standards that protect the 'public welfare' (which includes various forms of environmental effects). In setting these standards, EPA is specifically required to explain any deviation from the recommendations of an independent advisory agency."[62] Among other changes, the 1977 Amendments extended the timeline for the EPA to set NAAQS and "bolster[ed]" the standards by which the EPA judged state compliance with the NAAQS.[63]

2. Ground-Level Ozone Standards

The primary ground-level ozone standard and its ramifications for the state were the source of the controversy in *Clean Wisconsin*. Ozone has been included as a criteria pollutant since the EPA set the first NAAQS a mere four months after the Clean Air Act became law in 1970.[64] Ground-level ozone, the term given to ozone found in the breathable air, is created by a reaction between volatile organic compounds (VOCs) and nitrogen oxides (NO_x) that is catalyzed by heat and light.[65] The most prevalent sources of these ozone precursors are industrial sources and "sources of combustion" like cars, factories, and power plants.[66] Physicians and researchers have extensively studied the significant health effects of short-term ozone exposure.[67] There are a number of documented adverse health effects associated with ozone exposure for a range of one to eight hours, which are exacerbated in vulnerable populations such as the elderly,

61. *Id*. Criteria air pollutants are different from toxic air pollutants. Criteria air pollutants are defined as "particulate matter" that "can harm human health, harm the environment, and cause property damage." *Id*. As of March 2021, there are six criteria air pollutants recognized by the EPA: particulate matter, ground-level ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, and lead. *Criteria Air Pollutants*, EPA, https://www.epa.gov/criteria-air-pollutants (last updated Mar. 22, 2021). On the other hand, toxic air pollutants are "those pollutants known or suspected to cause cancer, other serious health effects . . . or adverse environmental effects." *What Are Hazardous Air Pollutants*?, EPA, https://www.epa.gov/haps/what-are-hazardous-air-pollutants#:~:text=Hazardous%20air%20pollutants—%2C%20also%20known,defects%2C%20or%20adverse%20environmental%20effects (last updated Feb. 9, 2017). These pollutants pose a more acute environmental and health risk and are regulated by a different section of the Clean Air Act not discussed in this Note. *Managing Air Quality – Air Pollutant Types*, EPA, https://www.epa.gov/air-quality-management-process/managing-air-quality-air-pollutant-types#:~:text=They%20are%20particulate%20matter%20(often,%2C%20nitrogen%20dioxide%2C%20and%20lead (last updated July 3, 2019); HOLLY DOREMUS & ALBERT LIN, ENVIRONMENTAL POLICY LAW, CH. 10 (2020).

62. Daniel Farber, *Rethinking Regulatory Reform*, 23 PACE L. REV. 43, 55 (2002).

63. Lori C. Imsland, Comment, *How Much Would You Pay for Clean Air? The Role of Cost/Benefit Analysis in Setting NAAQS*, 9 MO. ENV'T L. & POL'Y REV. 44, 45–46 (2002).

64. DOREMUS & LIN, *supra* note 61.

65. *Ground-Level Ozone Basics*, EPA, https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics#:~:text=air%20emission%20sources (last updated Sept. 10, 2020).

66. DOREMUS & LIN, *supra* note 61.

67. *Ozone*, AM. LUNG ASS'N, https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/ozone (last visited Dec. 12, 2020) ("Scientists have studied the effects of ozone on health for decades. . . . In the last decade, we have learned that it can also be deadly.").

children, and those with preexisting respiratory conditions.[68] Less is known about long-term health effects from ozone (for example, exposure to ozone over the course of days or years), but the information that is available suggests that health consequences increase as a function of exposure.[69] Some studies have shown that such long-term exposure can cause "irreversible damage" to the respiratory system.[70] The current primary standard level for ozone, set in 2015, is 0.070 parts per million (ppm).[71] But available public health data suggests that there is no 'safe' level of ozone exposure, and ozone NAAQS should be closely monitored, controlled, and adjusted.[72]

Once a primary standard for a criteria pollutant is set (or re-set, in the case of acceptable ozone levels in *Clean Wisconsin*), the EPA must determine whether states are in attainment with the newly set NAAQS. This process involves input from state and local governments; no later than one year following the promulgation of the new or revised NAAQS, states must submit an initial recommendation for designations within their borders.[73] These recommendations draw on air quality monitoring data and generated models that predict air flow and pollution pathways to set both the area boundaries themselves and the proposed "attainment" or "nonattainment" status.[74]

However, though states are allowed to comment on and contribute to this determination, the EPA makes the final decision on whether a region should be designated attainment or nonattainment for any given criteria pollutant.[75] The EPA has "no obligation to give any quantum of deference to a designation that it 'deems necessary' to change."[76] Moreover, just as the EPA is forbidden from considering costs in promulgating the NAAQS, the EPA is forbidden from considering costs in setting these regional designations.[77]

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68. *Health Effects of Ozone Pollution*, EPA, https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution (last updated Sept. 10, 2020).

69. DOREMUS & LIN, *supra* note 61.

70. *Id.*

71. This is an oversimplified explanation of the primary standard. In reality, there are two additional factors that the EPA considers beyond the acceptable concentration of a pollutant: the averaging time the pollutant remains in the breathable air and the form the pollutant takes. The averaging time for ozone is eight hours, and the form is the annual fourth-highest daily maximum, averaged over three consecutive years. *Ozone National Ambient Air Quality Standards (NAAQS)*, EPA, https://www.epa.gov/ground-level-ozone-pollution/ozone-national-ambient-air-quality-standards-naaqs (last updated Sept. 10, 2020). However, since the issue in *Clean Wisconsin* was whether the state was in violation of the revised ozone standard, not whether the standard was properly set, this section will not explore those details. *See infra* Subart III.A.

72. *See Ozone National Ambient Air Quality Standards (NAAQS)*, *supra* note 71 ("[N]ew research provides evidence that ozone can cause serious harm even at much lower levels [than current NAAQS].").

73. 42 U.S.C. § 7407(d)(1)(A).

74. *Id.*; *NAAQS Designation Process*, *supra* note 59.

75. The EPA is permitted to modify state recommendations as it "deems necessary." 42 U.S.C. § 7407(d)(1)(B)(ii); *NAAQS Designation Process*, *supra* note 59.

76. Catawba County. v. EPA, 571 F.3d 20, 40 (D.C. Cir. 2009).

77. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 465 (2001).

These designations have direct ramifications for states. If an area of a state is found to be in nonattainment, then the state must create a State Implementation Plan (SIP) that thoroughly details how that area will achieve attainment levels of the criteria pollutant by a set future date.[78] SIPs are technically complex on a multitude of levels, requiring coordination between the state and local authorities, identification of emissions reductions options, and management of uncertainties.[79] They can also be costly to the states; not only do SIPs often require states to put limits on industry emissions, they also require a substantial amount of regulatory resources.[80] There are, therefore, strong incentives for a state to lobby early and forcefully against the EPA designating any area within that state's borders as being in "nonattainment." This often leads to a conflict of interest between states, industry, government agencies, and concerned citizenry. This was exactly the type of conflict that played out in *Clean Wisconsin v. EPA*.

C. The Role of the Judiciary in Reviewing Final Agency Action Under the Clean Air Act

Kagan's predictive warning is now the reality of the nation's political scene: political influence has intruded into functional agency decision-making.[81] To understand the 'checks' on such improper influences, it is important to evaluate the judiciary's role in reviewing final agency determinations. Though courts have employed various levels of deference towards the EPA in reviewing agency decision making, they have been unable or unwilling to adequately address executive influence, regardless of the level of scrutiny applied to agency actions.[82]

1. Super Deference in Judicial Review

Broadly, judicial review is governed by the Administrative Procedure Act, which requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."[83] As Professor Emily Hammond Meazell has noted, however, this language "masks the nuances . . . [of] review that ranges in intensity from searching hard look to lenient super deference."[84]

78. 42 U.S.C. § 7410.

79. *See,* James D. Fine & Dave Owen, *Technocracy and Democracy Conflicts Between Models and Participation in Environmental Law and Planning*, 56 HASTINGS L.J. 901, 949–60 (2005) (commenting on the complexity and uncertainty involved in the SIP for San Joaquin Valley in central California).

80. *See id*. at 913 & n.46 (noting that "the financial costs of modeling, while often quite large in dollar terms, can pale in comparison to the costs of other planning methods" and that "EPA has estimated that compliance with the Clean Air Act . . . has cost hundreds of billions of dollars.").

81. *See infra* Subpart III.B.

82. *See* Roesler, *supra* note 29, at 554.

83. 5 U.S.C. § 706(2)(A).

84. Meazell, *supra* note 19, at 741.

In the environmental context specifically, courts have tended to apply a very deferential standard of review that was first articulated in *Baltimore Gas & Electric Co. v. NRDC* in 1983.[85] There, the Supreme Court stated that "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[86]

The principle behind super deference harkens back to the notion that agencies have expert knowledge that the courts are not well-placed to assess or critique; when an agency makes a decision based on that sophisticated scientific information, the court should be reticent to interfere. Many scholars have already documented the infirmities associated with a super deferential standard of review for agency action, especially in the environmental context.[87] Most notably, super deference encourages a "science charade" in which policy decisions are couched as matters of pure, objective science determinations.[88] This façade extends not just to agency rationalization but also to the arguments made by its challengers, who are incentivized "to wage a war on regulation disguised as a debate about science."[89]

Hammond Meazell suggests, however, that courts have largely replaced "boilerplate" super deference with a form of more scrutinous review, ultimately engaging in a "more detailed, and less superficial" analysis of an agency's reasonableness in reaching its decision.[90] While this may be true, the negative effect of excessive deference on judicial review persists.[91] By applying the language and standard of super deference, courts implicitly assert that they are ill-suited to question expert agency decisions if they are (or appear to be) scientific decisions.[92] That assertion has encouraged both agencies and other interested or involved parties to engage in what Professor Wendy Wagner calls the "good science" debate.[93] This debate leaves no room for "honest and open public discourse about how best to balance public health and environmental concern on the one hand, and chemical products that make life easier and the

85. Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) (articulating the super deference principle in a National Environmental Policy Act case).

86. *Id*. at 103.

87. *See, e.g*., Meazell, *supra* note 16, at 750 ("Three recurring issues of science in administrative law inform the critique of super deference: ossification, the science charade, and the good science debate. Each reveals that super deference has the potential to deepen problems that are present more broadly in administrative law and to undermine in particular the goal of incentivizing scientific transparency, accountability, and deliberation within agencies.").

88. *See* Wagner, *supra* note 58, at 1617.

89. Patrick A. Fuller, Note, *How Peer Review of Agency Science Can Help Rulemaking Enhancing Judicial Deference at the Frontiers of Knowledge*, 75 GEO. WASH. L. REV. 931, 934 (2007).

90. Meazell, *supra* note 16, at 764, 778.

91. *See id.* at 768–69 (observing that the lower courts still acknowledge that they must be at their "most deferential" in reviewing agency science even if they go on to take a closer look at the agency's decision).

92. *See* Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) ("A reviewing court must remember that [the agency] is making predictions, within its special expertise, at the frontiers of science.").

93. Wagner, *supra* note 58, at 1716.

economy more stable on the other hand."[94] Thus, whatever level of scrutiny the court is undertaking in its analysis, given the record before it, it is naturally led to conflate an inquiry into scientific reasonableness with an inquiry into the actual policy decision's reasonableness.

2. The Effect of Supreme Court Precedent on Judicial Review

The troubling ramifications of the science charade in judicial review are exacerbated in cases involving the Clean Air Act, because the Supreme Court articulated increased restrictions on what the EPA can and cannot consider in reaching its final decisions.[95] In *Whitman v. American Trucking Ass'ns*, the Supreme Court held that "economic considerations [may] play no part in the promulgation of ambient air quality standards under Section 109 [of the Clean Air Act]."[96] In his majority opinion, Justice Antonin Scalia justified this conclusion under a narrow, textualist evaluation of the Act. Looking to its statutory language, he reasoned that "[the cost of implementation] is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned . . . had Congress meant it to be considered."[97]

Justice Breyer concurred in the judgment, but also weighed the legislative history in determining that Congress "deci[ded] not to delegate to the agency the legal authority to consider economic costs of compliance."[98] However, Justice Breyer made several nods towards an acknowledgment that *ignoring* costs is neither productive nor necessarily what Congress intended. First, he noted that in general, ignoring important factors can generate "[a] rule that is likely to cause more harm to health than it provides," which is not "a rule that is 'requisite to protect the public health.'"[99] He also noted that, in drafting the Clean Air Act, Congress was "not to be limited by what is or what appears to be . . . economically feasible, but to establish what the public interest requires to protect the health of persons, even if that means that industries will be asked to do what seems impossible at the present time."[100] While Justice Breyer was ultimately in agreement with Justice Scalia that cost should play no part in air quality standard-setting, his concurrence is framed as a balancing test: though cost may weigh heavily against implementing some protective measures, the welfare of the public is, and should always be, even weightier.[101]

94. *Id.*
95. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001).
96. *Id.* at 464. The Clean Air Act and NAAQS are explored in substantial detail *infra* Subart II.
97. *Whitman*, 531 U.S. at 469.
98. *Id*. at 490 (Breyer, J., concurring).
99. *Id*. at 495.
100. *Id*. at 491 (quoting legislative history).
101. *See* Roger O. McClellan, *Role of Science and Judgment in Setting National Ambient Air Quality Standards How Low is Low Enough?*, 5 AIR QUALITY ATMOSPHERIC HEALTH 243, 247 (2012) (noting that Justice Breyer is "well known and highly regarded for his opinions and writings on risk assessment

Whitman has been interpreted as an absolute ban on cost considerations in setting NAAQS under the Clean Air Act.[102] On its face, this decision appears to be highly supportive of public health and a victory for environmental protection organizations.[103] From a practical standpoint, however, *Whitman* created an implied restriction on what kinds of evidence the EPA will present for judicial review, especially as the opinion did not clarify what constitutes "consideration" of a cost.

Whitman's impact on EPA decision making under Section 109 is further complicated by Executive Order 12,866.[104] Executive Order 12,866, which has been reaffirmed by every president since its introduction by President Clinton,[105] requires any agency undertaking "significant regulatory action" to perform "an assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate."[106] The Order requires an agency to consult with both public and private entities prior to publicly releasing any proposed rulemaking notification, but the ultimate review of the agency's cost analysis is handled by the Office of Management and Budget.[107] The combination of Supreme Court precedent and executive authorization of nondisclosure in decision making results in an EPA that is much less likely to include detailed records of cost considerations or acknowledge any influence industrial and economic players have over air quality standard-setting.[108] Given the economic and political backdrop of these cases—lax regulations on industry emissions, political pressure to increase national industry productivity, and the clear motivation of some of the intervening interest groups to limit costly regulation—this omission is particularly striking.[109]

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and regulation" and that it is "not surprising" that his interpretation of cost consideration forbade "eliminat[ing] every health risk, however slight, at any economic cost, however great").

102. DOREMUS & LIN, *supra* note 61; *see also* LINDA TSANG & ALEXANDRA M. WYATT, CONG. RSCH. SERV., R43699, KEY HISTORICAL COURT DECISIONS SHAPING EPA'S PROGRAM UNDER THE CLEAN AIR ACT 2 (Feb. 16, 2017).

103. *Whitman* rejected the arguments of pro-industry groups litigating against the EPA. *See About ATA*, AM. TRUCKING ASS'NS, https://www.trucking.org/about-ata (last visited May 31, 2021) ("We represent every sector of the industry . . . .").

104. *See* Exec. Order No. 12,866, 3 C.F.R. § 638 (1993), *reprinted in* 5 U.S.C. § 601.

105. The fact that President Clinton, a Democrat, was the president to immortalize the cost-benefit framework for agency action speaks to the universality of this economic concern; it is not limited to Republican presidential administrations. President Biden has issued a memo to "moderniz[e]" Executive Order 12,866 but did not rescind it entirely. *See Modernizing Regulatory Review*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/.

106. Exec. Order No. 12,866 §§ 3(f), 6(a)(3)(B)(ii).

107. *Id*. at § 6(a)(3)(C).

108. *See infra* Subpart III.B (discussing the shortcomings of the *Clean Wisconsin* decision).

109. *See id.*

III. *CLEAN WISCONSIN V. EPA*

A. The Clean Wisconsin Decision: Environmental Protection Triumphs?

Clean Wisconsin v. EPA exemplifies the kind of unsatisfactory legal outcome that results when courts fail to consider the underlying factors that motivated agency action. The case involved a dispute between environmental groups and the EPA over changes to ozone attainment designations.

In 2015, the EPA revised the ground-level ozone NAAQs, lowering the acceptable concentration limit from 0.075 to 0.070 ppm.[110] This change subsequently required area redesignations where states submitted their initial recommendations and the EPA then determined each proposed area's final attainment status.[111] An Obama-era EPA official circulated a memo intended to provide guidance to states during their recommendation process by highlighting the key factors and methodologies the EPA would consider when making their final designations.[112] In the time between the EPA revision of ozone NAAQS and state submissions of their area and attainment recommendations, President Trump was inaugurated.[113] Despite having received all state recommendations by October 2016, the Trump EPA sought to delay publishing the final designations.[114] Following several rounds of litigation, the national designations were finally released in mid-2018.[115]

Various groups then brought suit against the EPA, alleging that the final designations were arbitrary and capricious and also violated the Clean Air Act.[116] One of these groups was Clean Wisconsin, an environmental nonprofit organization representing residents in the state's southeastern counties. In making its case, Clean Wisconsin noted that the EPA had switched the designation of some areas of Wisconsin from "nonattainment" to "attainment" between making its intended and its final designations without sufficient justification as to why the designations were changed.[117] The EPA claimed to have relied on supplemental information from the State of Wisconsin, which had

110. *2015 Revision to 2008 Ozone National Ambient Air Quality Standards (NAAQS) Related Documents*, EPA, https://www.epa.gov/ground-level-ozone-pollution/2015-revision-2008-ozone-national-ambient-air-quality-standards-naaqs (last updated July 13, 2020).

111. *Designations and Permitting Requirements for the 2015 Ozone Standards,* EPA, https://www.epa.gov/sites/production/files/2015-10/documents/20151001designations_permitting.pdf (last visited May 31, 2021).

112. Clean Wis. v. EPA, 964 F.3d 1145, 1154 (D.C. Cir. 2020) (referencing Memorandum from Janet G. McCabe, Acting Assistant Adm'r, to Reg'l Adm'rs, Area Designations for the 2015 Ozone National Ambient Air Quality Standards 5 (Feb. 25, 2016)).

113. Peter Baker & Michael D. Shear, *Donald Trump Is Sworn In as President, Capping His Swift Ascent*, N.Y. TIMES, Jan. 20, 2017, https://www.nytimes.com/2017/01/20/us/politics/trump-inauguration-day.html.

114. *Clean Wis. v. EPA*, 964 F.3d at 1154.

115. *Id.* at 1155.

116. Petitioners' Joint Final Opening Brief at 2, *Clean Wis.*, 964 F.3d 1145 (No. 18-1203) [hereinafter Petitioners' Brief].

117. *Id.* at 105.

conducted further meteorological modeling based on a new "distance-from-the-shoreline" approach.[118] Specifically, the state noted that it took into account the "lake breeze" effect of Lake Michigan, which carried a disproportionate amount of volatile organic compounds generated out of state across the lake and into the shoreline regions of Wisconsin.[119]

Clean Wisconsin argued that the new attainment designations in Wisconsin were irrational choices that exposed residents to potentially unhealthy levels of ozone and violated the EPA's statutory mandate.[120] In its brief, Clean Wisconsin pointed out that the EPA itself had admitted its own inability to properly analyze the state's claims, noting in a technical support document that it was "difficult to fully evaluate because EPA does not have the details necessary to fully review the . . . modeling analysis these claims are based on."[121] Clean Wisconsin also made a science-based argument, calling into question the model's ability to properly account for VOCs that were actually generated within Wisconsin's border.[122] Specifically, the group urged the court to find the attainment designations in Sheboygan, Door, Racine, and several other "Milwaukee-area" counties to be arbitrary and capricious, to vacate the EPA's decision, and to remand the standards to the agency with strict time requirements for the reassessment of the counties' air quality.[123]

In response, the EPA argued that changing its final designation in response to state input was reasonable and justified.[124] The EPA claimed that it relied on Wisconsin's new approach to redesignate the area in Sheboygan and Door counties because the methodology was superior to the EPA's traditional meteorological modeling approach given Wisconsin's unique susceptibility to lake-related air patterns.[125] The State of Wisconsin submitted an amicus brief in support of the EPA with extensive details regarding its "distance-from-the-shoreline" approach. In the brief, the state argued that its modeling approach was "more refined . . . and reflect[ed] much more accurately the unique ozone characteristics in Wisconsin's lakeshore region."[126] The Wisconsin Department of Natural Resources claimed that their "distance-from-the-shoreline" technique captured the "effect of different types of lake breezes on the Sheboygan and Kenosha [air quality] monitors" and that it "analyzed wind direction during high

118. EPA's Final Corrected Answering Brief at 33, *Clean Wis.*, 964 F.3d 1145 (No. 18-1203) [hereinafter EPA Brief].

119. Final Brief of the State of Wisconsin in Support of Respondents at 11–16, *Clean Wis.*, 964 F.3d 1145 (No. 18-1203) [hereinafter Wisconsin Brief].

120. *Clean Wis.*, 946 F.3d at 1170–71; Petitioners' Brief, *supra* note 116, at 105.

121. Petitioners' Brief, *supra* note 116, at 16–17.

122. *Id*. at 15.

123. *Clean Wis.*, 964 F.3d at 1176.

124. *Id*. at 1171–72; *see* EPA Brief, *supra* note 118, at 29, 36–37.

125. *See* EPA Brief, *supra* note 118, at 30–34.

126. Wisconsin Brief, *supra* note 117, at 16 (quoting the administrative record).

ozone periods and found that the wind consistently came from the lake, rather than over land."[127]

In a relatively short opinion, the D.C. Circuit sided with Clean Wisconsin.[128] Regarding Racine County, the court treated the EPA's decision to change the county's status from "nonattainment" to "unclassified" as summarily arbitrary and capricious, as the agency had not provided any reasonable rationale at all for its change.[129] The court agreed with Clean Wisconsin's analysis regarding the shortcoming of the state's approach, unanimously acknowledging that the EPA had not done enough to understand the technicalities of the State of Wisconsin's modeling in the cases of the other two counties.[130]

The D.C. Circuit also made several technical observations critiquing the EPA's final decision. First, it broadly took issue with the State of Wisconsin's premise that the emissions causing high pollution-level readings in Sheboygan exclusively came from out of state, noting that just because "an area experiences lake breeze meteorology is alone not mutually exclusive with a determination that an area may also contribute to its own violations."[131] Second, it criticized the EPA's "failure to account for admittedly pertinent data" such as emissions trajectories at multiple points above ground level, which are important data points for use in modeling the source of those emissions and were considered by the Obama EPA during its initial proposed designations.[132] Ultimately, the court remanded the EPA's final decisions for the Wisconsin counties back to the agency with an order to complete the remand "as expeditiously as practicable."[133]

B. Empty Victory: Clean Wisconsin*'s Shortcomings*

On its face, the outcome of this decision appears to be a victory for proponents of environmental protection. However, a deeper dive into both the remedy provided by the court and the omitted background and broader context of this opinion indicates that it may be less than satisfactory. First, the remand back to the EPA does nothing to change the existing designations; until the EPA revises them, much of southeastern Wisconsin will stay in attainment. Moreover, the order to move "as expeditiously as practicable" is only a reiteration of the EPA's preexisting statutory duty under the Clean Air Act.[134] Since the EPA took over three years to publish the final designations the first time, it is unlikely to

127. *Id*. at 8.
128. *Clean Wis.*, 964 F.3d at 1177.
129. *Id*. at 1170.
130. *Id*. at 1172.
131. *Id*.
132. *Id*. at 1171.
133. *Id*. at 1176.
134. *See* 42 U.S.C. § 7511(a)(1).

be spurred to quicker action by this gentle reminder from the D.C. Circuit.[135] Despite the seemingly favorable ruling, the remedy provided by the court served only to maintain the status quo.

Furthermore, neither of the parties' briefs nor the opinion provide any context for the larger fight playing out behind the scenes of this decision. Instead, the EPA uses 'doublespeak' to mask many underlying factors in its technical discussion. Several of the Wisconsin counties at issue were the sites of existing or planned industrial infrastructure, and the shoreline region of the state is home to "some of the highest concentration of manufacturing companies in the country."[136] While Wisconsin mentions the "substantial and unnecessary costs" on the state in its amicus brief, it refers only to the costs of reevaluating designations on remand—not the economic costs to the lakeshore industrial zone.[137] Moreover, in explaining its decision, the EPA mentioned costs only once, in its discussion of the attainment designations of an entirely different state.[138]

In contrast to the absence of cost discussion in litigation, the Trump administration focused on American industrial "dominance" as a key part of its policy platform during the *Clean Wisconsin* action.[139] The president referred to himself as "the President of manufacturing,"[140] announced "great American [e]conomic [r]evival [g]roups," and promised "a future of unparalleled American prosperity" with the "wealth of America as the primary goal" of his

135. The Biden administration is unlikely to leave the Trump EPA designations unchanged if given the opportunity to revise them, but it may not act on that opportunity immediately. Since the Trump EPA did not return to the D.C. Circuit with "further explanation" before the change in administration occurred, the initial Obama EPA designations may well be reinstated by a Biden EPA. As of February 2021, it is unclear how pressing a priority this issue is for the Biden administration, especially given the aggressive environmental agenda that this administration has already outlined. *See, e.g.*, Ella Nilsen, *The Fauci of Climate Change? Gina McCarthy Is in Charge of Biden's Massive Climate Agenda*, VOX (Mar. 2, 2021, 8:20 AM), https://www.vox.com/22287385/climate-change-czar-gina-mccarthy-biden (noting the Biden administration's "ambitious goal of decarbonizing the US electricity sector by 2035 and put[ting] the country on a path to net-zero emissions by 2050"). Thus, at least for the foreseeable future, the "in attainment" designation for southeastern Wisconsin will likely persist.

136. Friedman, *supra* note 3; JAKE CURTIS, WIS. INST. FOR L. & LIBERTY, WISCONSIN'S NO GROWTH ZONE: THE IMPACT OF THE CLEAN AIR ACT ON SHEBOYGAN COUNTY 3 (2017), https://www.will-law.org/wp-content/uploads/2021/01/EPA-Nonattainment-nonprint-FINAL.pdf.

137. *See* Wisconsin Brief, *supra* note 119, at 2.

138. EPA Brief, *supra* note 118, at 53. The mention of "cost" was not even part of the Wisconsin designation debate in the case; it was mentioned in the debate over attainment designations in Colorado. (Multiple states were party to the suit, all of whom were engaged in similar disputes.)

139. *See* Friedman, *supr*a note 3; *America Will Dominate the Industries of the Future*, TRUMP WHITE HOUSE ARCHIVES (Feb. 7, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/america-will-dominate-industries-future/ ("As other nations work to catch up, President Donald J. Trump is maintaining American leadership with bold new strategies, key research and development (R&D) investments, and a relentless focus on reducing regulatory barriers to innovation.").

140. *See Remarks by President Trump at Foxconn Facility*, TRUMP WHITE HOUSE ARCHIVES (June 28, 2018, 1:14 PM), https://trumpwhitehouse.archiveswww.whitehouse.gov/briefings-statements/remarks-president-trump-foxconn-facility/.

administration.[141] In furtherance of these claims—and prior to the EPA's revision of the attainment designations—the President and Wisconsin state Republican leadership touted a multibillion-dollar deal to place a Foxconn factory in Racine, Wisconsin.[142] In a speech at the construction site, President Trump referred to the Racine factory as the "eighth wonder of the world" and declared the United States "open for business."[143]

At the same time, advocates for Wisconsin industry submitted a policy brief detailing the "no-growth" effects of a nonattainment designation on Sheboygan County, arguing that "[t]he impact of the EPA's proposed rule on the Sheboygan County economy is substantial."[144] Following the submission of this policy proposal, the EPA redesignated Sheboygan County, prompting the president of the Wisconsin Institute for Law and Liberty (WILL), the group that authored the policy brief, to announce that the "EPA agreed with our policy decisions, easing the regulatory burden on many Sheboygan County businesses."[145] Notably, the EPA never formally acknowledged that it was adopting the WILL policy proposal in its news release at the time or in its brief justifying its final designation decision, instead crediting the updated data from a shoreline monitor and Wisconsin's modeling.[146]

The final twist in this complicated backstory: the very shoreline monitor that the EPA relied upon to justify its decision had been installed upwind of the industrial activity in Sheboygan County by Republican Governor Scott Walker following the EPA's initial proposed designations.[147] Moreover, the single air quality monitor in Racine County, the proposed site of the Foxconn factory, was also removed between the time of the initial and final EPA designations and was never replaced.[148] When the EPA claimed there was a lack of data to support a designation of nonattainment in that region, what they meant was that the state had removed the sole source of that data.[149] This is especially interesting given

141. *See President Donald J. Trump Announces Great American Economic Revival Industry Groups*, TRUMP WHITE HOUSE ARCHIVES (April 14, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-announces-great-american-economic-revival-industry-groups/.

142. *See* Friedman, *supra* note 3.

143. *Remarks by President Trump at Foxconn Facility*, *supra* note 141.

144. CURTIS, *supra* note 136, at 11.

145. Wis. Inst. for L. & Liberty, *EPA Adopts WILL Recommendation, Majority of Sheboygan County Attains National Air Quality Standards*, URBAN MILWAUKEE (June 19, 2020, 9:18 AM), https://urbanmilwaukee.com/pressrelease/epa-adopts-will-recommendation-majority-of-sheboygan-county-attains-national-air-quality-standards/.

146. *See Administrator Wheeler Announces Cleaner Air in Sheboygan and Door Counties, Wisconsin*, EPA (June 16, 2020), https://www.epa.gov/newsreleases/administrator-wheeler-announces-cleaner-air-sheboygan-and-door-counties-wisconsin ("EPA and WDNR proposed to redesignate the Shoreline Sheboygan area to attainment based on data from the shoreline air quality monitor.").

147. Marianne Lavelle, *Wheeler in Wisconsin Putting a Green Veneer on the Actions of Trump's EPA*, INSIDE CLIMATE NEWS (June 18, 2020), https://insideclimatenews.org/news/18062020/wheeler-wisconsin-epa-green-clean-air/.

148. *See* Wisconsin Brief, *supra* note 119, at 12.

149. *Id.*

that one of the justifications for designating Racine County as "unclassifiable" was the removal of the air quality monitor in that area prior to the release of the final designations.[150]

Politically and economically motivated parties contributed to the EPA's change in designation by influencing the agency's policy decision and the raw data it used to justify that policy decision.[151] Yet this deeply divided, highly partisan policy struggle appears nowhere in the litigation. Instead, the EPA engaged in agency 'doublespeak,' masking its political and economic motivations as a straightforward adoption of a new modeling technique and the degree to which lake breezes affect ozone formation. This outcome is neither transparent nor productive, since on remand the EPA can simply pull from Wisconsin's extensive supplemental material to provide a justification for the use of a "distance-from-the-shoreline" approach in order to likely satisfy a deferential standard of judicial review.[152] *Clean Wisconsin* is a best-case litigation outcome for environmental advocates, yet exemplifies the consequences of 'doublespeak' by a politically motivated agency in combination with a super deferential standard of judicial review.

IV. REIMAGINING THE SYSTEM OF JUDICIAL REVIEW

Clean Wisconsin is not anomalous. During the Trump presidency, federal circuit courts have vacated or remanded numerous lawsuits against the EPA for failure to set forth reasonable explanations behind the agency's decision-making.[153] However, even in cases where the court has noted that the EPA "cannot reach whatever decision it likes and then defend it with vague allusions to its own expertise,"[154] the court qualifies that an agency's decision will be upheld if the court can discern any "rational connection between the facts found and the choice made."[155] This language again underscores the very low bar that

150. *Id.*

151. This is evident in part from the amicus briefs submitted in support of the EPA. *See* Final Brief for Amici Curiae American Petroleum Institute, Colorado Oil & Gas Association, Colorado Chamber of Commerce, and Colorado Farm Bureau in Support of Respondents at 2, Clean Wis. v. EPA, 964 F.3d 1145 (D.C. Cir. 2020) (No. 18-1203) ("The Chamber represents hundreds of businesses of all sizes across Colorado, as well as other trade associations, economic development organizations, and local chambers of commerce.").

152. *See generally* WIS. DEP'T OF NAT. RES., WISCONSIN'S RESPONSE TO EPA'S INTENDED NONATTAINMENT AREA DESIGNATIONS FOR THE 2015 OZONE NAAQS: TECHNICAL SUPPORT DOCUMENT (2018), https://dnr.wisconsin.gov/sites/default/files/topic/AirQuality/DNRResponse120DayLetter20180228.pdf (providing more than forty pages of detailed discussion of Wisconsin's findings and methodological approach to ozone monitoring).

153. *See, e.g.*, New York v. EPA, 964 F.3d 1214 (D.C. Cir. 2020) (vacating an EPA decision that denied New York's Good Neighbor Provision petition); Sierra Club v. EPA, 964 F.3d 882 (10th Cir. 2020) (vacating the EPA's decision on a Utah Title V permit); In re Nat. Res. Def. Council, 956 F.3d 1134 (9th Cir. 2020) (finding that EPA unreasonably delayed regulating the pesticide tetrachlorvinphos); Sierra Club v. EPA, 972 F 3d 290, 299 (3d Cir. 2020) (vacating the EPA's decision because it "spawn[ed] a pernicious loophole" in power plant pollution limits for NOx).

154. *See Sierra Club*, 972 F.3d at 298.

155. *Id.*

the Trump EPA had to meet, or any future EPA must meet, in order to have their actions upheld.

By avoiding or misrepresenting the variables underlying environmental policy choices, courts and the EPA center difficult policy decisions around "interpret[ing] and communicat[ing] the very same set of data" instead of around broader and more encompassing balancing tests.[156] This approach derails productive policymaking and moves away from the purpose of the Clean Air Act—to "promote the public health and welfare"—and towards the manipulation and rationalization of out-of-context data.[157] As exemplified in *Clean Wisconsin*, the current system of judicial review does not facilitate transparency in agency action.[158] As climate change and related environmental disasters take center stage as the most urgent and severe global crises, it is essential to take a hard look at our own nation's system of environmental regulation to ensure that it functions in the best interest of the public. Because agency action is integral to practically every national function, any structural solution will have to involve a coordinated effort to reimagine administrative decision making.

Changing the process of judicial review for Clean Air Act decisions can mitigate some of the infirmities of decision making in the environmental sector, as well as serve as a road map for other types of science-based agency review. First, such changes could help counteract the increasingly overt political pressure from the executive branch on agency action.[159] Second, they could shift the legal debate over environmental agency action from a myopic interpretation of data to a broader and more holistic contemplation of policy goals and public concerns.[160] Addressing both of these shortcomings in the current system of judicial review will increase transparency and accountability in agency decision making, as well as align agency action more closely with increasing the public welfare. This new system of review would encompass two levels of change: one to modify the level of scrutiny and another to modify what factors the court considers as part of the justification for the agency's action upon review.[161]

But several existing hurdles block these changes from occurring. First, so long as courts continue to say that they are applying a super deferential standard, agencies will continue to submit their decisions cloaked in science. Second, in the shadow of the *Whitman* precedent, agencies will be reluctant to discuss any consideration of cost-benefit analysis in the record submitted for review, for fear

156. *See* Meazell, *supra* note 16, at 745.

157. *See* 42 U.S.C. § 7401(b)(1).

158. *See supra* Subpart II.B.

159. *See infra* Subpart IV.A.

160. *See infra* Subpart IV.B.

161. This could likely also be done by modifying the Clean Air Act or the Administrative Procedure Act, but for reasons this Note will explore in Part IV, the most practical course of action is unlikely to rely on congressional action. *But see* Cary Coglianse & Gary E. Marchant, *Shifting Sands The Limits of Science in Setting Risk Standards*, 152 U. PA. L. REV. 1255, 1347–58 (2004) (analyzing many of the same infirmities in the current judicial review process and concluding that the text of the Clean Air Act should be amended).

of being found in violation of the plain language of Section 109 of the Clean Air Act. Courts have the power to address both of these roadblocks.

A. Returning to a Fidelity Model of Review—Checks and Balances on Executive Control of Agency Action

1. What Does a Fidelity Model Look Like?

First proposed by current U.S. Attorney General Merrick Garland[162] in the late 1980s, a fidelity model of review "contemplates substantive review of the reasonableness of agencies' choices"[163] and ensures that agencies "use [their] powers as Congress intended."[164] A fidelity-based model of judicial oversight would "balance the reality of increased presidential influence against congressional mandates to protect public health and the environment"[165] by increasing political integrity and statutory accountability. Because determinations "at the frontiers of scientific knowledge"—like air quality emissions regulations—are most susceptible to the infusion of policy preferences, they would greatly benefit from the fidelity model's more scrutinous form of review.[166] As Professor Holly Doremus has critiqued, "[t]he single biggest contributor to the lack of political integrity in . . . environmental policy decisions is the absence of barriers between political appointees who view their mission as the single-minded advancement of the President's policy agenda and career employees charged with providing scientific advice or analysis."[167]

While some courts already appear to be moving away from a super deferential approach to science decision making in practice, they continue to use the "most deferential" standard articulated in *Baltimore Gas* in the language of their opinions.[168] So long as courts employ that deferential standard of review for agency decisions based on science, agencies will continue to be incentivized to mask their policy choices as a debate over scientific rationales.[169] Moreover, such "recitations of super deference" have stripped the standard "of any real

162. Garland wrote this article while still a practitioner, prior to his impressive tenure as a D.C. Circuit judge and attorney general for the Biden administration.

163. *See* Garland, *supra* note 15, at 589.

164. *See id*. at 512.

165. Roesler, *supra* note 29, at 554; *see also* Garland, *supra* note 15, at 588 (proposing that changing the judicial standard of review can be a solution to political influence over deregulatory agency actions); Laura Anzie Nelson, *Delineating Deference to Agency Science Doctrine or Political Ideology?*, 40 ENV'T L. 1057, 1097–99 (2010) (acknowledging that the current standard allows for judges' own political preference to dictate their decision making).

166. *See* Wagner, *supra* note 58, at 1665.

167. Doremus, *supra* note 41, at 1640.

168. *See* Meazell, *supra* note 16 at 766, 774–76; Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983).

169. *See* Wagner, *supra* note 58 at 1617 (arguing that the consequences of extreme deference to agency science include "significant limitations on the ability of the public, the courts, and even public officials to participate in the policy choices embedded in scientific-sounding standards").

meaning," further underscoring the need to reimagine the standard of review for science-based regulatory decisions.[170]

Professor Shannon Roesler makes a persuasive argument that super deference should be replaced with traditional 'hard look' review, because it would "recognize the reality of presidential influence and control."[171] She suggests looking for certain "danger signals" in agency action that suggest overt and impermissible interference from the executive branch, such as cherry picking and showcasing preferred scientific outcomes or dodging challenges to the agency's factual assumptions.[172] But looking for such signals extends judicial oversight of executive control to encompass only what agencies include in the administrative record or what challenging parties assert in their briefs. Thus, hard look review absent other modifications is insufficient to address the problems with improper executive influence.

To extend judicial oversight further and to make it more effective, judges should explicitly take into account executive policy platforms when reviewing agency action, even if there are no overt "danger signals" that indicate the agency engaged in "identity-protective reasoning."[173] Expanding the judiciary's role in checking the executive in this way would serve the ex post function of steering agency decisions back towards their statutory mandate should they veer too far towards a particular policy agenda.[174] If courts are uncomfortable pronouncing executive policy positions as obvious facts, they should at least be undertaking independent research to understand the executive's policy positions outside of what may be raised in either EPA or opposing party arguments, and contextualizing the agency's decision within the framework of broader executive pressure.[175] While courts may be reticent to 'get into the heads' of agency

170. *See* Meazell, *supra* note 16, at 776.

171. Roesler, *supra* note 29, at 534.

172. *Id*. at 535.

173. *See id*.

174. *See* Jeneen Interlandi, *When Science is Pushed Aside*, N.Y. TIMES (Oct. 16, 2020), https://www.nytimes.com/2020/10/16/opinion/trump-covid-public-health.html (opining on the dangers of too much executive control and noting that "[a]gencies that use science to protect human health have long been plagued by a lack of funding and too much political interference. But a world in which these agencies become fully ornamental would be dangerously different than the world we currently inhabit.").

175. Given the prevalence of news articles (from both sides of the partisan news media), official White House press releases and updates, and the president's own speeches, it would be difficult to doubt on certain aspects of President Trump's political agenda, such as his push to deregulate in order to encourage economic growth. *See, e.g.*, *President Donald J. Trump Has Unleashed American Producers and Restored Our Energy Dominance*, TRUMP WHITE HOUSE ARCHIVES (July 29, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-unleashed-american-producers-restored-energy-dominance/ ("President Trump's deregulation campaign has eliminated unnecessary burdensome rules that stifled domestic energy production."); *A Regulatory Reform Agenda That Benefits All Americans*, TRUMP WHITE HOUSE ARCHIVES (Oct. 22, 2020), https://trumpwhitehouse.archives.gov/articles/regulatory-reform-agenda-benefits-americans/ ("Throughout his presidency, President Trump has promised economic freedom for the American people by eliminating excessive burdens imposed by the regulatory state."). Indeed, in other contexts, some courts are already willing to draw from sources outside the party briefs to question President Trump's pretextual motivations. *See* United States v. Flynn, No. 17-cr-00232, 2020 WL 7230702, at *10 (D.D.C. 2020) (referencing Trump's

officials in assessing their potential political motivations, such consideration is justified in cases where the executive branch has indicated a policy position that is explicitly at odds with the statutory mandate of the Clean Air Act.[176]

Importantly, the point of this kind of oversight would not be to replace the executive's policy agenda with a judicial policy agenda, or even to remove executive influence entirely from the agency decision-making process. Rather, it would be to reconcile the current executive administration's goals with the longstanding legislative statutory mandate that should serve as the lodestone of any agency action. Though proponents of strong executive control may challenge this approach as a violation of separation of powers, a court does not "violate the separation of powers when it directs an agency to take a specific action that the agency has no discretion to refuse to take—either because it has a statutory duty to take such action, or because refusal would exceed (or abuse) the discretion the agency does possess."[177] A fidelity model approach to judicial oversight would also help to contextualize an otherwise abstract debate between alternative scientific explanations, both of which could seem like, but may or may not actually be, reasonable interpretations of data.[178]

Critics of 'judicial policy making' will likely push back against the increase in both the level of scrutiny and the scope of judicial review that a fidelity model would entail. But courts are able, and perhaps more likely than agencies, to walk the line between inserting their own policy preferences and weighing evidence to determine if the EPA has chosen a reasonable policy course in light of many relevant factors.[179] As one law review article put it, "for the judiciary, the problem [of judicial policymaking] is amplified when agencies attempt to avoid accountability over controversial issues by disguising policy choices amidst science and technical expertise."[180]

A related criticism is that such a change in the system of environmental regulatory review should come from Congress, not the judiciary itself. However, given the 'legislative paralysis' the nation has experienced for the last few decades, it is not inappropriate to seek avenues for change elsewhere.[181]

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tweets and his "deep animosity toward those who investigated and prosecuted [Mr.] Flynn" (alteration in original)).

176. *See infra* Subpart IV.B (discussion of *Overton Park*).

177. *See* Garland, *supra* note 15, at 565.

178. *See* Holly Doremus, *Listing Decisions Under the Endangered Species Act Why Better Science Isn't Always Better Policy*, 75 WASHINGTON U. L.Q. 1029, 1065 (1997) ("[P]olicymakers must realize that simply characterizing a question as scientific does not guarantee an answer which is either objective or reasonable.").

179. *See* Nelson, *supra* note 165, at 1100–01.

180. *See id*. at 1100 (arguing that more transparency in agency review would reduce the amount of judicial bias in reaching a decision).

181. This paralysis has been especially acute in areas of climate change legislation. *See* Clemmer, *supra* note 19, at 1134–38 (noting that "the future looks grim for any meaningful legislative solution to the climate crisis," discussing "whether we might be better off with no new climate legislation at all," and outlining a solution outside the legislature that "the EPA could achieve under its existing Clean Air Act authority").

Moreover, moving away from judicial super deference and towards a fidelity model of review that calls for increased transparency in Clean Air Act decisions would realign EPA action with legislative intent. It would not usurp Congress's power to set agency directives but would instead judicially reinforce that power.

2. Applying a Fidelity Model of Review to Clean Wisconsin v. EPA

The D.C. Circuit in *Clean Wisconsin* appears to have trended towards a harder look at the EPA's science, even though it used the language of super deference. By commenting on the technicalities of Wisconsin's modeling approach, and the EPA's apparent lack of understanding, the court went beyond a cursory appraisal of agency science.[182] Even so, proceeding under the language of super deference is still misleading, since, upon remand, the EPA can simply bolster its explanation of the background and rationale for adopting Wisconsin's data without providing any further policy justification or analysis. However, more scientific data is not the same as a more robust policy justification. Without a clear indication that the court is applying a stricter standard of review, agencies will have no incentive to rigorously defend their decisions or to include any justification outside of a "deeper dive" into complicated data analysis; by doing the bare minimum, agencies like the EPA can escape with a 'slap on the wrist' remand and no substantive change to the contested decision.[183]

Applying a fidelity model of review would allow the court to consider whether an executive policy platform influenced the agency's final decision to a degree that took the decision outside of the realm of reasonable connection to the statutory purpose to "protect the public health and welfare." A fidelity model of review would apply even when, as in *Clean Wisconsin*, there was no mention of the administration's explicitly pro-industry policies in the record.[184] The court could engage in an explicit discussion of the agency's scientific decisions in the context of the political pressures and motivations affecting the agency, as opposed to simply declaring the action arbitrary and capricious without discussion of the cause of such an unreasonable outcome. The fidelity model would require agency officials to account for the political agenda of the current administration in order to pass the court's assessment of reasonable decision making.

182. *See* Clean Wis. v. EPA, 964 F.3d 1145, 1174 (D.C. Cir. 2020) (discussing the validity of the state's "distance-from-the-shoreline" modeling).

183. *See* Garland, *supra* note 15, at 571 ("Vacating and remanding would not be a logical response to agency failure, but an invitation to an endless charade—a kind of absurdist theater in which the court sends the agency back to try again each time the agency reaches a result other than the one the court believes reasonable.").

184. *See* Roesler, *supra* note 29, at 531 ("In an era of presidential control and influence, we should pause before embracing political reasons and assuming agency decision-makings can draw the line between science and politics.").

B. Exposing the Doublespeak: Increasing Transparency and Scope in Judicial Consideration of Relevant Factors

Explicitly moving away from super deference is only one tool with which the court can lessen the incentives for agencies to disguise their policy choices as data interpretation.[185] Courts should also employ a more holistic review of EPA action based on a consideration of factors that are consistently relevant to environmental decision making. Calling for a discussion of policy considerations and relevant factors outside of 'pure' science will increase transparency and put agency action more in line with public welfare. It would abandon the fiction that agencies, using science alone, formulate policy positions. Policy decisions involving risk regulation (such as determining the appropriate level at which to set air quality standards) leave the realm of decision making based on any semblance of "objective" scientific facts as soon as the permissible level of a pollutant is set above zero.[186]

Increasing the scope of judicial review is complicated for two reasons. First, this solution has the potential to voluminously expand the record presented to the court, putting a burden on both the agency responsible for compiling it and the judges responsible for reviewing it. Second, precedent like *Whitman* discourages agencies from considering cost variables in their decisions under Section 109 of the Clean Air Act.[187] Courts will therefore have to navigate pushback from agencies and avoid flouting precedent in considering a more expansive approach to judicial review of purportedly science-based agency decisions.

However, there are strong arguments in favor of adopting such an approach. As Wagner explains, "[e]xpensive and counterproductive 'good science' debates . . . will give way to honest and open public discourse about how best to strike a balance" between competing interests, or where to draw the line on issues about which there is no scientific consensus.[188] She argues that focusing only on the science in judicial review already increases the burden on agencies to keep detailed, highly technical records in order to convince the courts that they have made a reasonable decision in light of the facts.[189] Expanding the scope of review

185. This Note is not proposing an application of the substantial evidence standard for informal adjudications; rather, it is suggesting that agencies make reasonable decisions accounting for evidence across a variety of factors. *See* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 81–82 (2010) ("A court can apply the substantial evidence doctrine to uphold an agency action taken through use of informal adjudication or informal rulemaking only by determining whether the agency engaged in reasoned decision-making, including a statement of the agency's reasons in support of the factual predicates for its action.").

186. *See* Doremus, *supra* note 178, at 1036 ("Instead of pretending uncertainty can be avoided, we must learn how best to factor it into decisions."); Roesler, *supra* note 29, at 520–21 ("Scientific understanding is always contingent and subject to some level of uncertainty . . . . [A policy] answer requires an assumption based on a value judgment regarding how risk averse the standard should be.").

187. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 471 (2001).

188. Wagner, *supra* note 58, at 1665.

189. *See id.* at 1655 (arguing that the task of creating a sufficient administrative record to withstand judicial review is a "daunting requirement[]").

could allow agencies to reallocate their time and energy to a more expansive discussion of the policy decisions underlying their final action. It would also increase public faith in agency decision making with regards to environmental regulation and air quality; failing to adequately explain the basis for a policy rationale degrades trust in that agency's competency and efficacy.[190]

There are a number of factors that the EPA should be regularly addressing in the decisions it makes under the Clean Air Act. This Note focuses on the three factors that are the most pressing and require coordinated action across all branches of government. The first, cost, was discussed in earlier sections of this Note.[191] The second, the agency's explicit recognition of climate change, has been addressed by the Supreme Court in *Massachusetts v. EPA*, but is not regularly discussed by the EPA in Clean Air Act decision making.[192] The third, environmental justice, arguably falls squarely within the realm of public health and welfare considerations, but is notably absent from recent lower court opinions discussing EPA action on Clean Air Act issues.[193] Calling for an open discussion of environmental justice concerns, and a clear record regarding how the EPA handled them in the past, is a necessary part of complying with the Clean Air Act's statutory mandate in the modern era.[194]

1. Cost as a Relevant Factor

Allowing agencies to present a record describing the role cost debates played in the information gathering process would encourage a more honest application of *Whitman*'s reasoning and would be more explicitly in line with the directive of Executive Order 12,866. For example, it would be useful for the court to be able to evaluate a full discussion of a decision in which costs were presented as a counterargument to the stringency of an EPA regulation. This would allow the court to determine whether the EPA impermissibly adjusted its regulation due to those countervailing points.[195] Since it is unrealistic to assume agencies have no knowledge of cost concerns, that discussion should appear in

190. *See* Alexander Kuljis, Note, *Improving Wildlife Agency Decisions by Acknowledging and Explaining Policy Choices Embedded in Agency Science*, 41 ECOLOGY L.Q. 377, 379 (2014).

191. *See infra* Subpart IV.B.1.

192. *See* Massachusetts v. EPA, 549 U.S. 497, 532–33 (2007) (holding that the EPA is responsible for considering greenhouse gas emissions in its decision-making); *infra* Subpart IV.B.2.

193. *See* New York v. EPA, 964 F.3d 1214 (D.C. Cir. 2020) (listing recent cases decided by lower courts with little to no discussion of the social impacts of the environmental harms).

194. Here, "modern" refers to the fact that environmental justice only came into the public discourse after the passage of the Clean Air Act, not modern in the sense that it only recently came into existence at all. Robert D. Bullard, largely credited as the "father of environmental justice," published his first article about the effects of toxic waste sites on the Black Houston community in 1983, thirteen years after the passage of the Clean Air Act. *See generally* Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 SOCIO. INQUIRY 273 (1983).

195. *See* Coglianse & Marchant, *supra* note 161, at 1346 (noting that the EPA's refusal to explicitly consider costs "reduces political accountability for value judgments and political choices, [and] hides from public scrutiny claims that are made about risks, benefits and costs (since such claims are driven 'underground' in the course of regulatory deliberations)").

the record before the court, but it should not ultimately be the overarching basis for the agency's decision. The only way for the court to determine that industry costs were not improperly significant in the agency's final action is for it to be able to inspect a complete and comprehensive record.

A more holistic scope of judicial review would approach the interaction of the language of Section 109 of the Clean Air Act with environmental regulation in a more realistic manner; hiding some factors from judicial review, or from the public, only furthers the incorrect notion that agencies are capable of making the 'best' choice based on scientific data alone. Both the majority and concurring opinion in *Whitman* highlighted that the EPA should not allow industry cost to dominate or control their final decision; that is not the same as saying it should not be aware and mindful of the effects such a decision will have on that sector of the nation.[196] *Whitman* currently operates as a 'get out of jail free' card for the EPA to dodge any discussion of cost-motivated decision making.

The negative consequences of such a free pass were evident in the *Clean Wisconsin* decision. Had the EPA been obligated to disclose the cost-based considerations in its decision making, the D.C. Circuit would almost certainly have found the decision improperly motivated to a degree that would warrant vacatur or other stricter consequences for the agency. Such a finding would have 'undone' the EPA's previous designations, instead of leaving them unchanged while the agency sought to 'substantiate' them in accordance with the court's remand request.[197]

Instead, the word 'cost' does not appear once in the EPA's brief, Wisconsin's brief, or the Wisconsin's supplementary information submission to the EPA during the final designation process.[198] Justice Breyer's concurrence in *Whitman* indicated that he feared opening the door for the EPA to discuss costs because it would allow for undue industry influence that conflicted with the statutory mandate to protect human health and welfare.[199] But as *Whitman* is currently interpreted, the blanket ban on discussing costs merely incentivizes the EPA to mask its cost consideration behind discussion of science or to leave it out

196. Though Justice Scalia contrasts Section 109 with other sections of the Clean Air Act that require the EPA to "issue to the States" data on cost information, and concludes that costs cannot be considered in "applying the criteria" to determine NAAQS, he says nothing about how the EPA can or cannot document its actions in excluding costs from its final decision. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 469–71 (2001). The *Whitman* concurrence, written by Justice Breyer, also relies heavily on legislative history to justify the exclusion of costs. However, the legislative history regarding the Clean Air Act indicates that Congress was aware of, and may have even expected, some amount of balancing to take place in the setting of air quality standards. *See id*. at 490–92 (Breyer, J., concurring); *but see supra* Subpart II.A (discussing in greater detail the ambiguities in the legislative history).

197. *See* Clean Wis. v. EPA, 964 F.3d 1145, 1177 (D.C. Cir. 2020).

198. *See* EPA Brief*, supra* note 118; Wisconsin Brief*, supra* note 119; Petitioner Brief*, supra* note 116.

199. *See Whitman*, 531 U.S. at 492–93 (discussing the "time-consuming and potentially unresolvable arguments" that could ensure); Farber, *supra* note 62, at 65 ("[Justice Breyer] found . . . that Congress intended to impose standards beyond current economic or technological feasibility in order to force technology improvements and to preserve public health.").

of the formal record entirely. The court is thus faced with a record, like that in *Clean Wisconsin*, that suggests nothing about the true agency motivation, despite it being public knowledge and official administration policy. Such a practice is counter to the spirit of *Whitman*, and courts should begin to address this clear discrepancy by requiring the EPA to be transparent in its cost analysis.

In fact, the EPA itself has begun to reckon with the lack of transparency and the discrepancy between *Whitman* and the Executive Order 12,866 Regulatory Impact Analysis requirement. In a June 2020 proposed rule, the EPA directly acknowledged the need to "ensure that its analysis of regulatory decisions provided to the public . . . be rooted in sound, transparent, and consistent approaches to evaluating benefits and costs."[200] The EPA also addressed its consideration of costs in NAAQS decisions, noting that "while the [Clean Air Act] prohibits the EPA from considering cost when establishing requisite [NAAQS] for criteria pollutants, the EPA nonetheless provides Regulatory Impact Analyses (RIAs) to the public for these rulemakings." The EPA outlined admirable goals for its new cost-benefit analysis framework, such as "increas[ing] transparency and consistency across [Clean Air Act] rulemakings; . . . provid[ing] the public with additional information in the [Clean Air Act] rulemaking process; and . . . provid[ing] the [a]gency with supplemental information for potential use by the [a]gency when it is appropriate to be considered."[201] This rule was finalized by the Trump EPA on December 9, 2020, [202] but the Biden administration has since moved to rescind it.[203]

As the EPA increases its explicit reliance on cost-benefit analyses in Clean Air Act decision-making, including Section 109 decisions, courts must be more willing to consider RIAs and public comments that address the EPA's consideration of cost as a factor. The courts must take these considerations into account independent of whether or not these discussions appear in the final agency record. Avoiding such review, or assuming that the EPA has complied with the spirit of *Whitman* and avoided prioritizing industry costs over public health and welfare, fails to hold the EPA accountable to its statutory mandate or to provide the external, objective, and public-facing analysis of the EPA's cost-benefit analysis that could help guide future agency action.

The Supreme Court has called on reviewing courts to "engage in a substantial inquiry" when agency actions are unsupportable based on the record before the court.[204] In a case involving the Secretary of Transportation John

200. Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 35,612, 35,613 (proposed June 11, 2020) (to be codified at 40 C.F.R. pt. 83).

201. *Id.* at 36,315.

202. *See generally* Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 84,130 (Dec. 8, 2020) (to be codified at 40 C.F.R. pt. 83).

203. *Rescission of the 2020 Benefit-Cost Rule*, EPA, https://www.epa.gov/air-and-radiation/rescission-2020-benefit-cost-rule (last updated May 27, 2021).

204. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).

Volpe's siting of a highway route, *Citizens to Preserve Overton Park v. Volpe*, the Supreme Court indicated its willingness to "require some explanation" and "examin[e] the decisionmakers themselves" when agencies clearly fail to present the "whole record" for the court upon review.[205] The Court indicated that where statutes give "paramount importance" to certain factors over others, it is within the reviewing court's authority to ensure that the agency has properly prioritized in its decision making.[206] In future cases where the EPA offers minimal and unconvincing rationales for its decisions, the reviewing court could employ an *Overton Park* framework and probe the agency for its consideration of what the court considers to be the "relevant factors."[207] In Section 109 cases like *Clean Wisconsin*, one such relevant factor should be the explicit effort of the EPA to prioritize the "paramount" goal of the Clean Air Act in the face of strong economic opposition.[208]

While many have criticized cost-benefit analysis as heavily benefitting industry, in large part because dispersed public health benefits are extremely difficult to quantify, there are two main reasons for the courts to nevertheless address such analysis in reviewing Section 109 action.[209] First, it is clear from recent cases and the agency's own proposed rulemaking that the Trump EPA put increased emphasis on the importance cost consideration, even in light of supposed limits.[210] Therefore, environmental proponents, including a pro-regulatory Biden EPA, must improve their ability to convey and quantify the tremendous benefits of environmentally protective regulation. Embracing the quantification of public benefits will bolster the case in favor of stricter emissions limits, technological advancements, and controls on carbon in the face of deregulatory and pro-industry challenges. To set the framework for such review early, courts should be proactive in aligning cost-related considerations with preexisting statutory directives in determining what the EPA can and cannot do.

Second, it will be difficult to move beyond a conception of cost that "stuff[s] everything into the metric of dollars and cents" if those involved in decision making are not transparent about their current economic bias.[211] This is especially relevant in environmental decision making, where some have argued that the current efficiency-based system of assigning costs and benefits is

205. *Id*. at 419–20.

206. *Id*. at 412–13 (discussing the need for the Secretary to "protect[] . . . parkland" in accordance with the statutory mandate).

207. *See id*. at 416.

208. *Id*.

209. *See* Farber, *supra* note 62, at 51 ("Merely determining regulatory costs can be quite difficult; quantifying the benefits of environmental regulation is even more controversial.").

210. *See* Sierra Club v. EPA, 972 F.3d 290, 299 (3d Cir. 2020) (vacating the EPA's decision because it "spawn[ed] a pernicious loophole" in power plant pollution limits for NO_x); Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 84,130.

211. *See* Daniel Farber, *Reinventing Cost-Benefit Analysis*, LEGAL PLANET (Nov. 19, 2020), https://legal-planet.org/2020/11/19/reinventing-cost-benefit-analysis/.

"fundamentally incapable" of accurately assessing the value of things like clean air or wildlife preservation.[212] Costs and benefits assigned to most environmental protection measures are "artificial" and based on contingent valuation, which "asks . . . the affected population how much they would be willing to pay to preserve or protect something that can't be bought in a store."[213] Insofar as nobody in the executive branch has pushed for a more holistic regulatory decision-making framework, economic cost-benefit analysis is still broadly appealing to government and industry actors as a semi-quantitative decision-making system. The court can play an active role in encouraging an explicit discussion of cost, including both its utility and its shortcomings. Economic narratives often distort and overpower environmental concerns; transparency and critical work to improve cost-benefit analyses can mitigate some of these negative effects.

2. Climate Change as a Relevant Factor

There is a longstanding, highly partisan divide in this country's willingness to accept the reality of a changing climate, often disguised as a "debate about science."[214] Courts can play an active role in moving past that pseudo-debate and requiring parties, especially government agencies (or, in a future administration, industry challengers) to preemptively accept climate change as a scientific truth and begin to engage in a debate over legitimate policy differences in response to that truth. Courts should take climate change into account when reviewing any EPA decision under Clean Air Act Section 109, as it is a factual reality of the world that deserves consideration in any decision about environmental regulation.[215] Though discussions of the impacts of air pollution

212. *See, e.g.*, Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless Cost-Benefit Analysis of Environmental Protection*, 150 U. PENN. L. REV. 1553, 1564 (2002). In January 2021, President Biden issued a memo calling on the Office of Information and Regulatory Affairs to "modernize" its cost-benefit analysis process, which could allow for the assessment of costs based on a more progressive value system. *See Modernizing Regulatory Review*, *supra* note 105.

213. Ackerman & Heinzerling, *supra* note 212, at 1558.

214. *See* Andrew J. Hoffman, *Climate Science as Culture War*, STAN. SOC. INNOVATION REV. 30 (2012); Farhad Manjoo, *Human Weakness Is Responsible for This Poisonous Air*, N.Y. TIMES (Sept. 16, 2020), https://www.nytimes.com/2020/09/16/opinion/california-wildfires.html ("'It'll start getting cooler, you just watch,' [President Trump] told a state official who implored him to recognize that climate change is contributing to worsening wildfire seasons . . . . When the official pointed out that scientific consensus disagreed with Trump, the president all but pouted and stuck his fingers in his ears. 'I don't think science knows, actually,' he said. Science does know, actually."); Doremus, *supra* note 178, at 1603 (discussing the G.W. Bush administration's questionable climate change track record). Skepticism about climate change has also pervaded the highest court in the land. In her recent Supreme Court confirmation hearing, Justice Amy Coney Barrett responded with open distrust of accepting climate change as a common-sense truth. *See* John Schwartz & Hiroko Tabuchi, *By Calling Climate Change Controversial,' Barrett Created Controversy*, N.Y. TIMES (Oct. 22, 2020), https://www.nytimes.com/2020/10/15/climate/amy-coney-barrett-climate-change.html.

215. Such consideration would likely fall under the general umbrella of taking judicial notice of a legislative fact of "established truths, facts, or pronouncements that do not change from case to case."

and industry activity on global warming did not appear in the EPA's *Clean Wisconsin* brief, there is overwhelming scientific evidence to document these effects and broad consensus in the community that such research is to be believed.[216] On its "Facts" page, NASA states that "[m]ultiple studies published in peer-reviewed scientific journals show that 97 percent or more of actively publishing climate scientists agree: climate-warming trends over the past century are extremely likely due to human activities."[217] This consensus extends beyond individual scientists; numerous scientific societies and government bodies have issued public statements acknowledging the reality of climate change.[218] In assessing whether EPA action under the Clean Air Act directive to "promote public health" was reasonable, courts should bear in mind the realities of the world in which the EPA is acting.

Regulatory decisions that implicate greenhouse gas emissions, industry activity, and environmental degradation, all of which fall squarely in the realm of the Clean Air Act, run headlong into the dire need to address climate change.[219] According to the Intergovernmental Panel on Climate Change, "[w]ithout increased and urgent mitigation ambition in the coming years . . . global warming will surpass 1.5ºC in the following decades, leading to irreversible loss of the most fragile ecosystems, and crisis after crisis for the most vulnerable people and societies."[220] As lower courts consider how to address and analyze climate change in agency decision making, they should be mindful of the deeply conservative makeup of the current Supreme Court—the three Justices appointed during the Trump administration lean farther to the right than any other member of the Court in decades.[221] This highly conservative contingent of the Supreme Court has indicated a skepticism to allow broad, sweeping injuries from climate change to factor into the EPA's risk assessment decisions.[222] Consequently, how the lower courts frame their consideration of

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United States v. Gould, 536 F.2d 216, 220 (8th Cir. 1976); *see also* Aaron S. Bayer, *Judicial Notice on Appeal*, NAT'L L.J. (Dec. 8, 2003) https://www.wiggin.com/publication/judicial-notice-on-appeal/.

216. *See, e.g.*, *Scientific Consensus Earth's Climate is Warming*, NASA, https://climate.nasa.gov/scientific-consensus/ (last visited May 27, 2021).

217. *Id*.

218. *See id*. (providing a "partial list" of various organizations that have publicly commented on climate change).

219. *See* 42 U.S.C. §§ 7401(a)(2)–(3), (c).

220. Petteri Taalas & Joyce Msuya, *Foreword to* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5 C: AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5 C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY, at v–vi (Valérie Masson-Delmotte et al. eds., 2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_Foreword.pdf.

221. *See, e.g.*, Joan Biskupic, *The Supreme Court Hasn't Been This Conservative Since the 1930s*, CNN (Sept. 26, 2020), https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/—index.html.

222. *See* Massachusetts v. EPA, 549 U.S. 497, 535 (2007) (Roberts, J., dissenting). Though the Court held in *Massachusetts* that the EPA "may look to both science and general policy concerns when judging

climate change as a relevant factor in EPA decision making could help environmentally protective parties (either a future EPA or current challengers) face off against this increasingly conservative Supreme Court.

'Translating' the repercussions of climate change from the language of far-reaching, irreversible damage to the environment and into discrete 'costs' borne by individuals (and businesses) may appeal to a conservative Court.[223] Professor Teresa Clemmer summarized the costs and benefits of climate change action, saying that "many co-benefits, such as health benefits from the transition to cleaner energy sources . . . could substantially offset the costs. If deep cuts in greenhouse gas emissions are postponed . . . the costs and consequences of climate change would increase dramatically."[224] She concluded with a warning: "The sober truth is that, if we do nothing, "[u]nmitigated climate change would, in the long term, be likely to exceed the capacity of natural, managed and human systems to adapt."[225]

3. Environmental Justice as a Relevant Factor

Environmental justice concerns, specifically environmental racism, is a third critical factor that should be moved to the forefront of EPA decision making under the Clean Air Act.[226] The EPA defines environmental justice as "the fair treatment and meaningful involvement of all individuals regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[227] Despite this official language, the EPA has not historically made such considerations a priority[228]—nor has the EPA addressed concerns from the environmental justice community that its definition "falls far short of the

whether a pollutant poses a threat to public health and welfare," the holding did not necessarily extend the same freedom to the EPA's considerations in setting NAAQS. *See* Joel D. Smith, Massachusetts v. EPA *A Change of Climate at EPA Clouds the D.C. Circuit's Review of Risk-Based Policy Decisions*, 33 ECOLOGY. L.Q. 653, 653 (2006).

223. *See* Clemmer, *supra* note 19, at 1131. Articulating this strategy in the Clean Air Act context may provide helpful strategies for environmental proponents challenging other action by other agencies. For instance, the D.C. Circuit has articulated that the Federal Energy Regulatory Commission may not consider environmental impacts in their energy transmission siting decisions; the only way to circumvent this limitation is to frame environmental impacts in economic terms. *See* Grand Council of the Crees v. FERC, 198 F.3d 950, 957 (2000).

224. *See* Clemmer, *supra* note 19, at 1131.

225. *Id*.

226. The Clean Air Act currently contains directives to states to consider environmental justice impacts in drafting State Implementation Plans, but state-level action under the Act is beyond the scope of this Note.

227. *Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice (last visited June 27, 2021).

228. *See* Hannah Perls, *EPA Undermines its Own Environmental Justice Programs*, HARV. ENV'T & ENERGY L. PROGRAM (Nov. 12, 2020), https://eelp.law.harvard.edu/2020/11/epa-undermines-its-own-environmental-justice-programs/ ("EPA's EJ [environmental justice] efforts to-date have been insufficient to address the scale and severity of environmental injustice in the US.").

environmental justice vision."[229] This shortcoming was particularly evident in Trump administration decision making; the EPA "neglect[ed]" environmental justice considerations in its actions and actively attempted to roll back pollution regulations in the face of evidence that the burdens disproportionately affected people of color.[230] With respect to air pollution, the disparate impact on communities of color and low-income communities is two-fold. First, those communities are most likely to be exposed to higher levels of pollutants such as ozone.[231] Professor Robert Bullard explicitly discussed the concerning discrepancy in some of his seminal work on environmental injustice three decades ago: "In 1990, 437 of the 3109 counties and independent cities failed to meet at least one of the EPA ambient air quality standards . . . . 57 percent of whites, 65 percent of African Americans, and 80 percent of Hispanics live in 437 counties with substandard air quality.[232]

Second, the members of those communities are more vulnerable to exposure to those pollutants, often suffering more severe, adverse health consequences than a white, higher-income member of the population.[233]

In part, this failure is due to a need to move outside the raw data presented to think about larger cultural and societal issues with respect to how that data was collected and whose reality it reflects.[234] Common tools and metrics in

229. *See Environmental Justice & Environmental Racism*, GREENACTION, http://greenaction.org/what-is-environmental-justice/ (last visited June 2, 2021) ("The environmental justice movement isn't seeking to simply redistribute environmental harms, but to abolish them."). While the Biden administration has promised to make environmental racism a priority in its actions, other presidents have paid similar lip service—and signed similar executive orders—without making major strides to address these systemic inequities. *See* Rebecca Hersher, *Biden Promises to Grapple with Environmental Racism*, NPR (Feb. 4, 2021, 4:00 AM), https://www.npr.org/transcripts/963667177.

230. *See* Zoya Teirstein, *Elizabeth Warren Blasts EPA for Neglecting Environmental Justice*, GRIST (Oct. 21, 2020), https://grist.org/politics/elizabeth-warren-lambastes-the-epa-for-neglecting-environmental-justice/ ("In 2010, the Environmental Protection Agency under President Obama established a tool called EJSCREEN to literally map the factors that create environmental injustice . . . . The problem is, the Trump administration has been neglecting EJSCREEN."); *see also* Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism is Real,* ATLANTIC (Feb. 28, 2018), https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/ (detailing an EPA study finding increased particulate matter exposure for Black and Hispanic people and Scott Pruitt's ongoing attempts to "dismantle[e] Clean Air Act provisions at every turn").

231. *Disparities in the Impact of Air Pollution*, AM. LUNG ASS'N, https://www.lung.org/clean-air/outdoors/who-is-at-risk/disparities (last updated April 20, 2020).

232. Robert D. Bullard, *Overcoming Racism in Environmental Decisionmaking*, 36 ENV'T: SCI. & POL'Y FOR SUSTAINABLE DEV. 10, 12 (1994).

233. *Disparities in the Impact of Air Pollution, supra* note 231 ("The burden of air pollution is not evenly shared . . . . [A] large study found that Hispanics and Asians, but predominantly [B]lacks, had a higher risk of premature death from particle pollution than [W]hites did.").

234. The Trump administration has been an extreme example of how easy it is to manipulate input variables and data to achieve the kind of "conclusive" result you want. *See* Interlandi, *supra* note 174 ("The [EPA] has effectively prohibited any study involving human participants and any scientist who receives federal grants from informing its environmental policies. It has deliberately downplayed climate change, going so far as to purge the term from its website. It has also weakened or dismantled scores of environmental protections, including curbs on greenhouse gas emissions, rules meant to keep toxic chemicals in check and protections for national wetlands and wildlife.").

environmental decision making, such as "assignment of 'acceptable' risk and use of 'averages,' often result[] from the value judgments that serve to legitimate existing inequalities."[235]A myopic focus from both the EPA and the courts on the 'pure science' alone ignores the disparate distribution of environmental burdens that are often averaged away by the methods underlying that science.[236] As Professor Bullard cautioned years ago, "[r]eliance solely on 'objective' science for environmental decision-making—in a world shaped largely by power politics and special interests—often masks institutional racism."[237] Without an active effort to move away from doublespeak that disguises problematic burden-shifting as 'just' science—and without courts willing to critically engage with doublespeak when it occurs—the EPA will continue to fail to live up to their own lofty environmental justice language.

Clean Wisconsin exemplifies the consequences of a selective discussion that leaves out environmental inequalities. At no point during litigation did any party address the fact that Wisconsin had recently shut down one air quality monitor (in Racine) and installed another upwind of a major factory (in Sheboygan).[238] Without context, the EPA offered the lack of data from Racine as a justification for the EPA's refusal to designate it 'nonattainment' and the new Sheboygan monitor's data as justification for almost the whole county's 'attainment' designation. Both of these choices removed or manipulated empirical data at the expense of lower-income, working-class Wisconsinites.[239]

The consequences of how such air quality data is collected and where it is collected from are made clear in *Clean Wisconsin*; some regions get protection from polluted air, and others do not. Such discrepancies are ubiquitous in the

235. Robert D. Bullard, *Leveling the Playing Field Through Environmental Justice*, 23 VT. L. REV. 453, 453 (1999).

236. Researchers are continuously expanding on our knowledge of the scope and severity of environmental racism; the underlying theme appears to be that environmental conditions disparately affect health in far-reaching, insidious ways. For instance, it was recently documented that "environmental racism is fueling the coronavirus pandemic." *See generally* Harriet A. Washington, *How Environmental Racism is Fueling the Coronavirus Pandemic*, 581 NATURE 241 (2020), https://www.nature.com/articles/d41586-020-01453-y.

237. R. D. Bullard, *Decision Making*, *in* 2 FACES OF ENVIRONMENTAL RACISM: CONFRONTING ISSUES OF GLOBAL JUSTICE 3, 23 (Laura Westra & Bill E. Lawson eds., 2001).

238. *See* Lavelle, *supra* note 147; Wisconsin Brief, *supra* note 119, at 12 ("Racine County lacked complete data due to the closure of the monitor site for building-safety concerns.").

239. Average household income drops by $10,000 for communities farther from the Lake Michigan shoreline—and therefore outside the EPA's final nonattainment designation for Sheboygan County. *See Household Income in the Sheboygan Area, Wisconsin*, STAT. ATLAS, https://statisticalatlas.com/metro-area/Wisconsin/Sheboygan/Household-Income (last updated Sept. 14, 2018). Sheboygan also has a greater-than-average elderly (65+) population, a group known to experience increased health risks when exposed to air pollutants. *See Age and Sex in the Sheboygan Area, Wisconsin*, STAT. ATLAS, https://statisticalatlas.com/metro-area/Wisconsin/Sheboygan/Age-and-Sex (last updated Sept. 14, 2018). Similarly, Racine County has higher household incomes closer to the lakeshore and a 10.5 percent increase in their population of Black and Hispanic residents than the average Wisconsin county. *See Household Income in the Racine Area, Wisconsin*, STAT. ATLAS, https://statisticalatlas.com/metro-area/Wisconsin/Racine/Household-Income (last updated Sept. 14, 2018).

realm of air quality hazards and protections.[240] Halfway across the country from Wisconsin, in the South Coast Air Basin of California, poor air quality disproportionately affects the area's population along both racial and socioeconomic lines.[241] Moreover, it appears that racial segregation itself is an independent contributor to an increased risk of cancer from toxic air quality.[242] In Wisconsin, the most heavily segregated communities track almost exactly along the lines of the EPA's initial proposed nonattainment designations; when the agency reduced the size of the nonattainment designations, those communities were the ones to lose protection.[243] This data suggests that not only was the EPA's choice to reduce the size of the nonattainment areas in the state arbitrary and capricious, it was disproportionately harmful to a population that is already at higher risk for health issues that stem from unhealthy air quality.

The change in administration will almost certainly result in an EPA more willing and able to consider environmental justice factors in its decision making. While the Trump administration made its position on environmental justice clear, proposing budget cuts to environmental justice programs upon taking control of the executive and "immediately and systematically . . . undercut[ting] a wide range of regulatory protections . . . that are especially important for environmental justice communities exposed to higher environmental burdens," the EPA under President Obama and then-Vice President Biden made an effort to expand its consideration of environmental justice.[244] Not only did President Obama sign Executive Order 12,898, directing "each executive department, EPA, and certain other agencies to 'make achieving environmental justice part of its mission,'" he also implemented EJSCREEN, a program designed to provide demographic and geographic data on community vulnerability.[245] The Biden administration plans to continue where the Obama administration left off, going even further to address issues of environmental injustice.[246] During his

240. *See, e.g.*, Maria Cecilia Pinto de Moura & David Reichmuth, *Inequitable Exposure to Air Pollution from Vehicles in the Northeast and Mid-Atlantic*, UNION OF CONCERNED SCIENTISTS (Jun. 21, 2019), https://www.ucsusa.org/resources/inequitable-exposure-air-pollution-vehicles ("Communities of color in the Northeast and Mid-Atlantic breathe 66 percent more air pollution from vehicles than white residents"); Thomas Astell-Burt et al., *Effect of Air Pollution and Racism on Ethnic Differences in Respiratory Health Among Adolescents Living in an Urban Environment*, 23 HEALTH & PLACE 171 (2013) (finding that racism "amplif[ied]" health discrepancies between teenagers of color and White teenagers).

241. *See* Marcelo E. Korc, *A Socioeconomic Assessment of Human Exposure to Ozone in the South Coast Air Basin in California*, 46 J. AIR & WASTE MGMT. ASS'N 547, 548, 555–56 (1996).

242. Rachel Morello-Frosch & Bill M. Jesdale, *Separate and Unequal Residential Segregation and Estimated Cancer Risks Associated with Ambient Air Quality Toxics in U.S. Metropolitan Areas*, 114 ENV'T HEALTH PERSPS. 386, 390 (2006).

243. *See id*. at Fig.1 (showing a map of Wisconsin with "extreme" segregation levels along the southeastern shoreline).

244. *See* Uma Outka & Elizabeth Kronk Warner, *Environmental Justice Under Trump*, 54 WAKE FOREST L. REV. 101, 103 (2019).

245. CONG. RSCH. SERV., IF10529, ROLE OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY IN ENVIRONMENTAL JUSTICE (2021).

246. *The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity*, BIDEN HARRIS, https://joebiden.com/environmental-justice-plan/ (last visited June 4, 2021) ("In order to clean

2020 campaign, President Biden promised to "revise and reinvigorate" Executive Order 12,898, and also planned to create several community-centered programs for increasing accountability and reducing environmental harms to low-income and minority groups.[247] In the early months of his term, President Biden has already responded to pressure to prioritize environmental justice efforts. Notably, he replaced the favored nominee, Mary Nichols, with Michael Regan as EPA administrator after concerns that Nichols "had not done enough to address the disproportionate harm low-income and minority communities face" from environmental threats.[248] As environmental justice becomes more foundational to the executive platform, courts should be ready to evaluate agency decisions in light of such policy.

Though some may argue that increasing the scope of judicial review would overstep the court's role in checking agency action, courts have already adopted a more substantive review of EPA action under other environmentally protective legislation such as the National Environmental Protection Act (NEPA).[249] In so doing, courts have justified their more expansive review as aligned with the statutory purpose, with the Fifth Circuit going so far as to say that "[t]he spirit of the Act would die aborning if a facile, ex parte decision . . . were too well shielded from judicial review."[250] NEPA's environmentally protective mandate is closely related to the Clean Air Act's directive to prioritize the protection of public health and public welfare; the legislative history of the Clean Air Act explicitly emphasizes its progressive and protective intent, with senators noting that "industry will be asked to do what seems impossible at the present time" in order to comply with protective regulation.[251] Under both NEPA and the Clean Air

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up our communities and provide new opportunities to those that have been disproportionately burdened by pollution and economic and racial inequality, Biden will revise and reinvigorate the 1994 Executive Order 12898 (EO 12898) on Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations.")

247. *Id.*

248. Regan, a Black man, was known for his efforts in addressing environmental toxins and for creating the Environmental Justice and Equity Advisory Board in his home state of North Carolina. *See* Ellen Knickmeyer & Gary D. Robertson, *Biden Picks Regan for EPA Nominee, Haaland for Interior Head*, AP (Dec. 17, 2020), https://apnews.com/article/joe-biden-environment-north-carolina-3067fc22ce4e1e0cbc3279c8af9bf67c. Nichols, who championed a carbon trading program in California, came under fire for failing to protect low-income communities who would be disproportionately harmed by the program. Rachel Becker, *Legacy of a Clean-Air Czar Clearer Skies, Bold Alliances and Bitter Controversy*, CAL MATTERS, Jan. 4, 2021, https://calmatters.org/environment/2020/12/mary-nichols-czar-legacy-skies-controversy/.

249. *See* Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929, 931 (1993) ("One of the most prominent exceptions [to the "record rule" barring courts from considering information not in the administrative record] that developed during the 1970s and 1980s was a judicial willingness to admit such extra-record evidence when reviewing agency action under the National Environmental Policy Act (NEPA).").

250. Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973).

251. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 492 (2001) (Breyer, J., concurring). Similar arguments were made in the decades leading up to and following the initial passage of the Clean Air Act of 1970, with the Commissioner of the Department of Health arguing for "especially strong congressional support for aggressive actions to achieve clean air" in the 1960s and Senator Ed Muskie

Act, "[t]he agency still has a duty to consider impacts that will significantly affect the environment, but this duty will not be judicially enforceable unless the existence of those impacts is clear from the record."[252] Thus, similar justifications, already adopted and accepted for review of NEPA decisions, support an expansive scope of review for Section 109 Clean Air Act decisions.

Significant factors that affect public health and welfare, like climate change and disparate environmental harms, must be put before the court to review in order to strengthen the efficacy of the Clean Air Act's statutory mandate for a modern era. In fact, President Biden's memo "Modernizing Regulatory Review" openly acknowledges the importance of agencies considering many of the factors discussed in this Note.[253] Though *Whitman* could be read to present an obstacle to broadening the court's discretion to consider costs in setting attainment designations, it could also be read to require courts to ensure that the EPA is not prioritizing economic gains over human and environmental harms. Furthermore, issues of underlying methodological choices and the repercussions of action (or inaction) on marginalized groups are (arguably) squarely within the realm of public health and welfare considerations. Courts would be well within their discretion to push for agency records to include a thoughtful discussion of such factors for review.[254]

CONCLUSION

"We do not have time to waste, and we do not have the luxury of tossing aside powerful tools that can be brought to bear on the climate crisis."[255]

Environmental regulation is a crucial part of the fight to protect public welfare. As a law student during an "inflection point"[256] in our nation's trajectory regarding climate policy and systemic racism, the pressing need for radical action

noting that "if the alternative [to lax industry controls] is no control over dirty air, to those who think that ought to be the result, then [the answer] is maybe no growth" in 1977. *Air Pollution – 1968 Hearings before the Subcomm. on Air and Water Pollution of the Comm. on Pub. Works*, 90th Cong. 816 (1968); *Clean Air Act Amendments of 1977 Hearing Before the Subcommittee on Environmental Pollution, Bills to Amend the Clean Air Act, supra* note 51.

252. *See* French, *supra* note 249, at 964.

253. *See Modernizing Regulatory Review*, *supra* note 105 ("Our Nation today faces serious challenges, including a massive global pandemic; a major economic downturn; systemic racial inequality; and the undeniable reality and accelerating threat of climate change. It is the policy of my Administration to mobilize the power of the Federal Government to rebuild our Nation to address these and other challenges. As we do so, it is important that we evaluate the processes and principles that govern effective regulatory review.").

254. *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983) (arguing that an agency's decision should be found arbitrary and capricious where "the agency has relied on factors which Congress has not intended it to consider [or] entirely failed to consider an important aspect of the problem").

255. Clemmer, *supra* note 19, at 1157.

256. *See* Joseph R. Biden, President-Elect, Acceptance Speech (Nov. 9, 2020), https://abc11.com/joe-biden-speech-address-harris/7750636/ ("America has always been shaped by inflection points.").

has shaped the way I critique the role of the judiciary and the administrative state. Where once it may have seemed prudent to defer to a panel of executively appointed 'experts,' to let the kinks in policy work themselves out over the long run, and to avoid difficult rule making regarding non-"economic" costs; it is clear that for decades, we have been weighing the wrong variables and operating on borrowed time. We face the potential of another four years of a deadlocked and ineffectual Congress under the long shadow of a former president who embodied a shocking disregard for the health of nature and of our nation. The role of the judiciary in preserving and protecting environmental justice and integrity, and by extension the national welfare, is more important than ever. It may appear to some to be judicial activism, but, in reality, pushing the EPA to overtly address the human impacts of climate change is aligned with both preexisting statutory mandate under the Clean Air Act and a rational review of scientific evidence. Overwhelming consensus in various fields points to the devastation that will occur, and is already occurring, if we continue to plod down an 'economically viable' path towards sustainable living.[257]

As was true for other critical moments in our nation's history, now is the time for the courts to step up and help to shape our collective understanding of legal and moral duty in a complex and controversial realm. Courts can play an important guiding role in helping the other branches of government, and the general public, broaden their understanding of the factors at play in complex environmental decision making and what should really count as a 'cost' to the national welfare. Allowing the EPA to hide behind 'rational' science and capitulate to strong unilateral influences (even, and sometimes especially, when that influence is the president) will only delay much-needed action. Changing the current judicial procedural practices for environmental regulation review could have significant, substantive impacts: these changes could increase agency accountability and transparency as well as bring agency action in line with its statutory mandate to safeguard human and environmental health and welfare.

257. *See* Alexandria Ocasio-Cortez (@AOC), TWITTER (Sept. 18, 2020, 1:56 PM), https://twitter.com/AOC/status/1307061034256158721 (arguing that we will need "WWII level-mobilization" to accomplish the "massive infrastructure . . . plan to decarbonize the economy on a rapid timeline.").