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Introduction

Ken Guckenberger grew up in St. Petersburg, Florida, long before it was known for its world-class museums and craft breweries.[1] His family lived adjacent to Coffee Pot Bayou, an inlet connected to Tampa Bay. In the mid-1970s, the water of Coffee Pot Bayou could only be described as fetid. He recalls that the daily afternoon discharges from the downtown sewage treatment plant were particularly rough on the nearshore waters. Dolphins and manatees were not to be seen.

In March 1991, when home on a school break, Ken saw something for the first time: a school of dolphins playing off his backyard dock. In subsequent years, seagrass rebounded in Tampa Bay, and manatees began to regularly appear in Coffee Pot Bayou. The roseate spoonbill, once thought extinct in Florida outside the Everglades, graced the area with its presence. In 2018, Ken and his daughter witnessed a mullet run, a frenzy that he likened to the wildebeest migration in Africa, as thousands of fish headed to their spawning ground. He had never seen that many fish concentrated in Coffee Pot Bayou.

What accounted for the improvement in water quality over five decades? It was a concerted effort on the part of concerned citizens and federal, state, and local government officials. At the heart of the improvement is the Clean Water Act, enacted by Congress over President Nixon's veto in 1972. And at the heart of the Clean Water Act is the term "waters of the United States."[2]

If a waterbody is considered "waters of the United States," then the protections of the Clean Water Act apply. If the waterbody is not "waters of the United States," then the decision of whether and to what extent to provide legal protections is largely left to the states. Tampa Bay and Coffee Pot Bayou, which are traditionally navigable waters, fall easily under the umbrella of "waters of the United States." Whether other waters, such as nonnavigable tributaries and wetlands, should be afforded similar status has been hotly debated.

Yet the need to protect streams and wetlands is uncontroversial from a scientific perspective. Ensuring water quality in larger waterbodies requires regulating pollution in smaller upstream waters. Dr. Mažeika Sulliván, director of the Belle W. Baruch Institute of Coastal Ecology and Forest Science at Clemson University, analogizes streams and wetlands to capillaries, which play critical roles in the human body.[3] Healthy people need healthy arteries,

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which rely in part on healthy veins and capillaries. Likewise, on the landscape, the health of rivers and bays depends on the health of streams and wetlands. The loss and degradation of streams and wetlands have a cascading effect on the larger ecosystem, with the public losing the benefits that these water resources provide.

The story of the Clean Water Act is not necessarily one of linear progress, always on an upward trajectory. For example, in 2021 the state of Florida authorized the emergency discharge of phosphate mining wastewater to Tampa Bay. Over the course of ten days, Tampa Bay received approximately 205 tons of total nitrogen, which exceeded the waterbody's typical annual nitrogen load.[4] The discharge exacerbated an outbreak of red tide, a naturally occurring harmful algal bloom, leading to fish kills totaling more than 3.5 million pounds.[5] Floating front-end loaders were used to remove tons of dead, rotting fish from Tampa Bay and Coffee Pot Bayou. But Coffee Pot Bayou is thriving again, although seagrass coverage in Tampa Bay has declined.[6] Nature is resilient, and if given a chance, the aquatic ecosystem can recover.

In May 2023, however, the US Supreme Court issued an opinion that struck at the heart of the Clean Water Act. In *Sackett v. U.S. Environmental Protection Agency*, the Court interpreted "waters of the United States" in a most restrictive manner, removing millions of miles of streams and millions of acres of wetlands from federal protection.[7] How we arrived at this juncture, where five members of the Court have effectively gutted a key provision of the Clean Water Act, and what can be done in response, is a complicated story of politics, history, and law—and acronyms.

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CHAPTER 1

As Iowa Goes, So Goes the Nation

> Nothing galled [one Iowa farmer] more than a regulation Obama issued in 2015. . . . WOTUS felt like the government's hands on her throat.
>
> —*The Washington Post*, December 29, 2017

In Washington and elsewhere, *POTUS* is the well-known acronym for "President of the United States." Telegraph operators were early adopters of POTUS, using it in the 1890s.[1] POTUS was patterned after the acronym *SCOTUS*—for "Supreme Court of the United States"—which telegraph operators had been using for two decades previously.[2] Although opportunities for telegraphists waned with the advent of new technology, the use of POTUS and SCOTUS lives on in print, social media, and common parlance. The official Twitter account for the President of the United States, launched by President Obama in 2015, is @POTUS, and SCOTUSblog is an excellent source for news and analysis of the Supreme Court. The actions and decisions of POTUS and SCOTUS are often controversial, arousing passionate and partisan responses. Though more obscure, WOTUS evokes intense feelings as well.

WOTUS refers to "waters of the United States," a statutory term that is at the center of the Clean Water Act, landmark environmental legislation enacted by Congress in 1972.[3] Depending on your perspective, WOTUS includes parts of the ocean, navigable rivers and streams, lakes and ponds, nonnavigable tributaries, and wetlands—and, under some circumstances, agricultural fields. WOTUS as an acronym seemed to make its first appearance in the 2000s. A 2002 draft environmental impact statement submitted to the US Department of Transportation contained the phrase "Riverine WOTUS."[4] The first entry for WOTUS in the *Federal Register* was in a 2008 rule issued by the Surface Mining Reclamation and Enforcement Office,[5] and it was first invoked in a judicial opinion (unpublished) in 2015 by the US District Court for the Southern District of Georgia.[6] (Earlier WOTUS references unconnected to the Clean Water Act include Ron Wotus, an infielder for the Pittsburgh Pirates in the 1980s and later a coach for the San Francisco Giants, not to be

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confused with John Wetteland, who was a relief pitcher for the New York Yankees, Texas Rangers, and others.)

As a general matter, if a water—such as a river, stream, lake, pond, or wetland—is considered a WOTUS, then it is protected by the Clean Water Act. If a body of water is not a WOTUS, then it is not federally protected. Federal protection for a WOTUS does not mean that the water is off limits to pollution and must remain pristine and inviolable. Rather, if a water is WOTUS, then anyone who wants to discharge pollutants (broadly defined) must obtain a federal permit before doing so.[7] In fact, the federal government (and state agencies with delegated authority) issues thousands of Clean Water Act permits each year,[8] authorizing the discharge of about 200 million pounds of toxic substances directly into "protected" waters, and has approved the elimination of tens of thousands of acres of wetlands and hundreds of miles of streams through filling.[9] However, the federal permit process can be daunting, hence the farmer's strangulation metaphor.[10]

The debate over WOTUS and the Clean Water Act is about relationships, partly ecological but mostly political. From an ecological perspective, waters are interconnected, from "ridge to reef."[11] Headwater streams flow into higher-order streams, some of which are classified as rivers. Wetlands, such as marshes, swamps, and bogs, have surface and groundwater connections to these waters. Riparian and floodplain wetlands flow to and from a river network, whereas nonfloodplain wetlands have a unidirectional, lateral flow to other waters.[12] Wetlands are sometimes referred to as nature's kidneys, because they can filter out contaminants before they reach other waters. Wetlands are also viewed as "ecological supermarkets" because they support a vast array of plants and animals.[13] Many migratory bird species depend on wetland habitat, and most commercial and recreational seafood species spend some portion of their life cycle in wetland and estuarine habitats.[14] Hunters and fishers are often ardent supporters of wetland and stream conservation.[15]

What occurs upstream affects the quality of the water downstream. A single incident can have immediate and serious consequences. For example, in Florida in 2004, the dike of a phosphogypsum pond that contained the waste from a fertilizer plant breached, sending 65 million gallons of wastewater into Archie Creek, a stream that flowed into Hillsborough Bay, which is connected to Tampa Bay.[16] The spill killed or damaged 150 acres of mangroves and 22 acres of seagrass and disrupted the local fishery. The company was fined $270,000 by state and county agencies.[17] That money did

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not go to the commercial fishing operations, however, and they instituted their own lawsuit to recover economic damages. That litigation finally settled nearly twenty years after the spill, demonstrating that after-the-fact litigation may not be the most effective or efficient means of protecting the environment and livelihoods.

But the cumulative impact of many lesser actions can also have devastating impacts. Although nutrient-laden runoff from one agricultural field may not be a big deal, it is when multiplied a thousandfold. The fertilizer runoff from farms along the Mississippi River, from Minnesota on down, contributes to the dead zone in the Gulf of Mexico, an area where low oxygen levels preclude aquatic life.[18] Some years the dead zone is as large as New Jersey.[19] The draining of wetlands for agricultural purposes, which resulted in the loss of the pollution filtration services provided by those wetlands, only exacerbates the situation. Congress took all these connections into account when drafting the Clean Water Act, recognizing that "water moves in hydrologic cycles, and it is essential that discharge of pollutants be controlled at the source."[20]

Congress's authority is not unlimited, however. As a technical matter, when legislating Congress must rely on enumerated powers listed in the Constitution. As a practical matter, the Constitution's interstate commerce clause provides Congress a vehicle to legislate broadly, including to protect the environment. Congress relied on the interstate commerce clause when enacting the Clean Water Act.[21] Whether Congress (or the agencies) exceeded these constitutional limitations, impinging on state sovereignty, is a continuing subject of debate.

The Clean Water Act opens with a singular objective: to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[22] One principal feature is that it prohibits the point source discharge of pollutants to navigable waters in the absence of a federal permit. Yet the Clean Water Act also recognizes that the states retain "primary responsibilities" to combat water pollution and to develop and use land and water resources.[23] The Clean Water Act envisions the federal government and the states collaborating together under the model of cooperative federalism. It has not always worked out that way.

No one seriously questions Congress's authority under the interstate commerce clause to regulate activities that affect navigable waters. The classic definition of *navigable waters* includes waters that are navigable in fact (currently used in interstate commerce), navigable in the past (once

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navigable, always navigable), and navigable in the future (susceptible for use in interstate commerce if reasonable improvements are made), as well as waters subject to the ebb and flow of the tide.[24] A river that supports (or once supported) barge traffic is a clear example of a traditional navigable water. But Congress did not use this traditional definition in the Clean Water Act. Instead, Congress intended to cover a broader expanse of the nation's waters. The Clean Water Act's legislative history indicates that its geographic scope should be asserted "to the maximum extent permissible under the Commerce Clause."[25] The statutory text is less illuminating. It rather unhelpfully defined navigable waters as "waters of the United States, including the territorial seas."[26] The precise parameters of the geographic jurisdiction of the Clean Water Act—that is, what is and what is not a WOTUS—was kicked to executive branch agencies (responsible to POTUS) and the judicial branch (with SCOTUS as the ultimate arbiter).

Over the years, the US Environmental Protection Agency (EPA) and the US Army Corps of Engineers (Corps), the two agencies responsible for administering the Clean Water Act, have issued regulations defining WOTUS, sometimes narrowly, sometimes expansively. Every revised WOTUS definition leads, almost reflexively, to legal challenges brought by environmental groups and the regulated community. *The regulated community* is a phrase that conjures up (in my mind at least) a collegial group of people, perhaps gathering for a social event to discuss matters of mutual interest. In reality, however, *the regulated community* is a polite term for polluters. The community consists of homebuilders, manufacturers, miners, foresters, ranchers, and farmers, all of whom produce necessary and useful things (including food!) that we depend on to survive and thrive, but they also produce pollution that may harm water quality. Not infrequently, a revised WOTUS regulation will draw fire from both sides, with the regulated community contending it is too broad and the environmental groups asserting it is too narrow. On occasion, Corps regulators have been known to say that they must have struck the proper balance if both sides are upset.

In 2015, during the Obama administration, the EPA and the Corps promulgated the Clean Water Rule,[27] a regulation that, depending on one's point of view, either helpfully clarified the definition of WOTUS, failed to encompass all waters that should be protected, or represented a massive federal land grab and an unconstitutional intrusion into the province of states—even a hand on the throat of property owners. The agricultural community was among the Clean Water Rule's most vocal opponents, pointing out that farm

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ditches could now be subject to federal oversight and creating a "Ditch the Rule" campaign.[28] The Missouri Farm Bureau's parody of "Let It Go," from the movie *Frozen*, was particularly entertaining.[29] And the farmers were not wrong: Under the Clean Water Rule some ditches could be classified as WOTUS.[30]

But one person's ditch can be another person's stream.[31] The label *ditch*, signifying a human-made channel, sometimes carries with it a value judgment. Consider the Erie Canal, which was completed in 1825, providing a waterway connecting the Atlantic Ocean to the Great Lakes. Critics of New York Governor DeWitt Clinton's project derided it as "Clinton's Big Ditch."[32] However, that ditch was used for the transport of interstate commerce and thus is a traditional navigable water, including the portions of the former uplands that were dug out.

Ditches on agricultural lands are not traditional navigable waters, of course. They are constructed primarily to drain fields (which may include wetlands) and collect runoff (which usually includes excess nutrients and pesticides). The former function results in the elimination of waters, which can affect downstream water quality; the latter also contributes to the degradation of downstream water quality. For example, Iowa, which has drained nearly 90 percent of its historic wetland base, has some of the worst water quality in the country.[33]

Nationwide, agriculture is a primary source of water pollution.[34] According to the Natural Resources Defense Council, the sector is the top contributor of water pollution in streams and rivers and number two in wetlands. It is the third greatest source of contaminants to lakes. Here's the (un)funny thing: Although the Clean Water Act regulates some agricultural operations (e.g., concentrated animal feeding operations), many farming activities are not covered. The Clean Water Act focuses on point source discharges of pollution, such as discrete conveyances from a pipe. Runoff from agricultural fields is nonpoint source pollution, which does not require a federal permit. Nonpoint source pollution is a matter left to the states.[35] The EPA and the Corps also declared, through a regulation, that "prior converted croplands"—areas that were once wetlands but that had been placed in agricultural production—did not fall under the definition of WOTUS.[36] Furthermore, Congress specifically provided that "normal" farming and ranching activities, "such as plowing, seeding, cultivating, minor drainage, [and] harvesting," do not need a Clean Water Act section 404 permit, which is required if one adds dredged or fill material to a WOTUS.[37] As professor

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Dave Owen put it, "Farmers could continue farming lands that once were streams or wetlands, even if those lands continued to flood. They also could continue to discharge large amounts of pollutants into wetlands, streams, lakes, and rivers."[38]

If the Clean Water Act generally left farmers alone, what accounted for the agricultural community's visceral reaction to the Obama administration's Clean Water Rule? Although the scope of WOTUS was slightly increased (as will be discussed in more depth later), the existing exemption for prior converted croplands remained intact. The 2015 regulation did not expand coverage over agricultural runoff, nor could it affect the statutory exemption for normal farming and ranching activities.

Some of the antipathy might be explained by a concern that, if one day a farmer wanted to cease operations and sell to a developer, then the Clean Water Act might apply at that point, thus decreasing the land's value or at least slowing down the deal. Some may have objected out of a concern that the Clean Water Rule was but a first step to greater and more intrusive federal regulation. But much of the concern probably flowed from hostility toward federal regulation in general.

As a presidential candidate in 2016, Donald Trump tapped into the agricultural community's suspicion of the federal bureaucracy. His antiregulatory theme included attacks on the Obama administration's Clean Water Rule—which he called a "horrible rule," promising to jettison it in his first day in office.[39] This message resonated with farmers (and other members of the regulated community). As *The Washington Post* reported, one farmer believed that the WOTUS issue "won him [Trump] Iowa," a state that Barack Obama carried in 2008 and 2012.[40]

Did WOTUS flip Iowa and help elect Donald Trump POTUS? Obviously, there were much bigger issues at the heart of the campaign—such as the future appointments of justices to SCOTUS. But the WOTUS issue, lurking in the background, influenced some voters. The Iowa Farm Bureau Federation cheered the state of Iowa's intervention in a lawsuit challenging the Clean Water Rule,[41] and the chair of the Iowa Corn Growers Association voted for Trump in part because of the concern about the impact of WOTUS on agricultural operations.[42] And it is interesting to examine the 2016 Electoral College map with the position of states in recent major Clean Water Act rulemakings and cases (Figures 1-1 and 1-2). The alignment is striking: In general, states that have advocated a more narrow view of the Clean Water Act went for Trump, and states that backed a broader Clean Water Act favored Hillary Clinton.[43]

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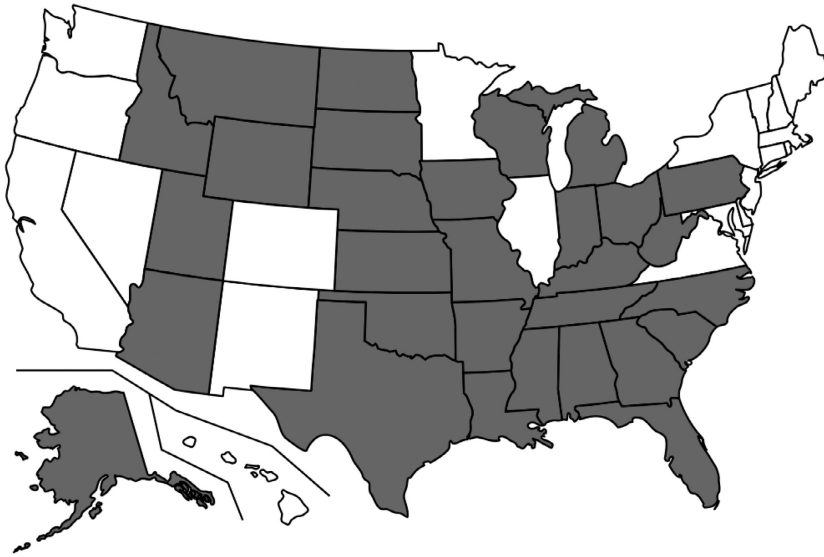

Figure 1-1. The 2016 Electoral College map, with gray indicating states won by Trump and white indicating states won by Clinton. Source: RealClearPolitics.

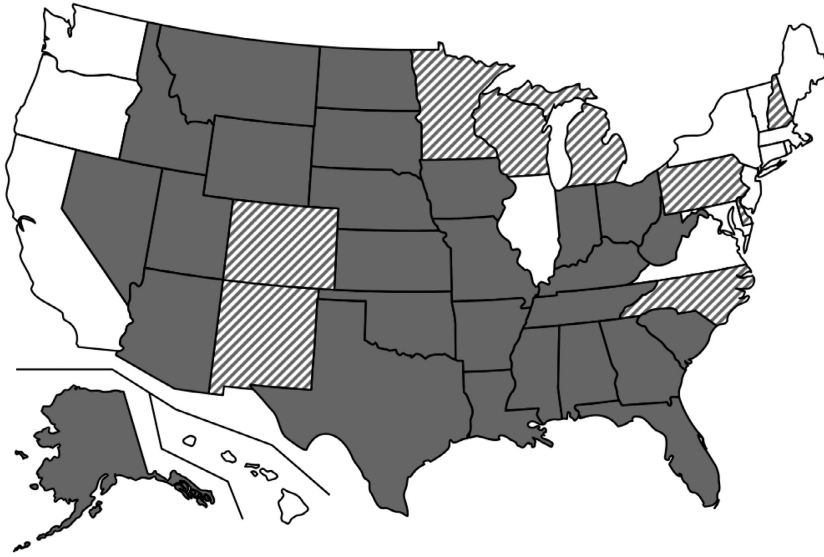

Figure 1-2. State views of the Clean Water Act, based on their positions regarding the Clean Water Rule (CWR, Obama WOTUS regulation) and the Navigable Waters Protection Rule (NWPR, Trump WOTUS regulation). Gray indicates states opposing the CWR or favoring the NWPR, and white indicates states favoring the CWR or opposing the NWPR. Gray and white stripes indicate that a state opposed both the CWR and the NWPR or took no position. See Table A-1 in the Appendix for specific details.

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Five swing states that opposed the Obama administration's Clean Water Rule later argued that the Trump administration's approach went too far: Colorado, Michigan, New Mexico, North Carolina, and Wisconsin. Of those five, all went for Joe Biden in 2020, except for North Carolina.

As President Obama once observed, "Elections have consequences."[44] Just a little more than one month after he was inaugurated in 2017, President Trump signed an executive order that began the process to repeal and replace the Obama administration's Clean Water Rule.[45] Later, during a trip to Iowa, President Trump recalled the Oval Office signing ceremony:

> And I signed that, and behind me I had homebuilders and farmers mostly, and ranchers. And many of them never cried in their life, including when they born, and they were crying. . . . They were crying behind me. . . . They were crying because we gave them back their land. We took it away. It was like eminent domain. It was terrible. We gave it back.[46]

Video of the event demonstrated a lack of lachrymose attendees: No one in the crowd was crying, although the homebuilders, farmers, and ranchers were clearly happy.[47] The only tears shed over the executive order might have been the tears of anger or anguish of environmental advocates.

Proponents of a limited definition of WOTUS are quick to point out that a non-WOTUS can be protected by the states. Yet that defense tends to overlook history, current practice, and political realities. The failure of the states to protect water quality was what spurred Congress to pass the Clean Water Act in the first place. The Clean Water Act established a national baseline of protection, and states could regulate more strictly if they wanted. Most did not, and many states simply relied, at least in part, on the federal agencies to protect water quality in their jurisdictions. Moreover, on occasions when the definition of WOTUS has contracted (such as when SCOTUS ruled that isolated ponds and wetlands were not WOTUS), states did not readily fill the gap, which requires state legislative action and state appropriations—and time. It took California more than ten years to fully respond to one SCOTUS decision.[48] It also requires political will, and in the red states there is little appetite to create or expand (and fund) regulatory programs.

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WOTUS was not the only front of the Trump administration's attacks on the Clean Water Act. It wanted to deregulate discharges to groundwater that flowed to surface waters. It sought to make it easier for states to assume federal responsibilities over wetlands and streams where states were prodevelopment but made it more difficult for states to deny water quality certifications to halt pipeline projects. It backed off enforcement efforts and limited the ability of the EPA to veto harmful projects. In some cases, the Trump administration was successful in its efforts, but in other cases it was stymied by environmental groups and its own inability to understand the niceties of administrative law.[49]

The Clean Water Act and WOTUS make for a fascinating case study of the relationship (and tensions) between the federal and state governments. The Clean Water Act also implicates separation-of-powers questions fundamental to our system of government: To what extent can Congress delegate lawmaking authority to executive branch agencies? Can the president rule by decree through executive orders? How may executive branch agencies properly exercise their authority? What is the role of the judiciary when reviewing the actions of Congress and executive branch agencies? Ultimately, which branch gets to say what the "law" is?

Not surprisingly, the answers are complex. But to understand the full context of the Trump administration's actions, which ultimately led to a Supreme Court decision that drastically reduced Clean Water Act protections across the country—and to craft effective responses to achieve the objective of restoring and maintaining the quality of the nation's waters—one must have a working understanding of our constitutional system.

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CHAPTER 2

The (Shifting) Rules of the Game

> All legislative Powers herein granted shall be vested
> in a Congress of the United States.
> The executive Power shall be vested in a President of
> the United States of America.
> The judicial Power of the United States, shall be vested
> in one supreme Court.
>
> —US Constitution, Articles I, II, and III

Aficionados of *Schoolhouse Rock* no doubt recall fondly "I'm Just a Bill," which explained the legislative process to children. It covered how a bill is considered in congressional committees, and if voted on affirmatively by both the US House of Representatives and the US Senate, it goes to the president to sign. If the president signs the bill, it becomes law. If the president vetoes the bill, Congress has an opportunity to override the veto with a two-thirds vote in both chambers. Although *Schoolhouse Rock* is a bit vague on the details of overriding a veto, it nonetheless notes that such an outcome is "very unlikely." The lesson concludes with the bill receiving the good news: "He's signed you, Bill. Now you're a law!" Although people of a certain age can recite from memory the refrain of "I'm Just a Bill," few can recall the subject of the bill sitting on Capitol Hill. It was a federal requirement that all school buses must stop at railroad crossings.

In real life, Congress has done no such thing. Instead, the operation of school buses, including whether they need to stop at railroad crossings, is largely left to the states.[1] In creating a fictional scenario where Congress cared enough about the safety of schoolchildren to pass legislation, *Schoolhouse Rock* missed an opportunity to introduce youngsters to the concept of federalism. *Schoolhouse Rock* also (understandably) declined to explore what often happens after a bill is enacted and executive branch agencies issue regulations that interpret or fill in the gaps of the statute. Also avoided was the quagmire of judicial review of legislative and executive branch actions (Figure 2-1).

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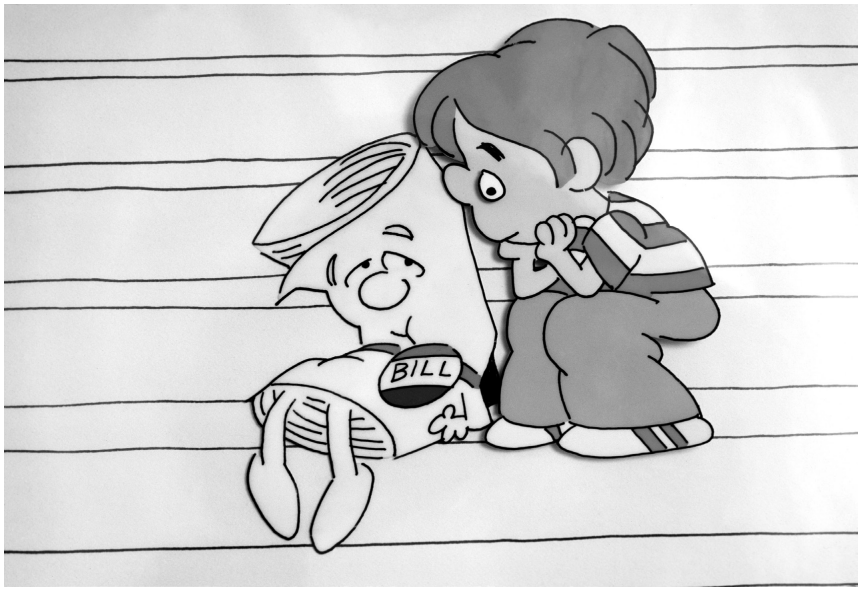

Figure 2-1. The classic explanation of the legislative process. Source: © ABC Photo Archives. All rights reserved.

The Constitution does not provide clear answers about the scope of legislative, executive, and judicial power with respect to school buses or any other matter, including water quality. The Supreme Court, however, has developed various tests and rules and principles to resolve federal–state and interbranch disputes. During his Senate confirmation hearing to become chief justice, John Roberts famously described the judiciary's role as being limited "to call balls and strikes, and not to pitch or bat,"[2] but the Court has been known to change the strike zone, sometimes dramatically, which has affected the outcome of many cases. Let's explore some key general concepts of our system of government, which are relevant to environmental protection, and consider how they have changed over time.

The President Is Not a King

Rejection of the monarchy was one of the main points of the American Revolution. Check out the Declaration of Independence: It is a long list of grievances—"repeated injuries and usurpations"—attributable to the king of Great Britain, who is characterized as a tyrant.[3] Instead of a king who is "absolute master of his own conduct in the exercise of his office,"[4] we have a president whose powers are checked by the other branches of government. As now-Justice Ketanji Brown Jackson observed, "the primary takeaway

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from the past 250 years of recorded American history is that Presidents are not kings."[5] This maxim has been invoked in a variety of settings. At one level, it means that no person is above the law. The law applies to the president personally, and the office of the presidency does not provide the occupant, or former occupant, with wholesale immunity from civil and criminal liability.[6] In addition, as *Schoolhouse Rock* implies, the nonmonarchical status of presidents also means that they cannot simply rule by decree. A law requires the assent of Congress.

But what about executive orders? What is their legal status? Presidents since Washington have issued executive orders.[7] Presidents have also long been criticized for their use of these seemingly unilateral actions, which some see as an unconstitutional mechanism to bypass Congress. The legitimacy of any particular executive order depends on whether the president is acting pursuant to authority granted by the Constitution or by Congress (through a statute). When President Truman ordered the desegregation of the military in 1948, he was acting as the commander in chief of the armed forces, a role the Constitution assigns to the president.[8] Yet even that authority is not unlimited, as Truman discovered when, during the Korean War, he directed the secretary of commerce to seize and operate steel mills to ensure that a labor dispute did not disrupt production for the war effort. The Supreme Court rejected this use of an executive order, emphasizing that "the framework of our Constitution . . . refutes the idea that [the president] is to be a lawmaker."[9] Because Congress had not authorized the seizures, the president could not do it by fiat.[10]

Often an executive order tells an agency how to exercise its discretion. For example, in 1977, Jimmy Carter issued Executive Order 11990 on Protection of Wetlands.[11] It called on agencies to minimize wetland loss and degradation when carrying out their responsibilities, such as avoiding the placement of new federally financed construction projects in wetlands. Or a president might create a task force or committee to report on and develop strategies to respond to a specific problem, as President Obama did in 2009 with Executive Order 13508 on Chesapeake Bay Protection and Restoration.[12] One part of the order directed the secretary of agriculture to focus the agency's "working lands and land retirement programs within priority watersheds in counties in the Chesapeake Bay watershed . . . [and to] apply priority conservation practices that most efficiently reduce nutrient and sediment loads to the Chesapeake Bay."[13] Like most executive orders, however, Executive Order 13508 was careful to note that it was not expanding any agency's statutory

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authority, because that would require Congress's involvement. The executive orders also typically make clear that they do not create legally enforceable rights. The standard boilerplate for executive orders includes this disclaimer:

> This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.[14]

Accordingly, courts have uniformly rejected attempts to enforce the provisions of an executive order.[15] Although the orders are legally relevant (by informing the public about how an agency is expected to exercise its authority), they are not, by themselves, legally binding. Executive orders (in the nonmilitary context) are not "law" like statutes or regulations.

Nondelegation: The Search for Intelligible Life

The Constitution vests Congress with "all legislative Powers." Obviously, Congress exercises those powers when it approves a bill. But may Congress share that power with the executive branch? May Congress delegate this law-making authority to agencies, or would that run afoul of the Constitution's pronouncement that Congress has all the legislative powers? One concern about delegation is that Congress may be abdicating its responsibilities and that unelected bureaucrats are exercising legislative power when they issue rules that the regulated community must follow.

Congress has delegated decision-making authority to the executive branch since the founding, and the Supreme Court has generally approved, so long as Congress provided some parameters. But on rare occasions the Court has struck down a law that grants the executive branch too much discretion. It last did so in 1935, in *Schechter Poultry Corporation v. United States*, striking down a statute that gave an agency the power to prescribe "codes of fair competition" for various industries.[16] Congress cannot simply say to the executive branch, "You write the rules as you deem fit."

Over the years, this "nondelegation doctrine" has been reduced to a simple phrase: an intelligible principle.[17] That is, Congress may give an agency the authority to issue legally binding regulations if it also articulates an intelligible principle for the agency to follow. Note that "intelligible" does not mean "intelligent." Rather, the principle or parameters or guideposts

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must be comprehensible or able to be understood. Thus, when Congress in the Clean Air Act authorized the EPA to set air quality standards "requisite to protect the public health," the Court concluded that this limiting principle was clear and that no delegation of legislative power had occurred.[18] In the Court's view, "requisite" meant "sufficient, but not more than necessary," and this somehow sufficiently constrained EPA's discretion when it determined the acceptable level of ozone in parts per million.[19]

Do not worry if you are confused, for you are not alone. To say that the EPA is not exercising legislative power when it issues a regulation (also known as legislative rule) is a legal fiction. To maintain the façade of a strict separation of powers between the branches, the Court is pretending that Congress did not delegate *any* legislative power. It would be more intellectually honest, as Justice Stevens suggested in a concurring opinion in the Clean Air Act case, to say that Congress can delegate legislative power, so long as that power is "adequately limited by the terms of the authorizing statute."[20]

But the Court is poised to go in a different direction that could upend decades of precedent. In 2019, the Court considered the constitutionality of the Sex Offender Notification and Registration Act (SONRA), which allowed the attorney general to decide whether sex offenders who were convicted before the law's enactment needed to register with the state where they live.[21] At the time, the Court consisted of only eight justices, as Justice Kennedy had stepped down and Justice Kavanaugh had yet to be confirmed. Four justices, led by Justice Kagan, voted to uphold SONRA, finding that Congress had laid down intelligible principles for the attorney general to follow. She noted that "if SONRA's delegation is unconstitutional, then most of Government is unconstitutional."[22] Three justices, led by Justice Gorsuch, voted to strike down the law on nondelegation grounds, stating that "the Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty."[23] And in a very odd concurring opinion, Justice Alito voted in favor of the law but declared he would support an effort to reexamine the nondelegation doctrine. However, "because a majority is not willing to do that, it would be freakish to single out the provision at issue for special treatment."[24] In other words, Justice Alito did not find a sex offender to be a sufficiently attractive party to reinvigorate the nondelegation doctrine. Bring me a more sympathetic defendant (perhaps a member of the regulated community), he seemed to suggest, and I will dismantle the administrative state.

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In Defense of the Administrative State

Proponents of a stronger nondelegation doctrine assert we need to return to first principles: The Framers intended that the legislative power reside with the branch that has the most political accountability.[25] In their view, the administrative state—primarily executive branch agencies—is an affront to the Constitution's separation of powers. These "headless" agencies are staffed by unelected bureaucrats who issue ukases that burden the American people (and businesses). Congress's fecklessness shifts responsibility to the agencies to make the "hard choices," thereby undermining the fundamental connection between the people and their elected representatives, ultimately threatening our liberty. Let me offer a contrary view.

Certainly, the Framers never envisioned the growth of executive branch agencies and their thousands of pages of regulations. But the Framers also did not envision the automobile, genetically modified food, or credit default swaps. Daily life is infinitely more complex than it was in the late eighteenth century, and a principal role of government is to provide for public safety. It is unrealistic to expect that individual members of Congress can make informed decisions about technical matters regarding environmental protection. Should Congress have to expressly decide how many parts per million of ozone is acceptable for human health? Should Congress have to vote on every species to be protected by the Endangered Species Act? Should Congress have to identify which individual streams and wetlands are protected by the Clean Water Act? While Congress may be passing the buck to regulatory agencies to make hard decisions, Congress is also empowering the subject matter experts to act. "Bureaucrat" is often a pejorative term, but agency staffers (especially in the environmental field) are specialists. Congress should be able to articulate general goals or principles and rely on these subject matter experts and specialists to make technical decisions informed by science.

Moreover, the agencies are not headless; they are subject to numerous political checks. Agencies are run by political appointees who are nominated by the president and confirmed by the Senate. The EPA's administrator, deputy administrator, and assistant administrators (e.g., the assistant administrator for the Office of Water) are all political appointees. They set the overall policy direction of the agency (within limits prescribed by Congress). Dick Cheney understood how government worked, and as vice president he made sure he had the lead on nominations at the deputy and assistant administrator or secretary level.[26] Thus, any time an agency issues

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a regulation—which may have the force of law—the regulation must be approved by the agency's political appointees.[27] In addition, all regulations are reviewed by the Office of Management and Budget (OMB) to ensure that they are consistent with the president's philosophy. And OMB is led by—you guessed it—political appointees.

Congress has also dictated the general process by which agencies may promulgate rules, through the Administrative Procedure Act.[28] A proposed regulation (after it is approved by political appointees within the agency and at OMB) is published for public notice and comment in the *Federal Register*, which is the official journal of the federal government. The notice of the proposed regulation typically contains the statutory authority for the rule, the reason for the rule, and the proposed text of the rule. The public, from the regulated community to environmental groups to literally anyone, is then usually given the opportunity to provide comments. (Bots have become a problem.[29]) Some noncontroversial proposed rules yield only a few comments, whereas others generate more than a million responses. The agency then must consider those comments when preparing the final rule. Note that the rulemaking process is not a plebiscite. The agency is not bound to follow the majority of the comments. The agency can adopt a rule that the public (at least through its comments) detests.

But doesn't this suggest that agencies are not politically accountable? No, because after the agency considers the public comments and drafts a final rule, the political appointees at the agency and OMB must sign off on the final rule. No rule of any consequence goes forward without someone appointed by the president approving it.[30]

Furthermore, Congress is another political check on the agencies. In the first instance, an agency can only exercise the authority that Congress grants it. (More on that shortly.) Congress also controls the agency's budget. An agency cannot act unless it has appropriations. And, of course, if Congress disagrees with an agency regulation, it can always enact a law that overrides the offending regulation. For example, in December 2016 during the waning days of the Obama administration, the Department of Interior issued the Stream Protection Rule (after a public notice and comment period).[31] This regulation was aimed at reducing the environmental impacts of mountaintop removal coal mining operations. "Mountaintop removal mining" is exactly what it sounds like: To get to the coal, the top of the mountain is removed. The overburden—the rock and soil that has been removed—is then deposited in the valley below. It's an efficient operation but it results in

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streams and wetlands in the valleys being smothered. The Stream Protection Rule required mining permits to place more emphasis on limiting impacts to surface water and groundwater.

Congress and the new Trump administration were more concerned about energy production than environmental impacts. In February 2017, Congress voted to repeal the Stream Protection Rule, and President Trump signed it into law.[32] Under the Congressional Review Act, the Department of Interior is prohibited from promulgating any new regulation that is substantially similar, unless Congress provides the agency the authority to do so.[33]

The bottom line is that the subject matter experts in the agencies are not freelancing. Any regulations that they develop are reviewed and approved by political appointees in the executive branch. Congress retains the authority to override agency regulations. And the judicial branch is also a check on agency power, as agency regulations are also subject to judicial review.

The Least Dangerous Branch?

Agency regulations breed litigation. When an agency action such as the promulgation or application of a regulation is challenged, the arguments fall into three camps: procedural (the agency failed to follow the proper process), statutory (the agency is acting beyond its authority or it has misinterpreted a statute), or constitutional (even if the agency followed the proper process and even it is acting consistent with the relevant statutes, the agency action is void because it violates the Constitution). Courts generally consider arguments in that order, ordinarily not reaching the constitutional questions unless necessary.

A key question regarding judicial review of agency actions is the proper standard of review. How deferential, if at all, should a court be to an agency's technical judgment? Due to their training, judges (like most lawyers) are probably most comfortable opining about process. (Attend any law faculty meeting and I bet you will witness at some point concerns expressed about process.) Moreover, deciding a matter on procedural grounds can allow one to avoid having to grapple with more complex, technical issues related to the merits. But sometimes cases cannot be resolved on procedural grounds, and the merits must be addressed. Questions of statutory interpretation often involve technical matters beyond a judge's expertise. For many years, in the context of judicial review of agency regulations, courts have applied what is known as the *Chevron* test, which balances a court's authority to interpret statutes and an agency's technical expertise.

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In 1984 in *Chevron v. Natural Resources Defense Council*, the Supreme Court specified how a court should review an agency's interpretation of a statute that Congress authorized it to administer.[34] The case involved the meaning of *stationary source* in the Clean Air Act and whether the EPA could adopt a plantwide definition of source, thereby allowing the "bubble" concept, a form of emission trading. Under the bubble concept, a plant or factory was treated as a single source of pollution, allowing individual stacks to emit more pollution, so long as greater control was placed on other stacks, thereby not increasing overall emissions or exceeding an emissions cap. The *Chevron* test has two steps. First, a court must inquire whether "Congress has directly spoken to the precise question at issue."[35] If Congress was clear in the statute, then Congress's intent must be followed. If the statute is silent or ambiguous, then the court moves to *Chevron*'s second step and determines whether the agency's interpretation is "permissible" or reasonable.[36] In the case of the term *stationary source*, the Court concluded that Congress had not spoken directly to the bubble issue, and that EPA's interpretation was reasonable in light of the Clean Air Act's structure and objectives. The Court therefore deferred to the agency's interpretation. As Justice Scalia later explained, "statutory ambiguities, in other words, were left to reasonable resolution by the Executive."[37]

However, some justices view the *Chevron* test as an abdication of judicial responsibility, inconsistent with the Constitution's separation of powers. Rather than deferring to an agency's technical expertise (if reasonable), these justices invoke Chief Justice John Marshall's pronouncement in *Marbury v. Madison* that it is the role of the judiciary "to say what the law is."[38] For example, Justice Gorsuch, before his appointment to the Supreme Court, stated that *Chevron* allows "executive bureaucracies to swallow huge amounts of core judicial and legislative power."[39] The change in the Court's composition may lead to *Chevron* being expressly overruled. At a minimum, however, the Court is adopting new rules, such as the major questions doctrine, that hollow out *Chevron* and limit the authority of agencies to interpret statutes.

Under the major questions doctrine, Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[40] The doctrine received the clearest imprimatur from the Court in the 2022 case of *West Virginia v. Environmental Protection Agency*, which considered the Obama administration's Clean Power Plan, a regulation developed through the notice and comment process.[41] The Clean Power

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Plan required the electric generation industry to shift from coal-burning plants to natural gas and wind farms. The Court deemed this industrywide approach to dealing with carbon dioxide emissions to be a major question. Therefore, the Court stated that separation of powers principles required the EPA to "point to 'clear congressional authorization' for the power it claims."[42] Because Congress did not provide this clear authorization, the Court struck down the Clean Power Plan. (Technically, the regulation wasn't even in force, but the Court eschewed traditional principles of judicial restraint to hear the case.) In a concurring opinion, Justice Gorsuch stated that "basic questions about self-government, equality, fair notice, federalism, and the separation of powers" were at stake.[43] In dissent, Justice Kagan observed that "the Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening."[44]

In theory, the major questions doctrine simply reinforces the notion that Congress must be clear when delegating authority to the executive branch. But as a practical matter, it enlarges the power of the judiciary, which decides what constitutes a "major" question. Whether a particular issue is one of "vast economic and political significance" depends on the perspective of individual judges.

While Justice Kagan expressed concern that the Supreme Court was displacing elected legislators and agency experts, in actuality a single US district court judge can appoint himself or herself the decision-maker on complex policy issues. In recent years, district courts have increasingly issued nationwide injunctions in lawsuits against executive branch agencies, and the question of a district court's authority on this point is unsettled.[45] On one hand, district courts have traditionally enjoyed broad discretion to fashion equitable remedies. In cases where an agency rule is successfully challenged, district courts might vacate the rule, offering programmatic relief. One argument in support of this broad power is that it avoids duplicative litigation. But why should a single judge in Texas or California or New York be able to vacate a rule nationwide? Shouldn't the relief extend only to the plaintiffs in the lawsuit or be limited to the geographic scope of the court or the circuit in which it sits? When a single judge can invalidate an agency regulation across the country, forum shopping is encouraged. It is no coincidence that many challenges to Obama-era regulations were filed in US district courts in Texas and challenges to Trump-era regulations were filed in New York or California.[46] The Supreme

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Court has yet to directly address the issue of nationwide injunctions but may do so soon.[47]

The Ebb and Flow of Congress's Commerce Powers

Under our constitutional system, individual states have a general police power. In this context, police power does not mean law enforcement; rather, it refers to a state's authority to adopt laws and regulations for the health, safety, and prosperity of its citizens. Accordingly, states enjoy broad authority to regulate activities that affect the natural environment. In contrast, Congress does not have a general police power.[48] It cannot simply legislate on any issue it desires. Instead, Congress must invoke an authority listed in the Constitution. Congress often relies on its power over interstate commerce, which is specifically enumerated in Article I.

Through a series of decisions, the Supreme Court interpreted the commerce clause broadly to permit Congress to regulate the channels of interstate commerce (e.g., rivers and highways), instrumentalities of interstate commerce (e.g., people and items transported across state borders), and intrastate activities that in the aggregate substantially affect interstate commerce.[49] Initially, however, the Court had a more limited view of Congress's powers.

At its heart, commerce is an exchange, whether commercial or of a more personal nature. (In 1828, *Webster's Dictionary* defined commerce to include "familiar intercourse between the sexes."[50]) In the constitutional context, the Court has long considered commerce to mean the buying and selling of goods. This led to decisions where the Court made distinctions between the production or manufacture of goods and the selling of those goods. If manufacturing was not "commerce," then Congress had no authority (under the commerce clause at least) to regulate the production process—no matter the health and environmental impacts. This reasoning led the Supreme Court to hold in *Hammer v. Dagenhart*, in a 5–4 decision in 1916, that Congress had no authority to regulate child labor.[51] The maximum number of hours a child could toil in a factory or a coal mine or on a farm was "purely" a state matter that was subject to the state's police power.

But, not for the first or the last time, the Court reversed itself on an issue of constitutional law after its composition changed. Twenty-five years later, the Court expressly overruled *Hammer v. Dagenhart*, upholding the Fair Labor Standards Act of 1938, which established minimum wages and maximum hours for employees producing goods that would cross state lines. The

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Court stated that "while manufacture is not, of itself, interstate commerce, the shipment of manufactured goods interstate is such commerce, and the prohibition of such shipment by Congress is indubitably a regulation of the commerce."[52] Thus Congress could regulate not only the channels and instrumentalities of interstate commerce but also activities that have a substantial relation to or substantially affect interstate commerce. This last clarification proved to be the most expansive and is most pertinent to the field of environmental law.

Wheat, Weed, and Broccoli

The outermost limits of Congress's power to regulate activities that substantially affect interstate commerce are illustrated by *Wickard v. Filburn*.[53] To ensure a stable supply of wheat for consumers and a reasonable return for wheat farmers, Congress passed New Deal legislation (the Agricultural Adjustment Act of 1938) that authorized the Department of Agriculture to impose marketing quotas on wheat farms. Farmers were assigned an acreage allotment with an expected yield. Excess harvests resulted in penalties. Filburn, who had a small farm in Ohio, received an 11.9-acre wheat allotment. However, he had the audacity to sow 23 acres, which produced an excess of 239 bushels. This use of his own property resulted in a $117 fine. Filburn argued that this regulation of his wheat production—some of which was for his own consumption—was beyond Congress's power to regulate interstate commerce. In his view, this was purely a local matter and not the business of the federal government.

Yet the Supreme Court upheld the law, reasoning that even purely local activities could have a substantial effect on interstate commerce.[54] Although one farmer's consumption of home-grown wheat would have a negligible effect on the market, the cumulative impact of many farmers could disrupt wheat demand, supply, and prices. Thus the law was constitutional, despite the fact that home-grown consumption of wheat is not even commerce, at least not in the sense of an exchange between two people. Whether the price support scheme was wise or workable or fair, the Court declined to say. That judgment was left to Congress.

The aggregation principle articulated in *Wickard* underpins many federal environmental laws. For example, the filling of an individual wetland may have little impact on the species of migratory birds that use it as habitat or on the water quality of a nearby river. But the destruction of these aquatic sites in the aggregate—the cumulative impact of many minor activities—can

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nevertheless have a substantial negative impact on a species or on water quality and thereby on interstate commerce. Hunting, birdwatching, and fishing generate billions of dollars in economic activity.[55] Protecting waterbird and fish habitat supports this commercial activity.

Decades later, the Court had an opportunity to reexamine the holding of *Wickard v. Filburn*. This time, instead of wheat, the crop was marijuana. And in place of the farmer was a patient with cancer who wanted to consume home-grown marijuana without fear of federal prosecution. In *Gonzales v. Raich*, in a 6–3 decision, the Court found that *Wickard* controlled: Congress's interstate commerce powers reached trivial, local, noncommercial activities because in the aggregate these activities could affect a national market.[56] In this case of marijuana, Congress wanted the national market to be zero. The Court reasoned that medicinal marijuana could affect the overall demand for marijuana. The fact that state law might permit the activity was irrelevant.[57] The aggregation principle endured, and environmentalists considering the big picture breathed a sigh of relief, even if they may have been sympathetic to Angela Raich's plight.

The Supreme Court has chipped away at the edges of Congress's interstate commerce powers, however.[58] Most recently, the Court held that the Affordable Care Act's mandate that individuals must purchase health insurance was beyond Congress's commerce clause powers.[59] The Court was concerned, in part, with Congress regulating inaction (not buying health insurance) and the lack of a limiting principle. If Congress could require people to buy health insurance, could Congress require people to purchase other things, such as broccoli?[60] The Court answered no, emphasizing that "the Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States."[61]

The commerce clause is not Congress's only enumerated power. Congress also has the power to tax and spend, among others. Indeed, although the Supreme Court ruled that the commerce clause did not authorize the Affordable Care Act's individual mandate, the requirement to purchase insurance was nevertheless upheld under Congress's taxing powers.[62] (Congress imposed a tax penalty on those who did not buy insurance.) This power over money gives Congress a mechanism to influence the behavior of individuals and, as we will see, states. Congress may not require you to eat broccoli, but it can offer you a carrot (or a stick).

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May I See Your ID?

Have you ever wondered why the United States has a uniform drinking age of twenty-one? It wasn't always that way. Under the Twenty-First Amendment, which repealed Prohibition, states have the sole authority to set alcohol consumption rules, rather than the federal government. In the 1970s, after the Twenty-Sixth Amendment was passed, which lowered the voting age from twenty-one to eighteen, some states began to lower their drinking ages as well. This resulted in a patchwork of rules: The minimum drinking age ranged from eighteen to twenty-one, with variations for beer or wine and hard alcohol.[63]

Although one could toast the beauty of federalism, the variations in the minimum drinking age had some negative consequences. Lower drinking ages were associated with increased traffic accidents involving teenagers. A Massachusetts Institute of Technology study found that fatalities for eighteen- to twenty-year-olds in Massachusetts increased by about 40 percent after the drinking age was lowered.[64] From a federal (and parental) perspective, concerns were raised about the underaged in one state traveling to a neighboring state where they were of legal age and then traveling back. But even with this connection to a channel of interstate commerce, Congress lacked the authority to mandate a uniform national drinking age because of the Twenty-First Amendment. However, Congress could control access to federal highway funds.

In 1984, Congress enacted a law directing the Department of Transportation to withhold a portion of federal highway grants to states that did not raise their drinking age to twenty-one.[65] South Dakota resisted, allowing nineteen-year-olds to consume beer with up to 3.2 percent alcohol. When the Department of Transportation reduced federal highway funds by 5 percent, South Dakota sued, alleging that the feds had unconstitutionally infringed on a core power of the states under the Twenty-First Amendment. The Supreme Court found South Dakota's arguments about weak beer to be weak tea.

The Court held that Congress, through its spending power and conditional grants, could encourage states to adopt a uniform policy.[66] The Court noted that a main purpose of the highway funding, to increase safe interstate travel, "had been frustrated by varying drinking ages among the States" which created an incentive for young people to drink and drive.[67] As for South Dakota's claim that the withholding of federal monies amounted to compelling the state to adopt a federal policy, the Court was unconvinced.

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Such a small percentage of funding did not support the state's claim of coercion, characterizing it to be "more rhetoric than fact."[68]

When more money was involved, the Supreme Court reached a different conclusion and used some rhetoric of its own. Medicaid, a program that provides health insurance to disabled and low-income people, is voluntarily administered by the states with the financial support of the federal government. The Affordable Care Act required states to expand Medicaid coverage beyond the populations traditionally served, with the federal government picking up almost all of the increased costs.[69] If a state declined to expand Medicaid, however, it risked losing *all* Medicaid funding—which on average amounted to 10 percent of a state's annual budget. In the 2012 case of *National Federation of Independent Business v. Sebelius*, the Court did not see this arrangement as presenting the states with a choice but rather as a "gun to the head."[70]

Putting aside the colorful phrase, the key takeaway is that, under our constitutional system of dual sovereignty, Congress cannot simply commandeer the states.[71] Congress may not order states to address particular problems or to require states to regulate according to federal dictates. Congress cannot do so through a direct order or even indirectly through the conditioning of funds, if the conditions amount to coercion. Where one draws the line between "encouragement" and "economic dragooning" (another colorful phrase used by the Court) is an open question.

The US Legal System in a Nutshell

New law students sometimes make the mistake of thinking that law school will teach them what the "law" is. But the law is not static; it is always changing. Even the basic rules about the separation of powers between the branches and the federal–state relationship are moving targets. So, to sum up our brief review of our complex legal system (in a general matter):

- A statute requires the approval of both houses of Congress and the president's signature. If the president vetoes a bill, Congress may override that veto, in which case the bill would become law. As a general rule, executive orders issued by the president are not "law" in this sense because they are not legally enforceable.
- Congress may (currently) delegate lawmaking authority to executive branch agencies. But the Supreme Court might adopt a new approach to the nondelegation doctrine, which would limit Congress's ability to do so.

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- Acting under authority delegated from Congress, executive branch agencies may promulgate legally binding rules—regulations—so long as the agency uses the proper process, which usually requires a public notice and comment period. Often these regulations interpret an ambiguous statutory term or fill in gaps in the statutory scheme.
- Executive branch regulations are subject to approval by presidential appointees, both inside and outside the agency. The regulations may be overridden by a statute enacted by Congress. They are also subject to judicial review.
- Under the *Chevron* doctrine (at the moment), the courts will defer to an agency's regulation (and technical expertise) that is a reasonable interpretation of a statute. But a court will not defer to an agency's regulation regarding a "major question" of "vast economic and political significance," unless Congress has clearly delegated that authority to the agency. What constitutes a "major question" or something of "vast economic and political significance" or a clear delegation of authority is up to the courts.
- A single US district court can issue an injunction that invalidates an agency regulation nationwide (for now).
- Congress (currently) has vast powers under the interstate commerce clause, but they are not unlimited. States have broader authority to regulate under the police power to adopt laws and regulations regarding health, safety, and prosperity.
- Under our federal system, Congress can encourage states to regulate in a particular manner, but Congress cannot simply commandeer the states and order them to apply and enforce federal law and regulations. The states are not "mere marionettes" of the federal government.

We are now a long way from *Schoolhouse Rock*. But with this background, we are ready to navigate the meandering history of the waters of the United States.

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