

THE SCALIA COURT: ENVIRONMENTAL LAW'S WRECKING CREW WITHIN THE SUPREME COURT

*Richard J. Lazarus**

In West Virginia vs. EPA, a conservative majority within the Supreme Court announced a sweeping ruling, traceable to the opinions of former Justice Scalia, that seriously threatens environmental law's ability to safeguard public health and welfare. In sustaining former President Trump's repeal of the Clean Power Plan—an ambitious Obama administration rulemaking that regulated greenhouse gas emissions from existing fossil fuel fired power plants—the West Virginia Court insisted that there must be “clear congressional authorization” to support any significant and important rule like the Clean Power Plan.

Our nation's environmental protection laws have been enormously successful over the past fifty years. That half century of extraordinary success has depended on a partnership between the federal legislative and executive branches, long upheld by the courts, in which Congress enacts broad, capacious statutory language that authorizes agencies such as the Environmental Protection Agency to enact pollution controls that reflect the complexities presented by evolving environmental science, the nation's economy, and constant technological innovation. Congress deliberately chose to delegate lawmaking authority to expert agencies in appreciation of Congress's own inability to anticipate and address all those complexities in the real-time basis.

The West Virginia Court, however, has called into question the legal viability of that legislative and executive branch partnership by insisting that such a deliberate congressional decision to use capacious statutory language is no longer sufficient to support any significant and important rule like the Clean Power Plan. Congress must instead pass a second piece of legislation that meets the Court's newly-coined “clear congressional authorization” standard, despite the obvious practical reality that the current Congress is incapable of doing so. The threatened upshot is the unraveling of the national government's ability to safeguard the public health and welfare just as the United States, and all nations, faces the greatest environmental challenge of all: climate change.

Under the ironic guise of promoting democracy, the branch of government least accountable to the voters has invented a sweeping doctrine of statutory interpretation—the “Major Questions Doctrine”—to place the equivalent of a constitutional straightjacket on the ability of Congress and the executive branch—both of which are more accountable to voters than courts—to enact laws necessary to address the nation's most pressing public health and environmental problems.

* Howard J. and Katherine W. Professor of Law, Harvard Law School. The genesis of this Article is a keynote talk with the same title as this Article's that I delivered on March 18, 2022, at George Washington University School of Law's 2022 J.B. & Maurice C. Shapiro Symposium on Environmental Law. I am grateful to Professor Robert Glicksman, who organized that symposium and commented on my talk as did his faculty colleague Professor Richard Pierce, and Professors Jonathan Adler and Robin Craig, who made their own symposium presentations. Many thanks to colleagues Hope Babcock, Peter Byrne, John Echeverria, Carrie Jenks, Robert Percival, Pat Parenteau, Cass Sunstein, Amanda Leiter, Jonathan Cannon, Matthew Stephenson, Tom McGarity, Mike Levin, and Jonathan Adler for their comments on an earlier draft; Amelia Keyes and Samantha Neal, Harvard Law School Class of 2023 for their excellent research; Conor Simons, also Harvard Law School Class of 2023, for his truly outstanding edit of a draft, which significantly improved the final product; the terrific student editors of the *Harvard Environmental Law Review*; and my faculty assistant, Melinda Eakin, for her extraordinary copy editing skills.

This Article is divided into three parts. First, the Article describes the background of the West Virginia case and the Court's ruling. Second, the Article explains that, with the West Virginia ruling, Justice Scalia has achieved, six years after his passing, a degree of influence on the Court's environmental law precedent that he never enjoyed during his three decades as a Justice on the Court. With Donald Trump's three new appointees to the Court, the Court has finally become Scalia's Court. Finally, the Article focuses on the adverse implications of the West Virginia ruling on our nation's ability to enact laws that can effectively address the kinds of serious threats to public health and the environment from pollution and natural resource destruction.

TABLE OF CONTENTS

Introduction 408

I. *West Virginia v. EPA* 411

A. The Obama Administration's Clean Power Plan and the Trump Administration's Repeal of that Plan 412

B. The D.C. Circuit Ruling in American Lung Association v. EPA 420

C. The Biden Administration's Response to the American Lung Ass'n Ruling 423

D. West Virginia v. EPA 426

E. The West Virginia Oral Argument 432

F. The Court's Ruling 434

II. *The Scalia Court: Justice Scalia and Environmental Law* 438

A. Environmental Law Before Justice Scalia Joined the Supreme Court 441

B. Justice Scalia on the Bench 449

III. *Environmental Law's Wrecking Crew* 456

A. The Clean Water Act and "Waters of the United States" 459

B. The National Environmental Policy Act and the Environmental Impact Statement Requirement 462

C. The Resource Conservation and Recovery Act and the Meaning of "Waste" 464

D. The Endangered Species Act and the Prohibition of the Taking of Endangered Species 466

Conclusion 469

INTRODUCTION

Our nation's environmental protection laws have been enormously successful over the last fifty years. Notwithstanding their obvious gaps and persistent shortfalls, those laws have significantly reduced air, water, and land pollution across the country while the nation's economy has grown exponentially. No less important, they have prevented the kind of environmental devas-

tation and public health disasters that have occurred in nations lacking such laws.¹ Yet, as underscored by the Supreme Court ruling in June 2022 in *West Virginia v. EPA*,² a radically conservative majority within the Supreme Court is seriously threatening environmental law's continued ability to safeguard public health and welfare.

Federal environmental law's extraordinary success over the past half century has depended on a partnership between Congress and the Executive, long upheld by the courts. Congress enacted capacious statutory language that authorizes agencies like the Environmental Protection Agency ("EPA") to promulgate pollution controls that address all the relevant complexities presented by environmental science, constant technological innovation, new scientific learning, and the nation's economy. Congress deliberately chose to delegate lawmaking authority to expert agencies in appreciation of Congress's own inability to anticipate and address all those complexities in real time; this delegation is necessary to safeguard public health and welfare from harmful pollution.³

Congress also knew, moreover, that it always retained the authority either to override, build upon, or statutorily codify agency rulemaking, all of which it has done repeatedly over the years. The iterative environmental lawmaking process between Congress, the executive branch, and the courts worked exceedingly well in the era of congressional compromise and productivity. But when partisan gridlock effectively shut down congressional environmental lawmaking in the early 1990s, the former framework could not support the levels of environmental policymaking productivity seen in the 1970s and 1980s.⁴

In sustaining former President Trump's repeal of the Clean Power Plan⁵—an ambitious Obama Administration rulemaking that regulated greenhouse gas emissions from existing fossil fuel-fired power plants—the Court's *West Virginia* ruling calls into question the sustainability of that legislative and executive branch partnership established by Congress for federal environmental law. Neither the ruling itself nor its unnecessarily sweeping scope should ever have happened. In an extraordinary instance of judicial activism, the Court agreed to hear a case that may not have satisfied Article III case-or-controversy requirements and certainly lacked the Court's traditional indicia of a case warranting

-
1. See, e.g., Erin McCann, *Life in China, Smothered by Smog*, N.Y. TIMES (Dec. 22, 2016), <https://perma.cc/43W3-T3GD>; Marlise Simons, *Uphaval in the East; Rising Iron Curtain Exposes Haunting Veil of Polluted Air*, N.Y. TIMES (Apr. 8, 1990), <https://perma.cc/RM39-7E6D>.
 2. 142 S. Ct. 2587 (2022).
 3. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 323–25 (2d. ed. 2023).
 4. Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 621–22 (2006).
 5. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60); Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520, 32,522–32 (July 8, 2019).

review. And then on the merits, in an opinion authored by Chief Justice Roberts, the Court ran roughshod over a longstanding tenet central to the Chief's own jurisprudence. As the Chief himself had repeated only days before in his *Dobbs v. Jackson Women's Health Organization*⁶ concurrence, when "it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more."⁷ In *West Virginia*, the Court decided much, much more.

Putting aside the substantial arguments that the D.C. Circuit had correctly ruled that the repeal of the Clean Power Plan was unlawful,⁸ the Court could have easily ruled against an expansive view of EPA's authority to promulgate the 2015 Clean Power Plan in a readily available, narrowly drawn holding based on specific statutory language. Instead, the Court invented a sweeping, constitutionally rooted doctrine of statutory interpretation. Under the ironic guise of promoting democracy, the least democratically accountable branch placed a constitutional straightjacket on the ability of the most democratically accountable branches—the Congress, first, and the Executive, second—to address the nation's most pressing public health and environmental problems. Unless the Court somehow re-centers itself quickly, the threatened upshot will be the unraveling of the national government's ability to safeguard the public health and welfare at the very moment when the United States, and all nations, are facing our greatest environmental challenge of all: climate change.

This article is divided into three parts. First, the Article describes the background of the *West Virginia* case and the Court's ruling. Second, the Article explains that, with the *West Virginia* ruling, Justice Scalia has achieved, six years after his passing, a degree of influence on the Court's environmental law precedent that he never enjoyed during his three decades as a Justice. With Donald Trump's three new appointees to the Court, the Court has become Scalia's Court even while a new conservative majority has made clear its willingness to be even more disruptive than Scalia ever was. Finally, the Article focuses on the adverse implications of the *West Virginia* ruling on our nation's ability to enact laws that can effectively address the kinds of serious threats to public health and the environment from pollution and natural resource destruction. These implications include both the President's ability to administer the laws that Congress has already passed as well as Congress's authority to enact new laws that even more clearly authorize the executive branch to undertake the necessary action. Even as the ink on the Court's *West Virginia* opinion has yet to dry, the Court has already made clear in another potentially significant envi-

6. 142 S. Ct. 2228, 2310 (2022) (Roberts, C.J., concurring in the judgment).

7. *Id.* at 2311; see Associated Press, *Chief Justice Says His Goal Is More Consensus*, N.Y. TIMES (May 22, 2006), <https://perma.cc/XK2L-L4T5>.

8. See *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 995 (D.C. Cir. 2021).

ronmental case on its docket that the appetite of the most conservative Justices to further unravel the nation’s environmental laws may remain unsated.⁹

I. WEST VIRGINIA V. EPA

On October 29, 2021, the Court granted certiorari to hear *West Virginia v. EPA*, after bumping the case from the Court’s conference on three prior occasions.¹⁰ In most instances, a Supreme Court decision to grant review in a case does not forecast that the Court will necessarily reverse the lower court decision. The Court’s stated criteria for exercising jurisdiction to hear a case on the merits are neutral on their face as to outcome.¹¹ The Justices consider only whether there are “compelling reasons” to grant a petition for a writ of certiorari seeking the Court’s review.¹²

When the Supreme Court granted review in *West Virginia v. EPA*, the outcome of the Court’s ruling was not remotely in doubt. Everyone following the case closely knew that the Justices would vote, most likely by a six to three majority, to reverse the D.C. Circuit.¹³ The minimum of four Justices who had voted to hear the *West Virginia* case had not done so with the intent of affirming the D.C. Circuit’s invalidation of the Trump Administration’s repeal of the Clean Power Plan. They had taken the case even though the underlying legal controversy was essentially moribund: the Clean Power Plan was no longer in force, the Biden Administration had made clear it had no interest in its revival, and subsequent events had rendered the Plan’s terms of little, if any, practical significance.¹⁴ When Justices agree to hear a case in such circumstances, their singular purpose is clear: to reverse a lower court ruling they be-

9. See *Sackett v. EPA*, 142 S. Ct. 896 (2022) (granting review in case concerning the geographic scope of the Clean Water Act); *infra* text accompanying notes 336–40.

10. *West Virginia v. EPA*, No. 20-1530, SUP. CT. OF THE U.S. (Oct. 29, 2021), <https://perma.cc/RJK5-UM5V>.

11. The Court’s stated neutrality was admittedly more accurate a few decades ago than it is today. Although, as the text above asserts, the Court does not “necessarily” reverse, it is far more likely to do so than in the past. For instance, during October Term 1980, the Court reversed 53.5 percent of the cases that it heard on writ of certiorari after briefing and argument. See *The Supreme Court, 1979 Term—III. The Statistics*, 94 HARV. L. REV. 289, 292 tbl.II (1980). In the most recently completed October Term 2021, the reversal rate was 82 percent. See Angie Gou, Ellena Erskine & James Romoser, *STAT PACK for the Supreme Court’s 2021–22 Term*, SCOTUSBLOG 1, 24 (2022), <https://perma.cc/24VN-P84D>.

12. SUP. CT. R. 10.

13. See, e.g., Ian Millhiser, *A New Supreme Court Case Could Gut the Government’s Power to Fight Climate Change*, VOX (Nov. 3, 2021), <https://perma.cc/T94U-SLB4> (“[T]he Supreme Court appears likely to wield these doctrines to invalidate key provisions of the Clean Air Act.”); Karen C. Sokol, *The Supreme Court’s Plan to Block Climate Action We Haven’t Even Taken Yet*, SLATE (Jan. 25, 2022), <https://perma.cc/93JZ-HR2A> (predicting the grant of certiorari “portends that the six conservative Justices will erect significant barriers to meaningful climate policy”).

14. See *infra* text accompanying note 107.

lieve is manifestly incorrect. So, when the Court granted review in *West Virginia*, the only remaining question was whether the Court would reverse based on a narrow or broad ruling.

A. The Obama Administration's Clean Power Plan and the Trump Administration's Repeal of that Plan

In October 2015, the Obama Administration EPA published its Clean Power Plan, which regulated greenhouse gas emissions for existing fossil-fueled power plants.¹⁵ By the time of its publication, EPA had already published significant greenhouse gas emissions limitations for many significant sources, including new motor vehicles,¹⁶ landfills,¹⁷ and oil and gas production facilities.¹⁸ But it was common ground that the Clean Power Plan was, by its timing and its content, the most ambitious and important of all.

The timing was critical because the President's pledge to regulate power plant emissions was essential to the nation's credibility on the global stage. Just one month later, Secretary of State John Kerry would arrive in Paris, aiming to persuade the nations of the world to sign the most significant climate change agreement to date.¹⁹ It is no overstatement that, absent EPA's publication of the Clean Power Plan in late October 2015, there would have been no Paris Climate Agreement in early December 2015.²⁰

The Clean Power Plan was the most ambitious of all of EPA's measures to reduce greenhouse gas emissions for two reasons. First, coal-fired power plants

-
15. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60).
 16. Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (codified at 40 C.F.R. pts. 85–86, 600, and in scattered sections of 49 C.F.R.); 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012) (codified at 40 C.F.R. pts. 85–86, 600, and in scattered sections of 49 C.F.R.); Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2, 81 Fed. Reg. 73,478 (Oct. 25, 2016) (codified at scattered sections of 40 and 49 C.F.R.).
 17. Standards of Performance for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,332 (2016) (codified at 40 C.F.R. pt. 60).
 18. Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (2016) (codified at 40 C.F.R. pt. 60).
 19. Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 12, 2015), <https://perma.cc/P6AF-C3DB>.
 20. See Brad Plumer, *The World Just Agreed to a Major Climate Deal in Paris. Now Comes the Hard Part.*, VOX (Dec. 12, 2015), <https://perma.cc/HVX9-HFXM> (characterizing the Clean Power Plan as one of the voluntary climate pledges on which the agreement was based); Andy Katz, *Momentum for Paris Agreement Continues to Build Climate Action*, SIERRA CLUB (Nov. 30, 2015), <https://perma.cc/AJ9B-4MGU> (describing “the Clean Power Plan [as] the cornerstone of national policies that back up” American participation in Paris).

were then one of the nation's single largest sources of emissions.²¹ The Administration had several years earlier already addressed the other largest source: new motor vehicles.²² The Clean Power Plan, like the earlier auto rules, also promised major reductions: a thirty-two percent reduction in emissions by 2030.²³

Second, unlike the auto rules, the Clean Power Plan was destined to generate significant industry opposition and political controversy. Weakened by the 2008–2009 economic recession, the auto industry largely acquiesced without complaint in a significant tightening of fuel efficiency standards needed to substantially lower motor vehicle greenhouse gas emissions.²⁴ The auto industry was also confident that so long as everyone had to play by the same rules, even if the rules were tougher, there were still significant profits to be made. The nation's fossil fuel industry, especially coal mining interests, would not be similarly complacent. Considering the Plan no less than a “war on coal,” they would most certainly wage an all-out attack on the Clean Power Plan.²⁵ The plan epitomized the fundamental clash between the coal industry's long-term viability and the nation's need to reduce reliance on coal to address climate change.

As important and as ambitious as the Clean Power Plan was, EPA was under no delusion that sustaining its validity when challenged in courts would be a slam dunk. It plainly would not be. A few years earlier, the Obama Administration had publicly and spectacularly failed to secure from Congress new legislation addressing greenhouse gas emissions economy-wide, including from power plants.²⁶ EPA knew the agency would be accused of trying to achieve through rulemaking a regulation that Congress had failed to provide. This was a familiar challenge for EPA, which by 2015 had been struggling for a quarter of a century under both Democratic and Republican administrations to address air pollution problems with increasingly old statutory language.²⁷

21. See Channele Wirman, *Carbon Dioxide Emissions from Electricity Generation in 2015 Were Lowest Since 1993*, U.S. ENERGY INFO. ADMIN. (May 13, 2016), <https://perma.cc/R654-D8J4> (charting the U.S. electricity generation mix from 2005 to 2015); *Energy and the Environment Explained: Where Greenhouse Gases Come From*, U.S. ENERGY INFO. ADMIN. (June 24, 2022), <https://perma.cc/N2VB-W8X8> (describing sources of greenhouse gas emissions in the United States, including from electricity from fossil fuel combustion).

22. See sources cited *supra* note 16.

23. EPA, OVERVIEW OF THE CLEAN POWER PLAN: CUTTING CARBON POLLUTION FROM POWER PLANTS 2 (2017), <https://perma.cc/9CHR-WV99>.

24. See Annie Sneed, *Why Automakers Keep Beating Government Standards*, SCI. AM. (Dec. 1, 2016), <https://perma.cc/S9U7-4843> (documenting the consistent overachievement of car manufacturers relative to federal emissions regulations).

25. RICHARD J. LAZARUS, *THE RULE OF FIVE* 278–79 (2020).

26. See Ryan Lizza, *As the World Burns*, NEW YORKER (Oct. 3, 2010), <https://perma.cc/2BCG-MXB6>.

27. Congress had last enacted significant amendments to the Clean Air Act in 1990. See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 20–22 (2014).

In addition, EPA would need to persuade the courts that the Clean Air Act²⁸ authorized shifting electricity generation from high-emissions facilities, like coal-fired plants, to low-emissions facilities,²⁹ like natural gas, solar, wind, hydroelectric, and geothermal. Known as “generation shifting,”³⁰ this mandate aimed to encourage a technological shift in electricity generation so that the grid’s production capacity remained stable but generated far lower emissions.³¹ To accomplish this, EPA would have to establish that the Clean Air Act could justify Agency action far beyond mandating that plants make their facilities more efficient, akin to motor vehicles.³² EPA had to argue the statutory language sanctioned regulation at grid-wide scale.

Based on the availability of such generation shifting on the grid, EPA calculated how much lower rates of greenhouse gas emissions could be per British thermal unit (“BTU”) of electricity produced. Considering the mix of existing and potential electricity-generation facilities within each State’s borders, EPA then established for each State a total greenhouse emissions target for emissions produced by electricity-generation facilities within their borders.³³ States with higher wind or solar power energy potential could, accordingly, produce electricity with lower greenhouse gas emissions than States lacking such opportunities. EPA then gave each State a choice on how to meet their state-wide emissions target. They could impose set emissions limitations on individual facilities within their borders any way they preferred, so long as their total did not exceed the target set for the State by EPA.³⁴ Or they could further allow sources within their borders to participate in a nationwide cap-and-trade program, established by EPA, which would allow sources to buy and sell the right to emit greenhouse gases that, taken together, did not exceed the applicable cap.³⁵ Such a tradeable emissions program allows those facilities which can produce electricity with fewer greenhouse gas emissions to sell those reductions

28. 42 U.S.C. §§ 7401–7671.

29. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,717 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60).

30. *Id.* at 64,728.

31. *See id.* at 64,646, 64,717–811.

32. *See, e.g.*, Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,412 (May 7, 2010) (codified at 40 C.F.R. pts. 85–86, 600, and scattered parts of 49 C.F.R.) (explaining how EPA’s motor vehicle emissions standards apply to each individual manufacturer—not, relevantly, the industry as a whole).

33. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units, 80 Fed. Reg. at 64,824–25 (identifying rate- and mass-based goals for forty-seven contiguous states and three tribal lands).

34. *Id.* at 64,832–33 (overviewing types of acceptable State plans).

35. *Id.* at 64,834 (“Rate-based and mass-based emission standards may incorporate the use of emission trading . . .”).

to those facilities wh would otherwise emit the gases at a higher rate. In that manner, the resulting market for tradeable greenhouse gas emissions promotes an outcome that generates the same amount of electricity at the lowest possible cost for greenhouse gas reduction.³⁶

The economic wisdom of such an approach can hardly be gainsaid. Indeed, its reliance on market mechanisms to achieve economic efficiency in designing pollution control requirements is an unqualified bull's-eye for the kind of regulatory reform of environmental law trumpeted by Republican administrations during the presidencies of Ronald Reagan, George H.W. Bush, and George W. Bush. Each of those administrations decried the inefficiency of pollution control requirements that applied strictly in an individual facility-by-facility basis regardless of the relative cost of such pollution reduction by those regulated facilities.³⁷ And they argued strenuously in favor of more cost-effective regulatory approaches that relied on market mechanisms.³⁸ These approaches, like the tradeable emissions programs contemplated by the Clean

36. *See id.* at 64,663, 64,820–914.

37. The inclination toward cost-benefit regulatory analyses has a long Republican lineage. For instance, when the George W. Bush EPA promulgated a rule to cut mercury pollution, it rejected individual-facility limits in favor of a national cap-and-trade regime. As the Assistant EPA Administrator for Air Quality explained, “[c]ap and trade for mercury allows you to get substantially greater reductions for less cost.” ERIC PIANIN, *EPA Announces “Cap and Trade” Plan to Cut Mercury Pollution*, WASH. POST (Dec. 16, 2003), <https://perma.cc/J3MZ-3YJE>; *see also, e.g., Fact Sheet – EPA’s Clean Air Mercury Rule*, EPA (Mar. 15, 2005), <https://perma.cc/LQ9E-4HN3>. Before the Bush II Administration, the Bush I Administration promoted and passed Clean Air Act amendments to reduce acid rain that allowed “utilities to trade allowances within their systems and/or buy or sell allowances to and from other affected sources.” *1990 Clean Air Act Amendment Summary: Title IV*, EPA (Nov. 28, 2022), <https://perma.cc/ZX9N-XCKX>. For its part, the Reagan Administration implemented a cap-and-trade policy that phased out leaded gasoline. *See* Chris Arnold, *GOP Demonizes Once Favored Cap-and-Trade Policy*, NAT’L PUB. RADIO (June 3, 2014), <https://perma.cc/A7PQ-4UKJ>. EPA under Reagan also promulgated regulations that allowed for “individual [New Source Performance Standards] compliance bubbles” that would achieve emissions reductions “at least as great as those produced by facility-by-facility compliance” at lower cost. Standards of Performance for New Stationary Sources; Fossil-Fuel-Fired Steam Generators, 52 Fed. Reg. 28,946, 28,954 (Aug. 4, 1987) (describing EPA “Bubble Policy”).

38. *See, e.g., Executive Summary: The Clear Skies Initiative*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Feb. 14, 2002), <https://perma.cc/NY3W-P5PE> (extolling the virtues of cap and trade); Keith Schneider, *Lawmakers Agree on Rules to Reduce Acid Rain Damage*, N.Y. TIMES (Oct. 22, 1990), <https://perma.cc/3L3B-A8YE> (“Lawmakers from both parties said today that the breakthrough on the rules for limiting acid rain could not have occurred without the intervention of President Bush.”); Philip Shabecoff, *Rules to Reduce the Lead in Gas Reported Ready*, N.Y. TIMES (Aug. 1, 1982), <https://perma.cc/F4ZH-H7R4> (highlighting the argument of a Reagan Administration official that the proposed cap-and-trade leaded gas regulations “would be more efficient and would mean a substantial saving to the refining industry”); *see also* sources cited *supra* note 37.

Power Plan, create economic incentives to have necessary pollution reductions undertaken by those facilities that can do so least expensively.³⁹

The Plan's obvious soundness as a matter of economic policy cannot be equally said about its legality. That a policy is clearly wise does not necessarily mean that it's lawful. The latter is a distinct inquiry.

The linchpin of EPA's argument that it possessed the legal authority to base its emissions controls on the prospect of generation shifting across the nation's electricity grid ultimately rested on the proper interpretation of one word in the Clean Air Act: "system." EPA based its authority to promulgate the Clean Power Plan on section 111(d) of the Clean Air Act,⁴⁰ which directed EPA to prescribe regulations that establish a procedure under which States in turn submit plans that establish standards of performance for an existing source of a pollutant like a power plant. Section 111(a) of the Act further defines "standard of performance" to mean a standard of emissions that "reflects the degree of emission limitation achievable through the application of the *best system of emission reduction* which . . . the Administrator determines has been adequately demonstrated."⁴¹ According to EPA, in issuing its Clean Power Plan, the term "system" need not be limited exclusively to what a power plant can do within the borders of its own facility. Instead, EPA thought it could reasonably construe "system" to refer to the nation's electricity grid, including the grid's capacity to engage in generation shifting between sources.⁴²

Before the Clean Power Plan, EPA's technology-based emissions limitations were, unlike the Clean Power Plan, generally limited to what is popularly characterized as "inside-the-fenceline" bases for emissions limitations.⁴³ They set emissions limitations based on EPA's assessment of what a facility like a

39. LAZARUS, *supra* note 3, at 110–13, 118–24, 147–48, 219–23, 227–29.

40. 42 U.S.C. § 7411(d).

41. *Id.* § 7411(a) (emphasis added).

42. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,709–10 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60).

43. Eric Anthony DeBellis, [*ELRS*] *EPA Unveils Final Clean Power Plan: So What's All the Fuss About?*, HARV. ENVTL. L. REV. (Dec. 7, 2015), <https://perma.cc/5Q6U-USPE> ("Conventional power plant air pollution regulation imposes technological and operational requirements onsite (within the plant's 'fenceline').") Illustrative counterexamples from the strictly inside-the-fenceline approach include EPA's 1987 "bubble policy" allowing individual facilities to comply with new source performance standards through "compliance bubbles" applicable to more than one facility, rather than by more costly facility-by-facility compliance (*see* STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES; FOSSIL-FUEL-FIRED STEAM GENERATORS, 52 Fed. Reg. 28,946, 28,954 (Aug. 4, 1987)), as well as a host of EPA rulemakings addressing interstate air pollution, though the latter were more solidly grounded in specific statutory language. *See* EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 500–01, 524 (2014) (describing EPA's past efforts to use tradeable emissions programs to address interstate pollution and upholding EPA's Cross-State Air Pollution Rule).

power plant could accomplish by adopting more efficient boilers and combustion that lose less heat and therefore burn less fuel,⁴⁴ or by adding to the plant's facilities electrostatic precipitators that capture particulate matter from emissions before they are released into the ambient air, or by adding scrubbers that do the same for pollutants like nitrogen and sulfur oxides.⁴⁵ There were invariably offsite implications of EPA's assumed bases for emissions control—e.g., the purchase of low-sulfur coal from distant mines—but the emissions-reducing activity (low-sulfur coal combustion) occurred on-site.⁴⁶

EPA justified the departure from such narrower approaches both on section 111(d)'s more capacious reference to “system”⁴⁷ and to practical experience with how industry has historically complied with EPA's technology-based emissions limitations. The power industry today regularly complies with EPA's pollution control standards by taking advantage of generation shifting within the grid.⁴⁸ Industry long ago discovered that the best way to achieve a reduction of pollution at the lowest cost was by shifting generation of electricity from facilities that generate more pollution—whether particulate matter, sulfur oxides, or nitrogen oxides—to those facilities on the grid that produce less pollution.⁴⁹ EPA argued that the Clean Power Plan did not therefore amount to a radical shift in regulation and instead did no more than acknowledge that existing practice by taking the natural next step of making generation shifting not just an available means of compliance, but also a basis for establishing what levels of emissions reduction are achievable in the first instance.⁵⁰

Whether the courts would accept the Clean Power Plan's validity depended on whether they agreed that EPA could reasonably construe the word “system” to take into account the enormous ways that technology had transformed the electricity industry during the five decades since Congress's 1970

44. *See generally* Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1,430 (Jan. 8, 2014) (codified at 40 C.F.R. 60).

45. *See generally* Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (codified at 40 C.F.R. pts. 51, 52, 72, 78, 97).

46. *See, e.g.*, EPA, AP 42, FIFTH EDITION, VOLUME I, CHAPTER 1.1: BITUMINOUS AND SUBBITUMINOUS COAL COMBUSTION 7–8 (1998) (describing the “switch to lower sulfur coals” as a common technique to reduce sulfur oxide emissions).

47. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,720 (arguing the term “system” in the Clean Air Act “takes a broad meaning”).

48. *Id.* at 64,729 (describing generation shifting as “an everyday occurrence within the integrated operations of the utility power sector”).

49. *See id.* at 64,728–30 (arguing that common industry practice in the integrated electricity system makes generation system achievable).

50. *See id.* at 64,717–18.

enactment of the statutory provision that included that word “system.”⁵¹ As the Court itself acknowledged in its groundbreaking 2007 climate ruling in *Massachusetts v. EPA*,⁵² that is the very reason why Congress enacts “capacious” statutory language in the first instance.⁵³ Capacious statutory language provides the agency charged with administering the law the ability to address new issues and problems as they arise without the need to resort to congressional passage of a new law: “While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete.”⁵⁴

Not surprisingly, some business interests, led by the coal mining interests, immediately challenged the Clean Power Plan’s legality in court.⁵⁵ As a sign of the times, they were joined by a coalition of Republican State Attorneys General who had similarly joined together to challenge the lawfulness of most of the Obama Administration’s highest-profile rulemakings.⁵⁶ They even challenged the Clean Power Plan as a proposed rule, only to be rebuffed by the D.C. Circuit for such a premature filing,⁵⁷ and immediately refiled once EPA published its final rule in October 2015.⁵⁸ Although the D.C. Circuit then similarly rejected the petitioners’ request for an immediate stay of the rule,⁵⁹ the Supreme Court stunningly agreed on February 9, 2016, to stay the rule pending the lower court’s ruling and the opportunity for the Justices to review that ruling.⁶⁰ It was the first time that the Justices had stayed an executive branch rule before the D.C. Circuit itself had yet to decide the rule’s validity and after the appellate court had denied a request to stay the rule pending its review.⁶¹ Because the High Court’s ruling occurred two months after the Paris Climate

51. 42 U.S.C. § 7411(a).

52. 549 U.S. 497 (2009).

53. *Id.* at 500.

54. *Id.* at 532.

55. *In re Murray Energy Corp.*, 788 F.3d 330, 332 (D.C. Cir. 2015).

56. *Id.* at 331–32 (listing State Attorneys General involved in the challenge); see, e.g., WFAA Staff, *Greg Abbott: “I Go into the Office, I Sue the Federal Government”*, WFAA (Oct. 30, 2013, 10:04 AM), <https://perma.cc/DZ4P-XJY4> (recording then-Texas Attorney General Greg Abbott’s description of his job: “I go into the office, I sue the federal government, and then I go home”).

57. *In re Murray Energy Corp.*, 788 F.3d at 333–34.

58. See Coral Davenport, *Numerous States Prepare Lawsuit Against Obama’s Climate Policy*, N.Y. TIMES (Oct. 22, 2015), <https://perma.cc/Z7C2-Z56F>.

59. Order Denying the Motions for Stay, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016).

60. *West Virginia v. EPA*, 577 U.S. 1126 (2016).

61. Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama’s Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), <https://perma.cc/MU3U-B92R>.

negotiations it did not affect the negotiations themselves, which allowed the agreement to be reached.⁶²

The longer-term practical effect of the Supreme Court's February 2016 stay was that the Clean Power Plan never went into effect because Donald Trump was elected President later that year. As a result, the Supreme Court's stay remained in place until EPA repealed the Plan in July 2019,⁶³ consistent with President Trump's campaign promise to do just that if elected.⁶⁴ That repeal naturally ended any need for the Court's stay.

During that same extended time period, the D.C. Circuit never ruled on the lawfulness of the Clean Power Plan, even though it had held oral argument, sitting en banc, to consider that issue in September 2016.⁶⁵ There was little doubt that the court had more than enough time during those thirty-four months to have issued its ruling. Instead, the court repeatedly acquiesced in the Trump Administration's requests, notwithstanding obvious grumblings from some judges,⁶⁶ to stay its proceedings until after the new Administration had an opportunity to decide whether to repeal the Plan, which it ultimately did.

In repealing the Clean Power Plan, moreover, EPA deliberately chose a pathway designed to ensure that the Plan, once repealed, could not be simply resurrected by a future presidential administration. EPA could have based its repeal on either of two grounds: (1) the agency's understanding of the plain meaning of the relevant language of the Clean Air Act; or (2) the agency's interpretation of ambiguous statutory language. The latter would likely have been a slam dunk winner. Even if the courts would agree that EPA could reasonably construe "system" to refer to the nation's electricity grid, the courts would also have no problem concluding that EPA could reasonably construe it *not* to apply so broadly.

But EPA during the Trump Administration did not want to win on an argument based on statutory ambiguity. It wanted to win on plain meaning,⁶⁷ which would foreclose any future EPA under a new administration from reviv-

62. See *supra* notes 19–20 and accompanying text.

63. Repeal of the Clean Power Plan, 84 Fed. Reg. 32,250, 32,520–22 (July 8, 2019).

64. See Richard J. Lazarus, *The Super Wicked Problem of Donald Trump*, 73 VAND. L. REV. 1811, 1842 (2020).

65. Per Curiam Order, En Banc, Filed Allocating Oral Argument Time, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Aug. 17, 2016).

66. See Per Curiam, En Banc, Order that Consolidated Cases Remain in Abeyance, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Aug. 8, 2017) (Tatel & Millett, JJ., concurring in the order granting further abeyance); Per Curiam, En Banc, Order that Consolidated Cases Remain in Abeyance, *West Virginia v. EPA*, No. 16-1363 (D.C. Cir. June 26, 2018) (Tatel & Millett, JJ., concurring in the order granting further abeyance); *Id.* (Wilkins & Millett, JJ.).

67. Repeal of the Clean Power Plan, 84 Fed. Reg. at 32,523–24 (“[Clean Air Act] section 111 unambiguously limits the BSER to those systems that can be put into operation *at* a building, structure, facility, or installation.”).

ing the Clean Power Plan. Even if the government lawyers at EPA charged with crafting the Clean Power Plan had included the ambiguity argument only as an available backup, a reviewing court would likely rely on the backup to sustain the agency repeal without addressing the plain meaning argument.⁶⁸ EPA accordingly formally rested its repeal of the Clean Power Plan solely on the ground that the “best system of emission reduction” (“BSER”) allows the agency to consider only emissions-reduction measures that “can be applied at and to a stationary source,” thereby excluding any reliance on generation shifting.⁶⁹

While repealing the Clean Power Plan, EPA further substituted for that Plan its own Affordable Clean Energy (“ACE”) rule, which was far less ambitious.⁷⁰ First, unlike the Clean Power Plan, the ACE rule did not rely on generation shifting. The only permissible statutory basis for emission limitations, according to EPA’s new reading of the law, was on-site heat efficiency improvements.⁷¹ In addition, EPA further concluded that section 111(d) did not allow EPA to require States to achieve any particular level of emissions reduction. Instead, whatever emission limitation EPA deemed supported by the best system of emission reduction could be merely advisory in nature and could even result in a net increase in emissions.⁷²

B. *The D.C. Circuit Ruling in American Lung Association v. EPA*⁷³

On January 19, 2021, the D.C. Circuit ruled that EPA’s repeal of the Clean Power Plan was unlawful.⁷⁴ The court concluded that the repeal was not, as EPA had argued, required by the plain meaning of the Clean Air Act: the Act “simply does not unambiguously bar a system of emission reduction that includes generation shifting.”⁷⁵ As summarized by the majority:

The EPA’s position depends critically on words that are not there. It erroneously treats a nominalization of a verb as requiring an indirect

68. See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222–23 (2009).

69. Repeal of the Clean Power Plan, 84 Fed. Reg. at 32,534; see *id.* at 32,523–32. The Trump Administration EPA found that “application,” which appears in Clean Air Act (“CAA”) section 111(a)(1), requires both a direct and indirect object. *Id.* at 32,524. In other words, someone must apply one thing (like a general rule) to another thing (like a particular circumstance). “In the case of CAA section 111,” EPA argued, “the direct object is the BSER” and “the indirect object is the ‘existing source,’” elsewhere defined as a “stationary source.” *Id.* As a result, EPA found that CAA section 111 limited the BSER to stationary sources, confining emissions-reduction measures within a plant’s fenceline. See *id.*

70. See *id.* at 32,532–64.

71. See *id.* at 32,533–35.

72. See *id.* at 32,537–38.

73. 985 F.3d 914 (D.C. Cir. 2021).

74. *Id.* at 995.

75. *Id.* at 951.

object, collapses two separate functions and provisions of the Act in order to supply a borrowed indirect object, does so without any evidence that the borrowed indirect object was what Congress necessarily intended, and narrowly focuses the Agency's authority on that indirect object by using a different preposition from the one that actually appears in the borrowed text. Each of these interpretive moves was a misstep. Read faithfully, [section 111(d)(a)(1)] lacks the straightjacket that the EPA imposes.⁷⁶

. . . .
The EPA's new reading of [section 111] would atrophy the muscle that Congress deliberately built up. The EPA asserts that it lacks authority to curb a pollutant that the Agency itself has repeatedly deemed a grave danger to health and welfare but that eludes effective control under other provisions of the Act. We do not believe that Congress drafted such an enfeebled gap-filling authority in [section 111].⁷⁷

The per curiam majority opinion, joined by Judges Millett and Pillard, made clear that the court was not reaching the distinct question whether EPA could have validly repealed the Clean Power Plan on the alternative ground that it had discretion to do so based on statutory ambiguity.⁷⁸ Given the strength of the alternative available argument to sustain the Clean Power Plan's repeal, I doubt Judges Millett and Pillard would have. But because EPA had declined to rely on that alternative ground, that distinct legal issue was not before the court.⁷⁹

The court further held that because EPA's repeal of the Clean Power Plan was unlawful, its substitute plan, the ACE rule, was similarly unlawful. The appeal and the rule expressly rested on the same erroneous premise that the plain meaning of the Clean Air Act precluded the agency from considering generation shifting in determining the best system of emission reduction.⁸⁰ Here too, EPA had deliberately decided not to base the ACE rule on the alternative ground that it reflected a permissible interpretation of the statutory language, even if not statutorily compelled.⁸¹

In reaching its result, the majority squarely rejected EPA's reliance on the "Major Questions Doctrine."⁸² The court distinguished the agency rulemakings

76. *Id.*

77. *Id.* at 957.

78. *Id.* at 946 ("The issue is not whether the EPA's counterargument to each of these points might show its interpretation to be permissible as an exercise of discretion.").

79. *Id.* ("[T]he EPA has not claimed to be exercising . . . discretion here.").

80. *Id.* at 957.

81. *See id.* at 944.

82. *Id.* at 958–59.

before it from those in which the Supreme Court had held that “sometimes an agency’s exercise of regulatory authority can be of such ‘extraordinary’ significance that a court should hesitate before concluding that Congress intended to house such sweeping authority in an ambiguous statutory provision.”⁸³ According to the majority, “[u]nlike cases that have triggered the major questions doctrine, each critical element of the Agency’s regulatory authority on this very subject has long been recognized by Congress and judicial precedent.”⁸⁴

First, the appellate court reasoned that, unlike the issue of the Food and Drug Administration’s authority to regulate tobacco in *FDA v. Brown & Williamson Tobacco Corp.*,⁸⁵ “there is no question that the regulation of greenhouse gas emissions by power plants across the Nation falls squarely within the EPA’s wheelhouse.”⁸⁶

Second, unlike in *Utility Air Regulatory Group v. EPA*⁸⁷ (“*UARG*”), the Clean Power Plan regulated the same entities the Supreme Court told EPA to regulate in *American Electric Power v. Connecticut*⁸⁸ and *UARG*: fossil fuel-fired power plants.⁸⁹ “While power plants are significant players in the American economy,” the majority added, “they have been subject to regulation under [section 111] for nearly half a century.”⁹⁰

Third, the court held the Major Questions Doctrine did not apply to EPA’s interpretation of the “best system of emission reduction” because that “is a task expressly and indisputably assigned by Congress to EPA and requiring specialized agency expertise.”⁹¹ The relevant statutory provisions, the court additionally noted, included many significant constraints on how EPA selects the best system of emission reduction. These constraints “foreclose using the major questions doctrine to write additional, extratextual, and inflexibly categorical limitations into a statute whose ‘broad language . . . reflects an intentional effort to confer the flexibility necessary to forestall . . . obsolescence.’”⁹² As the court concluded, “Congress’ carefully calibrated system . . . leaves no room for the unauthorized overreach that the EPA fears.”⁹³

83. *Id.* at 959.

84. *Id.*

85. 529 U.S. 120 (2000); see *Am. Lung Ass’n*, 985 F.3d at 960.

86. *Am. Lung Ass’n*, 985 F.3d at 959.

87. 573 U.S. 302 (2014).

88. 564 U.S. 410 (2011).

89. *Am. Lung Ass’n*, 985 F.3d at 961.

90. *Id.* at 964.

91. *Id.* at 962.

92. *Id.* at 964 (omissions in original) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007)).

93. *Id.* at 966–67.

Finally, the majority concluded that the “federalism canon” did not support EPA’s cramped reading of section 111.⁹⁴ “Interstate air pollution is not an area of traditional state regulation” and “the federalism clear-statement rule is of limited applicability” when, as is true for section 111(d), “a federal regulatory regime is enforced through a statutory cooperative-federalism framework.”⁹⁵

C. *The Biden Administration’s Response to the American Lung Ass’n Ruling*

One might have fairly expected that the Biden-Harris Transition Team would have greeted the D.C. Circuit’s January 19, 2021, ruling in *American Lung Ass’n* with the uncorking of champagne bottles. After all, only twenty-four hours before President Biden would take the oath of office and his political appointees would assume leadership over EPA, the D.C. Circuit had seemingly handed the new Administration a great gift: the legal basis for immediate revival of the signature climate regulatory initiative of the Obama Administration, which many of those same new Biden officials had earlier developed and defended. The Biden Administration would consequently not have to spend the years that would be otherwise required by the Administrative Procedure Act⁹⁶ to reverse the Trump Administration repeal of the Plan and then to reinstate the Plan itself or, even more likely, an improved, updated version. In short, the Clean Power Plan that the Supreme Court had taken away in 2016—and for which many of these now-incoming Biden officials had fought so hard as Obama appointees—the D.C. Circuit was now giving back to the new Administration.

The actual reaction of the incoming Biden Administration officials at EPA, however, was quite different. They were not elated. They were closer to horrified. Perhaps unlike the judges of the D.C. Circuit, they appreciated the consequences of the ruling’s timing: what might have been a gift in 2016 was in

94. *Id.* at 968.

95. *Id.* The majority also rejected the Coal Petitioners’ claim, not advanced by EPA, that EPA’s earlier regulation of a different air pollutant (mercury) from power plants under section 112 of the Act, precluded the EPA from regulating those same sources’ emissions of greenhouse gases under section 111(d). *Id.* at 977. The court held that the Clean Air Act instead authorizes EPA to regulate power plant emissions of both hazardous air pollutants under section 112 and greenhouse gas pollutants under section 111(d) and does not bar the latter upon regulation of the former. *Id.* at 977–88.

Judge Walker concurred in part, concurred in the judgment, and dissented in part. *Id.* at 995. Judge Walker concluded that EPA was required by the plain meaning of the Clean Air Act to repeal the Clean Power plan. *Id.* at 995–1003. He further concluded that EPA lacked the power to replace that Plan with a new plan “because coal-fired power plants are already regulated under § 112, and § 111 excludes from its scope any power plants regulated under § 112.” *Id.* at 996; *see id.* at 1003–13.

96. 5 U.S.C. §§ 551–559.

2021 the equivalent of a time bomb waiting to go off in the incoming Administration's face.

Why the difference? Simple—the relevant Supreme Court math had profoundly changed since 2016. The Biden Administration leadership could count only to a maximum of three Justices who would be sympathetic to their arguments in support of the Clean Power Plan's lawfulness. The Supreme Court in 2016, during the last year of the Obama Administration, was not the Court in 2021 at the outset of the Biden administration. In 2016, Obama Administration officials thought they were about to witness the emergence of the first working progressive majority on the Court in fifty years—since the late 1960s—with D.C. Circuit Chief Judge Merrick Garland's replacement of Justice Scalia on the bench.⁹⁷ Even Senate Majority Leader Mitch McConnell's refusal to allow for Senate consideration of Garland's nomination would merely postpone rather than prevent the inevitable seismic shift in the Court's makeup. It was an open secret in the nation's capital that Republican opposition to a vote on Garland's nomination would quickly fade once Hillary Clinton was elected, which most everyone assumed would happen, including the Republicans in Congress.⁹⁸ They would far prefer a Justice Garland to a nominee selected by a President Hillary Clinton, who would most certainly be a decade or two younger and more progressive than then-sixty-three-year-old Garland, who was well known for his moderation.⁹⁹

What the incoming Biden officials saw on January 19, 2021, was a six-Justice majority likely both to grant a petition to review the *American Lung Ass'n* D.C. Circuit ruling and reverse. And they worried so much about the potentially broader sweep of such an adverse ruling on EPA's authority to regulate greenhouse gas emissions, as well as the federal government's overall authority to enact regulations protective of public health and welfare, that they took immediate, decisive action. They quickly decided to effectively bury the Clean Power Plan to avoid the prospect of Supreme Court review—a unilateral, unqualified surrender.

The Department of Justice, representing EPA, filed a motion in the D.C. Circuit, asking the court to stay its mandate, to ensure that the Clean Power Plan would not be revived as a result of the appellate court's judgment.¹⁰⁰ EPA,

97. See Michael D. Shear et al., *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), <https://perma.cc/W7CF-F2XS>.

98. Chuck Todd et al., *First Read: Mitch McConnell's Supreme Court Dilemma*, NBC NEWS (Aug. 9, 2016), <https://perma.cc/7HQ4-5X7B>.

99. Mike DeBonis, *Will Hillary Clinton Stick with Merrick Garland if She Wins the White House?*, WASH. POST (Aug. 16, 2016), <https://perma.cc/MV6X-FWUE>; Stephen Stromberg, *Opinion, How Republicans Will Justify Flip-Flopping on Garland*, WASH. POST (Mar. 17, 2016), <https://perma.cc/V5PF-JG6F>.

100. Respondents' Motion for a Partial Stay of Issuance of the Mandate, *Am. Lung Ass'n*, 985 F.3d 914 (No. 19-1140).

moreover, further announced it would not reinstate the Clean Power Plan and instead would start from scratch to craft a new plan, which it could be more confident would survive judicial review.¹⁰¹ The D.C. Circuit in turn granted the motion,¹⁰² which had the legal effect of removing all section 111 restrictions of greenhouse gas emissions from existing power plants.

Although effectively throwing the Clean Power Plan under the bus was a high price to pay, the Justice Department and EPA were apparently confident that it was necessary and would be sufficient to persuade the Justices to deny review. As described in the briefs in opposition to certiorari filed by the Solicitor General and the other respondents, the absence of any legally effective restriction on greenhouse gas emissions by EPA would seem simultaneously both to make the case moot and to deprive the petitioners of an injury needed for Article III standing.¹⁰³ Or at least, even if Article III jurisdiction might nominally still exist, the lower court's stay would seem to render the case an improper vehicle for plenary review on prudential grounds.¹⁰⁴ Although the Court plainly harbored concerns about the lawfulness of the Clean Power Plan, resulting in its stay of that Plan five years earlier in 2016,¹⁰⁵ routine prudence supported the Court's waiting to see what new plan EPA crafted rather than address what would amount to no more than hypothetical legal issues in the absence of any legally effective plan at all.

The Biden Administration did not, for that same reason, believe it needed to take the even more drastic action of immediately repealing the Clean Power Plan.¹⁰⁶ Not only did such a further formal administrative step seem strategically unnecessary to avoid Supreme Court review, it could be politically disastrous. The Administration's filing of a mere motion to stay the appellate court's mandate was a low-profile event that attracted little public attention at the time. The Biden Administration could fairly anticipate, however, that grass-

101. *Id.*

102. Order Withholding Issuance of Mandate, *Am. Lung Ass'n*, 985 F.3d 914 (No. 19-1140).

103. See Brief for the Federal Respondents in Opposition at 17–19, *West Virginia v. EPA*, 142 S. Ct. 420 (2022) (No. 20-1530); Brief for States and Municipalities in Opposition at 9–15, *West Virginia*, 142 S. Ct. 420 (No. 20-1530); Brief in Opposition of Non-Governmental Organization and Trade Association Respondents at 6–9, *West Virginia*, 142 S. Ct. 420 (No. 20-1530). *But cf.* Reply Brief for Petitioners at 2–6, *West Virginia*, 142 S. Ct. 420 (No. 20-1530).

104. See Brief for the Federal Respondents in Opposition, *supra* note 103, at 19–22 (arguing the Court “should await the completion of EPA’s new rulemaking, when any challenge to the new rule ‘will take more concrete shape’” (quoting *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam))).

105. *Supra* text accompanying note 60.

106. The Administration could have justified the appeal under the Administrative Procedure Act's good cause exception from that Act's requirement of lengthy notice and comment rulemaking. 5 U.S.C. § 553(b)(3)(B); see generally Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237 (2021).

roots climate activists, many of whom supported President Biden's election, would be publicly and loudly outraged were the newly elected President to embrace the Clean Power Plan's repeal. Unfortunately for the new Administration, what reasonably appeared in its first month in office to be the smart short-term political calculation, proved eight months later to be the wrong choice.

D. West Virginia v. EPA

The Biden Administration learned on October 29, 2021, that it had overestimated the Court's adherence to past practice, or perhaps more accurately, underestimated the aggressiveness of the new conservative majority within the current Court. After relisting the case for additional consideration at three prior conferences, the Court's fourth conference proved the charm for State and industry petitioners seeking review of the D.C. Circuit's *American Lung Ass'n* ruling.¹⁰⁷ The Court granted review to consider whether the Trump Administration's repeal of the Clean Power Plan was lawful in light of the language of section 111(d) and the constitutional limits on congressional authority to delegate to EPA the power to issue significant rules.¹⁰⁸ There was little doubt about the portent of the Court's jurisdictional ruling. Although it takes only four Justices to grant certiorari, there were most certainly at least five, and likely six, Justices ready to reverse the D.C. Circuit's decision and reinstate the Trump repeal of the Clean Power Plan. The only remaining question was how broad versus narrow the Court's ruling would be and, accordingly, whether the Biden EPA's worst fears would be realized.

The competing briefs of the opposing parties, and their respective amici, reflected this shared understanding. Those filing topside (in support of petitioners) swung for the fences, inviting the Court to rule in their favor on the broadest possible grounds. Those filing bottom-side, however, sought to craft arguments to achieve the opposite result: while never formally acknowledging they were destined to lose, the respondents' briefs were plainly designed to prompt a High Court defeat on a ground that would be as narrowly drawn as possible.

1. *Topside: Petitioners' Briefs and Their Amici.* The *West Virginia* case was actually four consolidated cases¹⁰⁹ and each set of petitioners filed their own merits briefs as did three different sets of industry respondents supporting peti-

107. See Petition for a Writ of Certiorari, *West Virginia*, 142 S. Ct. 420 (No. 20-1530); Reply Brief for Petitioners, *supra* note 103; *West Virginia*, 142 S. Ct. 420 (mem.) (granting certiorari).

108. *West Virginia*, 142 S. Ct. 420 (mem.) (granting certiorari); see also Petition for a Writ of Certiorari, *supra* note 107, at I.

109. *West Virginia*, 142 S. Ct. 420 (mem.).

tioners.¹¹⁰ To some extent, their opening briefs reflected a coordinated strategy. Rather than submit seven briefs that repeated the same arguments seven times, different briefs emphasized different arguments in greater depth. Some discussed threshold jurisdictional issues more than others. And others spent more time on broader constitutional issues such as the Major Questions Doctrine,¹¹¹ the Federalism Canon,¹¹² or the Nondelegation Doctrine.¹¹³

One thing the briefs had in common was their shared objective not to win on the most readily available narrow ground: the plain meaning of section 111(d) of the Clean Air Act, standing alone. Though petitioners no doubt would have considered a plain-meaning win adequate at the D.C. Circuit, they were now in a far more favorable judicial forum with a much broader reach. They all sought a judicial ruling that relied on more sweeping constitutional grounding that could have far reaching implications in environmental cases well beyond the particular facts and procedural posture of the *West Virginia* case.

To that end, the seven petitioner briefs (which included respondent briefs supporting petitioners) invited the Court to ground its ruling in the first instance on a broader constitutional basis such as the Major Questions Doctrine.¹¹⁴ Their aims were more ambitious than the invalidation of the Clean Power Plan. They sought to establish that no federal regulation of economic or political significance was lawful unless the agency promulgating the regulation could establish that Congress had clearly demonstrated its decision to authorize the agency to issue such a rule.¹¹⁵ Such a clear demonstration could not be established, petitioners argued, by a statute's broad capacious language that, while theoretically admitting of such a sweeping interpretation, did not otherwise evince that Congress specifically contemplated the kind of regulation the

110. See generally Brief for Petitioners, *West Virginia, et al., West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530); Brief for Petitioner the North American Coal Corp., *West Virginia*, 142 S. Ct. 2587 (No. 20-1530); Brief of Petitioner Westmoreland Mining Holdings LLC, No. 20-1778, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530); Merits Brief of Petitioner the State of North Dakota, No. 20-1780, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530); Brief of Respondent National Mining Association in Support of Petitioners, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530); Brief of Respondent Basin Electric Power Cooperative in Support of Petitioners, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530); Brief of Respondent America's Power in Support of Petitioners, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530).

111. See, e.g., Brief of Respondent America's Power in Support of Petitioners, *supra* note 110; Brief for Petitioners the North America Coal Corp., *supra* note 110; Brief of Petitioner Westmoreland Mining Holdings LLC, No. 20-1778, *supra* note 110.

112. See, e.g., Merits Brief of Petitioner the State of North Dakota, *supra* note 110, at 38–40.

113. See, e.g., Brief of Respondent National Mining Association in Support of Petitioners, *supra* note 110, at 20–24, 26–29.

114. See, e.g., Brief for Petitioners, *West Virginia et al.*, *supra* note 110, at 14–26.

115. See, e.g., Brief for Petitioner, Westmoreland Mining Holdings LLC, *supra* note 110, at 21–25.

agency had issued.¹¹⁶ According to petitioners, such capacious language was inherently ambiguous in the extent of its reach and “[b]y definition, Congress does not speak clearly through ambiguous text.”¹¹⁷

The reason for this common strategy was clear: to advance petitioners’ deregulatory agenda. A ruling in favor of the petitioners rooted in the plain meaning of section 111(d) would not establish judicial precedent of any particular import beyond the peculiarities of the specific language of that provision. By contrast, a ruling that established, based on the Major Questions Doctrine, a heightened standard of judicial scrutiny for any law of economic or political significance would limit EPA’s authority to issue significant rules under any provision of the Clean Air Act or any other federal environmental law. Nor, of course, would it be limited to EPA. The same heightened standard of judicial review would apply throughout the federal government to all federal administrative agencies.

Proponents of deregulation could, for instance, use such a ruling to try to upend an anticipated effort by the Securities and Exchange Commission (“SEC”) to require disclosure of climate risks in SEC filings.¹¹⁸ For decades, environmental groups had pushed the SEC to require publicly owned companies to disclose the environmental risks and potential liabilities of their operations.¹¹⁹ Those groups knew that if a company’s stock prices reflected those risks and liabilities, the company would have an enormous economic incentive, otherwise missing, to take actions needed to reduce them.

Ever since climate risks first came to the forefront of environmentalist agendas in the 1990s, environmentalists have been trying to persuade the SEC to require publicly owned companies to disclose those risks, but with little success. During the Obama Administration, the SEC finally took some small steps in that direction,¹²⁰ but it was not until the Biden Administration that the SEC has made clear its ambition to require such climate risk disclosure in a more sweeping way.¹²¹ Powerful industry players, many who opposed the SEC cli-

116. *See, e.g.*, Brief for Petitioner, North American Coal Corporation, *supra* note 110, at 17–22.

117. Brief for Petitioners, West Virginia et al., at 18, *supra* note 110.

118. *See generally* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022) (to be codified at scattered sections of 17 C.F.R.).

119. *See* Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm’n, 606 F.2d 1031, 1045 (D.C. Cir. 1979).

120. *See generally* U.S. SEC. & EXCH. COMM’N, RELEASE NOS. 33-9106, 34-61469, FR-82, COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE (2010) (amending 17 C.F.R. pts. 211, 231, 241).

121. *See generally* The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022) (to be codified at scattered sections of 17 C.F.R.).

mate rule before it was even proposed,¹²² will most certainly invoke the Supreme Court's invocation of the Major Questions Doctrine in *West Virginia* in challenging any SEC climate rule. They will argue that, just like the EPA in the Clean Power Plan, the SEC is acting outside its lane absent clear congressional authorization. EPA's transgression was its attempt in the Clean Power Plan to regulate the nation's electricity grid. The SEC's mistake was to seek to regulate environmental risks.¹²³

If, however, the petitioners were swinging for the fences, their supporting amici were trying to knock it out of the park. Several did not, like the petitioners, seek to win based on a ruling that Congress had failed to evidence sufficient intent to support the agency's claimed authority to promulgate a significant rule. Some argued that Congress lacked that delegation authority altogether no matter how clearly it evinced its intent. Some briefs contended that any such delegation of significant rulemaking authority violated the Nondelegation Doctrine¹²⁴ and could not be cured by Congress providing an intelligible principle to guide its exercise of that authority.¹²⁵ They argued that the intelligible principle test upon which the courts had relied for decades in rejecting nondelegation arguments was vacuous and that there were accordingly no shortcuts to Congress itself making the significant lawmaking decisions.¹²⁶ One amicus brief relatedly argued that *Chevron* deference violated separation of powers and therefore the Court should overrule *Chevron*.¹²⁷

122. See Reuters, *Companies Worry U.S. SEC Climate Rule May Require Broad Emissions Disclosures*, CNBC (Jan. 19, 2022) <https://perma.cc/YE5T-78XG>; see also Letter from Patrick Morrissey, West Virginia Attorney General, to Allison Herren Lee, Acting Chair, Sec. & Exch. Comm'n (Mar. 25, 2021), <https://perma.cc/EG8F-SK6K>.

123. See Jacqueline M. Vallette & Kathryn M. Gray, *SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges*, HARV. L. SCH. F. CORP. GOVERNANCE (May 10, 2022), <https://perma.cc/P8RR-646R>. For further pre-*West Virginia* criticism of the proposed rule from various industries, see Abigail Gampher, *Analysis: Sectors Push Back on SEC Climate-Related Disclosures*, BLOOMBERG TAX (June 24, 2022) <https://perma.cc/BJG8-HVQ5>. For criticism of the proposed rule from a dissenting SEC Commissioner, see Hester M. Peirce, *We Are Not the Securities and Environment Commission – At Least Not Yet*, U.S. SEC. & EXCH. COMM'N (Mar. 21, 2022) <https://perma.cc/D4WS-CEP3>.

124. See, e.g., Brief for Amici Curiae the Michigan House of Representatives and the Michigan Senate in Support of Petitioners at 4, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530).

125. See Amicus Curiae Brief of the New Civil Liberties Alliance in Support of Petitioners at 16–19, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530); Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Petitioners at 23–26, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530).

126. See Amicus Curiae Brief of the New Civil Liberties Alliance in Support of Petitioners, *supra* note 125, at 13–19.

127. See Brief of Amicus Curiae the Claremont Institute's Center for Constitutional Jurisprudence in Support of Petitioners at 10–11, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530).

2. *Bottomside: Respondents' Briefs and Their Amici.* By contrast, the respondents were in full-fledged damage-control mode once certiorari was granted.¹²⁸ They were not trying to hit anything over the fences, let alone out of the park. They were mostly trying to avoid getting hit by a beanball pitch that might result in the equivalent of a career-ending injury. To be sure, respondents' briefs included the formal, obligatory request for affirmance of the lower court judgment.¹²⁹ But the primary thrust of their arguments was plainly pragmatic and not self-delusional: aimed at seeking what Supreme Court advocates dub a "soft landing." In the *West Virginia* case, that meant losing on a ground that did the smallest amount of damage possible to EPA's future ability to effectively regulate greenhouse gas emissions.

To that end, respondents devoted the lion's share of their written briefs to arguing that the petitions should be dismissed for lack of Article III jurisdiction on both standing and mootness grounds.¹³⁰ Petitioners lacked standing, respondents argued, because there was currently no regulation of power plant greenhouse gas emissions under section 111 of the Clean Air Act.¹³¹ The ACE rule had been struck down, the Clean Power Plan had not been revived (due to the lower court's acquiescence in EPA's request for a stay of that mandate), and EPA had repeatedly made clear that it was going back to the drawing board on crafting a new set of rules. Respondents relatedly argued that the case was also moot because the Clean Power Plan's applicable deadlines had essentially passed and its stated emission-reduction goals in 2015 had already been met without the Plan ever going into effect.¹³²

In most circumstances, such a tactic would have seemed an odd strategic choice, given that respondents had generally raised those same Article III arguments at the jurisdictional stage in an unsuccessful effort to persuade the Court not to hear the case at all. But it was nonetheless likely the wise choice in *West Virginia* for three reasons.

First, there was a lack of other attractive alternative pathways to a soft landing. Even Supreme Court advocates have to play the cards they are dealt, extending in this instance to six very conservative Justices who were very un-

128. See Brief for the Federal Respondents, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530); Brief of Non-Governmental Organization and Trade Association Respondents, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530); Brief for State of New York and Other State and Municipal Respondents, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530); Brief for the Power Company Respondents, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530).

129. See, e.g., Brief for the Federal Respondents, *supra* note 128, at 15.

130. See Brief for the Federal Respondents, *supra* note 128, at 14–21; Brief of Non-Governmental Organization and Trade Association Respondents, *supra* note 128, at 23–32.

131. See Brief for the Federal Respondents, *supra* note 128, at 11 (noting the "absence of any currently applicable [section 111(d)] regulation of greenhouse-gas emissions").

132. See Brief of Non-Governmental Organization and Trade Association Respondents, *supra* note 128, at 28 (arguing that "[o]ngoing market trends and the passage of time" eliminated the possibility of injury even if the Clean Power Plan were reimplemented).

likely to embrace any ruling that endorsed EPA's broad regulatory authority under the Clean Air Act. Securing a dismissal of the petitions, even if it required effectively burying the Clean Power Plan and vacating the D.C. Circuit's judgment, remained by leaps and bounds their best soft landing of all—the avoidance of any Supreme Court ruling on the merits.

Second, respondents' Article III arguments were likely their strongest basis for persuading a Court dominated by conservative Justices not to issue a damaging ruling. Ever since the Chief Justice joined the Court in 2005, the conservative majority has frequently relied on strict applications of Article III standing requirements to deny litigants access to federal courts.¹³³ The Chief himself has written multiple opinions on Article III standing in favor of a ruling that a party lacked standing,¹³⁴ and he even wrote a law review article—long before he became a federal judge—in support of more demanding standing requirements.¹³⁵

There was also good reason to believe that the Justices may not have fully considered the possible strength of the Article III jurisdictional arguments in nonetheless granting the four certiorari petitions. It is well-known that the Justices do not do their best work at the petition stage.¹³⁶ They are not yet “all in.” Far more than when the case is before them on the merits, at the petition stage, they are heavily reliant on the summary memos prepared by their law clerks.¹³⁷ The Justices themselves spend relatively little time, and sometimes none at all, taking a close look at the jurisdictional papers filed in deciding whether to grant review,¹³⁸ although that practice may have been undercut some in this instance given that the Court scheduled four conferences before deciding whether to grant review.

Finally, the Article III arguments respondents made in their merits briefs were better and more fully presented in their merits briefs than they had been in their briefs in opposition to the petitions for a writ of certiorari. Legal arguments at the appellate and Supreme Court stage are never static, at least if, as was true in the *West Virginia* case, the parties are represented by excellent Supreme Court lawyers. Such lawyers are constantly rethinking, revising, and improving on their arguments. That was especially true for the Solicitor General's

133. See Jess Bravin, *Court Under Roberts Limits Judicial Power*, WALL ST. J. (July 2, 2007), <https://perma.cc/L37L-S7PD>.

134. See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 354 (2006); *Massachusetts v. EPA*, 549 U.S. 497, 535–36 (2007) (Roberts, C.J., dissenting); *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 298 (2008) (Roberts, C.J., dissenting).

135. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993).

136. See Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 93–94 (2009).

137. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1523–24 (2008).

138. See *id.*

brief for respondent EPA, which focused far more attention on the Article III jurisdictional arguments in its merits brief than it had in its brief in opposition to certiorari.¹³⁹ The Solicitor General's merits brief also included the further smart invitation to the Justices to vacate the lower court judgment while dismissing the petitions, thereby providing the Justices with a pathway to eliminating a lower court precedent most of them plainly held in great disfavor.¹⁴⁰

The remainder of the respondents' briefs defended the lower court's ruling but in a manner plainly designed to steer the Court to rule narrowly—if the Court were to reach the merits and reverse. The briefs argued that the case could be decided based on the meaning of the relevant statutory language alone without resort to the Major Questions Doctrine, Federalism Canon, and Nondelegation Doctrine, none of which was implicated by that language.¹⁴¹ Their supporting amicus briefs sought to achieve that same end, but the most effective of those briefs were likely those that did so more indirectly rather than just repeating the merits arguments of the respondents themselves. For instance, an amicus brief filed on behalf of experts on the nation's electricity grid and another on behalf of former power industry executives explained how power companies had long and effectively responded to pollution controls by shifting to lower-emitting generators elsewhere on the grid and how a broad ruling against generation shifting could disrupt current business practices.¹⁴²

E. *The West Virginia Oral Argument*

The *West Virginia* oral argument commenced promptly at 10 a.m. on Monday, February 28, 2022,¹⁴³ and no more than five minutes later, it was readily apparent that respondents would not succeed on their threshold Article III standing and jurisdictional arguments. There would be no soft landing. By then, both Justice Thomas and the Chief Justice had asked their first questions and neither had picked up and questioned petitioners on whether there was a jurisdictional problem.¹⁴⁴ Even if Thomas might not have, the Chief would have done so in his opening salvo had he harbored any such concerns. He in-

139. Compare Brief for the Federal Respondents in Opposition to Petitions for Writs of Certiorari, *supra* note 103, at 17–22, with Brief for the Federal Respondents, *supra* note 128, at 15–23.

140. See Brief for the Federal Respondents, *supra* note 128, at 21–23.

141. See, e.g., Brief for the Power Company Respondents, *supra* note 128, at 20–27; Brief of Non-Governmental Organization and Trade Association Respondents, *supra* note 128, at 42–49; Brief for the Federal Respondents, *supra* note 128, at 44–50.

142. See, e.g., Brief of Amici Curiae Grid Experts Benjamin F. Hobbs, Brendan Kirby, Kenneth J. Lutz, and James McCalley in Support of Respondents at 16–30, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530); Brief of Amici Curiae Former Power Industry Executives in Support of Respondents at 15–26, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530).

143. Transcript of Oral Argument at 1, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530).

144. *Id.* at 6–9.

stead only questioned petitioners' counsel on the Major Questions Doctrine.¹⁴⁵ It was not until twenty minutes into the argument that any Justice asked petitioners about the threshold jurisdictional arguments. Even then, though Justice Gorsuch nominally referred to those arguments as strong, his tone and lack of any follow-up made clear his question was merely perfunctory in nature.¹⁴⁶

By the time the oral argument ended, 123 minutes after it began, there was no doubt that the federal government's principal strategy—though well planned and presented—had fallen far short. The minimum of five votes to sustain it were not there. Even Justice Breyer seemed unimpressed.¹⁴⁷ And the Solicitor General of West Virginia in her final rebuttal argument clearly appreciated just that; she used her closing seconds to deliver a final, but by then wholly unnecessary fatal blow—she stressed that there was very little in the formal record to support EPA's claim that the agency could not still easily bring the Clean Power Plan back to life.¹⁴⁸

Nor did the oral argument give EPA much reason to hope that a medium landing—in which the Court would rule against the federal agency based only on the plain meaning of relevant Clean Air Act language rather than rely more broadly on a threshold invocation of the Major Questions Doctrine—seemed credibly within reach. Solicitor General Elizabeth Prelogar tried her best to promote that result,¹⁴⁹ as did Justice Kagan in her earlier questioning of West Virginia's counsel,¹⁵⁰ but the Chief Justice seemed fairly clear that he was not buying it.¹⁵¹ His questions left little doubt that he was disinclined to have the Court first address the statute's plain meaning—as both Solicitor General Prelogar and Justice Kagan contended was appropriate—and that he favored instead the Court first invoking the Major Questions Doctrine against EPA's reading:¹⁵² the very result EPA and the other respondents had sought to prevent.

Of course, one could have argued that the Chief's preferred analytical framework was no particular cause for alarm—after all he is only one Justice out of nine. But those who watch the Court closely knew better. Of the six Justices expected to vote against EPA on the merits, Roberts seemed more likely than the other five to be open to a narrow ruling. That Roberts, too, seemed to favor a more broadly based ruling against EPA was tantamount to game over. There would be no soft landing. There would be no medium landing. Oral argument made clear that the most likely outcome would be a vote of six to three against

145. *Id.* at 9–10.

146. *See id.* at 20–22.

147. *See id.* at 92–95.

148. *Id.* at 134–35.

149. *See id.* at 64–65, 82–83.

150. *See id.* at 28–32.

151. *See id.* at 83–85.

152. *See id.*

the legal position of the Biden Administration EPA. The only sliver of good news for the Biden Administration coming from the oral argument was that the *West Virginia* ruling would fall well shy of the hardest possible landing of all promoted by petitioners' most extreme amici:¹⁵³ a formal constitutional ruling based squarely on the Nondelegation Doctrine, which limits the authority of Congress altogether to delegate legislative authority to executive branch agencies.¹⁵⁴ Even so, the government knew it should brace for impact. It was going to be a hard landing.

F. *The Court's Ruling*

The Court announced its opinion as expected in late June, on the morning of Thursday, June 30, 2022.¹⁵⁵ Also as expected, Chief Justice Roberts was the senior Justice in the six-Justice majority and, as the senior Justice, assigned the responsibility of authoring the opinion of the Court to himself. Nor, unfortunately for the Biden Administration, were there any surprises in the ruling itself.

The Court gave short shrift to the respondents' claim that the case should be dismissed for lack of Article III standing and for mootness.¹⁵⁶ Parroting the West Virginia Solicitor General's rebuttal at the oral argument in late February, the Court concluded that the D.C. Circuit's stay of its mandate, which would otherwise have revived the Clean Power Plan's legal effectiveness, necessarily fell short of eliminating petitioners' injury for standing purposes or rendering the case moot because EPA could still decide on its own at any time to revive that Plan.¹⁵⁷ The Court required only six short paragraphs to dispense with an argument on which the respondents had expended dozens of pages.¹⁵⁸

The Court similarly declined to accept the Solicitor General's implicit invitation to rule against the government based exclusively on the plain meaning of section 111(d) of the Clean Air Act in general, and the word "system" in particular.¹⁵⁹ The opinion mirrored the Chief Justice's questions months earlier at the oral argument.¹⁶⁰ It began not by considering the statutory language in the first instance but instead by offering a broad exposition on the Major Questions Doctrine.¹⁶¹ Indeed, as Justice Kagan pointed out in dissent, the majority

153. See e.g., Brief for Amici Curiae the Michigan House of Representatives and the Michigan Senate in Support of Petitioners at 4, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530).

154. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001).

155. *West Virginia*, 142 S. Ct. 2587.

156. See *id.* at 2606–07.

157. See *id.* at 2607.

158. See *id.* at 2606–07.

159. See *id.* at 2607–09.

160. See *supra* text accompanying note 143.

161. See *West Virginia*, 142 S. Ct. at 2607–09.

opinion hardly spent any time on the relevant statutory language at all: “It is not until page 28 of a 31-page opinion that the majority begins to seriously discuss the meaning of Section 111.”¹⁶²

The majority’s clear aim was to do far more than decide the meaning of section 111. Its agenda was instead to promote and expand upon a canon of statutory construction that would make it harder for federal agencies to issue significant rules. To that end, the Court announced the Major Questions Doctrine’s core principle that any agency rule of vast economic or political significance is valid only if supported by specific statutory language that provides “clear congressional authorization” sufficient to evidence an affirmative decision by Congress to authorize the agency to promulgate a rule of that sweep.¹⁶³ Broad, capacious language would not suffice.¹⁶⁴ The Major Questions Doctrine accordingly did not merely mean, in contradiction to *Chevron*, that a court should not defer to an agency’s interpretation of ambiguous statutory language for major rules. For agency rules that triggered the Major Questions Doctrine, “clear congressional authorization” was required.¹⁶⁵

The majority elaborated on both what factors were relevant in determining whether a particular agency rulemaking triggered the Major Questions Doctrine and, once triggered, what kind of evidence of congressional intent would then be needed for a court to conclude that Congress had authorized an agency to promulgate such a major rule.¹⁶⁶ With regard to the first inquiry, the Court stressed that several touchstones would inform whether the Court was presented with the kind of “extraordinary case[]” that called for the Major Questions Doctrine.¹⁶⁷ Those touchstones include the “‘unprecedented’ nature” of the agency regulation,¹⁶⁸ Congress’s past failure to enact legislation that would have authorized such a regulation,¹⁶⁹ and an agency’s “assertion[] of ‘extravagant statutory power over the national economy.’”¹⁷⁰

The Court found that the Major Questions Doctrine clearly applied in *West Virginia*. According to the majority, EPA was claiming “‘to discover in a long-extant statute an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority’”¹⁷¹ that would “empower[] it to substantially

162. *Id.* at 2634 (Kagan, J., dissenting).

163. *Id.* at 2609 (majority opinion) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

164. See *id.* at 2614–16.

165. *Id.* at 2609 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

166. See *id.* at 2607–16.

167. *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

168. *Id.* (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

169. See *id.* at 2614.

170. *Id.* at 2609 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

171. *Id.* at 2610 (alteration in original) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

restructure the American energy market.”¹⁷² EPA had “located that newfound power in the vague language of an ‘ancillary provision[]’ of the [Clean Air] Act.”¹⁷³ And the agency was adopting a regulatory program that “Congress had conspicuously and repeatedly declined to enact itself.”¹⁷⁴ Finally, the majority concluded that EPA lacked the technical and policy expertise relevant to determine “how much coal-based generation there should be over the coming decades. . . . The basic and consequential tradeoffs involved in such a choice,” the Court asserted, “are ones that Congress would likely have intended for itself” and not addressed “in the previously little-used backwater of Section 111(d).”¹⁷⁵

With regard to the second inquiry—what kind of evidence would be required to satisfy the Major Questions Doctrine’s exacting standard—the Court announced the “clear congressional authorization” standard.¹⁷⁶ “Textual plausibility” was not enough.¹⁷⁷ Nor were “‘modest words,’ ‘vague terms,’ . . . ‘subtle device[s],’” or “oblique or elliptical language.”¹⁷⁸

As applied to section 111(d) of the Clean Air Act, the Court concluded that the relevant statutory language was “not close” to providing the “clear authorization” required for the Clean Power Plan.¹⁷⁹ The majority acknowledged that “generation shifting can be described as a ‘system.’”¹⁸⁰ But, the court countered, the word “system” is ultimately “an empty vessel” because “almost anything could constitute such a ‘system.’”¹⁸¹

Justice Gorsuch joined the majority, but also filed a separate concurring opinion, which Justice Alito joined.¹⁸² As disruptive as the majority opinion was of the administrative state in general and environmental law in particular, the concurring opinion revealed how much further the Court might have gone had the Chief Justice, as the senior Justice in the majority, assigned the responsibility of drafting the majority opinion instead to Justices Alito or Gorsuch.¹⁸³ And perhaps, for that same reason, the concurrence explained why the Chief chose to keep the opinion for himself. Although only Justice Alito joined the Gorsuch concurrence, there is little reason to believe that Justices Thomas, Kavanaugh,

172. *Id.*

173. *Id.* (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

174. *Id.*

175. *Id.* at 2613.

176. *Id.* at 2609 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

177. *Id.* at 2608.

178. *Id.* at 2609 (quoting *Whitman*, 531 U.S. at 468).

179. *Id.* at 2614.

180. *Id.* (quoting Brief for the Federal Respondents, *supra* note 128, at 31).

181. *Id.*

182. *Id.* at 2616 (Gorsuch, J., concurring).

183. *Cf.* Richard J. Lazarus, *Back to “Business” at the Supreme Court: The “Administrative Side” of Chief Justice Roberts*, 129 HARV. L. REV. F. 33 (2015) (examining Chief Justice Roberts’ exercise of his opinion-assigning authority).

and Barrett would not have signed on had the language of that concurrence been the opinion of the Court instead.

The Gorsuch concurrence was, characteristically for its author, far more sweeping (and bombastic) in its effort to ground the Major Questions Doctrine in constitutional law. According to Gorsuch, the Major Questions Doctrine “operates to protect foundational constitutional guarantees,” and it is “[o]ne of the Judiciary’s most solemn duties . . . to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us.”¹⁸⁴ Gorsuch systematically described the circumstances for when an assertion of agency authority triggers the Major Questions Doctrine. According to the Justice, these circumstances include when an agency “claims the power to resolve a matter of great ‘political significance,’”¹⁸⁵ when an agency “seeks to regulate ‘a significant portion of the American economy,’ . . . or require[s] ‘billions of dollars in spending’ by private persons or entities,”¹⁸⁶ when an agency “intrud[es] into an area that is the particular domain of state law,”¹⁸⁷ and when an agency “claims the power to regulate vast swaths of American life.”¹⁸⁸

Justice Kagan filed a blistering dissenting opinion, joined by Justices Breyer and Sotomayor.¹⁸⁹ The dissent accused the majority of “strip[ping] the [EPA] of the power Congress gave it to respond to ‘the most pressing environmental challenge of our time.’”¹⁹⁰ The dissent noted that “[t]he parties do not dispute that generation shifting is indeed the ‘best system’” of emission reduction because it is “the most effective and efficient way to reduce power plants’ carbon dioxide emissions.”¹⁹¹ Nothing in the language of the Clean Air Act, the dissent concluded “suggests that Congress meant to foreclose EPA from selecting that system”¹⁹²:

[T]o the contrary, the Plan’s regulatory approach fits hand-in-glove with the rest of the statute. The majority’s decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111’s general terms. But that is wrong. A key reason Congress makes broad delegations like

184. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

185. *Id.* at 2620 (quoting *Nat’l Fed. of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022)).

186. *Id.* at 2621 (quoting *id.* at 2608 (majority opinion)); *King v. Burwell*, 576 U.S. 473, 485 (2015)).

187. *Id.* (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

188. *Id.*

189. *Id.* at 2626 (Kagan, J., dissenting).

190. *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007)).

191. *Id.* at 2628.

192. *Id.*

Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems.¹⁹³

The dissent contrasted Congress's use of a "broad term," which "is not the same thing as a 'vague' one. . . . A broad term is comprehensive, extensive, wide-ranging; a 'vague' term is unclear, ambiguous, hazy."¹⁹⁴ Here, the dissent continued, "EPA was quite right in stating in the Clean Power Plan that the '[p]lain meaning' of the term 'system' in Section 111" supports that Plan because "generation shifting fits comfortably within the conventional meaning of a 'system of emission reduction.'"¹⁹⁵

Finally, the dissent challenged the majority's invocation of the Major Questions Doctrine, pointing out in the first instance that before this case "[t]he Court has never even used the term 'major questions doctrine' before."¹⁹⁶ In all events, the dissent stressed, none of the concerns that the majority claimed warranted the invocation of that doctrine were implicated by the Clean Power Plan. Most important, EPA was plainly not "operating outside its sphere of expertise."¹⁹⁷ As previously recognized by the unanimous Court in *American Electric Power Co. v. Connecticut*,¹⁹⁸ "how" to regulate greenhouse gas emissions from power plants is "smack in the middle of EPA's wheelhouse."¹⁹⁹ In that earlier case, the Court described how "[r]egulating power plant emissions is a complex undertaking" because "[a]long with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance."²⁰⁰ But, "Congress specifically 'entrust[ed] such complex balancing to EPA,' because that 'expert agency' has the needed 'scientific, economic, and technological resources' to carry it out."²⁰¹

II. THE SCALIA COURT: JUSTICE SCALIA AND ENVIRONMENTAL LAW

By tradition, the Supreme Court for any period of time is often referred to by the name of the Chief Justice at that time: The Warren Court of *Brown v. Board of Education*²⁰² fame became the Burger Court in 1969, which became the Rehnquist Court in 1986, which then became the Roberts Court in 2005.²⁰³

193. *Id.*

194. *Id.* at 2630.

195. *Id.*

196. *Id.* at 2634.

197. *Id.* at 2636.

198. 564 U.S. 410 (2011).

199. *West Virginia*, 142 S. Ct. at 2636–37 (Kagan, J., dissenting) (citing *Am. Elec. Power Co.*, 564 U.S. at 426).

200. *Id.* (quoting *Am. Elec. Power Co.*, 564 U.S. at 427).

201. *Id.* at 2637 (quoting *Am. Elec. Power Co.*, 564 U.S. at 427–28).

202. 347 U.S. 483 (1954).

203. *Justices 1789 to Present*, SUP. CT. OF THE U.S., <https://perma.cc/6UJL-9J7T>.

Such naming reflects the central role played by the Chief in the Court's operations and in its decisionmaking. After all, unlike any of the Associate Justices, the Chief's official title is "Chief Justice of the United States."²⁰⁴ The others are referred to only as Justices "of the Supreme Court."²⁰⁵ The Chief, alone, presides over the entire third branch, establishing the committees of federal judges that craft the federal rules governing the federal courts' civil, criminal, and appellate procedures and assigning lower court judges to serve on special courts such as the Foreign Intelligence Surveillance Court.²⁰⁶ Even more significantly, although the Chief of course has no more votes than any of the others on the bench, the Chief is, here too by tradition only, considered the most senior Justice on the Court, which has meant as a practical matter that the Chief plays a dominant role in the all-important task of assigning the writing of majority opinions.²⁰⁷ Only sixty-eight years old, Chief Justice Roberts is the fourth longest serving Chief.²⁰⁸

However, to underscore the outsized influence of a Justice other than the Chief, commentators often refer to the Court by the name of that Justice. For instance, after Justice Sandra Day O'Connor retired, commentators frequently referred to "The Kennedy Court," in recognition of how frequently Kennedy controlled the majority on a bench that was otherwise equally split in its most high profile cases between four liberal and four conservative Justices.²⁰⁹ But when Justice Kennedy later retired, and Roberts was both the Chief Justice and the controlling vote in most closely divided cases, the headline writers quickly boasted in June 2020 that the Court was, finally, truly "The Roberts Court" in all ways.²¹⁰

The headline proved short-lived. Only a few months later, Justice Ruth Bader Ginsburg died, Justice Amy Coney Barrett took her seat on the bench within weeks (thanks to an expedited confirmation process), and there were five more reliably conservative Justices to the right of the Chief.²¹¹ That quickly, Roberts went from one of the most powerful Chief Justices in modern history to arguably one of the least powerful in recent memory, at least to the extent

204. *Current Members*, SUP. CT. OF THE U.S., <https://perma.cc/RVE4-Z3VW>.

205. *Id.*

206. DENIS STEVEN RUTKUS & LORRAINE H. TONG, CONG. RSCH. SERV., RL32821, THE CHIEF JUSTICE OF THE UNITED STATES: RESPONSIBILITIES OF THE OFFICE AND PROCESS FOR APPOINTMENT 4-5 (2005).

207. *See Lazarus*, *supra* note 183, at 38-45.

208. *See Justices 1789 to Present*, *supra* note 203.

209. *See, e.g.*, Adam Liptak, *In Influence if Not in Title, This Has Been the Kennedy Court*, N.Y. TIMES (June 27, 2018), <https://perma.cc/CR2M-CSWM>.

210. *See e.g.*, Adam Liptak, *John Roberts Was Already Chief Justice. But Now It's His Court.*, N.Y. TIMES (June 30, 2022), <https://perma.cc/G4VU-YUBP>.

211. *See* Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://perma.cc/NS3T-37Z2>.

that he chooses to split from the conservative majority and loses accordingly his opinion assignment authority.²¹²

It would, however, be a mistake to refer to the newly constituted Court as “The Kavanaugh Court,” as a few have done,²¹³ presumably on the theory that Kavanaugh is the most moderate of five very conservative Justices, or as “The Thomas Court” on the alternative theory that Justice Thomas is the intellectual leader of those five Justices.²¹⁴ The more telling moniker would be “The Scalia Court,” even though of course Justice Scalia died over seven years ago. Without obvious historical parallel, Justice Scalia is in many ways more influential on the Court today than at any time when he was alive and on the Court. In case after case while Scalia was on the Court, his opinions (whether in the majority or in dissent) placed a bull’s-eye on federal environmental laws he considered unreasonably demanding. He authored dozens of opinions in environmental cases over the years.²¹⁵ Justice Thomas’s votes were in accord with Justice Scalia’s,²¹⁶ but the cases never seemed a priority for Justice Thomas as they did for Justice Scalia.

The Court’s *West Virginia* ruling smacks of Scalia even while outdancing the Justice in the new majority’s willingness to invoke separation of powers concerns to reject executive branch agency expertise. Based on opinions Justice Scalia wrote while still on the Court, what the Justice’s views would have been on the questions presented in *West Virginia* are quite clear. Justice Scalia was, to say the least, not one to mince words, and he authored opinions that leave no doubt that he would have voted against EPA’s assertion of expansive jurisdiction over existing coal-fired power plant emissions of greenhouse gases in *West Virginia*. Indeed, Scalia’s last consequential vote on the Court, only a few days before he died, stayed the effectiveness of the Clean Power Plan²¹⁷—the very same EPA climate regulation that was the subject of the *West Virginia* case. Since his passing, moreover, the three Justices who joined the Court during the Trump Administration each made clear their admiration of Justice Scalia in general and his strict textual approach to statutory construction in

212. See Adam Liptak, *June 24, 2022: The Day Chief Justice Roberts Lost His Court*, N.Y. TIMES (June 24, 2022), <https://perma.cc/DMA8-KWSH>.

213. See e.g., Jason Richwine, *The Kavanaugh Court*, NAT’L REV. (Oct. 27, 2020), <https://perma.cc/JK3B-PEPU>.

214. See e.g., Jill Abramson, *This Justice Is Taking Over the Supreme Court, And He Won’t Be Alone*, N.Y. TIMES (Oct. 15, 2021), <https://perma.cc/5D5Y-W3Q9>.

215. See Jeremy P. Jacobs, *How Scalia Reshaped Environmental Law*, E&E NEWS GREENWIRE (Feb. 16, 2016), <https://perma.cc/SEZ8-LHNU>; Richard J. Lazarus, *Justice Breyer’s Friendly Legacy for Environmental Law*, 95 S. CAL. L. REV. (forthcoming 2023) (manuscript at 1420–28) (on file with author); RICHARD J. LAZARUS, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 727–28 (2000).

216. See LAZARUS, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, *supra* note 215, at 727–29.

217. *West Virginia v. EPA*, 577 U.S. 1126 (2016).

particular.²¹⁸ The only debate between the three during their successive confirmations might have been which one would be more loyal to Scalia's example. The *West Virginia* case has Justice Scalia's fingerprints—reflected both in his general attitude toward environmental law and as expressed in the judicial opinions he authored—all over it.

A. *Environmental Law Before Justice Scalia Joined the Supreme Court*

Given the utter lack of interest in then-D.C. Circuit Judge Antonin Scalia's views on environmental law during his 1986 Senate confirmation hearings—the word “environmental” was not uttered once in those hearings²¹⁹—one might understandably assume that his views were then largely unknown, akin to a stealth nominee. But not so. Just the opposite is true. Scalia's views were both well-known and openly hostile to aggressive environmental protection requirements. There was nothing subtle about it.

The reason for the complete absence of testimony about environmental law during Scalia's confirmation was apparently that no one cared, even though Scalia's view portended a sea change in judicial attitudes toward the role of the federal judiciary in environmental law. And for his three decades on the Court, Scalia practiced what he had previously preached. He promoted a dramatically scaled back version for environmental law, but his efforts were only moderately successful. It is only now after his passing, with the *West Virginia* ruling, that his preferred judicial skepticism towards tough environmental protection requirements seems triumphant.

218. See Neil M. Gorsuch, Address at the William J. Hughes Center for Public Policy at Stockton University (Jan. 23, 2018), in NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 22 (2019) (“Bring him evidence about what the written words on the pages of law books mean — evidence from the law’s text, structure, and history — and you could win his vote. I hope that my approach to judging on the Court will share at least that much in common with his.”); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (“Statutory interpretation has improved dramatically over the last generation, thanks to the extraordinary influence of Justice Scalia. Statutory text matters much more than it once did. If the text is sufficiently clear, the text usually controls. The text of the law is the law. . . . By emphasizing the centrality of the words of the statute, Justice Scalia brought about a massive and enduring change in American law.”); The New York Times, *Full Transcript: Read Judge Amy Coney Barrett’s Remarks*, N.Y. TIMES (Sept. 26, 2020), <https://perma.cc/EAQ6-W4NW> (“I clerked for Justice Scalia more than [twenty] years ago, but the lessons I learned still resonate. His judicial philosophy is mine, too. A judge must apply the law as written. Judges are not policymakers, and they must be resolute in setting aside any policy views they might hold.”).

219. See *Confirmation Hearing on the Nomination of Judge Antonin Scalia to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. (1986).

Fifty years ago, the nation's courts could be widely credited for the enormously positive and constructive role they had played in environmental law. Their early rulings promoted the emergence and maturation of the nation's environmental laws during the 1960s, 1970s, and 1980s. The courts embraced new, expansive theories for government regulation of pollution control and natural resource management based on seemingly ancient laws like the Rivers and Harbors Act of 1899²²⁰ and the Organic Act of 1897.²²¹ The courts easily applied broad statutory language to make unlawful industrial activity that Congress was unlikely to have contemplated at the time of the statute's enactment a century earlier. And those court rulings, in turn, prompted congressional enactment of new laws: the Supreme Court's strict application of the 1899 Rivers and Harbors Act to then-modern industrial water pollution played a catalytic role in securing passage of the Clean Water Act in 1972,²²² and the Fourth Circuit's strict application of the 1897 Organic Act to then-modern industrial forest clearcutting practices led to congressional enactment of the National Forest Management Act of 1976.²²³

Indeed, the courts not only prompted passage of new, sweeping environmental protection and natural resources laws, they then welcomed those laws. Many judges further saw it as their judicial function to safeguard and ensure their effective implementation and enforcement.

No judge better illustrates that judicial perspective than the D.C. Circuit's Judge Skelly Wright. Judge Wright was elevated in 1962 to a federal appellate position in D.C. because leading southern Democrats wanted him out of the South, where Judge Wright had been serving on the Federal Court for the Eastern District of Louisiana. Why? Because Judge Wright had been aggressively implementing the Supreme Court's ruling in *Brown v. Board of Education*, ordering the desegregation of public schools. Supporters of racial segregation burned crosses on the lawn of his home. And powerful Southern Democratic Senators told then-President Kennedy they would not tolerate Wright in their backyard—known as “Judas Wright”—so the President acquiesced.²²⁴

220. Pub. L. No. 101-136, 30 Stat. 1121 (1899) (codified in scattered sections of 33 U.S.C.).

221. Sundry Civil Appropriations Act, 30 Stat. 11 (1897) (codified as amended in scattered sections of 16 U.S.C.).

222. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended in scattered sections of 33 U.S.C.); see also ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 582-84 (9th ed. 2021).

223. Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended in scattered sections of 16 U.S.C.); see *W. Va. Div. of the Izaak Walton League of Am., Inc. v. Butz*, 522 F.2d 945, 954-55 (4th Cir. 1975); Robert W. Haines, Note, *Monongahela and the National Forest Management Act of 1976*, 7 ENV'T L. 345, 346 (1977).

224. See Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENV'T. L.J. 201, 204 (2004); Marjorie Hunter, *Judge J. Skelly Wright, Segregation Foe, Dies at 77*, N.Y. TIMES (Aug. 8, 1988), <https://perma.cc/NBS9-DLMC>.

Once on the D.C. Circuit, however, Judge Wright perceived the connection between civil rights law and environmental law. For each, the judicial role was to protect the interests of those with less political and economic power: African Americans for civil rights and future generations for environmental protection.²²⁵

Judge Wright most famously applied his judicial philosophy to environmental law in his 1971 opinion for the D.C. Circuit in *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission*.²²⁶ *Calvert Cliffs* is one of the nation's most famous environmental law cases. It is the court ruling that singlehandedly made the then-recently enacted National Environmental Policy Act of 1969²²⁷ ("NEPA") into a transformative law, which was not a likely, let alone preordained, result before the court's decision. Certainly, neither the Act's primary legislative sponsors who championed its passage nor the President who signed NEPA into law ever evinced any expectation that the Act would play the significant role that it has since served.

As a formal matter, the court in *Calvert Cliffs* ruled that the federal Atomic Energy Commission had violated NEPA by failing to adequately consider the environmental impacts of its proposed licensing of a nuclear power plant. But it was not so much that ruling, standing alone, that made the case so historically significant, as it was the opinion's opening paragraph:

These cases are only the beginning of what promises to become a flood of new litigation — litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material "progress." But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. . . . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.²²⁸

Consider just that first sentence and its reference to a "promise" of a "flood of new litigation." Typically, reference to a "flood of litigation" or the possible opening of the "floodgates" of litigation is in reference to a "threat," not a "promise"—something to be avoided rather than embraced. But not for Judge Wright. He defined "the judicial role" as ensuring that the "promise of this legislation will become a reality" and left no doubt about his own personal policy alignment with the sweeping pro-environmental protection policies NEPA

225. See Lazarus, *supra* note 224, at 206.

226. 449 F.2d 1109 (D.C. Cir. 1971).

227. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in 42 U.S.C. §§ 21–47).

228. *Calvert Cliffs*, 449 F.2d at 1111.

announced. Judge Wright further defined the judicial function in terms of his anticipation that the executive branch—which he described skeptically as “the vast hallways of the federal bureaucracy”—would fall short in NEPA’s administration. And, underscoring the judicial “activist” that Wright very much celebrated being, he characterized a federal judge’s need to counter that executive branch tendency as “our duty.”

For Judge Wright and some others who followed his example, there was almost a quasi-constitutional dimension to environmental protection law. Fifteen state constitutions include rights of or commitments to environmental protection.²²⁹ Although the federal Constitution does not contain any such explicit language and courts have not endorsed a notion of an implicit federal constitutional right to environmental protection,²³⁰ many judges like Wright appeared to treat environmental protection as entitled to heightened judicial safeguarding reminiscent of a constitutional right.²³¹

That same attitude spawned judicial rulings favorable to the interests of environmentalists throughout the 1970s. Courts expanded access to federal courts for environmental citizen suits. They handed down decisions favoring stronger environmental protection rules, and they ruled against federal agencies, or directly against industry itself, for falling short. In case after case, they relied on the broad, capacious language of early environmental laws to support their rulings and mandates without the need for more specific evidence of congressional intent.²³²

The apparent judicial assumption was to err on the side of stronger environmental protection, knowing that Congress could always respond, if it believed that the courts had overreached, by passing specific language that cut back or even negated any judicial ruling. There was also good reason to assume that such legislative corrections would be asymmetric in nature: Congress would be far more ready to correct a judicial ruling that called for tougher environmental requirements than a ruling that weakened those requirements. Powerful economic and political interests unhappy with stricter environmental laws would invariably find the ears of sympathetic legislators. By contrast, the beneficiaries of stricter requirements were far more likely to be dispersed both geo-

229. *Home*, ENVIRO RIGHTS MAP, <https://perma.cc/ABK4-Q7GN>.

230. For an argument in favor of the establishment of such a right, see Caleb Hall, *A Right Most Dear: The Case for a Constitutional Environmental Right*, 30 TUL. ENV’T L.J. 85, 98–108 (2016); see also Robin Kundis Craig, *Should There Be a Constitutional Right to a Clean/Healthy Environment?*, 34 ENV’T L. REP. 11013, 11018–24 (2004); Robert V. Percival, “Greening” the Constitution—Harmonizing Environmental and Constitutional Values, 32 ENV’T. L. 809, 858–71 (2002).

231. See Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 740–41 (1977).

232. LAZARUS, *supra* note 3, at 94–98.

graphically and temporally (especially future generations) and therefore as a practical matter unable to mount an effective response to a judicial ruling that they thought fell short. The court's concern in this regard was essentially the same as expressed by Judge Wright in *Calvert Cliffs* for why it was the court's "duty" to ensure that the important new policies reflected in the nation's environmental laws were not "lost or misdirected in the vast hallways of the federal bureaucracy."²³³

The court's willingness to put the onus of congressional "corrective" action on those seeking to cut back on the broader implications of the capacious, demanding language of the nation's early 1970s laws proved highly successful. In the mid-1970s, the courts relied upon statutory language of the Clean Air Act of 1970 to require EPA to establish a program to prevent significant deterioration of air quality in those parts of the county that already boasted clean air.²³⁴ The courts gleaned such congressional intent from little more than the sweeping remedial purposes of the law rather than from specific statutory language, ultimately reasoning that it was inconsistent with the Clean Air Act's overriding purpose—reduce air pollution—to construe the Act to permit parts of the country with cleaner air to get dirtier.²³⁵

Moreover, once confronted by that judicial ruling and therefore forced to face the issue by powerful interests unhappy with it, both EPA and Congress chose not to overturn, but rather to embrace it. EPA developed comprehensive regulations implementing the court ruling, and, in 1977, Congress passed a law that effectively codified and expanded upon that court ruling, yet with statutory detail that allowed for far more nuance in the new program's administration than any judicial ruling could provide.²³⁶ The Prevention of Significant Deterioration of Air Quality²³⁷ program, born out of a federal trial court ruling, resulted in a highly successful program that, for almost a half century, has played a major role in limiting air pollution nationwide.

The same constructive judicial-legislative tag team bore similar fruit a decade later in addressing the perils of unregulated hazardous waste disposal in the decades following the Second World War. In the late 1970s and early 1980s, the courts accepted the government's invitation to construe a broadly worded, yet nonetheless literally "miscellaneous," provision in the Resource Conservation and Recovery Act²³⁸ ("RCRA")—section 7003—to authorize lawsuits by

233. *Calvert Cliffs*, 449 F.2d at 1111.

234. *See, e.g.*, *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd*, 4 E.R.C. 1815 (D.C. Cir. 1972) (mem.), *aff'd by an equally divided Court sub nom.*, *Fri v. Sierra Club*, 412 U.S. 541 (1973) (mem.).

235. *Id.* at 256.

236. PERCIVAL ET AL., *supra* note 222, at 512–13; *see* 42 U.S.C. §§ 7470–7492.

237. 42 U.S.C. §§ 7470–7492.

238. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901–6992k).

the Attorney General across the nation to achieve cleanup of abandoned and inactive hazardous waste sites.²³⁹ Spurred on by national reports of hazardous waste literally bubbling to the surface of the Love Canal community outside Buffalo, New York,²⁴⁰ congressional hearings revealed an environmental problem of staggering dimensions.²⁴¹ Concluding that such imminent endangerments to public health could not await congressional enactment of targeted legislation, the Justice Department filed in 1979 and 1980 fifty-six lawsuits seeking court orders to secure cleanup before it was too late.²⁴²

In light of the pressing national emergency those sites presented to public health and welfare, the government argued in favor of strict, joint, and several liability even though the relevant statutory provision made no reference at all to an applicable standard of liability.²⁴³ The government further argued that not only owners or operators of those hazardous waste sites, but more importantly those who had generated the wastes now found in those sites, could be found liable. There was similarly no explicit language in the relevant statutory provision identifying generators as a possible responsible party, although there was language in a Senate report accompanying a 1980 amendment to the relevant provision.²⁴⁴ Absent strict, joint, and several liability for generators of hazardous wastes, however, the government was unlikely to have a sufficiently solvent party to sue: the owners and operators of abandoned or inactive hazardous waste sites were, almost by definition, bankrupt or lacking in the funds necessary to pay for multi-million-dollar cleanups. By contrast, generators of hazardous wastes included most of the largest and most profitable ongoing industries in the country—such as the chemical and manufacturing industries—which

239. See 42 U.S.C. § 6973 (authorizing cleanup of “any solid waste or hazardous waste . . . presenting an imminent and substantial endangerment to health or the environment”).

240. See *Time Bomb in Love Canal*, N.Y. TIMES (Aug. 5, 1978), <https://perma.cc/YM4Z-PL6M>; Philip Taubman, *U.S. Prepares to Sue Hooker Corp. on Dumping of Hazardous Wastes*, N.Y. TIMES, (May 21, 1979), <https://perma.cc/N6AH-AM37>; Irvin Molotsky, *Hooker Concern Is Sued by U.S. over Love Canal*, N.Y. TIMES (Dec. 21, 1979), <https://perma.cc/G2EM-HFKR>.

241. See *Hazardous and Toxic Waste Disposal: Joint Hearings on S. 1341 and S. 1480 Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works*, 96th Cong. (1979); SUBCOMM. ON OVERSIGHT & INVESTIGATION, COMM. ON INTERSTATE & FOREIGN COM., REPORT ON HAZARDOUS WASTE DISPOSAL, H.R. DOC. NO. 96-IFC 31 (Comm. Print 1979).

242. See KATHRYN SAENZ DUKE, *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies*, 9 ECOLOGY L.Q. 599, 601 & n.9 (1981).

243. *Hazardous Waste: EPA, Justice Invoke Emergency Authority, Common Law in Litigation Campaign Against Dump Sites*, 10 ENV'T L. REP. 10,034 (1980); *Justice's Hazardous Waste Prosecutor Expects to File 100 New Cases This Year*, 10 ENV'T REP. (BNA) 2243 (1980); JUSTICE DEPT. ORGANIZES UNIT ON HAZARDOUS WASTES, N.Y. TIMES (Nov. 4, 1979), <https://perma.cc/697R-99U5>.

244. See Duke, *supra* note 242, at 617 (quoting S. REP. NO. 172, 96th Cong. (1980)).

possessed the deep pockets required to pay for the cleanup of hazardous waste sites.²⁴⁵

The judicial reception of these lawsuits varied, especially on the threshold question whether RCRA section 7003 was substantive as well as jurisdictional—both authorizing the lawsuit and providing for a standard of strict, joint, and several liability too.²⁴⁶ But notwithstanding this divergence of judicial views, the courts were sufficiently receptive to create the precedent necessary both to prompt widespread settlements that addressed imminent hazards to public health and to prompt Congress to act to quickly fill the gaps in existing law that the government lawsuits revealed.²⁴⁷

In the immediate aftermath of the Justice Department's lawsuits, Congress responded in 1980 by passing the Comprehensive Environmental Response, Compensation, and Liability Act²⁴⁸ ("CERCLA"), popularly known as Superfund,²⁴⁹ which significantly built out the hazardous waste liability regime. In passing CERCLA, however, legislators could not reach closure on one of the most central policy issues: what standard of liability would apply to the potentially responsible parties identified by CERCLA, including generators. That legislative gap, however, did not deter the courts from filling the hole to make the law effective given its clear purposes. Courts agreed with the government that in the absence of Congress specifically addressing the issue, a federal common law of strict, joint, and several liability would apply.²⁵⁰

Finally, in late 1985, the Supreme Court ruled nine to zero in *United States v. Riverside Bayview*²⁵¹ in support of the federal government's expansive view of the geographic scope of the Clean Water Act, which that Act described

245. See Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584, 588–89 (1981).

246. See Duke, *supra* note 242, at 608–18. Compare *United States v. Solvents Recovery Serv. of New England*, 496 F. Supp. 1127, 1133–34 (D. Conn. 1980) (jurisdictional), and *United States v. Vertrac Chem. Corp.*, 489 F. Supp. 870, 885 (E.D. Ark. 1980) (jurisdictional), and *United States v. Midwest Solvents Recovery, Inc.*, 484 F. Supp. 138, 144–45 (N.D. Ind. 1980) (jurisdictional), with *United States v. Diamond Shamrock Corp.*, No. C80-1857, 12 ENV'T L. REP. 20,819, 20,821 (N.D. Ohio May 29, 1981) (substantive), and *United States v. Price*, 523 F. Supp. 1055, 1073 (D.N.J. 1981) (substantive).

247. See *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334 (S.D. Ind. 1982); Josh Barbanel, *Hooker Company Cleanup of Toxic Dump Upstate Approved*, N.Y. TIMES (May, 1, 1982), <https://perma.cc/2XZD-WHK4>.

248. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675).

249. See *Carter Signs Law that Establishes Fund for Chemical Waste Cleanup; \$100 Billion Estimate Response to Love Canal Oil Spills Deleted*, N.Y. TIMES (Dec. 12, 1980), <https://perma.cc/A3FJ-K3MP>; *Superfund: CERCLA Overview*, EPA (Feb. 14, 2022), <https://perma.cc/BB8G-W3VR>; see also *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, EPA (Sept. 12, 2022), <https://perma.cc/B8QW-NZJV>.

250. See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983).

251. 474 U.S. 121 (1985).

as covering “navigable waters” and which the Act then further defined as “the waters of the United States.”²⁵² After initial uncertainty,²⁵³ the two federal agencies charged by Congress with administering the law—EPA and the U.S. Army Corps of Engineers—determined that Congress had intended to extend the Clean Water Act’s protections far beyond traditional notions of navigable waters to include nonnavigable tributaries of those waters, wetlands adjacent and otherwise hydrologically connected to such waters, and any body of water the use, enjoyment, or impairment of which substantially affected interstate commerce.²⁵⁴

The federal agencies reasoned that without such a geographic jurisdiction, including the protection of wetlands that were clearly not themselves navigable, the Clean Water Act could not possibly achieve its expressly stated ambitious goals to protect and preserve the nation’s waters. And the government heavily relied on the fact that in defining “navigable waters” as extending to “the waters of the United States,” Congress had made clear in its accompanying legislative history its intent to exercise the “broadest possible constitutional interpretation” under the Commerce Clause,²⁵⁵ as expansively defined four decades earlier in *Wickard v. Filburn*.²⁵⁶

In an opinion written by Justice White, the Court agreed. The Court freely acknowledged that “[o]n a purely linguistic level, it may appear unreasonable to classify ‘lands,’ wet or otherwise, as ‘waters.’”²⁵⁷ But, for the Court in 1985, that was no bar to deferring to the expert agency’s administrative interpretation in light of “the realities of the problem of water pollution that the Clean Water Act was intended to combat.”²⁵⁸ The Court further admitted that determining where “water ends and land begins” is “no easy task.”²⁵⁹ And, in answering that question, the Court never considered it legally relevant to look to dictionary definitions of “waters” and instead stressed that an agency may appropriately look to the “legislative history and underlying policies of its statutory grants of authority.”²⁶⁰

As applied to the federal government’s sweeping definition of “waters of the United States,” within the meaning of the Clean Water Act, moreover, the Court concluded that the government’s interpretation was reasonable, given “the evident breadth of congressional concern for protection of water quality

252. *See id.* at 139; 33 U.S.C. § 1352(7).

253. *See Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

254. *See* Final Rule for Regulatory Program of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986).

255. H.R. REP. NO. 92-911, at 131 (1972).

256. 317 U.S. 111 (1942).

257. *Riverside Bayview*, 474 U.S. at 132.

258. *Id.*

259. *Id.*

260. *Id.*

and aquatic ecosystems.”²⁶¹ For that same reason, the Court concluded, the Act’s reference to the waters being “navigable” was of “limited import.”²⁶² Given the hydrologic connection between navigable and nonnavigable waters, the Act’s objectives for clean water could not be achieved if only discharges into navigable waters were regulated.

Significantly, this unanimous view was not reached by an especially progressive Court. Its author, Justice White, was himself a moderate conservative. And those joining the opinion included Chief Justice Burger and Justices Rehnquist, Powell, and O’Connor, all with deserved reputations as moderate to strongly conservative jurists.

The Court decided *Riverside Bayview* in December 1985. The Court would welcome a new member ten months later, Antonin Scalia. And, as Justice White once famously said, whenever you add a new Justice, you change the Court.²⁶³ Justice Scalia was no exception to that rule. Indeed, his example was that rule’s proof. Within a few weeks of Justice Scalia taking his seat on the high court bench, Justice Lewis Powell reportedly reacted to how much Scalia, even as the most junior Justice, monopolized the oral argument, by exclaiming to Justice Thurgood Marshall: “Do you think he knows the rest of us are here?”²⁶⁴

B. *Justice Scalia on the Bench*

In September 1986, Justice Scalia joined the Court. He championed a very different view of the judicial role in environmental law. And although those views prevailed occasionally during his three decades on the court, they never dominated. In the aftermath of the *West Virginia* ruling, however, there is reason to believe that his views may now do so, albeit posthumously.

As previously mentioned,²⁶⁵ no one paid any attention to then-D.C. Circuit Judge Scalia’s views on environmental law during his Senate confirmation hearings. But that was not because of the absence of a public record. Scalia was in many respects the anti-Skelly Wright. And proudly so.

In 1983, he published a law review article in which he unabashedly criticized Wright’s opinion in *Calvert Cliffs* and what he mockingly described as “the judiciary’s long love affair with environmental litigation.”²⁶⁶ Scalia argued

261. *Id.* at 133.

262. *Id.*

263. DENNIS J. HUTCHISON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 408 (1998) (“Every time a new Justice arrives on the Court, the Court’s a different instrument.”).

264. JOHN C. JEFFRIES JR., *JUSTICE LEWIS F. POWELL, JR.* 534 (Fordham Univ. Press 2001).

265. *See supra* text accompanying note 219.

266. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *SUFFOLK L. REV.* 881, 884 (1983).

for heightened Article III standing requirements that would cut off environmentalist plaintiffs' abilities to bring citizen suits against those violating federal environmental protection requirements. Scalia also unabashedly boasted that the practical import of those heightened standing requirements would be to defeat the very objectives Chief Judge Wright sought to accomplish. As then-Judge Scalia wrote in 1983, three years before he was nominated to the Court, about Judge Wright's words in *Calvert Cliffs*: "Does what I have said mean that, so long as no minority interests are affected, 'important legislative purposes, heralded in the hall of Congress [can be] lost or misdirected in the vast hallways of the federal bureaucracy?' Of course it does—and a good thing, too."²⁶⁷

Scalia further defended the resulting underenforcement of federal environmental law by claiming that strict enforcement was elitist and anti-democratic:

Their greatest success in such an enterprise — ensuring strict enforcement of the environmental laws . . . — met with approval in the classrooms of Cambridge and New Haven, but not in the factories of Detroit and the mines of West Virginia. It may well be, of course, that the judges know what is good for the people better than the people themselves; or that democracy simply does not permit the *genuine* desires of the people to be given effect; but those are not the premises under which our system operates.²⁶⁸

The latter charge—anti-democratic—seems hard to square, however, with Scalia's notion that the courts should invoke federal constitutional law to effectively cut back on the full enforcement of a law passed by Congress—a far more democratically accountable branch than a court.

Be that as it may, there is no question that Justice Scalia both placed a bull's-eye on environmental law and had a major impact on it. With a few notable exceptions, Scalia became a reliable skeptic of strict enforcement of environmental law and broad interpretations of its requirements. Tough enforcement of demanding environmental law systematically rubbed him the wrong way. The source of Justice Scalia's environmental antagonism can be fairly debated. Perhaps he did in fact view environmental protection as the product of liberal elitism and the limits of democratic self-government.²⁶⁹ Perhaps he was simply put off by the kind of laws environmental law consistently promoted: a powerful federal government at the expense of states, an erosion of private property rights, or a lowering of Article III case or controversy require-

267. *Id.* at 897.

268. *Id.*

269. See J. Peter Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia*, 41 *Vt. L. Rev.* 733, 744 (2017) ("[Scalia] posited that government restrictions on private ownership are nearly always bad because government officials have a pathological desire to extend their authority indefinitely.").

ments.²⁷⁰ But his resulting hostility to environmental laws was evident from the beginning to the end of this time on the Court.

Not long after he joined the Court, he authored two majority opinions that, presaged by his 1983 law review article, invoked Article III of the Constitution to limit citizen suit enforcement of federal environmental law. In both *Lujan v. National Wildlife Federation*²⁷¹ in 1990 and *Lujan v. Defenders of Wildlife*²⁷² in 1992, Scalia's opinions for the Court reversed significant lower court rulings in favor of environmental plaintiffs on the ground that the plaintiffs lacked Article III standing to bring the case.²⁷³ Each ruling upended what had been two decades of lower court rulings that had upheld environmental citizen suit standing.

With similar speed, Justice Scalia turned to another part of the Constitution to further cut back on environmental protection requirements. He quickly authored two opinions for the Court, invoking the Fifth Amendment's Just Compensation Clause to limit the ability of government at any level—federal, state, or local—to impose environmental restrictions on the use of private property, especially land.

Prior to Scalia's joining the Court, landowners had launched a series of cases, relying on the Court's 1922 decision in *Pennsylvania Coal v. Mahon*,²⁷⁴ in which they argued that federal, state, and local environmental restrictions that significantly reduced their property value amounted to regulatory takings requiring the payment of just compensation in money damages. The Supreme Court had rejected all of those arguments, including in *Keystone Bituminous v. DeBenedictis*²⁷⁵ soon after Scalia joined the Court, which sharply cut back on *Penn Coal* itself.²⁷⁶ But less than four months later in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*²⁷⁷ and *Nollan v. California Coastal Commission*,²⁷⁸ and five years later in *Lucas v. South Carolina Coastal Council*,²⁷⁹ Justice Scalia joined one and authored two opinions of the Court in favor of landowner plaintiffs. As described by the dissenting Justices, the three rulings risked chilling important land use regulation, especially at the local level. Local officials could ill afford taking a risk that enforcing a strict environmental

270. See Peter Manus, *Justice Scalia's Environmental Legacy: A Contextual Analysis*, 35 VA. ENVTL. L.J. 265 (2017); Lazarus, *supra* note 215, at 727–29.

271. 497 U.S. 871 (1990).

272. 504 U.S. 555 (1992).

273. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. at 885–90; *Lujan v. Defs. of Wildlife*, 504 U.S. at 578.

274. 260 U.S. 393 (1922).

275. 480 U.S. 470 (1987).

276. See *id.* at 473–74.

277. 482 U.S. 304 (1987).

278. 483 U.S. 825 (1987).

279. 505 U.S. 1003 (1992).

protection requirement—even one designed to prevent a land use that could do serious injury to public health and welfare—might result in a multi-million-dollar damage award.²⁸⁰

The Justice also turned to federal administrative law doctrine in rejecting the legal claims of environmental plaintiffs. Far more than in other areas of law, the Justice's view on applicable doctrine seemed context-specific in a demonstrably asymmetric way. Scalia seemed more or less willing to defer to a federal agency like EPA or the Department of the Interior, depending on whether the agency was defending a rulemaking that was more or less protective of the environment. When EPA resisted the arguments of environmentalists that a rule was insufficiently stringent, he backed EPA almost without exception, as in the Court's Clean Water Act ruling in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*.²⁸¹ But when industry argued that an EPA rule was unduly stringent by not taking regulatory costs sufficiently into account, he backed EPA's opponent, as in the Clean Air Act case *Michigan v. EPA*.²⁸²

Scalia's tendencies in this respect also evolved over time.²⁸³ In this first fifteen years, there were a few notable exceptions: two instances in which the Justice sided either with EPA against business interests or with environmentalists over EPA.²⁸⁴ But there were no such exceptions during his final fifteen years on the Court. During that time, he always voted for EPA when the agency favored more relaxed requirements and always voted against EPA when it didn't.²⁸⁵

For those like me, who argued more than a dozen cases before the Court sprinkled across Justice Scalia's thirty-year tenure on the Court, there seemed to be, in effect, two different Scalias. The first was on the bench for approximately his initial fifteen years. Justice Scalia, then, embraced in a wholly principled manner both textualism and, in the presence of statutory ambiguity, *Chevron* deference to reasonable agency interpretation, without regard to whether the result squared with his own policy preferences. Indeed, the original Justice

280. See *First English*, 482 U.S. at 340–41 (Stevens, J., dissenting); *Nollan*, 483 U.S. at 860–61 & n.10 (Brennan, J., dissenting); *id.* at 866–67 (Stevens, J., dissenting); *Lucas*, 505 U.S. at 1070 (Stevens, J., dissenting).

281. 557 U.S. 261 (2009).

282. 576 U.S. 743 (2015).

283. My colleague, Adrian Vermeule, has similarly noted Scalia's pronounced evolution over time, from a Justice who embraced the authority of an agency like EPA to exercise expansive powers in interpreting and implementing laws to becoming a "fierce opponent of the administrative state." See Jeff Neal, *Was Antonin Scalia Originally an Originalist?*, HARV. L. TODAY (Oct. 26, 2022), <https://perma.cc/5HLQ-E29S>.

284. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001); *City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 339 (1994).

285. Compare *Coeur Alaska*, 557 U.S. at 291 (upholding EPA's view), with *Michigan v. EPA*, 576 U.S. at 760 (rejecting EPA's view), and *EPA v. EME Holder City Generation*, 572 U.S. 489, 524 (2014) (rejecting EPA's view).

Scalia enjoyed trumpeting that his jurisprudential approach, in which the judicial branch took a back seat to both the legislative and executive branches, was policy neutral: “[i]f you are going to be a good and faithful judge, you have to resign yourself to the fact that you’re not always going to like the conclusions you reach. If you like them all the time, you’re probably doing something wrong.”²⁸⁶

The second Justice Scalia, however, was very different. During his final years on the Court, the Justice succumbed to the very temptation that he had long maintained judges should not let happen. He allowed his own policy preferences, including his heightened skepticism of the efficacy of demanding environmental protection laws, dictate his reasoning and his votes. His pretense of policy neutrality was shattered both by his abandonment of prior precedent he had long touted and by his increasingly obvious disdain for demanding environmental protection laws.

Justice Scalia’s hostility to demanding environmental protection requirements reached a crescendo during the Obama Administration, when the Justice formally discarded his longstanding fondness for *Chevron* deference. Rather than defer to agency interpretation of ambiguous statutory language, Justice Scalia adopted the very different view that separation of powers concerns made any such judicial deference improper, especially when the agency was proposing a rule that significantly expanded environmental protection. In that respect it was fitting that the Justice’s last significant vote, just a few days before he died, was to stay the effectiveness of the Clean Power Plan over EPA’s objection.²⁸⁷ In this manner, the Justice who had long championed the propriety of *Chevron* deference as the “hallmark of the modern administrative state”²⁸⁸ both signaled his own rethinking of the validity of *Chevron* deference²⁸⁹ and foreshadowed the emergence of a new, more radical conservative majority on the Court that now

286. Honorable Neil M. Gorsuch, *2016 Sumner Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. L. REV. 905, 906 n.3 (2016) (quoting Justice Antonin Scalia, *Madison Lecture at the Chapman University School of Law* (Aug. 29, 2005)).

287. See *supra* text accompanying note 217.

288. Antonin Scalia, *Judicial Deference to Administration Interpretations of Law*, 1989 DUKE L.J. 511, 516.

289. See *Chevron: Scalia’s Evolution*, FEDERALIST SOC’Y (May 6, 2020), <https://perma.cc/82GQ-TAJ3>. Justice Scalia similarly signaled his willingness to abandon so-called “*Auer*” deference—based on an opinion that the Justice himself authored for the Court (*Auer v. Robbins*, 519 U.S. 452 (1997))—which had instructed courts to defer to an agency’s interpretation of its own regulations. Ironically, Scalia did so in a separate opinion concurring and dissenting in part in *Decker v. Nw. Env’t Def. Ctr.*, 568 U.S. 597, 616–26 (2013), an exceedingly rare instance in his final years in which his adherence to textualism favored the legal position of environmentalists.

seems on the precipice of rejecting *Chevron* deference as unconstitutional on separation of powers grounds.²⁹⁰

Justice Scalia's impact on environmental law, however, was far less than it might have been because he was not always in the majority. Indeed, he was frequently in dissent. On many occasions, more moderately conservative Justices, such as Justices O'Connor and Kennedy, and even sometimes Chief Justice Roberts, declined to join Scalia's views, depriving him of a majority. Over Scalia's dissent, the Court in *Friends of the Earth v. Laidlaw*²⁹¹ cut back significantly on his Article III standing opinions for the Court in both *Lujan* cases.²⁹² In *Taboe-Sierra Preservation Council, Inc. v. Taboe Regional Planning Agency*,²⁹³ the Justices similarly significantly limited the reach of his 1992 *Lucas* regulatory takings decision, leaving Scalia in dissent.²⁹⁴

Scalia was relegated to the dissent as well in several significant cases relating to EPA's authority. In one of the Court's most significant environmental cases decided while Scalia was on the Court, *Massachusetts v. EPA*,²⁹⁵ he was in the minority on all three of the Court's rulings. The Court found that Massachusetts both deserved and satisfied watered-down, Article III standing requirements;²⁹⁶ that the CAA authorized EPA to regulate motor-vehicle emissions as air pollutants;²⁹⁷ and that EPA must address whether greenhouse gas emissions from new motor vehicles endangered public health and welfare.²⁹⁸ Justice Scalia dissented on all accounts. Scalia was similarly in dissent in *EPA v. EME Homer City Generation*,²⁹⁹ which upheld an exceedingly important EPA provision known as the Transport Rule that sought to distribute emissions-reduction costs effectively among upwind and downwind states.³⁰⁰ Both the Chief Justice and Justice Kennedy joined the majority.

290. See *Baldwin v. United States*, No. 19-402, slip op. at 2-8 (Feb. 24, 2020) (Thomas, J., dissenting from denial of certiorari) ("Chevron is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions."); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 (10th Cir. 2015) (Gorsuch, J.) ("[O]ne might question whether *Chevron* step two muddles the separation of powers by delegating to the Executive the power to legislate generally applicable rules of private conduct.").

291. 528 U.S. 167 (2000).

292. See *id.* at 198 (Scalia, J., dissenting) ("[T]he Court suggests that to avoid mootness one needs even less of a stake in the outcome than the Court's watered-down requirements for initial standing.").

293. 535 U.S. 302 (2002).

294. See *id.* at 329-32.

295. 549 U.S. 497 (2007).

296. See *id.* at 520, 526.

297. See *id.* at 532.

298. See *id.* at 533-35.

299. 572 U.S. 489 (2014).

300. See *id.* at 524.

Finally, the Justice was limited to a draw in a major Clean Water Act case, *Rapanos v. United States*,³⁰¹ in which his four-Justice plurality opinion fell one vote shy of a potential evisceration of what had been the Court's unanimous expansive view of the Clean Water Act's geographic reach in the *Riverside Bayview* case. Because that earlier case was, as described, decided just a few months before he joined the Court, Justice Scalia's securing four votes twenty years later to upend *Riverside Bayview* demonstrated how much his views were taking over the Court. But it was nonetheless a stark reminder—in what must have been frustrating for him—that he still remained short of a majority in many of the biggest environmental cases.

To be sure, five years earlier, Justice Scalia had supplied the fifth vote needed for Chief Justice Rehnquist's opinion for the Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,³⁰² which had limited the most far-reaching implications of *Riverside Bayview*.³⁰³ But Scalia's ambition in *Rapanos*, while still giving lip service to *Riverside Bayview* by not calling for its formal overruling, was far greater. Relying on a dictionary to define "waters," Scalia's plurality denounced the government's "'Land Is Waters' approach to federal jurisdiction" and concluded that the Act covered only "relatively permanent, standing or continuously flowing bodies of waters" that form "geographic features."³⁰⁴ The plurality exhibited none of the willingness of the *Riverside Bayview* Court to defer to the government's need to define "waters of the United States" broadly in order to meet the Clean Water Act's broad objective.

Only because Justice Kennedy rejected Scalia's view was the Clean Water Act not dramatically reduced in its geographic reach. In a separate concurring opinion, joining only in the Court's judgment, Kennedy rejected Scalia's dictionary approach to legal analysis in favor of the kind of more pragmatic, functional approach evident in Justice White's majority opinion twenty years earlier in *Riverside Bayview*.³⁰⁵ According to Kennedy, the federal government could apply the Clean Water Act broadly, including to waters such as wetlands, non-navigable tributaries, and ephemeral, seasonal waters, so long as they bore a significant hydrologic nexus to traditional navigable waters, as in *Riverside Bayview*.³⁰⁶ Although Kennedy provided the fifth vote needed for the Court's judgment that the federal government's existing regulations for defining the Clean Water Act's jurisdiction were inadequate, the reasoning and the practical effect of his separate concurring opinion were much closer to the views of the four dissenting Justices than to Justice Scalia's plurality.

301. 547 U.S. 715 (2006).

302. 531 U.S. 159 (2001).

303. *See id.* at 167.

304. *Rapanos*, 574 U.S. at 734, 739 (plurality opinion).

305. *See id.* at 759 (Kennedy, J., concurring).

306. *See id.* at 779–80.

But herein lies the rub. What Scalia failed to accomplish when alive and a member of the Court, the *West Virginia* ruling strongly suggests may be realized postmortem in his name. The accuracy of that characterization of the Court today is the topic for the next part of this article. There is moreover already a pending case before the Justices, to be decided during October Term 2022 that is likely to test the proposition whether the Court will continue on the pathway forged by *West Virginia* or perhaps retreat some in light of the considerable blowback that ruling generated.³⁰⁷

III. ENVIRONMENTAL LAW'S WRECKING CREW

If the Court today were to decide *ab initio* all of those same significant environmental law cases in which Scalia was relegated to the dissent, there is good reason to expect Justice Scalia's view would prevail in each case. The Court would likely find a regulatory taking in *Tahoe-Sierra*, the absence of Article III standing in *Laidlaw* and *Massachusetts v. EPA*, the absence of EPA authority to regulate greenhouse gases under the Clean Air Act in *Massachusetts v. EPA*, and the invalidity of EPA's Clean Air Interstate Rule in *EME Homer*. The only obvious brake would be the extent to which the Court's current conservative majority would feel bound by *stare decisis*—a brake the continued availability of which has inevitably been called into some question by the Court's willingness to overrule *Roe v. Wade*³⁰⁸ in *Dobbs v. Jackson Women's Health Organization*.³⁰⁹

The longer-term implications for environmental law of the new radically conservative Supreme Court majority, however, are even greater than suggested by the prospect of significant precedent reversal. At risk is no less than the legal viability of the entire framework upon which federal environmental law has rested for the past fifty years—a framework that has been remarkably successful in protecting public health and welfare and the natural environment. The majority's crabbed view of the authority of the other two branches of government to enact and administer statutes and regulations threatens to make it practically impossible to do either in an effective and timely way to address pressing environmental issues, especially climate change for which timeliness is critically important.

One of the most important features of our nation's environmental laws, and a central reason for their success, was Congress's decision in the 1970s to enlist broad statutory language to authorize expert agencies like the then-newly-created EPA to administer those laws, including by filling in the inevitable details required for pollution controls. Congress appreciated it could not possibly do so itself in the first instance. Legislators need to rely on agency

307. See *infra* text and accompanying notes 336–340.

308. 410 U.S. 113 (1973).

309. 142 S. Ct. 2228 (2022).

expertise: scientific, technological, and economic. Members of Congress knew that they lacked both the expertise and the practical ability to identify in advance all the hard questions that needed to be answered in developing environmental protection requirements: (1) what levels of cleanup would be necessary based on the best scientific information available to protect public health, safety, and the natural environment; (2) what types of technology were physically or economically available or achievable to reduce pollution and minimize natural resource degradation; and (3) how might the costs and benefits of environmental protection best be weighed and the balance struck. They knew they could hold agencies accountable through the Senate confirmation process for political appointees to the executive branch, through their power of the purse, through oversight hearings, and of course, ultimately through the power of Congress to pass new legislation that could override any agency action.

Congress also made clear the scope of its ambition in the nation's environmental protection laws. The laws were not designed to be incremental. They were intended to be transformative. And that transformative potential depended on the validity of the congressional decision to delegate broad rulemaking authority to administrative agencies.

According to the Court in *West Virginia*, however, such congressional delegation of broad rulemaking authority to an administrative agency such as EPA is no longer sufficient to allow the agency to promulgate a rule that triggers the Court's newly coined "Major Questions Doctrine." For such a rule, there must be "clear congressional authorization."³¹⁰ If strictly applied to environmental law, as the majority opinion, and certainly Justice Gorsuch's concurrence, suggest is necessary, such a requirement could perversely bar EPA from being able to issue the most important and pressing rules necessary to safeguard public health and welfare. Because so much of the nation's economic activities cause some air and water pollution, many environmental regulations are susceptible to claims that they "seek[] to regulate 'a significant portion of the American economy.'"³¹¹ Nor is it so unusual, given the temporal and spatial sweep of pollution control laws, for compliance with environmental rules to "require 'billions of dollars in spending' by private persons or entities."³¹² EPA rules designed to curb air and water pollution and the disposal of hazardous waste could also invariably be characterized as "intrud[ing] into an area that is the particular domain of state law," such as traditional state control over land use and water rights.³¹³ In short, there is nothing especially "extraordinary" about the enormous breadth and economic significance of environmental law.

310. *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022).

311. *Id.* at 2621 (Gorsuch, J., concurring) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

312. *Id.* (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)).

313. *Id.* (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

By nonetheless insisting that capacious statutory language fails to meet the Court's requirement of clear congressional authorization for "transformative" rules (whatever that means), the Court threatens to create an insurmountable hurdle to the issuance of important environmental protection rules. Congress knew it lacked the capacity to address environmental issues on a real-time and dynamic basis when it crafted the nation's environmental laws decades ago, which is why it opted for broad delegations rooted in sweeping statutory language. And recent history has left little doubt of the wisdom of that legislative judgment.

From 1970 through 1990, Congress passed a series of far-reaching, ambitious, and demanding environmental laws on a lopsided, bipartisan basis. But partisan gridlock has effectively shut down Congress's ability to enact significant amendments to those laws for the past three decades, making the nation entirely dependent on EPA's effective use of the broadly worded delegations of authority that Congress passed years ago. Congress has not enacted significant amendments to the Clean Air Act since 1990,³¹⁴ Clean Water Act since 1987,³¹⁵ RCRA since 1984,³¹⁶ Endangered Species Act since 1973,³¹⁷ and NEPA since 1970.³¹⁸ Neither Republican nor Democratic majorities in the House or Senate have been able to break that legislative logjam.³¹⁹

To be sure, one could well construct a principled basis for the core notion of the Major Questions Doctrine: that it should be up to Congress, not executive branch agencies to make law of momentous significance. In the abstract, that is not at all an extreme position.

What makes it nonetheless extreme in application is three-fold. The first is when and how the Court has applied it. Although one can trace the doctrine back to older cases like *Industrial Union Department v. American Petroleum Institute*³²⁰ and *FDA v. Brown & Williamson Tobacco Corp.*,³²¹ the promotion of the doctrine by Justices like Scalia and then lower court judges like Kavanaugh and Gorsuch did not occur until it served as a basis for rejecting any *Chevron* deference to EPA and other federal agencies during the Obama Administration. They discovered their dislike of *Chevron* deference and their interest in the

314. Pub. L. No. 101-549, 104 Stat. 2399 (1990).

315. Pub. L. No. 100-4, 101 Stat. 7 (1987).

316. Pub. L. No. 98-616, 98 Stat. 3221 (1984).

317. Pub. L. No. 93-205, 87 Stat. 884 (1973).

318. Pub. L. No. 91-190, 83 Stat. 852 (1970).

319. See LAZARUS, *supra* note 3, at 223–29. Congressional passage of the Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022), in August 2022 is not to the contrary. While that Act is no doubt very significant measured by the billions of dollars it appropriated to be spent on addressing climate change, it made little to no substantive changes in the underlying environmental protection laws themselves.

320. 448 U.S. 607 (1980).

321. 529 U.S. 120 (2000).

Major Questions Doctrine only when faced with agency rules they did not like as a matter of policy.³²²

The second is that the judicial claim that Congress can best address the issue is disingenuous. Everyone knows, including the judges who make that suggestion, that Congress is essentially dysfunctional. Indeed, one has a sense those judges are relying on that dysfunction. Finally, and perhaps most fundamentally, Congress expressly spoke to the lawmaking issue in the nation’s environmental laws when it deliberately provided for such expansive agency lawmaking authority because of congressional awareness that it was not itself capable of engaging in the necessary lawmaking on a real-time basis in subsequent decades.

In the immediate wake of the *West Virginia* ruling, the nation’s environmental laws abound with examples of important agency regulations now under a cloud. Here are just four examples.

A. *The Clean Water Act and “Waters of the United States”*

Congress was not shy about its ambition when it passed the Clean Water Act (“CWA”) in 1972. In its very first provision, the Act declares that its overriding objective “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³²³ To that end, the Act announced a “national goal that the discharge of pollutants into the navigable waters be eliminated by 1985,” “the discharge of toxic pollutants in toxic amounts be prohibited,” and wherever attainable all waters be fishable and swimmable by 1983.³²⁴

Members of Congress embraced and stressed the Act’s deliberately transformative aims. In first introducing the Senate Bill, West Virginia’s Senator Randolph highlighted its economic and political significance:

[W]e are doing something that is not a timid approach, but which is an all-out effort — a congressional effort which I think is reflective of the concern of the people, younger and older, who represent an enlightened citizenry of the United States of America.

Its impact will be felt by every citizen and by every segment of our society. It is perhaps the most comprehensive legislation ever developed in its field.

• • • •

322. See, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (Scalia, J., for the Court); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1154 (10th Cir. 2016) (Gorsuch, J., for the Court and concurring); *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 417–18 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

323. 33 U.S.C. § 1251(a).

324. *Id.* §§ 1251(a)(1)–(3).

. . . This bill is strong; and the bill is tough. It will be effective in ending pollution of the Nation's waters.³²⁵

Republican members of Congress repeatedly celebrated the CWA's ambitiousness. Ohio Representative Harsha declared, "I believe that we have developed the most significant environmental legislation in the history of the Congress," and Arkansas Representative Hammerschmidt stated that the bill was "one of the most far-reaching and most complex, as well as most costly, ever considered in Congress. Certainly, it is the most extensive environmental legislation ever undertaken."³²⁶ Similarly, Senator Baker from Tennessee suggested that "the pending bill may rank as one of the most far-reaching pieces of domestic legislation that has come before the Congress in recent years,"³²⁷ and Maryland Senator Mathias claimed that the bill was "one of the most ambitious bills to come before the 92d Congress"³²⁸ and that Congress was "finally and fully committing [itself] to an all-out campaign against water pollution."³²⁹

Members of Congress were also fully aware and accepting of the Act's economic impacts. Representative Blatnik, who introduced the final bill to the House, knew the bill's significance: "This is an enormously complex bill, as it must be, to solve the enormous, and complex problem of protecting our water resources." But he was also clear-eyed about its expense: "It has also been referred to as 'an enormously costly' bill. That may be too. But we have no choice. We must act now, and must be willing to pay the bill now—or face the task of paying later when, perhaps, no amount of money will be enough."³³⁰

Several senators also acknowledged the economic disruptions the CWA could bring. "It should be known that [the CWA] would have profound social and economic consequences," noted Senator Cooper, a Republican from Kentucky. "[I]t addresses in a comprehensive way an enormous task—that of ending, to the extent possible, water pollution and restoring to a natural condition the waters of our country. This is an undertaking which will require a great national effort. . . . It will cost a very large amount."³³¹ Texas Senator Bentsen explained that "[t]here is no doubt that we will suffer some disruptions in our economy because of our efforts; many marginal plants may be forced to close."³³² Finally, Senator Mathias acknowledged, "[t]he job will not be easy. It will not be short and it will not be cheap."³³³

325. 117 CONG. REC. 38,804–05 (1971).

326. 118 CONG. REC. 33,754 (1972).

327. 117 CONG. REC. 38,809 (1971).

328. 117 CONG. REC. 38,862 (1971).

329. *Id.*

330. 118 CONG. REC. 33,753 (1972).

331. 117 CONG. REC. 38,819 (1971).

332. *Id.* at 38,810.

333. *Id.* at 38,862.

In the immediate aftermath of the *West Virginia* ruling, however, the Court seems on track to undermine that congressional ambition by dramatically reducing the geographic scope of the Clean Water Act. As described above,³³⁴ less than a year before Justice Scalia joined the Court, the Court in *Riverside Bayview* unanimously embraced a broad reading of the Act's scope in deference to the judgment of the expert agencies charged by Congress with the Act's administration. The Court reasoned such a pragmatic reading of the text was necessary and appropriate to achieve those ambitious congressional objectives.³³⁵ Twenty years later, Justice Scalia fell one vote short in *Rapanos* from a Court ruling that would have dismissed the unanimous *Riverside Bayview's* pragmatic approach in favor of a static dictionary definition of "waters" that ignored the term's statutory context and the Act's obvious purpose. But, sixteen years after *Rapanos* and only a few months after granting review in *West Virginia*, the Court granted review in *Sackett v. EPA*,³³⁶ which plainly seeks to pick up where Scalia left off in *Rapanos*. In *Sackett*, the landowner petitioners seek reversal of a lower court ruling that had upheld the U.S. Army Corps of Engineers' determination that the property that they wanted to develop contained navigable waters subject to Clean Water Act jurisdiction.³³⁷

Nor were the petitioners in *Sackett* remotely shy about their far-reaching objectives, which were not limited merely to a simple ruling that their property fell outside the Clean Water Act's regulatory scope. Their petition expressly invited the Court to revisit its ruling in *Rapanos*.³³⁸ Formally left unstated was their obvious premise: the makeup of the Court today is very different from when *Rapanos* was decided, and petitioners were confident that Scalia's plurality would now become an opinion of the Court.

Only three of the nine Justices who were on the bench at the time of *Rapanos* are still on the bench: Chief Justice Roberts and Justices Thomas and Alito. All three signed onto Scalia's dissent. They have since been joined on the high court bench, moreover, by three new Justices—Gorsuch, Kavanaugh, and Barrett—who appear to be very reliable votes in support of Scalia's proffered narrow view of the Clean Water Act's scope, which would render the Act inapplicable beyond "relatively permanent, standing or flowing bodies of waters" that form "geographic features."³³⁹ In that respect, all three joining the majority opinion in *West Virginia* is a credible harbinger of their likely vote in *Sackett*. Indeed, Gorsuch's separate concurrence in *West Virginia* even makes deliberate reference to the jurisdictional scope of the Clean Water Act in describing how an agency might "[claim] the power to regulate vast swaths of American life,"

334. See *supra* notes 250–264 and accompanying text.

335. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132–33 (1985).

336. Grant of Writ of Certiorari, *Sackett*, 142 S. Ct. 896 (No. 19-35469).

337. Petition for Writ of Certiorari, *Sackett*, 142 S. Ct. 896 (No. 19-35469).

338. *Id.* at i.

339. *Rapanos v. United States*, 547 U.S. 715, 739 (2006).

leaving little doubt of his and Alito's view that the Major Questions Doctrine will be at play in *Sackett*.³⁴⁰

B. *The National Environmental Policy Act and the Environmental Impact Statement Requirement*

Known as environmental law's "Magna Carta,"³⁴¹ the National Environmental Policy Act of 1970 did not mince words in describing its ambition:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation³⁴²

NEPA further declared that to those ends:

[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

- (1) fulfill the responsibilities of each generation as a trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings.³⁴³

By contrast, Congress included in NEPA only one significant "action-forcing" provision. Section 102(2)(C) provides in relevant part:

The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,

340. *West Virginia v. EPA*, 142 S. Ct. 2587, 2621 (2022) (Alito, J., concurring).

341. See e.g., Richard J. Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1509 (2012).

342. 42 U.S.C. § 4321.

343. *Id.* § 4331(b).

- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.³⁴⁴

The ultimate breadth of this statutory requirement is not self-defining. It turns on how broadly and narrowly specific words of section 102(2)(C) are interpreted and applied: words like “major,” “Federal,” “action,” “significantly,” “affecting,” “human environment,” “environmental,” “effects,” and “alternatives.” Construed narrowly, NEPA would have had very little practical import. But precisely because the agency charged with interpreting and administering the law, the President’s Council on Environmental Quality (“CEQ”), embraced very broad interpretations of each,³⁴⁵ NEPA has had truly transformative repercussions. NEPA has affected how the federal government has managed public lands, how it has spent its monies in ways that potentially affect the natural environment, and how it has regulated activities to minimize adverse environmental consequences. By forcing government to consider and make public the environmental consequences before government agencies acted, NEPA prevented and sharply reduced adverse environmental effects of hundreds of thousands of such actions over the past fifty-plus years since its enactment.³⁴⁶ The law has been an enormous success story and our nation’s greatest environmental law export—a majority of the world’s nations have adopted environmental impact assessments in some form.³⁴⁷

But that success was not self-evident and did not result from the language itself. Catalyzed by early judicial rulings like Judge Wright’s opinion for the D.C. Circuit in *Calvert Cliffs*, which then-Judge Scalia subsequently mocked, it was CEQ that made the critical decision to embrace the most far reaching and demanding interpretations of NEPA’s sparse language through authoritative agency regulations. CEQ interpreted the word “Federal” to include actions not only that the government employees themselves took but also those that recipients of federal funding took and those that were taken by recipients of federal leases, licenses, or permits.³⁴⁸ CEQ interpreted “effects” to include direct and indirect effects;³⁴⁹ “actions” to include connected, cumulative, and similar ac-

344. *Id.* § 4332.

345. 40 C.F.R. pts. 1500–08.

346. *See generally* PERCIVAL ET AL., *supra* note 222, at 893–96; *See* LAZARUS, *supra* note 3, at 100–02.

347. TOR HUNDLOE, ENVIRONMENTAL IMPACT ASSESSMENT: INCORPORATING SUSTAINABILITY PRINCIPLES 81 (2021).

348. 40 C.F.R. § 1508.18 (2010).

349. *Id.* § 1508.8.

tions;³⁵⁰ and “significantly” to include consideration of both context and intensity, with the latter turning further on inquiries of whether an action’s effects are “highly controversial,” “highly uncertain or involve unique or unknown risks.”³⁵¹ CEQ further construed the statutory term “alternatives” to require the agency not only to consider a “no action alternative” but also a reasonable sweep of other ways that the agency might otherwise pursue its objective and the comparative environmental effects of each of those alternatives.³⁵²

Each of these broad constructions of NEPA’s relevant statutory requirements was reasonable in light of the Act’s bold statutory purposes. But few of CEQ’s detailed regulations were compelled by the plain meaning of the few capacious words passed by a Congress and signed into law by a president, neither of which at the time displayed any appreciation of how significant a law NEPA was to become. NEPA’s transformative impact instead depended on early judicial rulings and on an agency’s expansive interpretations of capacious statutory language, to which the courts, including the Supreme Court, deferred.

West Virginia, however, potentially calls into question the very regulatory foundation of NEPA. It requires no speculation to posit that the Supreme Court today would flatly reject rather than emulate the judicial role—indeed the “duty”—that Judge Wright described for the courts in ensuring that NEPA’s important policies were achieved.³⁵³ And, after the *West Virginia* ruling, the Court has cast doubt on whether agencies like CEQ may, as agencies have done for decades, permissibly interpret broad statutory language to achieve a transformative effect on the way the government does business. Here, too, the answer to that question will turn on whether the Court continues to adhere to the traditional view that it not overrule precedent on questions of statutory interpretation.

C. *The Resource Conservation and Recovery Act and the Meaning of “Waste”*

When Congress passed the Resource Conservation and Recovery Act, the Act itself made clear its lofty goals:

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.³⁵⁴

350. *Id.* § 1508.25(a).

351. *Id.* § 1508.27.

352. *Id.* § 1508.25(b).

353. *See supra* note 228 and accompanying text.

354. 42 U.S.C. § 6901(b).

So too did the accompanying House Committee Report in announcing that RCRA would do no less than close “the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous waste.”³⁵⁵

To that end, Congress deliberately singled out “hazardous waste” as distinct from “solid waste” and targeted the former for a comprehensive and exceedingly demanding federal “cradle to grave” regulatory program, beginning with the generation of hazardous wastes and extending to their transportation, treatment, and ultimate disposal.³⁵⁶ The linchpin of the Act’s sweep and effectiveness turns, however, in the first instance on the meaning of the term “waste,” about which the law itself provided little guidance. In this regard, the statutory term “waste” is similar in its regulatory significance to the term “waters of the United States,” which defines the geographic scope of the Clean Water Act. As with most federal environmental statutes, however, Congress itself made little effort in either RCRA or the Clean Water Act to define those critical jurisdictional terms, leaving that to EPA as the expert federal agency charged by Congress with administering, implementing, and enforcing the law. RCRA, for instance, never defines “waste” *per se* other than within the context of defining “solid waste,” which the Act provides “means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*.”³⁵⁷

However, in light of Congress’s stated goals of reducing or eliminating hazardous waste, there is tremendous ambiguity in the meaning of “discarded,” and whatever meaning EPA chose to embrace would have enormous regulatory implications. For instance, had EPA adopted a narrow view that places outside the meaning of the word “waste” any material that is nominally reused for another purpose rather than abandoned altogether, an enormous amount of material hazardous to the public would escape regulation. Generators of hazardous materials would avoid RCRA regulation by disingenuously claiming they recycled their disposed waste. This “sham recycling” problem has long bedeviled EPA. Companies claim they use hazardous waste as “fuel” for burning, as “fertilizer” to grow crops, as “building materials” in construction activities, as “fill” in landscaping for real estate development, and as “dust suppressant” in the coating of roads.³⁵⁸ On the other hand, were EPA instead to treat as “hazardous

355. H.R. REP. NO. 94-1491, at 4 (1976).

356. Compare 42 U.S.C. §§ 6921–6924, with 42 U.S.C. §§ 6941–6949a.

357. 42 U.S.C. § 6903(27) (emphasis added).

358. Marine Shale Processors, which operated an incinerator in Louisiana from 1985 to 1996, provides a classic example of sham recycling. The company claimed exemption from RCRA because it burned its hazardous waste and mixed the resulting ash into construction materials. The ash didn’t make building materials any stronger, but it did exempt Marine Shale from RCRA regulation until the Fifth Circuit awarded the United States an \$8 million judgment against the company. See PERCIVAL ET AL., *supra* note 222, at 327.

waste” every hazardous material that is susceptible to being reused and recycled in an economically valuable way, EPA would have significantly undermined Congress’s competing goals in RCRA to “conserve valuable material and energy resources” by promoting “resource recovery” and “recover[ing] valuable materials and energy from solid waste.”³⁵⁹

That is the extraordinary challenge EPA faced in 1985 in deciding on the meaning of “waste” for the purposes of determining the reach of the necessarily demanding statutory program applicable to hazardous waste. There is nothing easy about drawing that precise regulatory divide. That is no doubt why it required EPA fifty-four pages in the Federal Register to first define the term in 1985.³⁶⁰

There is also no doubt about the regulatory impact of EPA’s decision to go with the broader definition of “waste,” which did not simply exclude from hazardous waste regulation any hazardous material that was being reused in a manner that had some economic value. Thousands of business operations that would otherwise have escaped the rigors of RCRA hazardous waste regulation have instead been subject to it. RCRA’s regulatory scope is orders of magnitude larger and imposes hundreds of millions, if not billions, of dollars of compliance costs on generators of hazardous material the Agency has deemed waste by regulation. The validity of that entire federal hazardous waste regulatory program, which has been in place now for decades and upon which vast, settled economic expectations of both regulated industry and beneficiaries of RCRA regulations depend, turns on the very kind of expert agency interpretation of capacious statutory language at issue in *West Virginia*. Yet, *West Virginia* now suggests the possibility that Congress is powerless to delegate that kind of law-making authority to an expert agency like EPA, at least without detailed guidance on how the agency should strike the balance between competing factors—which regulated industry will no doubt now argue that RCRA lacks.

D. *The Endangered Species Act and the Prohibition of the Taking of Endangered Species*

Congress passed the Endangered Species Act (“ESA”)³⁶¹ in 1973. In most significant respects, the law is unchanged. The Act is distinct from most any other of the modern environmental protection laws because its focus is not on protection of public health and welfare in the first instance, but instead on the conservation of otherwise endangered and threatened species of fish, wildlife, and plants. In enacting the law, Congress expressly found that “species of fish,

359. *Id.* at 309, 316–18, 323–28.

360. Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. 614 (Jan. 4, 1985) (to be codified in 40 C.F.R. pts. 260, 261, 264, 265, 266).

361. 16 U.S.C. §§ 1531–1544.

wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.”³⁶² Congress further declared a new National Policy “that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”³⁶³

One of the most important provisions of the Act for achieving its purposes is section 9, which makes it unlawful for any person to “take” any endangered species of fish or wildlife.³⁶⁴ The Act further defines what it means to “take” to include “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”³⁶⁵ Absent the federal government’s issuance of a permit to allow for such a taking of an endangered species,³⁶⁶ any person who knowingly violates the ban on taking is subject to both civil and criminal penalties.³⁶⁷

In administering the Act, the Department of the Interior was faced with a critical threshold question: whether it was an unlawful taking of an endangered species for any person to cause harm to a member of that species by modifying the habitat upon which the species depended. The Department of the Interior concluded that the word “harm,” and accordingly the taking prohibition, extended to indirect harm caused by habitat modification, including habitat located on privately owned land. Interior reasoned that absent such an interpretation, the Endangered Species Act could not achieve its statutory objectives given that one of the greatest threats to the survival of endangered species is the destruction of their habitat.³⁶⁸

In *Babbitt v. Sweet Home Chapter Communities for a Great Oregon*,³⁶⁹ the Supreme Court upheld the Secretary of the Interior’s interpretation of “harm” to include habitat modification.³⁷⁰ The Court relied on its characterization of the ordinary meaning of the word “harm” and the Endangered Species Act’s broad purposes.³⁷¹ The Court rejected the landowners’ argument that the plain meaning of “harm” in the context of a prohibition of a “take” “must refer to a

362. *Id.* § 1531(a).

363. *Id.* § 1531(c).

364. *Id.* § 1538(a)(1)(B).

365. *Id.* § 1532(19).

366. *See id.* § 1539.

367. *See id.* § 1540.

368. *See* Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,416 (Sept. 26, 1975); Endangered and Threatened Wildlife and Plants; Final Redefinition of “Harm,” 46 Fed. Reg. 54,748, 54,748–49 (Nov. 4, 1981).

369. 515 U.S. 687 (1995).

370. *See id.* at 708.

371. *See id.* at 697–98.

direct application of force.”³⁷² The Court was similarly unmoved by the landowners’ argument that Interior’s expansion of its authority to what was tantamount to land use controls, more typically assumed to be within the province of state and local governmental authority, and not of the federal government, counseled against upholding the agency’s expansive definition.³⁷³ In short, the regulation was valid notwithstanding its transformative character because it was consistent with the transformative nature of the Endangered Species Act that Congress intended.³⁷⁴ As explained by the Court:

When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. . . . The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress. . . . The proper interpretation of a term such as “harm” involves a complex policy choice. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his.³⁷⁵

Here too, however, *West Virginia* now casts a shadow over this now long-standing expert agency interpretation to which the Court previously deferred. Not unlike in *West Virginia*, Interior adopted an expansive view of a capacious statutory term—“harm”—in order to achieve a federal statute’s highly ambitious purposes. Indeed, what Interior accomplished in *Babbitt* was arguably more ambitious than what EPA sought to accomplish in its Clean Power Plan. In *Babbitt*, Interior sought to expand significantly section 9’s geographic and substantive scope to include activities on private land that indirectly affected endangered species. In *West Virginia*, the Clean Power Plan’s geographic jurisdiction extended no further than it always had: emissions allowable by existing coal-fired power plants. The only changes were the factors that EPA could take into account in determining what the amount of those allowable emissions should be. Yet in *Babbitt*, by a six to three vote, the Court upheld Interior’s interpretation, with both Justices O’Connor and Kennedy joining Justice Stevens’ opinion for the Court.

However, it requires little, if any speculation, to anticipate how today’s Scalia Court would rule in the absence of prior precedent on that same legal

372. *Id.* at 701.

373. See Brief for Respondents at 26–28, *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (No. 94-859) (“[The U.S. Fish and Wildlife Service]’s interpretation broadly expands the agency’s power and the ESA’s reach based on the seemingly incidental use of a word in a statutory definition. Caution is warranted where an agency seizes on an elastic word to ‘bootstrap itself into an area in which it has no jurisdiction.’” (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990))).

374. See *Babbitt*, 515 U.S. at 696–704.

375. *Id.* at 708.

issue. Why? Because Justice Scalia dissented in *Babbitt*. Scalia sharply criticized the majority for upholding an agency interpretation that “imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.”³⁷⁶

Here again, *stare decisis* may play a critical role in determining how far the Supreme Court’s new environmental law wrecking crew is willing to go. So too may the enormous public fury over the Court’s sweeping conservative rulings announced in June and July 2022. Although the Court’s ruling in *Dobbs* underscores the conservative majority’s willingness to overrule significant, longstanding precedent, the question presented in *Dobbs* was purely a question of constitutional law: whether the Constitution confers the right to have an abortion *stare decisis* concerns always weigh against precedential overruling, the Court has long made clear that it is far more willing to do so on a question of constitutional law, for which there is no alternative lawmaking forum to revisit the issue, than for a question of statutory interpretation, for which congressional redress is always possible.³⁷⁷

CONCLUSION

These are challenging times for environmental law, to say the least. The nation, indeed, the world, faces the most daunting environmental challenge of our times: climate change. And we lack the luxury of time to address it.³⁷⁸ The longer it takes to reduce accumulating greenhouse gases in the atmosphere, the exponentially harder it becomes to bring down atmospheric concentrations of those gases—and not just in our lifetimes, but in the lifetimes of our children, our children’s children, and even the children of our children’s children, and likely longer still.

Tragically, however, the branch of our government most suited to enact the laws necessary to address climate change—the Congress—has effectively shut down due to partisan gridlock promoted in part by a scandalous campaign of scientific disinformation mounted by industrial interests worried that their

376. *Id.* at 714 (Scalia, J., dissenting).

377. *See, e.g.*, *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015) (“[*S*]tare decisis carries enhanced force when a decision . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.”); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring) (“[T]he Court has ordinarily left the updating or correction of erroneous statutory precedents to the legislative process.”).

378. *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS (Priyadarshi R. Shukla et al. eds., 2022); HANS-OTTO PÖRTNER ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY, SUMMARY FOR POLICYMAKERS (2022); Mark Fischetti, *There’s Still Time to Fix Climate—About 11 Years*, SCI. AM. (Oct. 27, 2021) <https://perma.cc/C2FB-H9LZ>.

short-term profits would be threatened by laws addressing climate change.³⁷⁹ In the absence of a working Congress, executive branch agencies have had no choice but to address mounting environmental issues with increasingly old statutory language. The only potentially saving grace is that when Congress enacted those environmental laws now decades ago, those legislators deliberately chose to use capacious language designed to provide those same agencies with the authority to deal with new, pressing issues as they arose. Congress understood, even as it passed those first major environmental protection laws of the 1970s and the 1980s that its own lawmaking processes could never keep up on a real-time basis with the nation's evolving need for environmental protection in light of ever-changing scientific information and technological innovation. That is why the ability of those agencies to do their job successfully has depended in recent decades on whether the federal judiciary honors that congressional choice.

Until its ruling in *West Virginia*, the Supreme Court had crafted a pathway marked for moderation dependent on closely divided votes. Sometimes the Court backed agencies like EPA with significant environmental regulatory authority. And other times, the Court concluded that the agency had crossed the line. In some of those cases, EPA sought to impose requirements that were less stringent than environmentalists favored. And in other cases, the agency sought to impose requirements that were more stringent than the regulated industry considered lawful. The resulting Court precedent effectively placed bounds within which agencies could operate but stopped far short of eviscerating their ability to address the needs of the nation.

There is nothing, however, remotely moderate about the Court's reasoning in *West Virginia* even though the Chief's majority opinion is certainly less foreboding in its reach than Justice Gorsuch's separate concurring opinion, which Justice Alito joined. Under the pretense of promoting democratic values, the Court has invented an impossibly high standard of review for agency environmental rulemaking. The Court insists that capacious statutory language is insufficient to sustain significant agency environmental regulations. And, even while knowing that the current Congress is incapable of doing so, the Court finds that such significant agency regulations are lawful only when supported by specific statutory language that makes clear that Congress anticipated and determined that such a regulation would be permissible.

In the best of times, such a judicial arrogation of how Congress can permissibly work with the executive branch to address the nation's most pressing problems might be merely misguided. Congress could adjust, and the nation's important lawmaking could be accomplished. But Congress has been broken

379. See NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBTAINED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING* 164–211 (2010).

for more than thirty years and shows no sign of restoring its essential lawmaking function. The nation—indeed the world—cannot wait: the time to address climate change is now. *West Virginia* is dangerous because it impedes that imperative; it is tragic because nothing in the Constitution remotely compelled such a misbegotten ruling.

As Justice Robert Jackson warned more than seventy years ago, “There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”³⁸⁰ The same is clearly true now for the *West Virginia* majority’s unbendingly strict doctrinaire views of the Constitution’s demands for separation of powers. Several of the current Justices singled out Justice Jackson as a role model during their confirmation hearings,³⁸¹ extending to his “healthy regard for the prerogatives of the legislative branch.”³⁸² Justice Gorsuch, however, best summed up Jackson’s wise admonition to future Justices: “I think it was Justice Jackson who said just because I made a mistake unknowingly yesterday does not mean I should make a mistake knowingly today.”³⁸³

The Court should heed Justice Jackson’s advice. Justice does not require being blind to the devastating real-world consequences of the aspirations for separations of powers favored by the conservative Justices who now dominate the Court. Here, wise judging requires beating a hasty retreat in future cases from the extreme implications for governance of the Court’s *West Virginia* ruling.

380. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

381. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 153, 280, 369 (2005) [hereinafter *Roberts Confirmation Hearing*]; *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 65, 180, 274 (2017) [hereinafter *Gorsuch Confirmation Hearing*]; *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 179 (2018).

382. *Roberts Confirmation Hearing*, *supra* note 381, at 163.

383. *Gorsuch Confirmation Hearing*, *supra* note 381, at 278.

