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1

The State We Are In

On February 29, 2017, President Trump issued Executive Order 13778, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States.'"[1] The purpose of this simultaneously ambitious-sounding and dull-sounding Order was to demand the reconsideration of a 2015 regulation – the "Waters of the United States" rule, known as the "WOTUS" rule. The rule adopted a definition of the term "waters of the United States" that defined the jurisdiction of the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) under the Clean Water Act.[2] On signing the Executive Order, Trump remarked "a few years ago the EPA decided that navigable waters can mean every puddle or every ditch . . . it was a massive power grab."[3]

Anyone reading the 2015 Rule will discover that it explicitly excludes puddles from the definition of "waters of the U.S."[4] It also does not include "every ditch" and explicitly lists those categories of ditches it excludes.[5] Nor is the rule a "significant power grab." The EPA assessed it would result in between a 2.84 and 4.65 percent increase in "positive jurisdictional determinations" or determinations that a "water" was subject to regulation.[6] The rule had been promulgated after "repeated calls for a more precise definition of 'waters of the United States'"[7] so as to

1 82 Fed. Reg. 12497 (March 3, 2017).
2 U.S. Department of Defense: Department of the Army – Corp of Engineers and Environmental Protection Agency, "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015).
3 Michelle Ye Hee Lee, "Trump's Claim That Waters of the United States Rule Cost 'Hundreds of Thousands' of Jobs," *The Washington Post*, March 2, 2017.
4 n. 1, 37098, 37107.
5 Ibid., 37107.
6 Ibid., 37101.
7 *National Association of Manufacturers* v. *United States Department of Defense*, 138 S. Ct. 617 (2018), 625. For a history of the rule, see Erin Ryan, "Federalism, Regulatory

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increase regulatory certainty. The rule change also reflected evolving science[8] and the fact that defining such waters is "a contentious and difficult task."[9]

This Executive Order is one of many attempts by the Trump administration to roll back regulations since his coming to office in 2017. The mixture of rhetoric and ignorance of the details of what is actually being deregulated has been a common feature of these attempts. Rick Perry in the 2011 presidential debate argued for the abolition of the Departments of Education, Commerce, and Energy, but during his nomination hearing to head the Department of Energy, he admitted that when "he called for its elimination he hadn't actually known what the Department of Energy did."[10] As Michael Lewis in his 2018 book, *The Fifth Risk*, argues, this lack of understanding and the accompanying mismanagement or neglect of public institutions creates serious risks across American life – risks to do with nuclear safety, the rural economy, food safety, and children's nutrition, and many more missions of the government.

It is tempting to dismiss these stories as examples of a post-truth politics in action. But it is important to remember that the general public, while having strong views about the federal government, also often has little understanding of public administration and how it addresses risks to the public.[11] Lewis points to why such an understanding is important: "There might be no time in the history of the country when it was so interesting to know what was going on inside these bland federal office buildings—because there has been no time when those things might be done ineptly, or not done at all."[12]

1.1 The Current Limits of Administrative Law Imagination

Paradoxically, many administrative lawyers also do not think very deeply about public administration and the problems it addresses when they

Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States," *Environmental Law* 46, no. 2 (2016): 277.

[8] Dave Owen, "Little Streams and Legal Transformations," *Utah Law Review* 2017, no. 1 (2017): 1; and Laurie Alexander, "Science at the Boundaries: Scientific Support for the Clean Water Rule," *Freshwater Science* 34, no. 4 (2015): 1588.

[9] *National Association of Manufacturers*, n. 7, 623.

[10] Michael Lewis, *The Fifth Risk* (London: Allen Lane, 2018), 45.

[11] Arlie Russell Hochschild, *Stranger in Their Own Land: Anger and Mourning on the American Right* (New York: New Press, 2016).

[12] Lewis, *The Fifth Risk*, n. 10, 48.

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reason about the law. Or to put the matter a slightly different way, public administration and what it governs registers little in the *legal* imagination. Administrative lawyers fail to understand how the *competence* of public administration – its entwined capacity and authority – are integral to administrative law. But sense cannot be made of administrative law without making sense of public administration.

Take, for example, the WOTUS rule that was the subject of President Trump's Executive Order. Congress passed the Clean Water Act (CWA) in 1972 with an explicit objective to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[13] The Act applies to discharges into "navigable waters," which are the "waters of the United States, including the territorial seas."[14] This definition is not only legally ambiguous, it is geographically ambiguous. There are no labels affixed to streams or rivers or wetlands stating that they are "waters of the United States." As a unanimous US Supreme Court noted in 1985, "the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land."[15] The WOTUS definition is also crucial to an Act aimed at environmental protection. In thinking about the definition of "waters," it is therefore necessary to incorporate into the definition scientific understandings about the contribution that watercourses, including wetlands and small streams, make to ecological health.[16]

That specialized knowledge is housed in the Corps (created in the early nineteenth century)[17] and EPA (created in 1970).[18] The Corps' Regulatory Program oversees the permitting regime under the Clean Water Act and has vast practical and technical experience. The EPA's Office of Water administers the implementation of the Act and its work is grounded in scientific research. Both institutions have developed their expertise relating to water quality over time. They have carried out

[13] 33 U.S.C. § 1251(a). See Chapter 2.
[14] 33 U.S.C. § 1362(7).
[15] *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985), 132.
[16] Owen, "Little Streams and Legal Transformations," n. 8.
[17] Todd Shallat, *Structures in the Stream: Water, Science and the Rise of the U.S. Army Corps of Engineers* (Austin: University of Texas Press, 1994); and Theodore Porter, *Trust in Numbers: The Pursuit of Objectivity and Science in Public Life* (Princeton, NJ: Princeton University Press, 1995), chapter 7.
[18] See Chapter 2.

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research, passed rules and guidance,[19] and been subject to judicial review that has forced them to reflect on their own competence.[20] The 2015 Rule, designed to clarify and simplify the WOTUS definition and delineate bright line distinctions where possible, was not written on the back of an envelope: "This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades."[21] The rule was accompanied by extensive analysis including a review of 1,200 peer-reviewed publications.[22]

Given all of this, the question of what are "waters of the United States" is not one of "simple definition,"[23] but it is also not just a "power grab." The legal definition is one of expert analysis utilizing the competence of public administration – its evolving legal mandate, its scientific capacity, its experience, and its history.

We do not argue that public administration or scientific expertise is superior to law and thus, law should yield to them. As the title of Executive Order 13778 makes clear, the definition has implications for the legal authority of the Corps and the EPA. And, as all water "passes through subsequent realms of state and federal jurisdiction," what are "waters of the United States" also evokes questions about federalism.[24] Our argument is that to properly assess the legal validity of this rule, or any form of administrative action, there is a need to understand the competence of public administration and the problems to which that competence is addressed.

Understanding administrative competence is a natural consequence of administrative law being the law of public administration. We explain not only administrative competence and why it is controversial, but also how competence has been a subject of political and legal attention since the Federalist period. Most significantly, we show how understanding

[19] See the history in Owen, "Little Streams and Legal Transformations," n. 8.

[20] *United States* v. *Riverside Bayview Homes*, n. 15; *Solid Waste Agency of Northern Cook City* v. *Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos* v. *United States*, 547 U.S. 715 (2006).

[21] n. 1, 37055.

[22] U.S. EPA, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft)," EPA/600/R11/098B (DC: U.S. EPA, September 2013).

[23] C.f. Richard Epstein, "Why the Modern Administrative State Is Inconsistent with the Rule of Law," *New York University Journal of Law and Liberty* 3, no. 3 (2008): 491, 506.

[24] Erin Ryan, *Federalism and the Tug of War Within* (New York: Oxford University Press, 2011), 151.

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administrative competence illuminates doctrinal reasoning in administrative law.

In short, understanding the nature of public administration and the competence it brings to government is fundamental to understanding the law. So much so, we argue in our conclusory chapter for the need for a new Administrative Procedure Act (APA) firmly grounded on administrative competence. We are conscious that such an argument appears politically naive and foolish at a time like this. But, as we shall show, it is also an important means of ensuring administrative law is focused on the *competence* of public administration. Administrative law should be about both the capacity of agencies to perform their legislation missions and their authority to do so.

There is nothing radical, either politically or intellectually, in this claim. As we will constantly show, acknowledging administrative competence is acknowledging the reality of American government. It is about taking existing legal and institutional structures and their implications for legal reasoning seriously.

We are not the first to argue for the need for lawyers to engage with the workings of public administration.[25] Nor are we alone in arguing the need to recognize a richer administrative history than is in the perceived wisdom.[26] Yet, despite this attention, there is a failure to appreciate how administrative law doctrine has evolved with understandings of administrative competence. Once you recognize competence as the goal of administrative law, much of that doctrine makes sense in a way it has not done before.

1.2 Existential Risks

We write at a time in which the capacity and authority of public administration is particularly parlous. It is, to use Lewis' language, a "risky" time

[25] See, e.g., Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven, CT: Yale University Press, 1983); Edward Rubin, "It's Time to Make the Administrative Procedure Act Administrative," *Cornell Law Review* 89, no. 3 (2003): 95; Gillian Metzger and Kevin M. Stack, "Internal Administrative Law," *Michigan Law Review* 115, no. 8 (2017): 1239; and Peter L. Strauss, "Jerry L. Mashaw and the Public Law Curriculum," in *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L. Mashaw*, ed. Nicholas Parrillo (Cambridge: Cambridge University Press, 2017), 87.

[26] Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven, CT: Yale University Press, 2012); and Blake Emerson, *The Public's Law: Origins and Architecture of Progressive Democracy* (New York: Oxford University Press, 2019).

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for the subject. Some of those risks are obvious due to their existential nature. Others are more invidious.

The existential risks arise because over the last twenty years there has been a group of administrative lawyers articulating strong rhetorical views about the perceived illegitimacy of the administrative state and administrative law. For this group of commentators, "bureaucracy has sprawled,"[27] the regulatory state is a "monstrosity,"[28] and administrative law is illegal[29] and illiberal.[30] While these accounts place heavy emphasis on the idea of a "lost constitution" that protected liberty at all costs,[31] there is little discussion of what public administration actually does.

Take, for example, Justice Scalia's judgment in the 2006 case of *Rapanos* v. *United States* where the Supreme Court reviewed an earlier definition of "waters of the United States" and whether it included certain types of wetlands. At the start of his judgment he notes, "The burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial. In deciding whether to grant or deny a permit, the U. S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot."[32]

This perceived despotism frames his analysis and thus his reasoning. He focuses on the "immense expansion of federal regulation of land use"[33] and the "Corps' sweeping assertions of jurisdiction."[34] The end result is a judgment that glides over the hydrological complexities of ensuring the ecological health of clean waters and sidelines the reasoning of the Corp. For Justice Scalia, "the Corps chose to adhere to its essentially boundless view of the scope of its power."[35] He inevitably concludes that the interpretation of the Corps is legally invalid.

[27] Christopher J. Walker, "Restoring Congress's Role in the Modern Administrative State," *Michigan Law Review* 116, no. 6 (2018): 1102.
[28] Senator Orrin Hatch, "A Constitutional Conservatism for our Time," *Texas Review of Law & Politics* 19, no. 2 (2015): 199.
[29] Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago University of Chicago Press, 2014).
[30] Douglas Ginsburg and Steve Menashi, "Our Illiberal Administrative Law," *New York University Journal of Law and Liberty* 10, no. 2 (2016): 475.
[31] Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, rev. ed. (Princeton, NJ: Princeton University Press, 2014); and Richard Epstein, *The Classic Liberal Constitution: The Uncertain Quest for Limited Government* (Cambridge, MA: Harvard University Press, 2014).
[32] *Rapanos* v. *U.S.*, n. 20, 721.
[33] Ibid., 722.
[34] Ibid., 726.
[35] Ibid., 758.

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Rapanos produced no clear precedent. As Ryan has noted it is "notoriously among the least helpful Supreme Court judgments of all time."[36] This is because while the judgment did produce a conclusion – the Corps action was vacated and remanded – it did not produce a coherent template for the Corps, with its particular expertise, thinking through the definitional question. In comparison to Scalia, other justices in the same case started with "the nature of the problem" and the reasoning of the Corps.[37] Nevertheless, President Trump's 2017 Executive Order 13778 stated that "the Administrator and the Assistant Secretary shall consider interpreting the term 'navigable waters' . . . in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*."[38] The further implications of this will be explored in Chapter 8.

That is not surprising. Justice Scalia's focus on administrative overreach is entirely consistent with Trump's statement that the 2015 rule was a "power grab." Other more extreme legal views understand the administrative state as either a political fashion left over from the Progressive and New Deal eras[39] and/or as a vehicle for a particular group of elites.[40] On this basis "administrative law has been the means by which a powerful class has enthroned its own authority within the form of republican government."[41]

Gillian Metzger has described these articulated views as "anti-administrativist"[42] and as having three strands: "a visceral resistance to an administrative government perceived to be running amok"; a heavy emphasis on courts to control power; and a belief in the unconstitutional nature of the administrative state.[43] Cass Sunstein and Adrian Vermeule have provided another label for "these cluster of impulses stemming from a belief in the illegitimacy of the administrative state":[44] the "new Coke"

[36] Ryan, "Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States," n. 7, 282.
[37] *Rapanos* v. *U.S.*, n. 20, 811 (Justice Breyer). See also Justice Kennedy.
[38] n. 1, s. 3.
[39] See, e.g., *Perez* v. *Mortgage Bankers Association*, 135 S. Ct. 1199 (2015) see footnote 6 of Justice Thomas' judgment.
[40] Hamburger, *Is Administrative Law Unlawful?*, n. 29, 373–74.
[41] Ibid., 11.
[42] Gillian Metzger, "1930s Redux: The Administrative State under Siege," *Harvard Law Review* 131, no. 1 (2017): 1.
[43] Ibid., 34.
[44] Cass Sunstein and Adrian Vermeule, "The New Coke: On the Plural Aims of Administrative Law," *Supreme Court Review* (2015): 41.

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approach to administrative law. By evoking the seventeenth-century jurist Sir Edward Coke, they highlight the way in which these views are grounded in a certain perception of history, common law, and the Constitution – a perception that places heavy emphasis on property and liberty.[45]

While the "anti-administrativist" and "new Coke" approaches have not translated into wholesale changes to legal doctrine, there are examples of it reflected in some cases.[46] This anti-administrative thinking is also mirrored in "regulatory reform" proposals repeatedly introduced into Congress that aim to overhaul the APA and rulemaking processes.[47] As Peter Shane states, "the basic thrust" of many of these proposals "is to load the rulemaking process with so many additional preliminary procedural requirements as to make an already cumbersome process interminable."[48] None have so far passed, although with each year such proposals appear to gain greater political traction.

"Anti-administrativist" thinking and these proposals present the type of dangers that Lewis highlighted in *The Fifth Risk*. They are blatant attempts to deconstruct and disable the administrative state with little acknowledgment of its substantial institutional role in American life or the potential harm to American democracy when administrative competence is undercut. As Martha Roberts noted about related recent regulatory reform proposals, "By tying up essential safeguards in enormous amounts of red tape, the legislation would covertly undermine longstanding protections for child safety, food safety, auto safety, and other broadly shared values."[49]

[45] See, e.g., Hamburger, *Is Administrative Law Unlawful?*, n. 29.
[46] *Association of American Railroads* v. *United States Department of Transportation*, 721 F.3d 666 (D.C. Cir. 2013), vacated and remanded by *Department of Transportation* v. *Association of American Railroads*, 135 S. Ct. 1225 (2015) (but see Justice Thomas' dissenting opinion); Justice Thomas' opinion in *Perez*, n. 39; *Gundy* v. *United States*, 139 S. Ct. 2116 (2019); and *Kisor* v. *Wilkie*. 139 S. Ct. 2400 (2019).
[47] These proposals stretch back at least to Gingrich's "Contract with America." See Richard Plides and Cass Sunstein, "Reinventing the Regulatory State," *University of Chicago Law Review* 62, no. 1 (1995): 1. See more recently Sidney A. Shapiro, "The Regulatory Accountabilty Act of 2011: Way Too Much of a Good Thing," *Administrative and Regulatory Law News* 37, no. 3 (Spring 2012): 10.
[48] Peter Shane, "The Quiet GOP Campaign against Government Regulation," *The Atlantic*, January 26, 2017.
[49] Martha Roberts, "The Misguided Regulatory Accountability Act," *The Regulatory Review*, March 29, 2017.

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1.3 Insidious Risks

"Anti-administrativist" thinking amounts to a paradoxical demand for administrative law without public administration. This impulse is not new and has arisen throughout American history.[50] But there are also more insidious problems that are inherent in the way that administrative lawyers collectively think about their subject, what they consider to be the fault lines of disagreement, and what they understand to be administrative competence.

As Jerry Mashaw argued over two decades ago, "mental images" about administrative law influence "not just what we expect and what we see, but also what we demand and or affirm."[51] These images and the assumptions that accompany them are part of the modus operandi of the subject. Although administrative lawyers rarely identify these images and assumptions, let alone ponder them, recognition of these images and assumptions reveals the way in which they dominate administrative law thinking, and thus the administrative law imagination. That domination is at the expense of seeing the importance of administrative competence to administrative law.

1.3.1 Constraining/Empowering Public Administration

The failure of imagination is reflected in the way that all administrative law disagreement ends up being binary. Administrative law is primarily characterized as an instrument for controlling and limiting the administrative state, and that constraint is often viewed in conflict with public administration delivering on its mandates. From this perspective, public administration must be untrammeled by law, or at least given nonlegal space in which to maneuver, for it to be efficacious. There are of course many variations on this, but overall the choice to be made in administrative law is understood as being between two options: either to interfere with public administration or to leave it be. This choice is described in a variety of ways: as between "law's abnegation"[52] and the dominance of a

[50] Discussed in Part II. See also Metzger, "1930s Redux: The Administrative State under Siege," n. 42; and Cass Sunstein and Adrian Vermeule, "Libertarian Administrative Law," *University of Chicago Law Review* 82, no. 1 (2015): 393.

[51] Jerry L. Mashaw, *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (New Haven, CT: Yale University Press, 1997), 1.

[52] Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Cambridge, MA: Harvard University Press, 2016).

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singular vision of the rule of law;[53] as between rules and discretion;[54] or as between deference and intensive review.[55]

The notion that the citizens of the United States must make a choice between having an administrative state complying with the rule of law and having clean water, regulated markets, and social security is absurd. It is particularly farcical given that the administrative state is delivering these things while at the same time law is constituting, empowering, limiting, and holding public administration to account. Legislative mandates are both sources and constraints on authority. Accountability mechanisms both limit and also frame understandings of administrative power. Administrators are often being simultaneously held to account and enabled to implement their statutory responsibilities. Embedded in the legal reasoning of judges are divergent approaches to understanding what administrators do and how they should do it. *Rapanos* is a perfect example of this. The dissenting judges didn't just yield to the Corps – they analyzed it's reasoning in considerable detail.

And yet despite all this, law is understood to play only one role – limiting public administration – and nothing else. Moreover, that role is characterized as having no dimension and no nuance. Law either interferes or it does not. There is no recognition that law could take a variety of forms or play varied roles in administrative law. Understood that way, the choice for administrative lawyers is a dismal one. It is either between squeezing the life out of the administrative state or letting it overrun all else.

The dominance of this binary choice is so powerful that it is hard to escape. Even Sunstein and Vermeule in their insightful dissection of the "new Coke" find themselves forced into this dichotomy:

> [P]ublic law in effect trades off the risks of executive abuse against other goals and commitments. These include democratic participation and accountability, which will sometimes lead to a stronger executive; efficiency in government, which can lead in the same direction; rational and coordinated policymaking; and (the primary Hamiltonian theme) the promotion of overall welfare, often by means of executive action from public officials, who sometimes display constitutionally legitimate

[53] Hamburger, *Is Administrative Law Unlawful?*, n. 29.

[54] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Enquiry* (Urbana: University of Illinois Press, 1965).

[55] Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State*, n. 52; and Emily Hammond Meazell, "Presidential Control, Expertise and the Deference Dilemma," *Duke Law Journal* 61, no. 8 (2012): 1763.

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