State Administrative Constitutionalism and Environmental Rights: Judicial Review and New York's Green Amendment

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Since New York's Environmental Rights Amendment took effect in 2022, judges and litigants alike have understandably struggled to make sense of it. The "Green Amendment" presents unique interpretive challenges as a state constitutional positive right that is closely related to a preexisting regulatory scheme. Thus far, Green Amendment claims have been accompanied by statutory causes of action. Consequently, courts' early interpretations of the right have, at best, entangled—and at worst, equated—the right with adherence to existing environmental laws, especially the State Environmental Quality Review Act (SEQRA).

Reviewing environmental statutory and constitutional rights claims concurrently raises questions related to state constitutional interpretation, administrative agencies' role in constitutional interpretation, and deference. This Note seeks to propose a framework for reviewing Green Amendment claims within the existing statutory context using lessons from scholarship on state constitutionalism and administrative constitutionalism.

This Note ultimately concludes that democratic proportionality review is the most appropriate way to interpret the Green Amendment as a positive state constitutional right and argues that courts can conduct this proportionality analysis by merely reviewing agencies' mitigation findings under SEQRA using a de novo standard of review. Such an approach acknowledges that administrators engage in constitutional interpretation when implementing their statutes, but it

* J.D., Columbia Law School, 2025; B.A., Vanderbilt University, 2022. Thank you to everyone who reviewed my Note and shared thoughtful feedback, especially Professors Michael Gerrard, Gillian Metzger, William Ohlemeyer, and Rebecca Bratspies. I am also immensely grateful to the staff of the Columbia Journal of Environmental Law for their diligent editorial work.

applies the appropriate standard of review to those interpretations, since courts are the final arbiters of constitutional meaning.

I. Introduction 176
II. State Constitutionalism 184
A. Federal Doctrines and Incompatibility with State Constitutional Rights 184
B. State Judges' Authority to Engage in the Policymaking Inherent to Positive Rights Enforcement 187
C. State Judges' Obligation to Enforce these Rights to Defend Democratic Prerogatives 188
D. State Constitutionalism and the Green Amendment 190
III. Administrative Constitutionalism 190
A. Constitutional Facts and Administrative Constitutionalism 194
IV. State Administrative Constitutionalism 199
A. New York and Administrative Constitutionalism 201
V. New York's Green Amendment and State Administrative Constitutionalism 203
VI. Conclusion 207

I. INTRODUCTION

In 2021, New Yorkers made a pivotal decision at the ballot box: they overwhelmingly supported a ballot initiative to amend the state's constitution, enshrining a "right to clean air and water, and a healthful environment."[1] Also known as the "Green Amendment," its placement within the New York Constitution's Article I "Bill of Rights" puts it on "equal footing with other fundamental liberty or property interests like the rights to property, to petition the government, to religious freedom, and to freedom of speech."[2] Pursuant to longstanding precedent in New York case law that Article I rights are presumptively self-executing,[3] no early judicial applications of the Green Amendment

1. The amendment was supported by 70% of voters. *New York's Environmental Rights Repository,* PACE UNIVERSITY, https://nygreen.pace.edu [https://perma.cc/7WL2-MGG2] (last visited Mar. 13, 2024); N.Y. CONST. art. I, § 19.

2. Rebecca Bratspies, *"Underburdened" Communities*, 110 CAL. L. REV. 1933, 1983 (2022).

3. *See, e.g.*, People v. Carroll, 3 N.Y.2d 686, 690–91 (1958); Brown v. State, 89 N.Y.2d 172, 186 (1996).

have seriously challenged the right's immediate applicability[4] despite attempts from state defendants to argue as much.[5]

However, New York courts have not explicitly construed the breadth of the Amendment. As a result, defendants in Green Amendment cases have argued—sometimes successfully—that their compliance with the state's preexisting environmental regulations adequately protects plaintiffs' environmental rights.[6] Courts accepting this premise have declined to conduct an additional analysis of whether the plaintiff's Green Amendment rights were violated.[7] For example, courts have dismissed Green Amendment cases for failure to state a claim in light of defendants' procedural compliance with the State Environmental Quality Review Act (SEQRA)[8] and have dismissed others for lack of standing to challenge an agency's SEQRA procedures.[9] Such rulings equate the protections provided by the statute with those provided by the Amendment.

The desire to conflate SEQRA and Green Amendment protections is understandable: at first glance, SEQRA's requirements seem geared towards the protection of environmental rights. But a closer look at SEQRA's substantive components demonstrates why such an approach is untenable. SEQRA is New York's environmental review statute. It differs from the federal environmental review statute—the National Environmental Policy Act (NEPA)[10]—because agencies under SEQRA must issue a "findings" statement certifying that a

4. *See, e.g.*, Fresh Air for the Eastside, Inc. v. State, 229 A.D.3d 1217, 1220 (N.Y. App. Div. 4th Dept. 2024) (ruling in favor of defendants on the narrow ground that a court may not order mandamus for discretionary decisions, and declining to independently interpret the Green Amendment or determine whether or not it is self-executing because such analysis would be purely "academic" given court's lack of authority to compel relief). *See generally, e.g.,* Fresh Air for the Eastside, Inc. v. State, 2022 WL 18141022 (N.Y. Sup. Ct. 2022); Marte v. City of New York, 2023 WL 2971394 (N.Y. Sup. Ct. 2023); Matter of Renew 81 for All by Fowler v. Dep't of Transp., 204 N.Y.S.3d 666 (N.Y. App. Div. 4th Dept. 2024); Seneca Lake Guardian v. Dep't of Env't Conservation, No. EF2022-0533 (N.Y. Sup. Ct. 2023).

5. *See, e.g.*, Matter of Renew 81 for all by Fowler v. Dep't of Transp., No. 007925/2022, at 12 (N.Y. Sup. Ct. 2023) ("Respondents argue there can be no cognizable claim under the Green Amendment" because it "contains no operative language").

6. *See, e.g., Renew 81 for All*, No. 007925/2022, at 12 ("Respondents assert compliance with SEQRA protects Petitioners' rights").

7. *See supra* note 4.

8. *See, e.g.*, *Marte*, 2023 WL 2971394, at *6 ("The Court hesitates to create a brand-new route to challenge developments on an environmental basis").

9. This implies there is no separate constitutional injury. *Seneca Lake Guardian*, No. EF2022-0533, at 3 (N.Y. Sup. Ct. 2023) ("[T]he type of harm that would allegedly be suffered by petitioner's members is not sufficient to confer standing").

10. 42 U.S.C. §§ 4321–4370(h).

project's adverse environmental effects will be mitigated "to the maximum extent practicable."[11] This language insinuates a substantive component: environmental protection to the extent it is realistically possible, "consistent with social, economic and other essential considerations."[12] However, New York state courts have effectively nullified SEQRA's substantive component by according state agencies incredible deference when reviewing agency findings.[13] In its current interpretive form, SEQRA is no more than a strictly procedural information-forcing statute,[14] with judicial review so deferential that virtually no concrete mitigation is required.[15]

11. N.Y. Env't Conserv. Law § 8-0109 (McKinney) ("When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided.").

12. *Id.*

13. Citizen challenges to SEQRA findings are only possible through New York's Administrative Procedure Act. NY C.P.L.R. § 7801–7806 (McKinney). Under the Article 78 "hard look" standard of review, relief is only granted where an agency action could not be justified upon any rational basis. Pell v. Bd. of Ed., 313 N.E.2d 321, 325 (N.Y. 1974) ("Rationality is what is reviewed under both the 'substantial evidence' rule and the 'arbitrary and capricious' standard"). Courts have characterized the SEQRA "hard look" review as "flexible . . . allowing considerable latitude for the exercise of discretion by the responsible administrative body." Aldrich v. Pattison, 486 N.Y.S.2d 23, 30 (1985). However, courts' construction of the requisite rationality is so lenient as to virtually foreclose any meaningful challenge to agency decisionmaking, as there is no rule "of strict substantive compliance with SEQRA's call for protection of the environment." MICHAEL GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 7.04 (Lexis 1990) (updated September 2023); Henrietta v. Dep't of Env't Conservation, 430 N.Y.S.2d 440, 447 (1980). *See also* Michael Gerrard & Edward McTiernan, *Survey of 2022 Cases Under State Environmental Quality Review Act*, N.Y.L.J., July 13, 2023, at 1 ("[I]f an EIS has been prepared, very rarely will the approvals be annulled on SEQRA grounds").

14. At most, one could say that all "SEQRA requires [is] that the agency permitting or undergoing an activity comply with the substantive mandates of laws like the Clean Water Act or the Clean Air Act." Philip Weinberg et al., *Discussion: The Historical Development of SEQRA*, 65 ALB. L. REV. 323, 344 (2001). However, even that limited assertion may exaggerate SEQRA's requirements. In scenarios where there is any lingering doubt about whether the limited rationality review supports agency determinations, courts "must resolve reasonable doubts in favor of the administrative findings and decisions." *Henrietta*, 430 N.Y.S.2d at 448. In other words, SEQRA only requires agencies to *ostensibly* comply with the substantive environmental mandates in other laws.

15. For example, New York courts have held that "[d]issatisfaction with an agency's proposed mitigation measures is not redressable by the courts so long as those measures have a rational basis in the record." Jackson v. Urban Dev. Corp., 494 N.E.2d 429, 439 (N.Y. 1985). However, "nothing in the act bars an agency from relying upon mitigation measures it cannot itself

If SEQRA required the balancing of environmental harms and competing policy considerations within the parameters of a substantive environmental protection mandate, conflating SEQRA compliance with adequate protection of environmental rights might logically make sense. However, this conflation is incompatible with the current status quo, where courts' deferential review of SEQRA findings has stripped the statute of its substance. New York courts have arrived at this untenable position by applying federal administrative and constitutional law doctrines to state contexts without question. This is understandable, as state courts rely heavily upon federal court doctrines,[16] and federal jurisprudence has never comprehensively addressed two theories that are important to the Green Amendment's implementation: state constitutionalism and administrative constitutionalism.[17] But these disciplines must enter the dialogue surrounding the Green Amendment's implementation, because the Green Amendment is a state constitutional positive right that is closely tied to an existing regulatory scheme. The Amendment thus exists at the intersection of state constitutionalism and administrative constitutionalism. To interpret it faithfully, judges must grapple with what that means.

Scholars of state constitutionalism agree that state constitutional amendments must be construed differently than federal amendments due to the major structural differences between the federal and state constitutions.[18] State constitutional amendments are often positive rights, which act as a check on state governmental discretion and

guarantee in the future." *Id.* at 432. Deference to the administrative agency, with respect to scientific judgement supporting mitigation findings, is presumed with little qualification. For example, if "conflicting expert testimony is presented to DEC or another lead agency, the courts will generally defer to the lead agency's judgment about what view to accept." GERRARD ET AL., *supra* note 13, at § 5.11.

16. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1834 (2001) ("[S]tate courts draw heavily from federal justiciability principles").

17. Federal courts have not addressed state constitutionalism because state courts are the final arbiters of state constitutional interpretation. *See* Murdock v. Memphis, 87 U.S. 590, 626 (1874) ("The state courts are the appropriate tribunals . . . for the decision of questions arising under" state law). Scholars have various theories as to why federal courts have failed to address administrative constitutionalism. *See, e.g.*, Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 526–27 (2015) (explaining one theory of why courts have resisted addressing administrative constitutionalism).

18. States' unique constitutional attributes include a weaker separation of powers, an elected judiciary, and constitutional amendments through direct democracy ballot measures—among other attributes that will be elaborated upon *infra* Part II. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1169 (1999).

place an affirmative duty on state courts to implement them.[19] Positive rights are self-executing, even if their execution requires state courts to take actions that federal courts might denigrate as "judicial policy making."[20] The interpretation and enforcement of state constitutional rights to education provide a prominent example.[21] A state court ruling on state constitutional rights therefore cannot justify an abdication of duty predicated on judicial restraint, the countermajoritarian difficulty, or the separation of powers.[22]

Scholarship on administrative constitutionalism further demonstrates how inappropriate judicial abdication is in the context of positive rights. Administrative constitutionalism posits that federal agencies interpret and implement the Constitution through their ordinary

19. Positive rights impose an affirmative duty upon the state to "realize and advance the objects and purposes for which . . . powers have been granted." D.J. GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 30 (1986). *See also* Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1058 nn.5–7 (1993) ("A number of state courts have interpreted state constitutions as providing positive rights for the poor and have insisted that state legislatures pass laws to vindicate" these positive rights). In this context, judicial review "must serve to ensure that the government is doing its job and moving policy closer to the constitutionally prescribed end." Herskhoff, *supra* note 18, at 1138.

20. Because state courts are "not bound by Article III," state and federal judicial practices differ drastically. Hershkoff, *supra* note 16, at 1836. "Some state courts issue advisory opinions, grant standing to taxpayers challenging misuse of public funds, [] decide important public questions even when federal courts would consider the disputes moot," and comfortably discharge "functions that [would] seem intuitively nonjudicial in the federal system." *Id.* (citations omitted). Meanwhile, because state court rulings lack finality, the judiciary effectively engages in a dialectical process of interpretation and amendment by subsequent ballot measures. Herskhoff, *supra* note 18, at 1163 ("Because state constitutional amendments are . . . ordinary events in a state's political life, state court judges can demonstrate a greater willingness to experiment with legal norms, on the assumption that their judgments comprise only the opening statement in a public dialogue with other branches of government and the people") (citations omitted). Professor Douglas Reed characterizes this public dialogue as "popular constitutionalism," which consists of judges interpreting state constitutional provisions and citizens "seek[ing] to redefine or reinterpret those same or other provisions" in response, such as by subsequent ballot or legislative initiatives. Douglas S. Reed, *Popular Constitutionalism: Toward A Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 890 (1999).

21. *See infra* Part IV(A), which discusses New York's interpretation of the right to education in Campaign for Fiscal Eq., Inc. v. State, 801 N.E.2d 326, 330–332 (N.Y. 2003) (affirming lower court's issuance of a remedial policy directive reorganizing the state's financing of public education due to its failure to provide children with a sound basic education, as guaranteed by the state constitution).

22. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2d ed. 1962) (establishing the enduring argument that an unelected judiciary should not overturn the will of the government's more democratic branches).

activities.[23] Federal agency actions are generally subject to a deferential standard of review, premised both upon expert agencies' superior competence and the judiciary's status as an undemocratic actor.[24] However, courts—not agencies—have the ultimate expertise and authority in constitutional interpretation.[25] Thus, administrative constitutionalism has paved the way for an expanded judicial review—characterized by decreased deference accorded to agencies and a greater willingness to impose heightened requirements beyond what the Administrative Procedure Act requires—to ensure that constitutional values are protected.[26] Essentially, the constitutional role that federal administrators play has shaped administrative law doctrines at the federal level and eroded some of the basis for deference, because courts should not defer to agencies' constitutional interpretations.[27]

By extension, a highly deferential review of agency action is even less justifiable where that action burdens a state constitutional right. The institutional competence basis for deference to agencies is diminished both by the judiciary's superior expertise in constitutional interpretation and by state judges' democratic accountability.[28] State constitutional amendments' status as products of direct democracy and as mechanisms for limiting governmental discretion further

23. Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present,* 96 VA. L. REV. 799, 801 (2010). These activities can include rulemaking, enforcement, adjudication, and more. Ross, *supra* note 17, at 522 ("[B]y fleshing out and applying statutes that rest on constitutional values, the agencies are undertaking a form of constitutionalism.").

24. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (establishing expertise and accountability to the elected executive as the basis for deference); *See also* Bickel, *supra* note 22.

25. Martin Redish & William Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 327 (2017). *See also* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

26. Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 509 (2010) (describing how federal courts have "intensified arbitrary and capricious review," beyond what the APA was initially read to require, in order to ensure constitutional rights are adequately protected by administrators); 5 U.S.C. § 706.

27. This is not a novel concern. The Court previously sought to mitigate the discomfort associated with deference to agency constitutional interpretation through the "constitutional fact doctrine." *See infra* Part III(A). *See generally* Crowell v. Benson, 285 U.S. 22 (1932); Redish & Gohl, *supra* note 25, at 327.

28. *See supra* note 20 and accompanying text; Herskhoff, *supra* note 18, at 1158 ("[I]n all but a handful of states, state judges are popularly elected and retained").

bolsters the comparative legitimacy of state court execution.[29] At the same time, if a state's legislature and judiciary both remain silent on a new amendment's meaning, state agencies—engaging in administrative constitutionalism as they "flesh[] out and apply[] statutes that rest on constitutional values"[30]—will be the only branch interpreting the state constitution. Therefore, deference to state agency action bearing on positive—and thus self-executing—rights is an improper deferral to agency constitutional interpretation. That such a deferral would be plainly unconstitutional highlights why New York state courts must adopt a different standard of review.

This Note seeks to determine what that standard of review should be. It endeavors to expand upon the initial literature introducing "state administrative constitutionalism," as coined by Professor Katherine Shaw and preliminarily cataloged by Professor Jonathan Marshfield.[31] Specifically, it aims to contribute to this discipline with a discussion of why state administrators' interpretations of state constitutions ought to shape judicial review of state administrative action. To accomplish this, the Note outlines how the interaction between state constitutionalism and administrative constitutionalism serves to inform a framework for conceptualizing the role of the state judiciary—as arbiter of various affirmative constitutional rights—with respect to the administrative apparatus. The product of this discussion is employed to develop a theory of what the proper judicial enforcement of New York's Environmental Rights Amendment should consist of. Namely, I assert that state administrative agencies should be tasked with transparently interpreting and implementing the Green Amendment within the existing statutory context. However, when administrative interpretations threaten constitutional rights, judges must be permitted to conduct a more searching review. This expanded judicial review should exceed the deferential standard

29. Daniel B. Rodriguez, *State Constitutionalism and the Scope of Judicial Review, in* NEW FRONTIERS OF STATE CONSTITUTIONAL LAW 71 (Gardner & Rossi eds., 2010) (characterizing state constitutional amendments as direct democracy mechanisms which act as a "critical external constraint on the exercise of power").

30. Ross, *supra* note 17, at 522.

31. Katherine Shaw, *State Administrative Constitutionalism*, 69 ARK. L. REV. 527 (2016). Although Professor Shaw's paper discusses how state administrators interpret the federal constitution in the context of cooperative federalism, she acknowledges that state agencies interact with "both state and federal constitutions." A more recent elaboration includes discussion of how state constitutional amendments are interpreted by state administrators. Jonathan L. Marshfield, *Popular Regulation? State Constitutional Amendment and the Administrative State*, 8 BELMONT L. REV. 342 (2021).

typically employed in administrative challenges, because that standard of review exists to address structural concerns about the countermajoritarian nature of judicial power,[32] and those concerns do not apply in the context of state administrative constitutionalism.[33]

Given that the unique institutional context of state constitutional law must shape judicial review, my Note suggests that state judges can implement the Green Amendment by ensuring that SEQRA's "mitigation" requirement is truly met—specifically by decreasing deference when reviewing agencies' SEQRA findings statements and ensuring that environmental concerns are given increased weight in the analysis, now that their protection is constitutionally obligatory. This review should consist of: 1) courts' independent review of agency SEQRA mitigation findings, which involves courts' independent determination of the weight that must be accorded to environmental rights when reconciling the various competing interests under the SEQRA framework; and 2) an intermediate, moderately deferential review of the quantitative factual basis that supports the mitigation finding, exceeding the "hard look" rationality standard typically employed in Article 78 proceedings.

Part II elaborates upon the distinct characteristics of state constitutions and the role of state court judges to clarify why the judiciary can command affirmative judicial enforcement of state constitutional rights against coordinate branches. Part III explains how administrative constitutional interpretations have shaped administrative law doctrines, and what the development of those doctrines indicates with respect to deference to agency determinations bearing upon constitutional rights. Part IV unifies the discussion of state constitutionalism and administrative constitutionalism to argue that judicial restraint is more flawed than judicial activism in the context of state constitutional rights that bear upon agency interpretations, because judicial failure to enforce positive rights is functionally equivalent to wrongly rendering deference to an agency's constitutional interpretations. A case study of New York's implementation of its state constitutional right to education is used to illustrate the point. Part V applies concepts from the prior discussion to New York's Environmental Rights Amendment and proposes a framework for adjudicating constitutional rights claims that appear alongside SEQRA challenges. Specifically, I suggest that courts can properly enforce the Green

32. *See supra* notes 26–27 and accompanying text.
33. *See supra* notes 16–20 and accompanying text.

Amendment by reviewing SEQRA mitigation determinations *de novo* and reviewing the factual basis for these determinations using an expanded judicial review that retains some deference but more closely resembles the heightened requirements of federal rationality review.

II. STATE CONSTITUTIONALISM

State courts play a different role than federal courts due to the distinct nature of state constitutions. Specifically, state constitutions contain positive rights, are frequently amended pursuant to popular will, have a weaker separation of powers, and tend to be more concerned with legislative overreach than judicial overreach.[34] Thus, in the state constitutional context, there is no anti-democratic threat posed by judicial enforcement of positive rights. Additionally, judges are at less of a disadvantage relative to the other branches when it comes to the legitimacy and competency required to engage in alleged "policymaking" through judicial review.[35] In reality, the greatest hindrance to state judges who endeavor to implement and enforce their state constitution is the importation of ill-fitting legal doctrines from the federal courts. Instead, judges should use a proportionality approach to interpret state constitutional rights.[36] To protect the rights of the people, and enact their will, state judges must root their interpretive decisions in the distinct attributes of state constitutional law.

A. Federal Doctrines and Incompatibility with State Constitutional Rights

Federal constitutional law doctrines are incompatible with state constitutional adjudication because state constitutions contain an abundance of rights—including positive rights—while the federal Constitution contains a much smaller number of strictly negative rights.[37] While negative rights are protections *from* government

34. Marshfield, *supra* note 31, at 344–46.

35. *See infra* text accompanying notes 55–56.

36. Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1881 (2023).

37. Hershkoff, *supra* note 18, at 1133, 1135 (characterizing the federal Constitution as having only negative rights while "every state constitution in the United States addresses social and economic concerns and provides the basis for a variety of positive claims against the government"). There is one exception to this proposition: the Sixth Amendment of the federal Constitution provides positive rights to individuals accused of crimes, which include a jury trial and assistance of counsel. U.S. CONST. amend. VI.

action—i.e., freedom of speech—positive rights are entitlements *to* government action—i.e., the right to education.[38] Positive rights are "prescriptive duties compelling government to use [its] power to achieve constitutionally fixed social ends."[39] In other words, positive rights in state constitutions are self-executing and demand judicial enforcement.

Federal courts accustomed to adjudicating only negative rights have developed doctrines unsuitable for positive rights adjudication. It has been argued that federal courts' "strict scrutiny" standard for constitutional adjudication resembles a categorical reasoning model that treats constitutional rights as absolutes, or "trump[s]" over all other considerations.[40] Under the "strict scrutiny" standard employed by federal courts, there are almost no exceptions or limiting principles; fundamental rights can (almost) never be violated.[41] This categorical approach is only instructive in the context of a limited number of negative rights that do not need to be qualified in relation to one another.

In contrast, the numerosity of state constitutional rights—and the fact that positive rights command state action—means that these state rights often conflict with one another.[42] Judges cannot view the existence of one right as a trump over all other considerations and hope to duly interpret all rights laid out in their state's constitution; positive rights do not lend themselves to implementation using that interpretive framework. Thus, state court judges mistakenly applying federal court doctrines can hinder the implementation of positive rights.

For example, state courts have ruled constitutional environmental rights non-self-executing due to their failure to engage in good faith interpretations of environmental rights as positive rights. Some state courts outside of New York have held that state constitutional

38. Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights,* 20 RUTGERS L.J. 881, 883 n.12 (1989) (citation omitted) ("A negative right is a right to be free to engage in an activity without governmental interference. A positive right connotes a right to engage in the activity, even if it requires affirmative government assistance.").

39. Hershkoff, *supra* note 18, at 1156.

40. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977).

41. Jamal Greene, *Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28, 60 (2018) (explaining how the "result [of constitutional adjudication] largely follows from [the] initial identification" of a right and categorization of the dispute into a tier of scrutiny).

42. Bulman-Pozen & Seifter, *supra* note 36, at 1898 (explaining how the conflicts and tensions that exist between rights in state constitutions "follow[] from the number and specificity of rights contained" in them).

environmental rights were not self-executing "because they were not formulated as a limit on governmental power."[43] Essentially, those courts claimed that the fact that environmental rights are positive rights must make them necessarily unenforceable. But this is wrong, and it demonstrates the consequences of exclusively adhering to federal court doctrines that are only instructive when interpreting negative rights. In actuality, positive rights *are* self-executing; judges have historically executed them by compelling government action, most enthusiastically in the context of education.[44] To do so, they must merely apply a framework appropriate for the context.

According to Professors Jessica Bulman-Pozen and Miriam Seifter, state constitutional rights adjudication requires judges to use a "democratic proportionality framework," in order to "strike a balance between protecting rights and recognizing legitimate democratic limits on those rights."[45] This approach requires judges to view rights in conjunction with one another, comparing rights' relative importance alongside potential infringements to adjudicate claims.

Courts in all fifty states should technically already be doing this; every single state constitution directs its courts to interpret it "as a whole, rather than clause by clause."[46] However, because democratic proportionality review requires broad analysis and interpretation of various rights and democratic prerogatives, it can devolve into questions related to policy preferences.[47] For example, how should the government protect a right, and to what extent? Which rights should be prioritized over others?[48] As a result, judges have appeared

43. Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?,* 17 HARV. ENV'T L. REV. 333, 373 (1993).

44. Hershkoff, *supra* note 18, at 1187 (describing how various state courts have "attempt[ed] to construct a manageable definition of educational adequacy for constitutional purposes" and commanded legislative action to enforce that standard of adequacy). For a New York example, *see infra* Part IV(A) discussing Campaign for Fiscal Eq., Inc. v. State, 801 N.E.2d 326, 330–332 (N.Y. 2003) (affirming lower court's issuance of a remedial policy directive reorganizing the state's financing of public education due to its failure to provide children with a sound basic education, as guaranteed by the state constitution).

45. Bulman-Pozen & Seifter, *supra* note 36, at 1896.

46. *Id.* at 1891–92 ("[A]ll fifty state high courts purport to interpret their state constitutions as a whole, rather than clause by clause" and "[m]any state courts also engage in case specific, contextual balancing to determine outcomes and remedies, accepting that their democratically embedded and common-law role differs from that of federal courts").

47. *Id*. at 1899 ("[T]he task state courts face in combining clauses is not mechanical but requires judgment").

48. *Id.* (explaining how judges will view "some rights as weightier than others even as they decline to replicate rigid tiers of scrutiny").

hesitant to conduct review in that form, citing notions of democracy, separation of powers, and/or the countermajoritarian difficulty.[49] However, none of these justifications apply; state judges have the authority and legitimacy to conduct such reviews.

B. State Judges' Authority to Engage in the Policymaking Inherent to Positive Rights Enforcement

The reasons that state court judges often cite to justify their refusal to implement state constitutional rights originate from federal court doctrines and are frequently inapplicable to state constitutional contexts. Notions of democracy and the countermajoritarian nature of judicial review animate the federal judiciary's restraint and refusal to engage in policymaking that might infringe on the prerogatives of the legislature.[50] However, unlike the federal judiciary, most state court judges are electorally accountable.[51] Therefore, it is not democratically improper for state judges to affirmatively command the legislature; in fact, it is by design. Democratically elected judges became common during the mid-nineteenth century Reform Movement as a way for citizens to restrain state legislatures—because the judiciary's accountability provided the people with a mechanism for control and expanded the legitimacy of its actions.[52]

Additionally, there is less need for judicial restraint at the state level because state constitutional law decisions lack the finality of their federal counterparts. According to Professor Barry Friedman, judicial review suffers from a legitimacy deficit and perceptions of being antidemocratic when court rulings hold (seemingly) permanent

49. *Id.* at 1891 (explaining how state court judges invoke federal notions of a court's proper institutional role to justify their refusal to "express judgments about competing interests[] or draw difficult lines").

50. *Id.*

51. Bulman-Pozen & Seifter, *supra* note 36, at 1899 ("[State courts] are majoritarian, not counter-majoritarian; their judges are elected and recallable rather than insulated; and their decisions are readily countermanded rather than 'infallible [because they] are final'") (citation omitted).

52. Feldman, *supra* note 19, at 1066–67 ("State constitutions were amended to provide explicitly for judicial review or election of judges. An elected judiciary, many thought, would possess greater legitimacy."); James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 834 (1991) (explaining how reformers "sought to safeguard their new constitutional order by limiting the power of the state legislatures" including through making the judiciary electorally accountable).

normative force.[53] This makes sense in the federal context, given that the United States Constitution has only seen twenty-six amendments since the nation's founding. However, there have been thousands of state constitutional amendments nationally; the New York Constitution alone has been amended over 200 times since its last full-scale revision via constitutional convention in 1938, and there have been 19 amendments since 1996.[54] Thus, the comparative ease with which state constitutional amendments can be passed means that state court decisions can be effectively overruled, and the lack of finality in state court decisions empowers judges to issue rulings that, on the federal level, might otherwise be denigrated as "judicial activism."[55] In fact, "state legislatures not only accept such judicial decisionmaking as entirely legitimate, but also expect that within defined boundaries courts will make such choices."[56]

Relatedly, state court judges have broad power to make legislative and policy judgements because they possess common law powers. State judiciaries interpret—and make—the common law; and this "common law process remains the core element in state court decision-making" today.[57] A "paradigmatic example" is tort law, where judges "defin[e] the boundaries of socially acceptable conduct" relying almost "exclusively on their own policy perceptions."[58]

C. State Judges' Obligation to Enforce these Rights to Defend Democratic Prerogatives

Judges must implement positive rights if they hope to fulfill their institutional purpose. At the state level, the separation of powers is

53. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 646 (1993) ("Critics of judicial interference with popular will tend to see constitutional decisions as roadblocks to majoritarian action. Because the Constitution trumps all other legal (read *legitimate*) decisionmaking, a judicial decision, if final, would frustrate majority will.").

54. *Constitutions and Constitutional Conventions*, N.Y. STATE ARCHIVES, https://www.archives.nysed.gov/research/constitutions-and-constitional-conventions [https://perma.cc/ZS4B-3X2B] (last visited Aug. 14, 2024).

55. Hershkoff, *supra* note 18, at 1131 ("[C]onstitutional amendments are relatively ordinary events in a state's political life, state court judges can demonstrate a greater willingness to experiment with legal norms, on the assumption that their judgments comprise only the opening statement in a public dialogue with the other branches of government and the people.").

56. Judith S. Kaye, *State Courts at the Dawn of A New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 34 (1995).

57. *Id.* at 6.

58. D. Zachary Hudson, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 378 (2009).

not as clear or strong as at the federal level.[59] While the separation of powers is a primary accountability tool against the federal government, state drafters selected constitutional amendments—and judicial enforcement of those amendments—as their preferred mechanism for influencing or curbing government action.[60] Thus, the judiciary's proper role "in such a regime . . . must serve to ensure that the government is doing its job and moving policy closer to the constitutionally prescribed end."[61] Shirking that duty, under the guise of preventing a countermajoritarian overreach and maintaining the separation of powers, operates to the detriment of democracy.[62]

State courts' refusal to implement positive constitutional rights could also be viewed as a refusal to facilitate dialogue and important political contestation. Professor Douglas Reed argues that "popular constitutionalism" consists of the "dialectical exchange between judicial rulings based on state constitutional provisions and popular initiative politics that seek to redefine or reinterpret those same or other provisions."[63] In Reed's conception, state courts are an integral component of enacting the popular will, alongside "state citizenries [who] have used the [constitutional] initiative process to engage" in political contestation.[64] It is also tremendously important that constitutional amendments in most states embody the will of the people. Courts implementing a constitutional right added by ballot amendment are quite literally enacting the majority's will through direct democracy.[65]

59. John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers*, 66 TEMP. L. REV. 1205, 1220–21 ("[T]he divergences between federal and state constitutions [with respect to separation of powers] are too great to permit much reliance" on federal doctrine, and such reliance "does not lead to happy results in state allocation of powers cases").

60. Rodriguez, *supra* note 29, at 19 (characterizing state constitutional amendments and direct democracy as a "critical external constraint on the exercise of power," which not only "give[s] to the state's citizens an avenue for creating public policy without representative intermediaries, but also [serves as] an important weapon with which to defend themselves against liberty encroachments by government authorities"). *See also* Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U.L. REV. 79 (1998).

61. Hershkoff, *supra* note 18, at 1139.

62. Feldman, *supra* note 19, at 1089 ("[W]hen positive rights are at issue legislative action represents the good and legislative inertia the evil").

63. Reed, *supra* note 20, at 890.

64. *Id.*

65. Rodriguez, *supra* note 29, at 71. This statement holds true regardless of the ballot measure's source. Even measures placed on the ballot by the state legislature require voters' direct support.

D. State Constitutionalism and the Green Amendment

State courts should engage in proportionality analysis to interpret state constitutional rights and should affirmatively enforce positive rights. Sometimes they do. But in the case of New York's Green Amendment, courts interpreting it thus far have fallen into the traps outlined by scholars of state constitutionalism; they have abdicated their affirmative duty due to an overreliance on federal doctrine.[66] However, the case of New York's Green Amendment is more complex because there is an existing regulatory scheme implemented by administrative officials who should, in theory, be enforcing the right. There, the improper application of administrative law doctrines to constitutional adjudication is also contributing to the Green Amendment's underenforcement.

III. ADMINISTRATIVE CONSTITUTIONALISM

If the discourse around state constitutionalism sees the state judiciary's affirmative implementation of positive rights as merely one voice involved in the process of defining the contours of those rights, the literature on administrative constitutionalism posits that the executive branch's administrative agencies are also among the cacophony.

Administrative constitutionalism, defined as "agencies' interpretation and implementation of constitutional law,"[67] is an integral aspect of constitutional governance nationally, because "most governing occurs at the administrative level and, thus, that is where constitutional issues often arise."[68] With a growing body of scholarship, literature on administrative constitutionalism establishes that administrative agencies necessarily interpret the Constitution as they administer their statutory mandate.[69] Some examples of agencies engaging in

66. *See, e.g.*, Marte v. City of New York, 2023 WL 2971394, at *3–4 (N.Y. Sup. Ct. 2023) (justifying refusal to conduct a Green Amendment analysis with the assertion that "a Court is not the right forum to, essentially, modify the state's environmental regulatory scheme regarding consideration of proposals for developments" because "that is the province of the legislature"; and refusing to weigh various competing interests, as is inherent to proportionality analysis, by emphasizing that SEQRA challenges are the appropriate procedural vehicles where a contemplated action (in this case, a zoning change) "must balance environmental impacts with the benefits of that development" (in this case, increased housing)).

67. Lee, *supra* note 23, at 801.

68. Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1898 (2013).

69. *Id.*

administrative constitutionalism include interpretations of equal protection by the Department of Education and the Equal Employment Opportunity Commission,[70] interpretations of due process by the Environmental Protection Agency and Army Corps of Engineers as they sought to define "waters of the United States" in the Clean Water Act,[71] and interpretations of freedom of speech by the Federal Communications Commission.[72] In these cases, agencies interpreted the U.S. Constitution in the process of fulfilling their statutory mandate, and in the process of this constitutional interpretation, they incorporated the judiciary's prevailing constitutional views on administrative action to predict how their efforts were "likely to play in the courts,"[73] given that agencies must operate in the "shadow of judicial review."[74]

However, this constitutional interpretation is not done transparently: agencies do not make clear that they are engaging in constitutional interpretation, and the judiciary does not make clear that this administrative constitutionalism shapes its review of related agency action. For example, agencies generally present their actions "in less contentious statutory or regulatory terms," instead of acknowledging the constitutional influences shaping their decisions.[75] This inscrutability is carried on by the judiciary, which has allowed constitutional concerns to silently "shape[] the development of ordinary administrative law doctrine" rather than acknowledge that administrative constitutionalism occurs.[76] Federal courts have developed many prevailing administrative law doctrines around ensuring adequate protection of constitutional rights. Professor Gillian Metzger contends that, over the preceding decades, the Supreme Court has "heightened substantive scrutiny" in arbitrary and capricious review and "dramatically expanded the range of persons who can challenge

70. Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847 (2018); Lee, *supra* note 23, at 837–44. For discussion of the Food and Drug Administration and equal protection, *see also* Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L. J. 927, 953 (2014).

71. *See* the line of cases stretching from Rapanos v. U.S., 547 U.S. 715 (2006) to Sackett v. Env't. Prot. Agency, 598 U.S. 651 (2023) as EPA, the Corps, and the federal courts dialectically developed a constitutionally acceptable definition of "waters of the United States."

72. Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 101 (2000) (characterizing the FCC as "the constitutional decisionmaker" defining free speech through its regulatory activities).

73. Metzger, *supra* note 68, at 1911.

74. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1111 (D.C. Cir. 1993) ("[A]gency personnel at every level act under the shadow of judicial review").

75. Metzger, *supra* note 68, at 1914; Lee, *supra* note 23.

76. Metzger, *supra* note 26, at 490.

agency action" as a mechanism for enforcing constitutional norms against administrators.[77] The need to enforce these norms was born from the growth of the administrative state and the increased, unaccountable power being delegated to it.[78] This broad authority notably left administrators with discretion to interpret the Constitution when its provisions bore upon the statutes they implemented.[79] However, because administrative law doctrines allow agencies to avoid responsibility for engaging in constitutional interpretation, and allow courts to avoid responsibility for directly reviewing these interpretations, it is ultimately unclear how courts hold administrators "accountable for the constitutional judgments they do make,"[80] specifically in terms of how much deference is granted to these interpretations. Professor Eric Berger argues that the Court's jurisprudence regarding how much deference is owed to an agency action that infringes upon constitutional rights is inconsistent, inchoate, and poorly explained.[81]

Administrative constitutionalism continues to tacitly influence administrative law doctrines related to deference into the present. At the federal level, it only bolsters arguments challenging the legitimacy of the modern administrative state. Broadly, the fact of administrative constitutionalism serves to paint a picture of an overly powerful executive branch infringing on the prerogatives of the judicial and legislative branches. Such an image reinforces claims by critics of the modern administrative state that the expansive power exercised by agencies is unconstitutional.[82]

However, the most prominent legitimacy debates have centered arguments that deference to agency statutory interpretation infringes on the prerogatives of the other branches. These arguments have seen their jurisprudential high-water mark in recent years with the

77. *Id.* at 509. *See also* Maria Ponomarenko, *Administrative Rationality Review*, 104 VA. L. REV. 1399, 1407, 1417, 1420–21 (2018) (explaining how agencies began receiving broader delegated grants of authority following the decline of the nondelegation doctrine in the 1940s, and as a result, courts "gradually imposed more robust and substantive procedural constraints on agency orders and rules").

78. *Id*.

79. *See* Lee, *supra* note 23 and accompanying text.

80. Metzger, *supra* note 26, at 490 ("[J]udicial obfuscation has undermined the extent to which agencies are held accountable for the constitutional judgments they do make").

81. Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2032 (2011) (describing a "deeper phenomenon in constitutional doctrine in which the Court's consideration of administrative discretion in individual rights cases is inconsistent and inchoate").

82. *See, e.g.,* Gundy v. United States, 588 U.S. 128, 149 (2019) (Gorsuch, J., dissenting).

Supreme Court's creation of the major questions doctrine and its overruling of the *Chevron* doctrine as unconstitutional.[83] While these latest decisions have dealt with the constitutionality of judicial deference to agency *statutory* interpretation—ultimately holding that it is the judiciary's role to "say what the law is"[84]—agency *constitutional* interpretation has never been entitled deference.[85] Thus, administrative constitutional interpretations systematically escaping direct review by the judiciary—due to its failure to acknowledge administrative constitutionalism—would be repugnant to commentators who take issue with statutory deference. Notably, *Chevron* deference itself affords administrators greater opportunity to engage in administrative constitutionalism, and with less judicial oversight.[86] Statutory deference provides leeway for an agency to incorporate its own constitutional interpretations when deciding on a course of action. Conversely, constraining agency power and authority—especially with respect to statutory interpretation—eliminates opportunities for agencies to engage in administrative constitutionalism that escapes meaningful judicial review.[87]

Thus, administrative constitutionalism—and federal courts' failure to acknowledge it—likely compounded critics' discomfort with *Chevron* deference. The separation of powers concerns created by statutory deference were actually twofold, even though the Court only acknowledged the statutory component: agencies were receiving deference not only when interpreting statutes, but also—through the leeway afforded by that statutory deference—the Constitution. Accordingly, the Supreme Court's decision to do away with *Chevron* deference can be viewed as a move motivated, in part, by the inadequacies of preexisting doctrine which permitted administrative constitutionalism to go unreviewed by the judiciary.

83. West Virginia v. Env't Prot. Agency, 577 U.S. 1126 (2016); Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

84. *Loper Bright*, 144 S. Ct. at 2257 (quoting Marbury v. Madison, 5. U.S. 137, 177 (1803)).

85. *Id.* at 152 (stating that "agency interpretations of the Constitution are not entitled to deference").

86. Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present,* 167 U. PA. L. REV 1699, 1745–46 (explaining how "conservative Justices' growing skepticism about the constitutionality of judicial deference to agency interpretations of statutes" and "efforts to deeply constrain agencies' ambit and subject them to far closer judicial scrutiny" do not "bode well for the future of administrative constitutionalism"—meaning more deference and broader authority leave room for administrative constitutionalism).

87. *Id.*

In this way, administrative constitutionalism, and the judiciary's frequent failure to directly acknowledge it, continues to shape modern administrative law doctrines. And its power to influence these doctrines lends additional support to the widely accepted principle that agency constitutional interpretation should not be granted deference.

A. Constitutional Facts and Administrative Constitutionalism

The import of deference to agency facts is central to constitutional adjudication at the federal level because particularized facts are necessary to faithfully apply the "strict scrutiny" standard of review in challenges to state action burdening a fundamental right.[88] Deference and scrutiny are in theory two separate analyses: "when courts determine how rigorously to review a governmental policy they (often silently) select a level of deference based on institutional concerns and (usually more explicitly) sometimes also apply a level of scrutiny triggered by the substantive constitutional issues."[89] However, institutional determinations bearing on deference can reduce a court's ability to determine whether a state action is narrowly tailored or furthers a compelling state interest—as is necessary when applying strict scrutiny. Envision a scenario where an agency's choice of the mathematical formula used to calculate how many lives will be saved per year by a new rule determines whether its action infringing upon individual rights is narrowly tailored and furthers a compelling interest. Applying excessive deference to agencies' factual findings (i.e., how many lives will be saved by a rule) could lead to rubber stamping an agency's selection of a formula with sparse scientific support in contrast to its alternatives, but whose application would generate facts resulting in a favorable agency outcome (i.e. the rule would save many lives—and thus the constitutional right infringement is narrowly tailored and furthers a compelling state interest). In this way, excessive deference to facts can obstruct a comprehensive strict scrutiny analysis.

88. *See, e.g.,* Adarand Constructors v. Peña, 515 U.S. 200 (1995) (establishing the "strict scrutiny" standard of review, which requires that state action burdening fundamental rights be the least restrictive and narrowly tailored method of furthering a compelling interest); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 75 ("Constitutional litigation demands fact analysis of the most particularized kind.").

89. Berger, *supra* note 81, at 2074.

In the 20th century, courts took a different approach to mitigating the substantive discomfort with allowing agencies to decide constitutional questions: the "constitutional fact doctrine," a rarely cited source of authority today. The constitutional fact doctrine mandates courts "independently decide factual issues whose resolution will be determinative of constitutional challenges."[90] Professors Martin Redish and William Gohl explain what it means for a factual issue to be determinative of a constitutional challenge in the context of the First Amendment:

> The simple reality is that resolving constitutional challenges of governmental action will often turn on how questions of mixed law and fact, or even pure fact, are resolved—i.e., questions of constitutional fact. For example, if expression sought to be suppressed is determined to be obscene, such suppression does not violate the First Amendment's guarantee of free speech because obscenity has been categorically deemed to fall outside that constitutional protection. On the other hand, if the speech in question is found not to be obscene, then its regulation may well violate the First Amendment. If the regulator, rather than the judicial branch, is given final authority to decide the mixed law-fact question of obscenity, then this effectively undermines, if not circumvents, the judiciary's ability to guarantee protection of constitutional rights.[91]

Despite its decline following the post-*Lochner* erosion of economic substantive due process—where ratemaking cases were the context to which it was most commonly applied—scholars contend that the constitutional fact doctrine's tenets are still highly applicable to modern dilemmas in administrative law.[92] Support for the normative underpinnings of the constitutional fact doctrine is attributed to either Due Process[93] or the Article III separation of powers,[94] but usually both.[95] Scholars have also cited the necessity of fact-bound analysis

90. Redish & Gohl, *supra* note 25, at 290.

91. *Id.* at 291 (citations omitted).

92. *Id*.

93. Adam Hoffman, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1447 (2001) ("The implication is that, where the right at stake is important enough, to allow the agency to have the last word on the central factual question would itself be a violation of due process.").

94. Article III arguments are based on the premise that it is the province of courts, not agencies, to decide questions of law. This is rarely invoked in isolation, and usually alongside concerns about due process. Crowell v. Benson, 285 U.S. 22 (1932) established the Article III basis for constitutional fact review.

95. *See, e.g*., Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward A Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499, 550 (2006); Redish & Gohl, supra note 25.

in constitutional interpretation,[96] the legitimacy deficit of agencies within the administrative state,[97] misrepresentation of science,[98] and the intentional conflation of science and policy to conceal agencies' subjective policy decisions,[99] as justifications for the constitutional fact doctrine. Critics of the constitutional fact doctrine argue it is duplicative, failing to efficiently differentiate functions according to relative competence, as the appellate review model does by affording deference to agency findings of fact.[100]

The doctrine has never been formally overruled, although it hasn't been imposed with regularity since the middle of the twentieth century.[101] The middle of the twentieth century also happens to be when courts began intensifying arbitrary and capricious review.[102] Redish and Gohl assert that the constitutional values upheld by the constitutional fact doctrine have persisted and shaped administrative law under different names and doctrines.[103] Based on Metzger's account of how constitutional values have shaped judicially created administrative law doctrines, one could argue that the rationale for the constitutional fact doctrine remains relevant and compelling; courts have

96. Karst, *supra* note 88 ("Constitutional litigation demands fact analysis of the most particularized kind.").

97. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 276 (1985) ("[S]uch review may be compelled because administrative action suffers from a so-called legitimacy deficit").

98. Angelo N. Ancheta, *Science and Constitutional Fact Finding in Equal Protection Analysis*, 69 OHIO ST. L.J. 1115, 1128 (2008).

99. Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1616 (1995) (describing how agency decisionmakers often "exaggerate the contributions made by science" and "carelessly or deliberately characterize policy choices as matters" best "resolved by science in order to survive a variety of strong political, legal, and institutional forces" and "avoid accountability for the underlying policy" choices animating their decisions"); Jonathan H. Adler, *Super Deference and Heightened Scrutiny*, 74 FLA. L. REV. 267, 286 (explaining that, when science and policy are jointly presented before the judiciary, which lacks authority to review science, the policy becomes unreviewable because "a failure to defer to an agency's assessment and application of the relevant science is, in effect, a failure to defer to the agency's policy judgment").

100. *See e.g.*, Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 945 (2011); JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES (1927).

101. Redish & Gohl, *supra* note 25, at 296–99.

102. Metzger, *supra* note 26, at 490. *See also* Ponomarenko, *supra* note 77, at 1407 ("[B]y the middle of the twentieth century, courts began to scrutinize agency decisions far more closely").

103. Redish & Gohl, *supra* note 25, at 326–27 (citing the substantial evidence standard under Section 706 of the Administrative Procedure Act, the fact that constitutional interpretations were not owed *Chevron* deference prior to its overruling, and Courts' resistance to "legislative efforts to strip the judiciary's ability to decide challenges to the constitutionality of agency action").

merely avoided invoking it explicitly by instead adjusting administrative law doctrines to protect constitutional values.

A recent, prominent example in support of that hypothesis is *Boumediene v. Bush*.[104] There, the Supreme Court found it violated the Constitution's Suspension Clause[105] for the executive to hold alleged "enemy combatants" at Guantanamo Bay if detainees' sole opportunity to challenge their classification as a combatant occurred in an administrative adjudication that was only reviewable by a federal court "under a deferential standard that did not permit factual scrutiny."[106] The Court held that the challenged statutory scheme, which stripped all federal courts of original jurisdiction over detainees' habeas claims and barred them from conducting *de novo* review of the administrative determinations, failed to provide petitioners with an adequate substitute for the constitutionally mandated Writ of Habeas Corpus. Essentially, the administrative configuration was unconstitutional due to "detainees' limited ability to challenge the factual basis on which they [were] being held as enemy combatants"[107] in front of an Article III tribunal, because federal courts lacked the ability to review those factual determinations *de novo*.[108] Thus, these inadequate administrative proceedings unconstitutionally denied petitioners' habeas right.

Metzger argues that the *Boumediene* Court's resolution demonstrates how constitutional concerns have shaped administrative law doctrines, which have, in turn, shaped regulators' behavior as agencies and legislators seek to avoid heavy-handed judicial revision and oversight.[109] The *Boumediene* ruling did not explicitly state that *de novo* fact review was the only mechanism by which habeas could be protected, instead merely claiming that the aggregate protection

104. Boumediene v. Bush, 553 U.S. 723 (2008).

105. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

106. Redish & Gohl, *supra* note 25, at 328.

107. Metzger, *supra* note 26, at 498.

108. Redish & Gohl, *supra* note 25, at 328 ("[I]n one commentator's words, the Court's holding in *Boumediene* 'jealously guards the ability of Article III courts to find facts in constitutional cases'") (quoting Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 535, 578 (2010)).

109. Metzger, *supra* note 26, at 497–501 (describing how judicial decisions invalidating agency actions incentivize administrators to take constitutional concerns seriously prior to taking actions or crafting procedures).

afforded to the detainees was inadequate.[110] Meanwhile, Redish and Gohl claim that *Boumediene* stands for the proposition that an administrative tribunal cannot serve as an adequately neutral decisionmaker for habeas (and due process) purposes unless an Article III court "retains ultimate control over the facts at issue."[111] From this perspective, they claim it serves as evidence of the constitutional fact doctrine's continuing vitality. It is likely that Metzger and Redish and Gohl are both correct, and their approaches represent alternative mechanisms for protecting the same constitutional values.

The fact that federal courts altered and heightened arbitrary and capricious review in the decades following the constitutional fact doctrine's decline supports Metzger's contention that administrative law doctrines were shaped and altered to mediate concerns about the constitutionality of administrators making major decisions bearing on constitutional rights. Imposing these additional procedural constraints on administrators has likely allowed the court to avoid invoking the constitutional fact doctrine, because these constraints either: 1) ensure that courts have room to make important factual determinations, as in the case of *Boumediene*; or 2) impose such extensive procedural requirements upon administrators that compliance with them must necessarily result in arriving at accurate factual conclusions, as in the case of *State Farm*.[112]

Taken together, the existence of these various approaches to constraining administrators' ability to decide questions of constitutional significance supports the contention that, when constitutional rights depend entirely upon agency decisionmaking, some sort of heightened judicial scrutiny is warranted: whether it is *de novo* review of constitutional facts, heightened procedural constraints to ensure the accuracy of facts, or both.

110. Metzger, *supra* note 26, at 498 ("According to the Court, 'the adequacy of the process through which [a detainee's] status determination was made' is a relevant factor 'in determining the reach of the Suspension Clause.'") (quoting Boumediene v. Bush, 553 U.S. 723, 766 (2008)).

111. Redish & Gohl, *supra* note 25, at 328–329.

112. *Id.* at 491 ("[I]t is generally accepted, at least by scholars, that 'arbitrary and capricious' review under *State Farm* is a far cry from the lenient scrutiny originally intended by the Congress that enacted the APA" but administrators having to supply "substantial, contemporaneous, and reasoned explanations for their decisions exerts a powerful disciplining force on the agency's decisionmaking process"); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (holding that rationality review under the APA requires the agency ensure its decision is rational, contemporaneous, adequately explained, relies upon permissible factors, and considers alternatives).

IV. STATE ADMINISTRATIVE CONSTITUTIONALISM

The practice of administrative constitutionalism is no less common at the state level.[113] If anything, administrative constitutionalism should be more pervasive, given that state agencies are subject to less public oversight[114] and state constitutions frequently contain more constitutional rights open to interpretation.[115] Professor Jonathan Marshfield has cataloged how states' "amendomania" influences state agencies' unique form of administrative constitutionalism, concluding that amendments actually serve as a mechanism for checking and shaping administrators' behavior.[116] In fact, constitutional amendments are frequently intended to directly impact specific agencies' activities.[117]

Furthermore, the burgeoning number of conflicting positive rights within state constitutions means that, when selecting courses of action that prioritize some rights over others, unelected administrators are effectively engaging in their own proportionality review akin to that which Bulman-Pozen and Seifter advocate courts use in state constitutional adjudication.[118] Unless they have been directed by the

113. *See generally* Shaw, *supra* note 31 (discussing how state agencies interpret the federal constitution); *see also* Marshfield, *supra* note 31 (discussing how state agencies interpret state constitutions).

114. Lack of oversight is an issue endemic to state agencies across the country. Professor Miriam Seifter argues that the "absence of robust civil society oversight is an important contributing factor" to state agencies' "record[s] of regulatory slippage—and sometimes outright regulatory failures" in implementing state and federal programs. Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U.L. REV. 107, 113 (2018) ("[S]tate agencies have also failed to inspect natural gas pipelines (to disastrous effect); failed to conduct required voter registration; and allowed subsidized housing to depart dangerously from habitability standards. In addition, some states have imposed dubious occupational licensing requirements that burden the many for the sake of the few."). Although New York certainly has above average civil society oversight in some arenas, the state's failure to adequately regulate pipelines supplies several of Seifter's examples. *Id.* at 158 nn.308 & 310. The issue is thus most pressing in subject areas where civil society attention is "nonexistent or weak." *Id.* at 159 ("There are few watchdog groups or journalists whose 'beat' includes pipeline safety, and those who do occupy this space tend to lack the information, access, and megaphone to have an impact."). *See also* Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, U. ILL. L. REV. 947, 977 n.127 (2001) (concluding that New York state agencies are subject to "less oversight than federal agencies").

115. *See generally supra* Part II(A) (discussing the numerosity of rights in state constitutions).

116. "Amendomania" is defined as a "frequent popular intervention in policymaking and administration" to (state) constitutions as a "dominant accountability device." Marshfield, *supra* note 31, at 345.

117. *Id.* at 358 (finding state amendments can address state agencies directly and indirectly).

118. *See supra* Part II(A).

judiciary or legislature, agencies must be making their own implicit judgments as to how far the outer limits of each right extend, since administration inevitably involves reconciling the competing values and rights at stake.

For example, if an agency decides that the benefits of building affordable housing outweigh the potential environmental harms of its construction, that decision embodies administrators' perspective on how the various rights at issue must be weighed and reconciled with one another. The decision reveals exactly where the administrator determines that the outer bounds of environmental rights should be limited by other competing social and economic entitlements. Similarly, if an agency pursues a right with such single-minded resolve that it serves to infringe upon other rights, it is interpreting the state constitution to proportionally assign more value to the right being secured by its actions.

Furthermore, even when agencies are not consciously selecting a course of action, they are still engaging in tacit constitutional interpretation. For example, when agencies maintain status quo operations following constitutional recognition of a new right that conflicts with presumptions rationalizing pre-existing operations, agencies are not simply refraining from constitutional interpretation. An agency's delegated authority must be construed in light of constitutional constraints,[119] and the words of a statute delegating authority to agencies might carry different meanings and implications following the enactment of a new constitutional constraint.[120] Administrators cannot simply ignore a right in the absence of legislative guidance, since positive rights are self-executing and affirmatively demand action from all branches.[121] Thus, agencies' failure to acknowledge, assign significance to, or alter their procedures in light of a new constitutional right is tantamount to an interpretation that the right is devoid of any substantive value. Correspondingly, courts' refusal to implement or enforce a positive right is not the equivalent of ceding responsibility to the legislature. A court's refusal must be a grant of deference to an unelected administrator's implicit conclusion regarding the right's insignificance.

119. Adler, *supra* note 99, at 301 ("[A]gencies only exercise that authority delegated to them by Congress, and such delegations are fully subject to the constitutional constraints under which Congress itself must operate").

120. Marshfield, *supra* note 31, at 362.

121. Feldman, *supra* note 19, at 1066 n.45.

Ultimately, when courts opt not to force an administrative or legislative realization of constitutional demands—and the court itself abdicates its interpretive role by claiming standards are unmanageable—the only institution that has actually interpreted the constitutional right is the administrative agency. In this context, judicial restraint cannot justify a court's failure to enforce a positive right, since the alternative is according absolute deference to an unelected branch. Although administrators have field-specific expertise that allows them to understand the policy implications of a specific approach[122]—and for this reason their constitutional interpretations can provide a valuable record for courts to review—they are not "designed to strike bargains across a broad range of policy domains" the way that courts are.[123] To return to the example of an affordable housing development: an environmental regulator may have expertise in quantifying the environmental impact of an action, but they do not have expertise in determining how to reconcile competing rights, or how much infringement upon one right is permissible in pursuit of promoting another. That is purely constitutional interpretation which falls in the judiciary's purview. That is not to say that administrators should never attempt to interpret state constitutional rights. In fact, they must, to fulfill their mandate within the parameters delineated by the state constitution. However, it is inappropriate for the judiciary to permit unelected administrators with the wrong scope of expertise to be the last word on fundamental rights.

A. New York and Administrative Constitutionalism

An analysis of how New York courts interpreted and enforced the state's constitutional right to education should dispel any notion that judicial restraint compels the judiciary to refrain from enforcing the positive rights in its constitution against the legislature or administrative agencies.

New York courts have interpreted Article XI of the New York constitution[124] to require that the state "offer all children the opportunity

122. Metzger, *supra* note 26, at 533 (describing the benefits of agencies' expertise when it comes to incorporating constitutional norms into statutory schemes at a granular level).

123. Ponomarenko, *supra* note 77, at 1447 ("Agencies are not designed to strike bargains across a broad range of policy domains. They are designed to apply their expertise to optimize policy within a limited sphere, and it is that expertise that legitimates the choices they make.").

124. N.Y. CONST. art. XI, § 1.

of a sound basic education"[125] and took the liberty of construing a "sound basic education" to consist of a high school education whose recipients will be capable of "meaningful civic participation in contemporary society,"[126] which involves more than merely being capable of sitting on a jury, but doing so "capably and knowledgeably."[127] The court used its judgment to establish a framework for quantifying the quality of a child's education through analysis of "inputs" (which included facilities, teachers, and instrumentalities of learning) and "outputs" (which included school completion rates and test results) to discern whether the constitutional minimum had been satisfied.[128]

Notably, when deciding how to define "sound education," the court declined to adopt the standard proposed by state administrators vested with oversight authority over the state public school system, claiming that adopting the administrators' proposed interpretation would impermissibly "cede to a state agency the power to define a constitutional right."[129] Citing *Schieffelin v. Komfort*—a New York state court decision—alongside *Marbury v. Madison*, the trial court explained that allowing state agencies to define a constitutional right "fails to give due deference to the State Constitution and to courts' final authority to 'say what the law is.'"[130] Instead, the court opted to determine the contours of this indeterminate, broad right independently, without deferring to legislative or administrative guidance.

Thereafter, the court determined that the state had violated the right and compelled immediate remedial action, giving the legislature one year to submit a fiscal estimate of the costs of ensuring that the requisite educational requirements were met in the challenged districts, reform the education finance system that resulted in the present shortfalls, and implement a system of accountability to monitor progress in remediating the current inadequacies.[131] The state's subsequent failure to comply within the enumerated time frame launched litigation, the appointment of a Panel of Judicial Referees to facilitate

125. Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995).

126. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 330 (N.Y. 2003).

127. *Id.* at 331.

128. *Id.* at 332–40.

129. *Id.* at 332.

130. Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 484 (Sup. Ct. 2001) *rev'd sub nom.* Campaign For Fiscal Equity, Inc. v. State, 744 N.Y.S.2d 130 (App. Div. 1st Dept. 2002), *aff'd as modified and remanded*, 801 N.E.2d 326 (N.Y. 2003) (citing Marbury v. Madison, 5. U.S. 137, 177 (1803) and Schieffelin v. Komfort, 106 N.E. 675 (N.Y. 1914)).

131. *Campaign for Fiscal Equity*, 801 N.E.2d at 348.

the state's compliance, and a series of piecemeal legislative enactments—until 2021 when the state budget finally allocated the full financial commitment, which was phased in by 2023.[132]

This example demonstrates how New York state courts have successfully and independently defined constitutional rights with broad, indeterminate contours and demanded compliance—by compelling the legislature and executive to take action—without necessarily fashioning relief at high levels of specificity.

V. NEW YORK'S GREEN AMENDMENT AND STATE ADMINISTRATIVE CONSTITUTIONALISM

The positive, self-executing nature of New York's Environmental Right necessarily means that agencies implementing pre-existing environmental regulations should have duly interpreted what the Green Amendment's passage meant for their statutory mandate and incorporated that meaning into their mission and activities.[133] However, by failing to act in response to the Green Amendment's passage—such as by modifying rules and regulations, or even informally elevating environmental concerns in everyday administration—New York agencies have passively concluded that the Green Amendment holds no inherent value.[134] Consequently, if courts fail to acknowledge the affirmative right guaranteed by the Green Amendment—which many have, by dismissing Green Amendment claims where pre-existing statutory requirements were satisfied—they will be improperly deferring to an agency's constitutional interpretation.[135]

Deferring to an agency's SEQRA determination is an attractive offramp for state court judges who discover that applying the federal negative rights framework to Green Amendment interpretation is an unmanageable task. At first glance, this approach seems reasonable because SEQRA's environmental review process—especially the final statement finding that environmental harms have been mitigated to the "maximum extent practicable"—resembles the democratic

132. Educational Equity, ALLIANCE FOR EDUCATIONAL EQUITY, https://www.aqeny.org/equity/ [https://perma.cc/7V23-H9BG] (last visited Nov. 15, 2024).

133. *See supra* Part III.

134. *See supra* Part III.

135. *See, e.g.,* Marte v. City of New York, 2023 WL 2971394 (N.Y. Sup. Ct. 2023); Matter of Renew 81 for All by Fowler v. Dep't of Transp., 204 N.Y.S.3d 666 (N.Y. App. Div. 4th Dept. 2024); Seneca Lake Guardian v. Dep't of Env't Conservation, No. EF2022-0533 (N.Y. Sup. Ct. 2023); *cf. supra* notes 13–15 and accompanying text.

proportionality review that state judges themselves should be conducting to interpret state constitutional rights.[136] Determining that environmental impacts have been mitigated to the "maximum extent practicable" is inextricably wound up with interpreting the Green Amendment. It involves identifying the right's outer bounds and how it must be weighed and balanced alongside other competing rights. Thus, courts' conflation of SEQRA compliance with Green Amendment compliance is not, in itself, the issue. The issue is the excessive deference accorded to agency SEQRA findings which effectively: 1) strips SEQRA of the substantive mandate that could align the act more closely with the amendment, and 2) places the court in a position where it defers to an agencies' constitutional interpretation.

A. Suggested Standard of Review

Prior to the Green Amendment's passage, determining whether environmental impacts were mitigated to the maximum extent practicable under SEQRA was a question of expertise-based factfinding and statutory interpretation. Administrators engaged in factfinding when they quantified environmental harms. They engaged in statutory interpretation when they applied the law to those facts—meaning when they interpreted what the "maximum extent practicable" language in SEQRA's findings statement meant and whether it was satisfied in light of the facts they found quantifying environmental impact.[137] Although these determinations consisted of mixed questions of law and fact,[138] courts did not have to disentangle them, because blanket deference was owed to agencies' interpretations of both the facts and the statute.[139]

136. *See supra* notes 13–15 and accompanying text.

137. *Id.*

138. A "mixed question" of law and fact involves the application of a legal standard to a set of pre-existing facts. Wilkinson v. Garland, 601 U.S. 209, 211 (2024). Mitigation findings are mixed questions of law and fact because they require determining whether the quantitative facts supplied by the agency demonstrate sufficient mitigation to satisfy the legal environmental standard.

139. In Article 78 proceedings challenging administrative action under New York's Administrative Procedure Act, agencies' interpretations of statutes they administer "are entitled to deference and should be upheld unless they are irrational, unreasonable or inconsistent with the governing law." McKnight v. Office of State Comptroller, 2024 WL 2453505 (N.Y. Sup. Ct. 2024); NY C.P.L.R. § 7801–7806 (McKinney).

However, with the passage of the Green Amendment, determining whether environmental impact has been mitigated to the "maximum extent practicable" is no longer just a question of statutory interpretation. It is now a question of constitutional interpretation. And it must be reviewed using a different standard than that which is applied to the purely factual quantifications of environmental impact.[140] Following the Green Amendment's passage, the finding that environmental impacts have been mitigated to the maximum extent practicable is now a question of how facts (environmental impact) are applied to constitutional law (the constitutional proportionality analysis inherent in arriving at a mitigation finding).

The mitigation finding itself should be reviewed *de novo*. Courts should take an independent look at whether an agency has balanced competing interests, within the SEQRA framework, in accordance with constitutional norms. Returning to the example where an agency builds affordable housing notwithstanding environmental impacts: courts should be able to review an agency's constitutional determination that the environmental impacts of the construction have been mitigated to the maximum extent practicable and the countervailing interests in affordable housing outweigh those impacts. This assessment would include reviewing the alternative mitigation measures considered and rejected by the agency and independently determining whether the incremental improvements in environmental rights protection that the alternatives could have supplied were truly outweighed by the costs of their imposition. For example, if an agency incorrectly declined to impose cheap and effective construction site mitigation measures that would reduce suspension of airborne pollution from a construction site and improve surrounding environmental conditions significantly, a court conducting independent review should be able to course correct and determine that the agency undervalued the environmental right when making that determination. In other words, it was unconstitutional for the agency to refrain from protecting the environmental right when countervailing or conflicting interests were so minimal in comparison. And courts should be able to say so after conducting their own independent proportionality review of how the constitutional rights and interests stack up against one another. A court overruling an agency here would merely be asserting that its constitutional interpretation was erroneous.

140. *See supra* text accompanying note 27.

The more difficult question arises in relation to "constitutional facts," given that mitigation findings are mixed questions of law and fact,[141] and the applicable law is now constitutional. The factual basis for a mitigation finding should be reviewed with heightened scrutiny, albeit not *de novo* review. The constitutional fact doctrine and its normative underpinnings may counsel in favor of permitting a court to conduct independent review of the quantitative environmental impact analysis upon which the mitigation findings are based.[142] However, the comparative advantage that agencies have over courts when it comes to technical analysis weighs against this approach, as do the inefficiencies of denying deference to agency facts.[143]

To balance the benefits of agency efficiency and expertise with the judiciary's obligation to ensure protection of fundamental rights, courts should apply an intermediate, moderately deferential standard of review to agency factfinding that is central to constitutional claims. This intermediate deference entails an expanded review of the reasoning and explanation provided by an agency in support of its factual findings. Although courts are not experts or technocrats, they can certainly ensure that agencies' technical decisions are supported by persuasive reasoning and justification. The proposed approach suggests that courts do so in a manner resembling the federal judiciary's doctrinal moves over the last century, where scrutiny has been increased to mitigate concerns about unaccountable administrative action bearing on constitutional rights.[144]

This approach would be especially consequential in cases where experts provided by a state agency and its opponents present conflicting testimony. Under the existing Article 78 standard of review, courts have held that the "choice between conflicting expert testimony rests in the discretion of the administrative agency" without qualification.[145] Thus, the Article 78 standard of review is so deferential that it effectively gives agencies the power to resolve constitutional issues where the outcome hinges on which expert testimony is accepted. Under the proposed intermediate deference standard of review, the agency must provide a more persuasive explanation to justify why its preferred expert's approach is superior to that of its opponents.

141. *See supra* note 138 and accompanying text.

142. *See supra* Part III(A).

143. *See* Merrill, *supra* note 100.

144. *See supra* note 26 and accompanying text.

145. Matter of Brooklyn Bridge Park Legal Def. Fund, Inc. v. N.Y. State Urban Dev. Corp., 856 N.Y.S.2d 235, 236 (2008).

Ultimately, this heightened explanation requirement would ensure that agencies do not obscure policy choices or impermissible motives in the language of technical expertise.

Heightening review of agency facts is especially integral to environmental rights protection in New York because SEQRA allows project applicants—who naturally have a vested interest in minimizing findings of environmental harm—to prepare the environmental impact statements upon which administrators rely when issuing their mitigation findings statements.[146] Heightening the standard for reasoned decisionmaking would ensure that agencies are truly relying upon the bases they cite for support in technical factfinding, and that those bases—which may often originate from sources with an incentive to minimize environmental impacts when finding facts—are sound.

Thus, to adequately implement the Green Amendment, courts should use the framework for proportionality analysis inherent in SEQRA's mitigation requirement to balance environmental concerns protected by the Green Amendment with other competing rights. But in doing so, they should not defer to the agency. Courts should independently review whether environmental impacts are mitigated to the maximum extent practicable, employing their own constitutional interpretation to determine how the competing rights and interests should be reconciled. With respect to agency factfinding that is central to the court's constitutional analysis, only intermediate deference should be accorded to the agency, meaning that agency facts must be supported by persuasive reasoning and explanation. This serves to mitigate any concerns about the administrative record obscuring subjective policy choices with the language of technical expertise.

VI. CONCLUSION

Essentially, there is theoretically some truth to courts' claims that New York's existing environmental regulatory framework provides for adequate protection of the people's environmental rights. However, this only holds true when agency actions endeavor to protect the right and the judiciary compels them to do so when they fall short, implicating issues of deference to administrative decisionmaking. State courts' role is thus to independently review administrators'

146. GERRARD ET AL., *supra* note 13, at § 8A.05 (stating that city agencies "rarely exercise[] [their] prerogative to prepare the final EIS. Rather, as with the draft EIS, the project sponsor submits a preliminary final EIS, which is reviewed and ultimately accepted by the lead agency").

constitutional interpretations which surface most prominently in their SEQRA mitigation findings. By employing the SEQRA mitigation framework—which involves balancing interests in the image of democratic proportionality review—but withholding deference to agency determinations, courts can delineate and interpret the contours of the right created by the Green Amendment, and ensure it is given adequate weight when administrators engage in administrative constitutionalism.