

Justice Gorsuch and the Future of Environmental Law

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Justice Gorsuch will have completed his seventh year on the Supreme Court when the Justices recess for the summer later this year. If those seven years are prologue, the Justice's longer-term impact on environmental law may well exceed even the worst fears expressed by environmentalists who opposed his confirmation. Whether assessed quantitatively or qualitatively, Justice Gorsuch is a solidly conservative vote skewed against legal positions that environmentalists favor, with the potential to unsettle the entire federal administrative state upon which much of federal environmental law depends. His votes and opinions do not evince hostility to environmentalism

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per se, but instead reflect misgivings about the heightened roles that the national government and federal executive branch officials serve in administering environmental law. No doubt there will be instances when Justice Gorsuch's views on cross-cutting issues of constitutional law tip in favor of particular outcomes protective of the environment, but these are likely to be the exception.

Justice Gorsuch's views on separation of powers have already proven incompatible with the efforts of the United States Environmental Protection Agency and other federal agencies to assert the kind of expansive authority necessary to meet today's compelling environmental problems. His views on federalism are even more foreboding, especially his exceedingly narrow conception of congressional Commerce Clause authority to address environmental protection concerns. With regard to federalism, there is potential for some votes favorable to environmentalists when state and local governments, rather than the federal government, champion environmental causes. However, even that mitigating potential seems likely to be diminished in light of the Justice's evident concern that environmental protection requirements, regardless of the sovereign imposing them, unduly burden individual liberty and private property interests.

I. INTRODUCTION

Justice Neil Gorsuch has a uniquely personal relationship to environmental law. His mother, Anne Gorsuch, served as President Ronald Reagan's first Administrator of the United States Environmental Protection Agency (EPA) at a time when the newly elected President had made clear his commitment to cutting back significantly on EPA's authority.¹ Indeed, when Reagan administration officials interviewed Anne Gorsuch for the job, they asked her whether she was willing "to bring EPA to its knees."² During her two years in office, Administrator Gorsuch sought to do the President's bidding. She undertook a series of headline-producing efforts to slash EPA's budget, cut back regulatory requirements, and turn authority over to states.³ After a bipartisan

1. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 116–18 (2d ed. 2023) [hereinafter LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW*].

2. *Id.* at 119.

3. Philip Shabecoff, *New Environmental Chief Vows to Lift Regulatory "Overburden,"* N.Y. TIMES (June 21, 1981), <https://perma.cc/4JLJ-ADXX>; Philip Shabecoff, *Funds and Staff for Protecting Environment May Be Halved,* N.Y. TIMES (Sept. 29, 1981), <https://perma.cc/6UGD-WS3C>; *E.P.A. Will Look to the States,* N.Y. TIMES (Nov. 27, 1981), <https://perma.cc/K788-627V>; LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW*, *supra* note 1, at 119 & n.12.

congressional backlash against Gorsuch's initiatives created a political firestorm, however, the Reagan White House unceremoniously cut her loose in an effort to appease Congress when she was held in contempt for resisting a congressional subpoena. Although she had done no more than to faithfully advance the President's own policies (including the Justice Department's position on the subpoena), the President effectively forced his vilified Administrator to resign to limit the political damage that his administration might otherwise have suffered.⁴

Four decades later, environmentalists have not forgotten the Gorsuch era at EPA. For many, just the name "Gorsuch" evokes the threatened gutting of the nation's federal pollution control laws during her tenure. These memories likely resurfaced when President Trump nominated then-Judge Neil Gorsuch to the Supreme Court. Although environmentalists could have fairly worried about any Supreme Court nominee named to the Court by a President who had campaigned on the promise "to 'get rid of' the EPA 'in almost every form,' leaving only 'little tidbits,'"⁵ those worries may well have been aggravated by attributing to the son the perceived "sins of the mother."⁶ Abandoning the ordinary practice of national environmental groups of not taking a position on Supreme Court nominees, both Earthjustice and Sierra Club formally opposed Judge Gorsuch's nomination to fill the seat on the Court left by Justice Antonin Scalia's death a year earlier.⁷

Nor, reportedly, are the environmentalists the only ones harboring searing memories of Administrator Gorsuch's tenure at EPA. So too reportedly does her son, now a Supreme Court Justice. According to his mother's own account, then-fifteen-year-old Neil was furious about what had happened to his mother in the early 1980s—and not without reason.⁸ He told his mother that she "never should have resigned."⁹ "You didn't do anything wrong. You only

4. Philip Shabecoff, *House Charges Head of E.P.A. with Contempt*, N.Y. TIMES (Dec. 17, 1982), <https://perma.cc/5T5J-XARW>; Philip Shabecoff, *Mrs. Burford Quits at E.P.A.; Reagan Announces Accord Giving Congress All Papers*, N.Y. TIMES (Mar. 10, 1983), <https://perma.cc/V275-VW2N>; LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 1, at 120.

5. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 1, at 263.

6. See, e.g., 1 Kings 15:3 ("And he walked in all the sins of his father, . . .").

7. *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. 1062, 1182 (2017) (reproducing letters of opposition submitted by Earthjustice and the Sierra Club) [hereinafter *Confirmation Hearing*].

8. See ANNE M. BURFORD, ARE YOU TOUGH ENOUGH? 143–227 (1986).

9. Adam Liptak, Peter Baker, Nicholas Fandos & Julie Turkewitz, *In Fall of Gorsuch's*

did what the president ordered. Why are you quitting? You raised me not to be a quitter.”¹⁰ A law school classmate described how now-Justice Gorsuch “viewed his mother as an environmentalist. . . . And meanwhile she was made the poster child of the view that the Reagan administration was just out there to rape the environment.”¹¹ His hostility towards Washington politics and heightened skepticism of government were consequently well grounded in personal experience rooted in his own peculiar family history.¹²

This past fall, Justice Gorsuch completed his sixth full Term on the Court. So far, he has rendered decisions in several cases addressing important issues of environmental law. To be sure, the precise number of environmental law cases decided during the Justice’s tenure to date—fifteen—remains relatively small. The Court’s docket, after all, does not regularly include many environmental law issues, and when it does, it includes fewer than it did during some Terms in the 1990s.¹³ Yet, as described below, it is not too soon to glean some early patterns and draw some preliminary conclusions from Justice Gorsuch’s votes and his opinions regarding his likely longer-term impact on environmental law.

The purpose of this article is to recount and assess Justice Gorsuch’s early environmental-law record on the Supreme Court. The essay is divided into three Parts. Part I describes Justice Gorsuch’s path through the Supreme Court nomination process, which invited environmentalists’ scrutiny of his limited record as a judge on the United States Court of Appeals for the Tenth Circuit. Part II offers a quantitative analysis of Justice Gorsuch’s Supreme Court record in environmental cases, based on an empirical methodology one of this essay’s co-authors has used in prior scholarship.¹⁴ The exclusive focus is his voting record. Such

Mother, a Painful Lesson in Politicking, N.Y. TIMES (Feb. 4, 2017), <https://perma.cc/9QAX-RZHW>.

10. *Id.*

11. *Id.*

12. *Id.*

13. For instance, during October Term 1993, the Court decided five significant environmental law cases: *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality*, 511 U.S. 93 (1994); *City of Chicago v. Env’t Def. Fund*, 511 U.S. 328 (1994); *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700 (1994); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

14. Richard J. Lazarus, *Justice Breyer’s Friendly Legacy for Environmental Law*, 95 S. CAL. L. REV. 1395, 1409–12 (2022) [hereinafter Lazarus, *Justice Breyer’s Friendly Legacy*]; Richard J. Lazarus, *Restoring What’s Environmental about Environmental Law in the Supreme Court*, 47

analysis yields some interesting comparative information about the Justice and his colleagues. It is necessarily limited in its reach both because of the way that environmental law cuts across so many other areas of law, and because the strength of any given legal argument need not turn on whether environmentalists favor it. But at the very least, the analysis suggests that Justice Gorsuch generally, although certainly not exclusively, votes against the legal arguments favored by environmentalists.

Finally, Part III examines Justice Gorsuch's opinions and votes on a qualitative basis. This analysis considers the reasoning of the opinions that the Justice joined and wrote in individual environmental cases as well as sentiments that he expressed during oral argument. Based on that review, the article offers three reasons for Justice Gorsuch's environmental record. Not surprisingly, none suggests any focused *per se* hostility to laws that protect environmental quality. Rather, as with Justice Scalia, whose jurisprudence Justice Gorsuch greatly admires,¹⁵ it appears that Justice Gorsuch "perceives environmental protection concerns as systematically promoting a set of legal rules antithetical to those he generally favors."¹⁶

The first reason relates to Justice Gorsuch's strong views on separation of powers within the federal government. The Justice has questioned the authority of federal agencies, like EPA, to promulgate regulations that address legal issues of economic and political significance, as most environmental regulations do. The second relates to the Justice's views on federalism and the vertical division of lawmaking authority between the national and state governments. Justice Gorsuch's votes so far strongly suggest that he is highly skeptical of broad understandings of the environmental lawmaking authority of Congress under the Commerce Clause, especially when such federal authority could undermine state lawmaking authority. The third reason relates to the Justice's

UCLA L. REV. 703, 744–63 (2000) [hereinafter Lazarus, *Restoring What's Environmental About Environmental Law*].

15. See, e.g., NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 22 (2019) ("Bring [Justice Scalia] 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."). See generally Richard J. Lazarus, *The Scalia Court: Environmental Law's Wrecking Crew Within the Supreme Court*, 47 HARV. ENV'T L. REV. 407 (2023) [hereinafter Lazarus, *The Scalia Court*].

16. Lazarus, *Restoring What's Environmental About Environmental Law*, *supra* note 14, at 727 (describing Justice Scalia's approach to environmental law).

obviously heightened concerns with the impact of government regulations, including environmental regulations, upon individual autonomy, liberty, and private property rights. In combination, these three aspects of the Justice's jurisprudence both explain his record to date and suggest that he will continue to vote disproportionately against legal arguments that environmentalists favor in cases before the Court.

II. JUSTICE GORSUCH'S NOMINATION

In January of 2017, President Trump nominated then-Judge Gorsuch to the Supreme Court.¹⁷ The “youngest nominee to the Supreme Court in 25 years”—and a classmate of President Trump's predecessor at Harvard Law School—Judge Gorsuch served on the Tenth Circuit.¹⁸ Any Trump Supreme Court nominee for the seat created by Justice Scalia's death was destined to trigger a highly partisan brawl, for reasons wholly unrelated to Judge Gorsuch himself.

Most simply put, Democrats considered the seat on the Court that President Trump had nominated Judge Gorsuch to fill as “stolen.”¹⁹ Although Republicans did not believe the seat had been “stolen,” everyone knew why there was an opening for the newly elected President to fill. For almost a year, Republican Senate Majority Leader Mitch McConnell had refused to allow a hearing or vote on President Obama's nominee to fill the seat, D.C. Circuit Judge Merrick Garland. Nor was there anything remotely subtle about the reasons for McConnell's unprecedented maneuver. He sought to maintain an opening for a potentially Republican President to fill in January 2017 after the November 2016 election.²⁰ The partisan divide was that Republicans gleefully cheered what McConnell had done, while Democrats sharply denounced it.

Candidate Trump, in turn, fully and effectively embraced the political opportunity created by Senator McConnell. Trump produced lists of many of the most conservative judges in the country and, in an effort to attract votes from the most conservative

17. Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://perma.cc/6KU2-5YDX>.

18. *Id.*

19. Paul Kane, *As the Gorsuch Nomination Proceeds, This Man Is Taking Credit: Mitch McConnell*, WASH. POST (Feb. 18, 2017), <https://perma.cc/DQ2H-TZEA>_(quoting Senator Jeff Merkley).

20. *Id.*

wing in the Republican Party, he announced that he would fill the Court opening with a judge from those lists if elected.²¹ Candidate Trump was characteristically unsubtle about his offer: “Even if you can’t stand Donald Trump, you think Trump is the worst, you’re going to vote for me. You know why? Justices of the Supreme Court.”²² Trump’s election counsel, working with the conservative Federalist Society, crafted lists of potential Supreme Court nominees for Trump, and Judge Gorsuch was included.²³

Yet, notwithstanding the political clash underlying the Supreme Court vacancy, the announcement of Judge Gorsuch’s nomination received some immediate bipartisan praise.²⁴ Neal Katyal, acting Solicitor General under President Obama, even suggested to liberals that nominating Judge Gorsuch was the first choice in office that President Trump had gotten right.²⁵ But the adulation was far from unanimous. Many on the left pressured Congress to block the confirmation and “scour[ed] the judge’s record and history for anything that could help derail the appointment.”²⁶ As described above, environmental groups were among these skeptics. The Sierra Club warned that Judge Gorsuch harbored “dangerous views” that “favor[ed] polluters and industry over the rights of the people.”²⁷

21. Adam Liptak, *How Trump Chose His Supreme Court Nominee*, N.Y. TIMES (Feb. 6, 2017), <https://perma.cc/8VV8-F8MW>.

22. Editorial, *Neil Gorsuch, the Nominee for a Stolen Seat*, N.Y. TIMES (Jan. 31, 2017), <https://perma.cc/KP8F-KM2N>.

23. Liptak, *supra* note 21; Kane, *supra* note 19; Robert O’Harrow, Jr. & Shawn Boburg, *A Conservative Activist’s Behind-the-Scenes Campaign to Remake the Nation’s Courts*, WASH. POST (May 21, 2019), <https://perma.cc/DCJ8-KHVN>.

24. *Confirmation Hearing*, *supra* note 7, at VII–VIII; *see, e.g.*, David C. Frederick, Opinion, *There is No Principled Reason to Vote Against Gorsuch*, WASH. POST (Mar. 8, 2017), <https://perma.cc/59YG-QKDC>; Noah Feldman, Opinion, *Democrats’ Misguided Argument Against Gorsuch*, BLOOMBERG (Mar. 15, 2017), <https://perma.cc/GYH6-ZS82>; Jessica Greenstone, Opinion, *I’m a Moderate for Gorsuch: Former Law Clerk*, USA TODAY (Feb. 13, 2017), <https://perma.cc/H2TT-G9JZ>; Jason Murray, Opinion, *Liberals Should Welcome Gorsuch. Like Kagan, He Puts Law Before Politics.*, WASH. POST (Feb. 8, 2017), <https://perma.cc/4VYH-VSKJ>; Deanell Reece Tacha & Robert Henry, Opinion, *Neil Gorsuch is the Kind of Judge Our Framers Envisioned*, WASH. POST (Mar. 17, 2017), <https://perma.cc/Z74T-TK7Q>; *Neil Gorsuch is a Supreme Court Pick: An Originalist Judge in the Antonin Scalia Mold.*, WALL ST. J. (Feb. 1, 2017), <https://perma.cc/EL87-RWBV>; Evan Young, *Judge Gorsuch is Just Right for the Scalia Seat*, FORBES (Feb. 13, 2017), <https://perma.cc/4XH2-6RSD>.

25. Neal K. Katyal, *Why Liberals Should Back Neil Gorsuch*, N.Y. TIMES (Jan. 31, 2017), <https://perma.cc/QFK3-CCL5>.

26. Kate Ackley & Todd Ruger, *Democrats in a Dilemma Over Trump’s Court Nominee*, CQ ROLL CALL (Feb. 9, 2017), <https://perma.cc/BB3S-TA9P>.

27. Press Release, Sierra Club, *Gorsuch Is Unfit to Be Supreme Court Justice* (Jan. 30, 2017), <https://perma.cc/4XPX-9RDC>.

Judge Gorsuch's Tenth Circuit record in the relatively few environmental law cases in which he participated,²⁸ however, hardly seemed "dangerous." He had frequently voted in favor of positions that environmentalists supported.²⁹ As summarized by one analysis of Gorsuch's environmental law record at the time of his nomination, co-authored by attorneys sympathetic to environmental protection concerns, "Judge Gorsuch interprets statutes strictly, but does not evidence a discernible bias for or against 'the environment,' environmental regulation, or federal control over public lands."³⁰

At the heart of environmentalists' concerns, however, were Judge Gorsuch's clearly fierce views about separation of powers in general and the power of federal administrative agencies in particular. In response to a question from the Senate Judiciary Committee, Judge Gorsuch listed "the 10 most significant cases over which [he] presided."³¹ The first case he listed was *Gutierrez-Brizuela v. Lynch*.³² The case broadly concerned the standard of judicial review of an agency's interpretation of a federal statute that Congress had charged the agency with administering. What made Judge Gorsuch's reference to that case so significant, and simultaneously so troubling, to progressive organizations was its portent for the ability of federal agencies like EPA to promulgate strong environmental protection requirements.

In *Gutierrez-Brizuela*, Judge Gorsuch went out of his way to question the correctness of the Supreme Court's 1984 ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*³³ Indeed, he did so by the exceedingly peculiar procedural

28. Christine A. Fazio & Ethan I. Strell, *Judge Gorsuch's Environmental Record*, N.Y. L.J. (Feb. 22, 2017), <https://perma.cc/Z4RT-HG5S>.

29. See, e.g., *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015) (rejecting Dormant Commerce Clause challenge to Colorado law requiring renewable sources for fixed proportion of electricity sold to Colorado consumers); *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088 (10th Cir. 2015) (rejecting preemption of state nuisance law and upholding jury award of hundreds of millions of dollars in compensatory and punitive damages to neighbors of nuclear weapons facility); *Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245 (10th Cir. 2009) (dismissing as moot a challenge to a National Park Service restriction on snowmobiling in Yellowstone National Park).

30. Fazio & Strell, *supra* note 28, at 1.

31. S. Comm. on the Judiciary, Questionnaire for Nominee to the U.S. Supreme Court 25 (2017), [https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJQ%20\(Public\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJQ%20(Public).pdf).

32. 834 F.3d 1142 (10th Cir. 2016).

33. 467 U.S. 837 (1984).

maneuver of writing a separate concurring opinion *to his own opinion for the court*.³⁴ In *Chevron*, the Supreme Court famously ruled that courts should defer to interpretations of ambiguous statutory language by agencies charged by Congress with the statute's administration. On its face, of course, *Chevron* is not an inherently pro-environmental doctrine. Such judicial deference may occur in a case in which an agency interpretation favors or disfavors the statutory reading favored by environmentalists. After all, environmentalists lost in *Chevron* itself.³⁵

By the time of Gorsuch's opinion, however, environmentalists were leaning heavily into *Chevron* deference in support of eight years of Obama administration environmental rulemakings that relied on increasingly ambiguous connections to statutory language. Nor was that rising ambiguity mere happenstance. As those environmental statutes, many of which Congress enacted in the 1970s and 1980s became increasingly old, their application to new environmental problems like climate change less frequently fit the assumptions of those in Congress who drafted that language decades earlier.³⁶ The courts, including the United States Supreme Court, had accordingly frequently invoked *Chevron*'s holding that courts should defer to agency interpretations of ambiguous statutory language in upholding significant EPA rulemakings that environmentalists favored.³⁷ That is why, even though *Chevron* deference may in theory cut either way, environmentalists were especially sensitive to Judge Gorsuch's challenge to *Chevron*'s viability, with the Sierra Club stating: "His stance against the well-established Chevron doctrine will prevent agencies like the United States Environmental Protection Agency from fulfilling their mission to protect our air, water, and health."³⁸

Judge Gorsuch's separate opinion in *Gutierrez-Brizuela* made

34. For an in-depth analysis of then-Judge Gorsuch's opinion in *Gutierrez-Brizuela*, and its possible significance for administrative law, see William Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357 (2018).

35. For an empirical analysis of the use and impact of *Chevron* analysis in environmental cases, see Jason J. Czarnecki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767 (2008).

36. See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 17–19 (2014); Lazarus, *The Scalia Court*, *supra* note 15, at 413–14, 458.

37. See, e.g., *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014) (upholding EPA's Cross-State Air Pollution Rule); see also John C. Cruden & Matthew R. Oakes, *The Enduring Nature of the Chevron Doctrine*, 40 HARV. ENV'T L. REV. 189 (2016).

38. *Confirmation Hearing*, *supra* note 7 at 1192 (letter from Sierra Club in opposition to Gorsuch confirmation).

clear that he considered sweeping *Chevron* judicial deference to agency interpretations constitutionally problematic.³⁹ “Maybe the time,” he suggested about *Chevron*, “has come to face the behemoth.”⁴⁰ If elevated to the Court, environmentalists understandably worried that a Justice Gorsuch would do just that, upending decades of favorable precedent upholding EPA regulations. Although the Democrats had enough votes in the Senate to prevent confirmation by mounting a filibuster, Senator McConnell responded to their filibuster effort by taking the unprecedented step of eliminating the filibuster for Supreme Court nominees. On April 7, 2017, the Senate easily confirmed the President’s nomination with 54 votes in the majority, and Supreme Court Justice Anthony Kennedy swore Justice Gorsuch into office three days later.⁴¹

III. JUSTICE GORSUCH’S ENVIRONMENTAL RECORD: A QUANTITATIVE ASSESSMENT

With the benefit of almost seven years of hindsight and, with the commencement of October Term 2023 this past fall, six fully completed Supreme Court Terms, what is Justice Gorsuch’s actual environmental record? Have the worst fears of environmentalists who opposed his confirmation been realized? Conversely, have those who supported his nomination in hopes that the new Justice would cut back on the reach of environmental protection requirements achieved their objectives? Or does the Justice’s early record corroborate the claims of those progressives who, in 2017, cautiously supported his confirmation on the grounds that he harbored “a deep conviction about the role of the judiciary in preserving the rule of law”?⁴²

This Part and the next offer two complementary sets of answers to these questions. This Part offers a quantitative, numerical assessment of the Justice’s record based on the (admittedly empirically perilous) notion that one can fairly label outcomes in cases as “pro-environmental protection” and score Justices’ environmental records accordingly. Part III of the essay offers a

39. *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

40. *Id.*

41. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://perma.cc/S65J-Y69H>; Robert Barnes & Ashley Parker, *Neil M. Gorsuch Sworn In as 113th Supreme Court Justice*, WASH. POST (Apr. 10, 2017), <https://perma.cc/3WHC-UXFU>.

42. Katyal, *supra* note 25.

second, complementary view based on a qualitative assessment of Justice Gorsuch's record in individual environmental law cases.

Since joining the Court in April 2017, Justice Gorsuch has written forty-two "opinions of the Court" out of the approximately 400 cases that the Court has decided on the merits, and he has written separately about twice as many times.⁴³ Most of his separate opinions are dissents.⁴⁴ Not surprisingly, only a relatively small fraction of those decisions can fairly be considered "environmental law" cases. A tricky threshold question for both quantitative and qualitative assessment, however, is which cases qualify in the first instance as "environmental."

The reason it is tricky is that one could fairly characterize cases as "environmental" on either a very narrow or a very broad basis. A very narrow basis would require both the stakes of the cases *and* the legal issue to be decided to involve something distinctively "environmental." Under this classification test, only cases involving federal pollution control and natural resources statutes, federal environmental common law (*e.g.*, interstate nuisance), or state environmental or natural resources law would qualify. A contrastingly broad basis for classifying a case as "environmental" would consider only whether the legal issue decided by the Court would have significant implications for environmental law, even if neither the facts of the actual case before the Court nor the legal issue involved had any particular environmental dimension to it beyond those potential implications. This broader classification would include, for example, any administrative law, federalism, or "Major Questions Doctrine" cases, as well as many separation of powers, procedural, and Commerce Clause cases, regardless of the actual substantive law involved in those decisions.

For example, in *BP P.L.C. v. Mayor of Baltimore*,⁴⁵ Justice Gorsuch wrote for the Court on the scope of review of remand

43. See RECENT DECISIONS BY JUSTICE NEIL M. GORSUCH, LEGAL INFO. INST., <https://www.law.cornell.edu/supct/justices/gorsuch.dec.html> (last accessed May 26, 2023); UNITED STATES SUPREME COURT, OPINIONS OF THE COURT – 2022, <https://www.supremecourt.gov/opinions/slipopinion/22> (last accessed June 27, 2023). Justice Gorsuch's percentage of Court opinions is a bit low only because he joined the Court just as the Court was hearing its last argument for October Term 2016 and he was therefore ineligible to write almost all of the cases that the Court decided after April 10. He wrote one opinion out of the forty-eight cases the Court decided on the merits after he joined the Court and before the Justices recessed for the summer, almost all of which had been argued beforehand. See *Opinions*, SUP. CT. OF THE U.S., <https://perma.cc/GYN8-BQSB> (archived Mar. 8, 2023).

44. RECENT DECISIONS BY JUSTICE NEIL M. GORSUCH, *supra* note 43.

45. 141 S. Ct. 1532 (2021).

orders following removal to federal court under 28 U.S.C. § 1442 and § 1443.⁴⁶ The underlying stakes of the litigation were plainly “environmental” in nature. The *BP* case was one of a series of coordinated lawsuits brought across the country against the fossil fuel industry by state and local governments under their respective state laws to seek monetary redress initially for their climate change-related injuries.⁴⁷ The City of Baltimore was the plaintiff in the *BP* case.⁴⁸

But as Justice Gorsuch noted, this environmental aspect of the case was peripheral to the procedural question before the Supreme Court: “[T]he merits of that claim have nothing to do with this appeal. The only question before us is one of civil procedure”⁴⁹ Under a narrow view, *BP* would not be considered “environmental” even though the viability of the underlying climate litigation was exceedingly significant for climate activists.⁵⁰ The case would nonetheless fall short because the precise legal question at issue—the scope of federal appellate review of a district court’s denial of a defendant’s motion to remove a case from state court to federal court—had absolutely no distinct environmental character to it.

Such a narrow view, moreover, could miss cases that, unlike *BP*, arise in litigation with no environmental connection at all, but where the legal issue to be decided by the Court may nonetheless have enormous implications for future environmental law cases. For instance, whether environmental plaintiffs have Article III standing is critically important to the effectiveness of the citizen-suit enforcement provisions found in most of the major federal environmental protection laws. Even in a case lacking any hint of an environmental nexus, a Court ruling on what kinds of injury, causal relationship, or judicial redressability a plaintiff must establish to demonstrate Article III standing can easily have an outsized impact on environmental cases.⁵¹

Another obvious example is furnished by the Court’s rulings on the scope of congressional authority pursuant to the Commerce

46. *Id.* at 1536.

47. John Schwartz, *Climate Lawsuits, Once Limited to the Coasts, Jump Inland*, N.Y. TIMES (Apr. 18, 2018), <https://perma.cc/X94Q-BV2F>.

48. *Mayor of Baltimore v. BP P.L.C.*, 952 F.3d 452, 457 (4th Cir. 2020), *vacated and remanded*, 141 S. Ct. 1532 (2021).

49. *BP*, 141 S. Ct. at 1535–36.

50. See John Schwartz, *Supreme Court Case Could Limit Future Lawsuits Against Fossil Fuel Industry*, N.Y. TIMES (Jan. 19, 2021), <https://perma.cc/2N7X-AMES>.

51. See, e.g., *Spokeo v. Robins*, 578 U.S. 330, 334, 339–43 (2016) (rejecting plaintiff’s standing for lack of sufficiently “concrete and particularized” injury).

Clause. In *Gonzalez v. Raich*,⁵² the Court rejected a constitutional claim that Congress had exceeded its Commerce Clause authority by criminalizing the production and use of homegrown cannabis.⁵³ *Raich*'s relationship to environmental law would seem nonexistent. However, much of federal environmental statutory law depends on Congress's Commerce Clause authority. That is why every environmental lawyer knew at the time *Raich* was before the Court that the Court's ruling in that case posed immediate implications for the viability of ongoing challenges to the constitutionality of significant environmental laws like the Endangered Species Act.⁵⁴ Indeed, Justice Scalia himself drew the connection during the oral argument in *Raich*.⁵⁵

This essay nonetheless focuses on the much smaller set of cases where environmental protection issues are front and center. The defining criteria are that to be an "environmental" case, the case must have both (1) a set of facts implicating environmental protection, *and* (2) a substantial connection between those facts and the legal questions before the Supreme Court. A classic example of this type of case involves the scope of the authority that Congress has conferred on EPA under the Clean Air Act. These criteria exclude not only cases arising out of an incidentally environmental context, like *BP* as described above, but also the Article III standing and Commerce Clause cases arising outside the context of an environmental dispute, notwithstanding their import for environmental law.⁵⁶ A broader lens would no doubt capture

52. 545 U.S. 1 (2005).

53. *Id.* at 22.

54. See, e.g., Bradford C. Mank, *After Gonzalez v. Raich: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. COLO. L. REV. 375 (2007).

55. See Transcript of Oral Argument at 27, *Raich*, 545 U.S. 1 (No. 03-1454), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2004/03-1454.pdf ("Well, you know, Congress has applied this theory in other contexts. One is the protection of endangered species.").

56. One further qualification is in order given Justice Gorsuch's well-known authorship of federal Indian law opinions, both on the Tenth Circuit and on the Supreme Court. See John Dossett, *Justice Gorsuch and Federal Indian Law*, 43 AM. BAR ASS'N HUMAN RTS. MAG. 5 (2017); see, e.g., *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (Gorsuch, J.); *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting); *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring in the judgment); *Denezpi v. United States*, 142 S. Ct. 1838, 1849 (2022) (Gorsuch, J., dissenting). Because it seems incorrect to assume a monolithic set of equivalences between federal Indian law and environmental law, this essay treats issues of federal Indian law and tribal sovereignty, standing alone, as distinct from environmental law. Of course, while every Indian law case may not directly implicate environmental law, plenty of Indian law cases do. See, e.g., *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1044 (D.C. Cir. 2021) ("The Tribes' unique role and their

important cross-cutting connections between the environmental law cases and their companions in the *United States Reports* that this essay's narrower analytical lens misses. But a narrower lens can reveal how features particular to environmental law may be affecting the Justices' votes and reasoning in environmental cases.⁵⁷

With the set of environmental cases defined, Justice Gorsuch's record and those of his colleagues on the Court are, as in past analysis undertaken by one of this essay's co-authors,⁵⁸ scored similarly to how the League of Conservation Voters rates congressional voting records on the environment.⁵⁹ A "pro-environmental protection" decision receives one point. A Justice's number of points, divided by the number of decisions in which that Justice participated, then provides their total percentage of pro-environmental votes. This percentage is labeled their "EP"

government-to-government relationship with the United States demand that their criticisms be treated with appropriate solicitude." Although others may disagree, we have concluded that the Court's recent ruling in *Arizona v. Navajo Nation*, 143 S. Ct. 1804 (2023), falls outside the scope of an "environmental law" Supreme Court case for the purposes of this article's analysis even though it involves the scope of the responsibility of the United States to take affirmative steps to protect the Navajo Tribe's reserved water rights. That precise legal issue about the respective rights and responsibilities of different sovereigns does not readily appear to be one about which environmental protection advocates would have a distinct view and therefore does not lend itself to assessment on that basis. For that reason, we have excluded the case from our database of Supreme Court environmental cases.

57. See Lazarus, *Restoring What's Environmental About Environmental Law*, *supra* note 14, at 744–63; Lazarus, *Justice Breyer's Friendly Legacy*, *supra* note 14, at 1408–09; LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 1, at 25–53. The essay's quantitative assessment is also limited to full-length opinions that make the Court's reasoning accessible to analysis, despite the Court's increasing use of its "shadow docket"—when the Court issues rulings on a summary basis, in the absence of full briefing and oral argument, often granting or denying preliminary relief such as a stay or an injunction. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015); see, e.g., *Louisiana v. Am. Rivers*, 142 S. Ct. 1347 (2022) (granting stay in Clean Water Act case). Such dispositions do sometimes include the Justices' reasoning. See *id.* at 1348 (Kagan, J., dissenting). Given the rise in the shadow docket's significance—see Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019)—the omission of these dispositions is less theoretically defensible and more grounded in practical challenges. In particular, this aspect of the docket was not considered in earlier numerical analyses, see *supra* note 14, and changing the basis of comparison would make numerical comparisons over time more difficult. The shadow docket's environmental law matters, however, remain fair game for qualitative assessment in Part III, *infra*.

58. For descriptions of this method in previous work, see Richard J. Lazarus, *Justice Breyer's Friendly Legacy*, *supra* note 14, at 1409–10; Lazarus, *Restoring What's Environmental About Environmental Law*, *supra* note 14, at 715–16, 721–24.

59. See, e.g., 2021 *National Environmental Scorecard*, LEAGUE OF CONSERVATION VOTERS, https://scorecard.lcv.org/sites/scorecard.lcv.org/files/2021_LCV_Scorecard.pdf.

(environmental protection) score, the metric reported in the tables below.

Such an approach has its limits. To start, it may be unclear which side is “pro-environment” in the first place. An opinion in favor of environmental protection may lay down a rule of decision that will diminish environmental protection in future cases. Suppose that EPA interprets its statute to cabin its authority to regulate. In a challenge to that deregulatory action, a decision taking a narrow view of *Chevron* would provide an environmental win, but it could lay the groundwork for limits on friendlier EPA actions in the future. Depending on the case, *Chevron* can cut either way.

Additionally, there is good reason to anticipate that environmentalists may have the weaker legal arguments in the cases that the Court has agreed to decide on the merits, which may help to explain why they lose far more often than they win. As a general matter, petitioners win most of the time in the Supreme Court because the Court is far more ready to grant certiorari and reverse when the lower court’s ruling appears erroneous. In the past three Terms, petitioners have won around seventy to eighty percent of the cases decided on the merits following oral argument.⁶⁰ Environmentalists, however, are most always either themselves the respondents or aligned with the respondents in Supreme Court cases, because the Court seems far more ready to grant review to correct lower court errors that disadvantage industry interests.⁶¹ This would logically lead to an overall bias

60. ANGIE GOU, ELLENA ERSKINE & JAMES ROMOSER, SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT’S 2021-22 TERM 4 (2022), <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf>; SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT’S 2020-21 TERM 4 (2021), <https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-7.6.21.pdf>; SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2019 2 (2020), <https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf>.

61. Lazarus, *Justice Breyer’s Friendly Legacy*, *supra* note 14, at 1411–12, 1412 n.95; RICHARD J. LAZARUS, THE RULE OF FIVE 115–16 (2020) [hereinafter LAZARUS, THE RULE OF FIVE] (describing how the Supreme Court’s decision in 2006 to grant review in *Massachusetts v. EPA*, 549 U.S. 497 (2007), was the first time the Court had granted review over the federal government’s opposition in favor of environmentalists in 35 years); Richard J. Lazarus, *The Power of Persuasion Before and Within the Supreme Court: Reflections on NEPA’s Zero for Seventeen Record at the High Court*, 2012 U. ILL. L. REV. 231, 250–51 (2012) (describing how the Supreme Court had decided seventeen cases on the merits arising under the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.*, but in none of those cases had the environmentalists been the petitioner). *See generally* Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 91–93 (2010) (describing Court’s

against environmental interests in this article's dataset, even for a Justice who would otherwise sit at the environmental protection median. Accordingly, inferences from the scores must be cautiously drawn.

Some conclusions may nonetheless still be fairly reached. A score out toward the extreme ends of the spectrum may be informative.⁶² An extreme score suggests that a Justice tends to decide cases on grounds highly correlated with the environmental nature of the questions at issue. Such correlation might seem to be political, but it certainly need not be so, given the significant overlaps between environmental outcomes and judicial philosophies in areas like statutory construction or Article III standing. Consistent outcomes could suggest, however, that a Justice has strong philosophical dispositions which are consistently relevant to their decisions in environmental cases. Similarly, comparisons among Justices might also tend to provide some limited information. To the extent that two Justices have reached substantially differing outcomes in similar sets of cases, it might suggest stable differences in their orientations toward the legal questions relevant to environmental protection.

The following tables report the results. Because Justice Gorsuch has heard a relatively small number of these cases during his time on the Supreme Court, EP scores are reported over two timeframes to provide additional context. The longer timeframe extends back to October Term 1994. The shorter timeframe is coextensive with the cases in which Justice Gorsuch has participated—*i.e.*, since October Term 2017. A Justice who joined the Court or stepped down during the relevant time window is assessed only against the decisions in which they participated.

EP Scores, October Term 1994 – October Term 2022			
Justice (by seniority)	Total Votes	Total Points	EP Score
Roberts	42	8	19.0
Stevens	37	29	78.4
Scalia	47	11	23.4
Kennedy	50	18	36.0
Souter	36	29	80.6
Thomas	65	14	21.5

receptivity to granting industry requests for review in environmental cases seemingly lacking in the traditional criteria warranting certiorari).

62. Lazarus, *Justice Breyer's Friendly Legacy*, *supra* note 14, at 1412.

Ginsburg	57	41	71.9
Breyer	61	38	62.3
Alito	40	4	10.0
Sotomayor	27	18	66.7
Kagan	27	18	66.7
Gorsuch	15	5	33.3
Kavanaugh	14	5	35.7
Barrett	8	4	50.0
Jackson	2	1	50.0

EP Scores, October Term 2017 – October Term 2022 (since Justice Gorsuch)				
Justice (by seniority)	Total Votes	Total Points	EP Score	
Roberts	15	3	20.0	
Thomas	15	5	33.3	
Ginsburg	7	4	57.1	
Breyer	13	7	53.8	
Alito	15	1	6.7	
Sotomayor	15	12	80.0	
Kagan	15	12	80.0	
Gorsuch	15	5	33.3	
Kavanaugh	14	5	35.7	
Barrett	8	4	50.0	
Jackson	2	1	50.0	

Although the number of environmental cases decided during the time when Justice Gorsuch has been on the Court is small, these figures suggest a few conclusions. In the environmental cases he has decided, Justice Gorsuch has not been an extremist like Justice Alito, whose EP score is stunningly low.⁶³ But Justice Gorsuch's score of 33.3 is solidly conservative, roughly akin to Justices Kavanaugh and Thomas and Chief Justice Roberts. (The number of cases decided by Justices Barrett and Jackson is too small to allow for any fair assessment at this time).

One interpretation could be that Justice Gorsuch's philosophies and predispositions lead him to decide more often

63. The opposite of Justice William Douglas who, while on the Court, always voted in favor of the side supported by environmentalists, seemingly regardless of the actual merits of the opposing legal arguments. Douglas had a perfect EP score of 100. *See* Lazarus, *Restoring What's Environmental About Environmental Law*, *supra* note 14, at 724–25.

than not against environmental interests. Justice Gorsuch's 33.3 is in a markedly lower register than the contemporaneous EP scores of Justices Breyer (53.8) or Ginsburg (57.1), to say nothing of the much higher scores of Justices Sotomayor (80.0) and Kagan (80.0)—or, over our more extended historical period, those of Justices Stevens (78.4) and Souter (80.6). When Justice Gorsuch's EP score is compared to these higher scores, the differences suggest that Justice Gorsuch's orientation toward some questions of environmental law produces consistently less favorable results for environmental protection. On the other hand, his EP score is significantly higher than either Chief Justice Roberts (20.0) or certainly Justice Alito (6.7). Some reasons for these discrepancies are discussed next.

IV. JUSTICE GORSUCH'S ENVIRONMENTAL RECORD: A QUALITATIVE ASSESSMENT

This Part shifts from the quantitative to the qualitative in assessing Justice Gorsuch's environmental record on the Court. The analysis accordingly focuses not just on whether the Justice's support of or dissent from the Court's judgment in individual cases favored the position supported by environmentalists. This analysis also considers the portent of the reasoning of the opinions that Justice Gorsuch wrote or joined. Because, moreover, the questions that Justices currently pose at oral argument are frequently reliable harbingers of their thinking, this assessment looks as well to Justice Gorsuch's oral argument questions (and comments) for indications of his thinking and motivations for his votes in environmental cases.

Although there are, as explained above, relatively few cases since Justice Gorsuch joined the Court that meet this essay's narrow definition of an "environmental law case," themes emerge from these few cases that are strongly suggestive of how the Justice will vote in environmental cases over time. First, there are cases relating to the federal separation of powers, which relate to Justice Gorsuch's views on nondelegation, statutory construction, and *Chevron* deference. Second, there are the environmental cases that implicate federalism concerns, such as the scope of congressional Commerce Clause authority, the reach of the Dormant Commerce Clause, and the test for determining whether federal law preempts state law. Third and finally, there are the environmental law cases that implicate concerns relating to liberty and property in general, and the government's interference with those concerns in

particular, including Fifth Amendment takings. Each is discussed below.

A. *Separation of Powers*

The first set of cases raise the separation of powers concerns that lurk in the background whenever a federal agency like EPA promulgates environmental protection regulations. Such regulations necessarily turn on the scope of the agency's authority to regulate under lawmaking authority delegated by Congress in environmental protection and natural resource management laws. As described above, then-Judge Gorsuch emphasized his strong doubts before joining the Court, based on separation of powers concerns, about the Court's longstanding ruling in *Chevron* that judges should defer to a federal agency's interpretation of ambiguous language in a statute that the agency administers. According to Judge Gorsuch, such judicial deference abdicates the essential judicial function of ensuring that agencies are strictly limited to the authority Congress has delegated to them.⁶⁴ And, further still, now on the Court, Justice Gorsuch has maintained views suggesting that such constitutional concerns grounded in separation of powers require courts to reject assertions of expansive agency authority unsupported by clear congressional authorization.⁶⁵ The import of these views for environmental law was, as described above, a primary reason that environmentalists strongly opposed then-Judge Gorsuch's confirmation.

Those concerns have already been realized in the Court's rulings. The first shoe dropped in the environmental case *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association*,⁶⁶ decided in 2021. Although *HollyFrontier* was far from an especially significant, headline-grabbing case, Justice Gorsuch exploited his opportunity as the Court opinion writer to cut back on the reach of *Chevron* deference.

HollyFrontier involved the federal Clean Air Act's Renewable Fuel Program, which required refineries to mix in "renewable fuel" like biofuels.⁶⁷ The case concerned statutory ambiguity about

64. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring).

65. Compare *id.* at 1154–55, and *United States v. Nichols*, 784 F.3d 666, 675–77 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc), with *West Virginia v. EPA*, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring).

66. 141 S. Ct. 2172 (2021).

67. *Id.* at 2175.

exemptions for small refineries.⁶⁸ In Justice Gorsuch's opinion for the majority, the Court held in favor of the refineries, reasoning from the "ordinary usage" of the relevant statutory language and rejecting appeals to statutory purpose.⁶⁹ However, Justice Gorsuch's opinion for the Court declined to take up the refineries on their argument that an EPA regulation supported their interpretation. Although EPA had sought *Chevron* deference in the Tenth Circuit, Justice Gorsuch wrote, "[w]ith the recent change in administrations, 'the government is not invoking *Chevron*.'" We therefore decline to consider whether any deference might be due its regulation."⁷⁰

This seemingly relatively minor piece of reasoning provided Justice Gorsuch with an outlet for the Court to express a view on the question of a "*Chevron* waiver"⁷¹—the significance of an agency decision not to rely on *Chevron* in litigation—which he had himself been cultivating.⁷² The lower courts have since taken the hint. *Chevron* waiver analysis based on *HollyFrontier* has cropped up in the D.C.⁷³ and Fifth⁷⁴ Circuits, and has led to conflicting decisions in the Sixth Circuit.⁷⁵ The Federal Circuit has used *HollyFrontier* in reasoning by analogy to the deference afforded to an agency's interpretation of its own regulations⁷⁶ under the Supreme Court's 1997 decision in *Auer v. Robbins*.⁷⁷

The second and far bigger shoe dropped last Term in *West Virginia v. EPA*.⁷⁸ *West Virginia* concerned the scope of EPA's authority to promulgate the Clean Power Plan—the Obama administration's signature effort to rein in greenhouse gas

68. *Id.* at 2175–76.

69. *Id.* at 2176–83.

70. *Id.* at 2180.

71. See Kristin E. Hickman & R. David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 611, 642 (2020).

72. See *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789 (2020) (statement of Gorsuch, J., respecting the denial of certiorari).

73. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 45 F.4th 306, 313 (D.C. Cir. 2022).

74. *Cargill v. Garland*, 57 F.4th 447, 465–66 (5th Cir. 2023).

75. *Compare Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 899 n.5 (6th Cir. 2021), with *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 669 (6th Cir. 2021).

76. *Ortiz v. McDonough*, 6 F.4th 1267, 1275 (Fed. Cir. 2021); see also *Hernandez-Lara v. Lyons*, 10 F.4th 19, 50 n.17 (1st Cir. 2021) (Lynch, J., dissenting).

77. 519 U.S. 452 (1997).

78. 142 S. Ct. 2587 (2022).

emissions from the nation's existing power plants⁷⁹—but this question arose in a case challenging the validity of the Trump administration's subsequent repeal of that Plan based on the Clean Air Act's plain meaning.⁸⁰ In a nutshell, the precise legal issue was whether EPA had exceeded the bounds of its authority by basing the degree to which individual fossil-fueled power plants were to reduce their greenhouse gas emissions on opportunities to shift the generation of electricity from those plants to other, lower-emissions facilities. Those challenging the Clean Power Plan, and supporting the Trump administration's repeal of that Plan, argued that EPA's assertion of authority to rely on such "generation shifting" outside the plant's own "fence line" triggered the Major Questions Doctrine—due to its allegedly transformative nature and allegedly enormous economic and political repercussions—and that it was therefore lawful only if supported by clear congressional authorization.⁸¹ Accordingly, the legal challenge was ultimately one of statutory construction, but one expressly tied to claims that a contrary view of EPA authority would violate separation of powers in general and the nondelegation doctrine in particular.⁸²

The Supreme Court agreed with the challengers and upheld the Trump administration's repeal of the Clean Power Plan.⁸³ As the challengers had hoped, the Court did not base its ruling on a readily available narrow reading of the relevant statutory language.⁸⁴ The Court instead expressly relied on the "Major Questions Doctrine," which the Court described as follows: "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."⁸⁵ Without clear authorization in the

79. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,717 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

80. Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520, 32,520–22 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

81. Petition for a Writ of Certiorari at 25–29, 32–34, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530), 2021 WL 9218185.

82. See Lazarus, *The Scalia Court*, *supra* note 15 at 413–29.

83. See *West Virginia*, 142 S. Ct. at 2616.

84. See, e.g., Petition for a Writ of Certiorari, *supra* note 81, at 30 ("The 'system' EPA selects is thus one aspect of one definition; the key terms surrounding it make clear that it refers to measures a particular source can successfully adopt to reduce its own emissions.").

85. *West Virginia*, 142 S. Ct. at 2609 (citation omitted) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Clean Air Act, the Clean Power Plan was unlawful.⁸⁶

Justice Gorsuch joined the majority opinion, and he wrote separately “to offer some additional observations” about the Major Questions Doctrine.⁸⁷ In his concurrence, he stressed the “foundational constitutional guarantees” upon which the Court’s opinion rested, especially the separation of powers and the nondelegation doctrine.⁸⁸ Targeting agency regulation, he noted that laws made without democratic accountability might “pose a serious threat to individual liberty.”⁸⁹ To prevent Congress from “divest[ing] its legislative power to the Executive Branch” (and overrunning the states in the process), the Vesting Clause of Article I imposed a clear statement rule on agencies seeking statutory authority to decide matters of political or economic significance.⁹⁰ Unable to find the requisite clarity in the Clean Air Act, Justice Gorsuch thus found “a clear answer in our case.”⁹¹

Before *West Virginia*, there was some ambiguity about whether the Major Questions Doctrine was part of *Chevron* deference or antecedent to it. After *West Virginia*, that ambiguity is slipping away. Putting the Major Questions inquiry before *Chevron*, as Justice Gorsuch would have it,⁹² abstracts the “extraordinary” consequences of an agency’s authority from statutory context. That is particularly troublesome for environmental law. The redistributive nature of environmental regulation lends itself to politicization because environmental regulations tend to impose regulations on certain activities at one time or place for the benefit of activities at another time or place.⁹³ Add to this the pressure on statutory ambiguities when decades-old environmental laws are applied to current problems,⁹⁴ and “major questions,” sufficiently broadly defined, may lurk around every corner.

86. *Id.* at 2616.

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

88. *Id.* at 2616–18.

89. *Id.* at 2618 (describing the views of the framers on “the power to make new laws regulating private conduct”).

90. *Id.* at 2618–22.

91. *Id.* at 2624.

92. In this respect, Justice Gorsuch’s approach does not differ from that of the *West Virginia* majority opinion, authored by the Chief Justice. *See id.* at 2607–09 (majority opinion).

93. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 1, at 33–38 (describing how the redistributive nature of environmental restrictions invariably generates political controversy).

94. *See supra* text accompanying note 36.

The longer-term implications for environmental law are tremendous. The conservative majority, within which Justice Gorsuch has made clear he is a central player, may well make it impossible as a practical matter for the other two branches to engage in effective environmental lawmaking if they are subject to these constraints.⁹⁵ Congress made a deliberate decision in the 1970s to enlist the expertise of administrative agencies like EPA to fill in the details of the nation's environmental protection programs.⁹⁶ Congress appreciated that it lacked the scientific, technological, and economic expertise necessary to fill in the details itself in the first instance, let alone revise them as facts on the ground invariably shifted dramatically over time.⁹⁷ That was why Congress chose to use broad, capacious statutory language to authorize expert agencies to engage in the complex and resource-intensive factfinding needed to promulgate environmental protection regulations to protect public health and safety and the natural environment. The important questions include, for example: (1) what levels of cleanup would be necessary based on the best scientific information available; (2) what types of technology would be physically or economically available or achievable in the near or longer term; and (3) how best to weigh the costs and benefits of possible levels of environmental protection and then strike a balance.⁹⁸ That congressional decision was, moreover, absolutely "clear" on the face of the environmental statutes.⁹⁹ And the success of those laws over the past several decades leaves little doubt of the wisdom of that legislative delegation.¹⁰⁰

For the Court in *West Virginia* and Justice Gorsuch in his concurring opinion, however, such congressional clarity fell short of the "clear congressional authorization" that they asserted to be required by the Court's newly coined "Major Questions Doctrine."¹⁰¹ The Court's new test threatens to create an insurmountable hurdle to the issuance of important environmental protection rules. For more than three decades, Congress has been essentially dysfunctional in environmental

95. Lazarus, *The Scalia Court*, *supra* note 15, at 470.

96. *Id.* at 456.

97. *Id.* at 456–57.

98. *Id.* at 457.

99. *Id.*

100. *Id.* at 456–57.

101. 142 S. Ct. at 2609; *id.* at 2616 (Gorsuch, J., concurring).

lawmaking. Congress has not enacted significant amendments to the Clean Air Act since 1990.¹⁰² Congress has not revised the Clean Water Act, the Resource Conservation and Recovery Act, nor any other major federal pollution control or natural resource protection statute since the 1980s or, for some, the 1970s,¹⁰³ with the arguable exception of the Toxic Substances Control Act.¹⁰⁴ The Justices, including Justice Gorsuch, know this, which is why their suggestion that Congress must now enact new, detailed laws to allow EPA to meet the “clear congressional authorization” standard they have themselves erected smacks of willful blindness to the actual challenges government faces in avoiding the catastrophic consequences of climate change.¹⁰⁵

And this is also why Justice Gorsuch’s separate opinion in *West Virginia* is particularly portentous for environmental law. Unlike the Chief Justice’s opinion for the Court, in which there is at least the hint—rooted in the opinion’s lack of clarity about the Major Questions Doctrine’s scope—of some limitations in the Doctrine’s ultimate reach, Justice Gorsuch’s opinion slams the door shut on possible qualification of his view that the Constitution itself compels a clear congressional statement. In that respect, his view of the Major Questions Doctrine holds far more potential for disruption than, for instance, Justice Barrett’s recently announced view that the Doctrine is more akin to a commonsense tool of statutory construction.¹⁰⁶ According to Justice Gorsuch, moreover, it is wholly irrelevant that Congress may be “slow to solve problems,”¹⁰⁷ suggesting that Justice Gorsuch either does not

102. Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended at 42 U.S.C. § 7401 *et seq.*).

103. See LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 1, at 223–29; Lazarus, *The Scalia Court*, *supra* note 15, at 458. While the Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818, significantly appropriated billions of dollars to be spent on addressing climate change, it made few or no actual substantive changes to environmental protection laws.

104. The one counterexample would be the Frank R. Lautenberg Chemical Safety for the 21st Century Act, enacted by Congress and signed into law in June 2016, which amended the 1976 Toxic Substances Control Act. See Pub. L. No. 114-182, 130 Stat. 448 (2016). Some of Professor Lazarus’s faculty colleagues suggested in comments that the Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (1996), might also fit that bill.

105. Lazarus, *The Scalia Court*, *supra* note 15, at 458.

106. *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (rejecting the view that the Major Questions Doctrine is a “substantive canon” in favor of the view that the doctrine is merely “a tool for discerning—not departing from—the text’s most natural interpretation”).

107. *West Virginia v. EPA*, 142 S. Ct. 2587, 2626 (2022).

appreciate or does not care that in the environmental context Congress is not merely “slow” but stuck, and that this nation’s failure to address an issue like climate change sooner rather than later may have disastrous, irreversible consequences.¹⁰⁸

Furthermore, the Court’s recent ruling in *Sackett v. EPA*¹⁰⁹ makes clear that the Major Questions Doctrine can reach even core statutory issues that have been debated, and mostly settled, since the 1970s, realizing the broader concerns raised for environmental law by the *West Virginia* ruling and Justice Gorsuch’s separate opinion in that case. At issue in *Sackett* was a question of environmental law of enormous potential consequence: the geographic scope of the Clean Water Act.¹¹⁰ In 2006, Justice Scalia fell just one vote shy in *Rapanos v. United States*¹¹¹ of securing a majority for his exceedingly narrow view of the Act’s reach.¹¹²

In *Sackett*, Justice Gorsuch supplied one of the five votes necessary for the majority that had been missing in *Rapanos*, converting what had been Scalia’s *Rapanos* plurality into an opinion for the Court. Although Justice Alito, rather than Gorsuch, was the opinion’s author, the opinion strongly reflects Gorsuch’s views on separation of powers in general and the impropriety of judicial deference to agency readings of statutory language. The *Sackett* Court relied on reasoning similar to *West Virginia* in rejecting EPA’s broader view of the meaning of “navigable waters” and “adjacent wetlands.”¹¹³ According to the majority, it would require evidence in the relevant statutory language of “clear congressional authorization” to conclude that Congress intended to provide an agency like EPA or the United States Army Corps of Engineers with such expansive regulatory authority over the nation’s waters.¹¹⁴

According to the Court, moreover, not only did the Clean Water Act fail to provide such expansive regulatory authority, its

108. Brad Plumer, Raymond Zhong & Lisa Friedman, *Time is Running Out to Avert a Harrowing Future, Climate Panel Warns*, N.Y. TIMES (Feb. 28, 2022), <https://perma.cc/QV8N-6S8J>.

109. 143 S. Ct. (2023).

110. *Id.* at 1329; *see* Clean Water Act, 33 U.S.C. § 1251 *et seq.*

111. 547 U.S. 715 (2006).

112. *See id.* at 734, 739 (plurality opinion).

113. The Court relied in part on the principle, extracted from another environmental law opinion joined by Justice Gorsuch, that Congress is “require[d] . . . to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.” *Sackett*, 143 S. Ct. at 1341 (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1849–50 (2020)). *See infra* note 226 and accompanying text.

114. *Sackett*, 143 S. Ct. at 1342–43.

precise language did the exact opposite. The Court expressly embraced the *Rapanos* plurality's view that the Clean Water Act's "use of 'waters' encompasses 'only those relatively permanent, standing, or continuously flowing bodies of water "forming geographic[al] features" that are described in ordinary parlance as "streams, oceans, rivers, and lakes."'"¹¹⁵ The *Sackett* majority further ruled, in a potentially devastating blow to Clean Water Act jurisdiction because of the critical role wetlands play in safeguarding water quality,¹¹⁶ that the only wetlands covered by the Act were those that were "as a practical matter indistinguishable" from those same bodies of water.¹¹⁷

As Justice Kavanaugh explained in his separate opinion disagreeing with the majority's interpretation of the Clean Water Act, in discerning these new limits the Court upended decades of agency practice reflected across both Republican and Democratic administrations.¹¹⁸ Ironically, that is precisely the sort of novel discovery of "unheralded" meaning in a decades-old statute for which EPA came under censure in *West Virginia*.¹¹⁹ Taking *West Virginia* and *Sackett* together suggests that federal agencies cannot update their interpretations of broadly worded environmental statutes in light of scientific developments, but that the Court retains ample discretion to craft updates to the same statutes in light of its own evolving interpretive preferences. Although doubts about *Chevron* may have emerged out of discomfort with agencies like EPA repurposing old statutes to address new problems, those doubts seem to be leading the Court and Justice Gorsuch down a path where those agencies will ultimately face obstacles in addressing many of the old problems too.

Finally, no doubt at Justice Gorsuch's urging, the Court will soon have the opportunity to decide whether the Court should formally overrule *Chevron* in its entirety rather than simply

115. *Id.* at 1336 (quoting *Rapanos*, 547 U.S. at 739).

116. Richard J. Lazarus, *The Supreme Court Just Gutted the Clean Water Act. It Could Be Devastating.*, WASH. POST (May 25, 2023), <https://perma.cc/5YXP-SSNV>.

117. *Sackett*, 143 S. Ct. at 1340.

118. *Id.* at 1362–69 (Kavanaugh, J., concurring in the judgment). While Justices Kavanaugh, Sotomayor, Kagan, and Jackson all agreed with the Court's ruling that the lower court judgment should be reversed, and therefore their separate opinions were nominally "concurring" rather than "dissenting," their grounds for reversal were narrowly drawn and rejected the majority's more sweeping rationale. *See id.* at 1362–69 (Kavanaugh, J., concurring); *id.* at 1359 (Kagan, J., concurring in the judgment).

119. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

continue to chop it up with a series of incremental rulings. As discussed above,¹²⁰ Gorsuch argued for overruling *Chevron* while still on the Tenth Circuit. In November 2022, as a Justice, Gorsuch wrote a lengthy and pointed opinion dissenting from denial of certiorari in *Buffington v. McDonough*¹²¹ on the ground that the Court should have granted review in the case to provide *Chevron* with “a tombstone no one can miss.”¹²² According to Justice Gorsuch’s dissent, the courts’ “expansive reconstruction of *Chevron* . . . turns out to pose a serious threat to some of our most fundamental commitments as judges and courts” by undermining the rights of people to have an independent judiciary.¹²³ In May 2023, the Court granted review in *Loper Bright Enterprises v. Raimondo*¹²⁴ to consider whether *Chevron* should be overruled; the case was argued in January 2024. The petition for a writ of certiorari in *Loper-Bright Enterprises* relied repeatedly on Justice Gorsuch’s dissent in *Buffington*.¹²⁵

B. Federalism

Another area in which Justice Gorsuch’s views have the potential to shape environmental law concerns the balance of power between the federal government and the states.¹²⁶

120. See *supra* text accompanying notes 31–40.

121. 143 S. Ct. 14 (2022).

122. *Id.* at 22 (Gorsuch, J., dissenting from denial of certiorari).

123. *Id.* at 19.

124. 143 S. Ct. 2429 (2023).

125. Petition for a Writ of Certiorari at 33, 35, *Loper Bright Enters. v. Raimondo* (No. 22-441) (U.S. Nov. 10, 2022), 2022 WL 19770137, *cert. granted*, 143 S. Ct. 2429 (2023). The Court subsequently granted review in a second case that raises the same *Chevron* issue, *Relentless, Inc. v. Dept. of Commerce* (No. 22-1219), *cert. granted*, 144 S. Ct. 325 (2024). Both cases were argued the same day in January 2024. See U.S. Supreme Court Argument Calendar (January 2024 Session), <https://perma.cc/AP9W-EAGG>.

126. Justice Gorsuch’s strongly held views on respecting tribal sovereignty are also likely to play a significant role in the federalism context. Just as the Justice has displayed a heightened skepticism of federal intrusion on the sovereignty of states, as discussed in this section, so too has the Justice made clear in a series of cases his strong interest in ensuring that neither the federal government nor the states intrude unduly on Native American tribal sovereignty. See *supra* note 56. The most significant tribal sovereignty cases decided by the Court since Gorsuch joined have not had a distinct environmental law dimension. See, e.g., *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (holding that the State of Oklahoma lacked criminal jurisdiction to prosecute a member of the Seminole Nation for conduct on land that U.S. treaties established as an Indian reservation); *Haaland v. Brackeen*, 599 U.S. 255 (2023) (upholding constitutionality of the Indian Child Welfare Act). But given the role that Western states play in many environmental cases and the ecological significance of many of the lands within tribal reservations, there will invariably be environmental cases that turn on the extent of tribal sovereign authority. Both the Clean

Federalism pervades environmental law.¹²⁷ For constitutional and political reasons, many of the environmental statutes retain a key role for state implementation. At the same time, in many cases environmental protection is simply not the kind of problem that can be localized to a single jurisdiction. A source of pollution may generate economic benefits for one state and environmental problems for another. Federal control can help address such externalities. Nevertheless, federal control has drawbacks, too. It entails compromise between states that highly value environmental resources and states that value them less. Even more fundamentally, the national government lacks both the resources and the local knowledge required to implement environmental protection policies at the state and local level. So while the states and local government are dependent on the national government to achieve their environmental protection goals, so too is the national government ultimately dependent on state and local governments.¹²⁸

Four areas of law define the federalism border for environmental law. They include Tenth Amendment safeguards on federal government intrusions on state sovereignty,¹²⁹ Dormant Commerce Clause limits on the laws of one state unduly intruding on the sovereignty of other states,¹³⁰ the Supremacy Clause's preemption of state laws in conflict with federal law,¹³¹ and the

Air Act and the Clean Water Act, for instance, expressly provide for tribes, like individual states, to administer programs pursuant to those Acts. *See, e.g.*, 42 U.S.C. § 7410(o) (providing for tribal authority to submit an implementation plan under the Clean Air Act); 33 U.S.C. § 1377(a) (stating that "Indian tribes shall be treated as States for purposes of" the Clean Water Act's policy of preserving State rights over water resources); *id.* § 1377(e) (providing under certain circumstances that "[t]he Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, . . .").

127. *See generally* LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 1, at 45–49; Denise A. Grab & Michael A. Livermore, *Environmental Federalism in a Dark Time*, 79 OHIO ST. L.J. 667 (2018); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Environmental Protection*, 67 N.Y.U. L. REV. 1210 (1992); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

128. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 1, at 335–40.

129. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 174–77 (1992) (striking down under the Tenth Amendment a federal statutory provision for "commandeer[ing]" a State into service for regulatory purposes). *See generally* ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION 110–15 (2d ed. 2009).

130. *See, e.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (striking down under the Dormant Commerce Clause a state ban on the importation of solid waste from another state).

131. *See, e.g.*, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 629–36 (1981)

scope of congressional Commerce Clause authority to address environmental issues.¹³² Since Justice Gorsuch joined the Court, the Justices have decided four environmental cases relating to these federalism issues, with only the Tenth Amendment left unaddressed. In chronological order by date of decision, the first two were *Virginia Uranium, Inc. v. Warren*¹³³ and *Atlantic Richfield Co. v. Christian*,¹³⁴ which each raised Supremacy Clause issues of federal preemption. They were followed by two cases in the most recently completed October Term 2022: *National Pork Producers Council v. Ross*,¹³⁵ which presented a Dormant Commerce Clause issue, and *Sackett v. EPA*,¹³⁶ in which Gorsuch was one of two Justices who chose to inject the issue of congressional Commerce Clause authority.

In *Virginia Uranium*, the petitioner uranium mining company argued that the Atomic Energy Act implicitly preempted Virginia's ban on uranium mining.¹³⁷ The problem, Justice Gorsuch's plurality opinion pointed out, was that the Atomic Energy Act "grants the [Nuclear Regulatory Commission] extensive and sometimes exclusive authority to regulate nearly every aspect of the nuclear fuel life cycle *except* mining."¹³⁸ An amendment, however, allowed states to continue "to regulate activities for purposes other than protection against radiation hazards."¹³⁹ Virginia Uranium argued that state laws where the legislature intended to protect against radiation hazards, and did provide such protection, were preempted, even if they facially served some other non-preemptive purpose such as the control of mining activities.¹⁴⁰

Justice Gorsuch's plurality opinion rejected that argument. His opinion explained at length that field preemption involved "*what* the State did, not *why* it did it."¹⁴¹ The alternative—in addition to

(rejecting a Supremacy Clause challenge to a state coal severance tax).

132. See, e.g., *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (describing significant constitutional issues concerning the scope of congressional authority under the Commerce Clause raised by an expansive reading of the geographical reach of the Clean Water Act).

133. 139 S. Ct. 1894 (2019).

134. 140 S. Ct. 1335 (2020).

135. 143 S. Ct. 1142 (2023).

136. 143 S. Ct. 1322 (2023).

137. 139 S. Ct. at 1900 (plurality opinion).

138. *Id.* at 1902.

139. *Id.*

140. *Id.* at 1902–03.

141. *Id.* at 1905.

the difficulties of inferring legislative purpose—”would be to stifle deliberation in state legislatures and encourage resort to secrecy and subterfuge.”¹⁴² Responding to Virginia Uranium’s conflict preemption argument, Justice Gorsuch’s opinion cautioned against “proceeding down the purposes-and-objectives branch of conflict preemption” and the attempt to divine congressional purpose that it would require.¹⁴³ Despite three other votes for affirmance, Justice Gorsuch’s exposition of his views on legislative purpose left him unable to hold a majority. In an opinion concurring only in the judgment, Justice Ginsburg wrote that the “discussion of the perils of inquiring into legislative motive sweeps well beyond the confines of this case, and therefore seems to me inappropriate in an opinion speaking for the Court.”¹⁴⁴

To advocates for environmental protection, there are, at least in theory, significant upsides to the narrow view of preemption expressed in Justice Gorsuch’s plurality opinion. For example, the Clean Air Act generally preempts vehicle-emissions regulations, but the Act also allows California to apply for a waiver of federal preemption.¹⁴⁵ A challenge, on preemption and other federalism grounds, is currently pending in the D.C. Circuit to a waiver granted by EPA to California to impose greenhouse gas emissions restrictions on new motor vehicles more stringent than otherwise applicable federal standards.¹⁴⁶ This reflects the significant environmental stakes of allowing states the leeway to advance local environmental protection needs. It remains to be seen, of course, whether Justice Gorsuch’s potentially more limited view of federal preemption would prompt him to vote in favor of California’s authority to obtain a Clean Air Act waiver or otherwise defeat preemption challenges.

Another example of contemporary importance relating to climate change concerns the standard for federal preemption of state common law. A narrow view of preemption could, at least in theory, afford state common law the flexibility to fill in gaps in the federal statutes,¹⁴⁷ allowing plaintiffs like those in the *BP* climate

142. *Id.* at 1906–07.

143. *Id.* at 1907–08.

144. *Id.* at 1909 (Ginsburg, J., concurring in the judgment) (citation omitted).

145. 42 U.S.C. § 7543.

146. Brief for Petitioners at 25, *Ohio v. EPA*, No. 22-1081 (D.C. Cir. Oct. 24, 2022).

147. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011) (“None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand.”).

cases¹⁴⁸ to proceed under state law causes of action like nuisance. We do not yet know whether Justice Gorsuch's apparent receptivity to state law in the *Virginia Uranium* case extends to such claims. If it did, that would be a happy surprise for environmentalists who presumably fear how the current conservative Court might rule on the merits in those cases. However, because the Court recently denied an industry-led effort to have the Justices rule on that preemption issue even before the cases are tried on the merits in state court, it will likely be a few years before Justice Gorsuch has an opportunity to express his views on that question.¹⁴⁹

The other recently decided environmental law case that raised a federal preemption question, *Atlantic Richfield Co. v. Christian*,¹⁵⁰ similarly addressed the prospect for environmental protection through state common law when federal law generally governs the relevant activities. In *Atlantic Richfield*, a copper smelting facility contaminated land in Montana, rendering its owner, Atlantic Richfield, liable for the costs of cleaning up the site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁵¹ Private landowners of property contaminated by the copper smelting facility, however, successfully sued in the Montana courts, obtaining a state law restorative damages remedy that required Atlantic Richfield to pay to clean up the site beyond what had been approved by EPA.¹⁵² At issue in the case was whether CERCLA stripped the Montana courts' jurisdiction over state law claims, and whether CERCLA preempted any state law restorative damages remedy unless and until EPA approved of such a remedial plan.¹⁵³ The Court answered no and yes.¹⁵⁴

Justice Gorsuch, joined by Justice Thomas, concurred in the first ruling on the threshold jurisdictional issue but not in the

148. See *supra* note 45 and accompanying text.

149. On April 24, 2023, the Court denied the petition for a writ of certiorari in *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners*, which raised the issue of whether federal law preempts the varied state law claims for climate injury brought by state and local governments against the fossil fuel industry. See No. 21-1550, 2023 WL 3046222, at *1 (U.S. Apr. 24, 2023). Only Justice Kavanaugh formally recorded a dissenting vote from the Court's denial of the petition, leaving unclear how Justice Gorsuch voted on the jurisdictional issue. *Id.*

150. 140 S. Ct. 1335 (2020).

151. *Id.* at 1345.

152. *Id.*

153. *Id.*

154. *Id.* at 1349, 1352.

second ruling on the merits.¹⁵⁵ Expressing disbelief at the notion that CERCLA required “the federal government’s permission” for property owners to remediate their own land, Justice Gorsuch wrote: “Everything in CERCLA suggests that it seeks to supplement, not supplant, traditional state law remedies and promote, not prohibit, efforts to restore contaminated land.”¹⁵⁶ Even more revealingly, Justice Gorsuch piled on with his own policy reasons to support his view of the law in *Atlantic Richfield*. He maligned “paternalistic central planning,” rejecting the views that “things would be so much more orderly if the federal government ran everything,” and that “property owners cannot be trusted to clean up their lands without causing trouble.”¹⁵⁷

In *Atlantic Richfield*, Justice Gorsuch’s favored view could be dubbed “pro-environmental” on the ground that its practical effect would have been to provide for further cleanup of a hazardous waste site beyond that chosen by EPA. Indeed, Part II’s quantitative analysis characterizes Justice Gorsuch’s *Atlantic Richfield* vote in just that way. But the Justice’s underlying reasons for that vote—which expressed pronounced distrust of and disdain for expert government agencies like EPA and heightened concern with government measures tending to interfere with personal liberty and private property—suggested very different tendencies. And, as discussed in Subpart C below, that is precisely what has already happened. In several cases, the Justice has endorsed limiting the authority of both federal and state environmental protection agencies to curb the activities of individuals, notwithstanding the potential of those activities to harm the environment, justifying this result in part because of the impacts of such government regulation upon individual liberty and property rights.

Justice Gorsuch’s opinions for the Court and the differing pluralities in *National Pork Producers Council v. Ross*¹⁵⁸ are particularly telling regarding one aspect of his environmental federalism. His opinions reveal both how strongly the Justice favors limiting Dormant Commerce Clause review of state laws and how those views can lead to outcomes favorable to environmentalists in significant future cases.

At issue in the *National Pork Producers* case was the validity under the Dormant Commerce Clause of a California animal welfare law

155. *Id.* at 1367 (Gorsuch, J., concurring in part and dissenting in part).

156. *Id.* at 1363.

157. *Id.* at 1355.

158. 143 S. Ct. 1142 (2023).

that restricted the sale within the state of pork products made from pigs that are “confined in a cruel manner.”¹⁵⁹ The law defined confinement as “cruel” if it prevented a pig from “lying down, standing up, fully extending [its] limbs, or turning around freely.”¹⁶⁰ Industry plaintiffs challenged the law’s validity, arguing that the law amounted to an unconstitutional extraterritorial application of state law and to a constitutionally impermissible burden on interstate commerce.¹⁶¹

The gravamen of both arguments was four-layered: (a) the vast majority of pork producers operate outside of California; (b) the California market for their products is so enormous that producers could not simply ignore that market; (c) the vertically integrated nature of the pork industry made it practically impossible to produce pork products just for California; and (d) the costs of complying with the California requirements were considerable for those producers and for the interstate market.¹⁶² Industry plaintiffs suggested that these regulations, in effect, required out-of-state pork producers to comply with California’s law if they wanted to stay in business.¹⁶³

The industry plaintiffs, however, did not argue that the state law was discriminatory on its face, given that it applied to all pork producers regardless of their geographic location.¹⁶⁴ They instead argued in the first instance that because the practical effect of the California law was to control the conduct of business outside of its borders, the law was unconstitutionally extraterritorial.¹⁶⁵ The industry petitioners alternatively argued that the California law flunked the Court’s Dormant Commerce Clause balancing test under *Pike v. Bruce Church, Inc.*,¹⁶⁶ on the ground that the law’s burdens on commerce were “clearly excessive in relation to the putative local benefits.”¹⁶⁷

Both the district court and court of appeals dismissed the

159. CAL. HEALTH & SAFETY CODE ANN. § 25990(b)(2).

160. *Id.* § 25991(e)(1).

161. *Nat’l Pork Producers Council*, 143 S. Ct. at 1153–54.

162. *Id.* at 1151–52.

163. See Brief for Petitioners at 16–17, 16 n.7, *Nat’l Pork Producers Council*, 143 S. Ct. 1142 (No. 21-468).

164. *Nat’l Pork Producers Council*, 143 S. Ct. at 1153 (“In fact, petitioners *disavow* any discrimination-based claim, . . .” (emphasis in original)); see *id.* at 1158.

165. *Id.* at 1154.

166. 397 U.S. 137 (1970).

167. *Nat’l Pork Producers Council*, 143 S. Ct. at 1157 (quoting Brief for Petitioners at 44, *Nat’l Pork Producers Council*, 143 S. Ct. 1142 (No. 21-468)).

complaint for failing to state a valid claim.¹⁶⁸ The Supreme Court affirmed by a vote of five to four, based on an unusual alignment. Justices Thomas, Sotomayor, Kagan, Gorsuch, and Barrett voted in the majority on the judgment, with Chief Justice Roberts and Justices Alito, Kavanaugh, and Jackson in partial dissent.¹⁶⁹

Although it took seven months from argument for the Court to decide the *National Pork Producers* case, Justice Gorsuch's vote was never in serious doubt in light of the skewed nature of the questions that he posed to counsel during oral argument. Gorsuch interrupted counsel who argued that the state law was constitutionally infirm approximately twenty times, making clear his skeptical view of the force of their argument.¹⁷⁰ By contrast, how many times did he question their opposing counsel? Zero.¹⁷¹ The inference to be drawn was clear. Gorsuch believed the Court should uphold the California animal welfare law.

Justice Gorsuch's opinion for the Court did just that. It affirmed the court of appeals' judgment. But there was little harmony among the Justices as to why that was so. Indeed, because of the number of separate opinions the majority Justices filed, declining to join in significant parts the opinion for the Court that Justice Gorsuch wrote, the precedential reach of the Court's ruling is sharply limited.¹⁷² To be sure, all nine Justices rejected the industry petitioners' argument that the California law was unconstitutionally extraterritorial.¹⁷³ However, there was no majority in favor of Justice Gorsuch's sweeping view that the Court's *Pike* Dormant Commerce Clause test did not apply at all to laws like California's because that test invited an impermissible judicial balancing of incommensurable values.¹⁷⁴ Nor was there a majority supporting Gorsuch's alternative view that even if the *Pike* test did apply, the industry petitioners failed to establish that the

168. *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020), *aff'd*, 6 F.4th 1021 (9th Cir. 2021).

169. *Nat'l Pork Producers Council*, 143 S. Ct. at 1148; *id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part).

170. See Transcript of Oral Argument, *Nat'l Pork Producers Council*, 143 S. Ct. 1142 (No. 21-468), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-468_f2ag.pdf.

171. *Id.*

172. See *infra* note 176.

173. See *Nat'l Pork Producers Council*, 143 S. Ct. at 1165 (Sotomayor, J., concurring in part); *id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part).

174. *Id.* at 1159 (opinion of Gorsuch, J.).

California law imposed a “substantial burden” on interstate commerce.¹⁷⁵ The reason Justice Gorsuch was nonetheless the nominal author of the majority opinion was that Justices Sotomayor, Kagan, and Barrett all shared his bottom-line view that the lower court judgment should be affirmed, while disagreeing about the application of the *Pike* balancing test.¹⁷⁶

While they failed to gather a majority on the applicability of *Pike*, the views Justice Gorsuch expressed in *National Pork Producers* are nonetheless revealing in their likely portent for future environmental law cases before the Court. Perhaps more than any other case since Justice Gorsuch joined the Court, *National Pork Producers* best illustrates how the Justice’s adherence to text, claimed opposition to judicial policymaking, and focus on historical practices may, in some circumstances, favor environmentalists.

In *National Pork Producers*, Justice Gorsuch supported the constitutionality of a significant animal rights law. He did so based on his skepticism of the propriety of federal judges invoking an atextual constitutional doctrine like the Dormant Commerce Clause to second-guess the policy judgments underlying state laws that, despite invariable effects on economic activities in other states, are facially nondiscriminatory in purpose and design. As described by the Justice, “[w]hatever other judicial authorities the Commerce Clause may imply, that kind of freewheeling power is

175. *Id.* at 1161.

176. Only two other Justices supported Justice Gorsuch’s narrow reading of the applicability of *Pike v. Bruce Church*: Justices Thomas and Barrett. *Nat’l Pork Producers Council*, 143 S. Ct. at 1159–61 (opinion of Gorsuch, J.); *id.* at 1167 (Barrett, J., concurring in part). And only three other Justices supported Gorsuch’s view on the lack of evidence of a “substantial burden”: Justices Thomas, Sotomayor, and Kagan. *Id.* at 1161–63 (opinion of Gorsuch, J.); *id.* at 1165 (Sotomayor, J., concurring in part); *id.* at 1167 (Barrett, J., concurring in part). By contrast, Chief Justice Roberts’s dissent commanded a majority on both those same issues. Five other Justices shared his view that *Pike* balancing could be fairly applied to the California law: Justices Alito, Sotomayor, Kagan, Kavanaugh, and Jackson. *Id.* at 1166 (Sotomayor, J., concurring in part); *id.* at 1168–69 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part). And four other Justices agreed with the Chief Justice that under the *Pike* test, California’s law could be fairly faulted for imposing a substantial burden on interstate commerce. Justices Alito, Kavanaugh, Barrett, and Jackson. *Id.* at 1167 (Barrett, J., concurring in part) (finding this burden not susceptible of judicial balancing under *Pike*); *id.* at 1170–72 (Roberts, C.J., concurring in part and dissenting in part). Gorsuch accordingly managed to cobble together a five-Justice majority for affirming the judgment only because Justice Barrett agreed with him that *Pike* should not apply in the case and because, although Justices Sotomayor and Kagan thought that *Pike* should apply, they agreed with Gorsuch that the petitioners had failed to show a substantial burden on interstate commerce.

not among them.”¹⁷⁷ “How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? . . . The competing goods before us are insusceptible to resolution by reference to any juridical principle.”¹⁷⁸ According to Gorsuch, “[i]n a functioning democracy, policy choices like these usually belong to the people and their elected representatives.”¹⁷⁹ Gorsuch also noted the historical pedigree of the California law, noting that “States (and their predecessors) have long enacted laws aimed at protecting animal welfare.”¹⁸⁰

Gorsuch’s views on the limited nature of Dormant Commerce Clause scrutiny are good news for environmentalists. Especially in the absence of congressional action on the climate issue, several states have stepped up to fill the gap by enacting laws that, like California’s animal welfare law, are nondiscriminatory on their face, but that have practical effects on commercial activities in other states, which is why they have generated their own Dormant Commerce Clause challenges.¹⁸¹ Indeed, the potentially close kinship between California’s anti-animal cruelty law and a host of state climate laws, including California’s own, was reflected in the briefing in *National Pork Producers*—by those hoping that a ruling against the California law would subsequently undermine those state climate laws.¹⁸²

By contrast, Justice Gorsuch’s views on the limited reach of congressional Commerce Clause authority contain no good news for environmentalists who believe that Congress is best positioned to address many important environmental issues. Indeed, the views that Justice Gorsuch signed onto in a separate opinion authored by Justice Thomas in *Sackett v. EPA* may prove to be the most

177. *Nat’l Pork Producers Council*, 143 S. Ct. at 1159 (opinion of Gorsuch, J.).

178. *Id.* at 1159–60.

179. *Id.* at 1160.

180. *Id.* at 1150 (majority opinion) (“As far back as 1641, the Massachusetts Bay Colony prohibited ‘Tiranny or Crueltie towards any brute Creature.’” (quoting BODY OF LIBERTIES § 92, in WILLIAM H. WHITMORE, A BIBLIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY 52–53 (1890))).

181. See, e.g., *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (upholding California’s Low Carbon Fuel Standard); *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016) (invalidating parts of Minnesota’s Next Generation Energy Act).

182. See, e.g., Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners at 16–17, *Nat’l Pork Producers Council*, 143 S. Ct. 1142 (No. 21-468) (describing state climate laws challenged under the Dormant Commerce Clause). Interestingly, the many briefs filed in support of California’s law seemed to avoid referring to those state climate laws, presumably due to the risk of promoting an adverse Court ruling that could have created damaging precedent as to their validity.

portentous of all for federal environmental law. Going even further than the Alito majority opinion in *Sackett*—which advanced a muscular application of separation of powers principles that denied federal agencies environmental lawmaking authority absent “clear congressional authorization”¹⁸³—the Thomas-Gorsuch concurrence contended that even such clear congressional authorization might not be enough.

According to the concurrence, the Commerce Clause denied the federal government the kind of sweeping regulatory power over the waters of the United States that EPA was claiming. “The Commerce Clause . . . vests Congress with a limited authority over what we now call the ‘channels of interstate commerce’” and “does not displace States’ traditional sovereignty over their waters.”¹⁸⁴ The concurrence insisted that the Clean Water Act’s reference to “waters of the United States” to define its jurisdictional reach was entirely consistent with limiting the Act to traditional navigable waters, and that EPA’s contrary view would absurdly extend Clean Water Act jurisdiction to “any plot of land” over which the smallest visible channel of water flowed.¹⁸⁵

Nor did the concurrence stop there. It added a broadside attack on how the Court’s Commerce Clause precedent “has significantly departed from the original meaning of the Constitution,” and that “nowhere is this deviation more evident than in federal environmental law.”¹⁸⁶ The concurrence described how, in its view, federal environmental law “is uniquely dependent upon an expansive interpretation of the Commerce Clause.”¹⁸⁷ The concurrence, accordingly, simultaneously recognized a unique quality of environmental law, while placing the equivalent of a bull’s-eye on statutes like the Clean Water Act and Endangered Species Act—to which the concurrence made specific reference¹⁸⁸—for future constitutional challenge.

The possible implications for federal environmental

183. See *Sackett v. EPA*, 143 S. Ct. 1322, 1342 (2023); *supra* text accompanying note 113.

184. *Sackett*, 143 S. Ct. at 1346 (2023) (Thomas, J., joined by Gorsuch, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 558–59 (1995)).

185. *Id.* at 1357 (“Indeed, because ‘the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface,’ ‘any plot of land containing such a channel may potentially be regulated.’” (quoting *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality opinion))).

186. *Id.* at 1358.

187. *Id.*

188. *Id.*

lawmaking are seismic. For the Clean Water Act, the Thomas-Gorsuch concurrence posited that the Act “extends only to the limits of Congress’ traditional jurisdiction over navigable waters”¹⁸⁹ and was accordingly not “based on New Deal era conceptions of Congress’ commerce power.”¹⁹⁰ For this reason, the concurrence further argued, the Act’s jurisdiction was not triggered by a mere showing that pollution affected navigable waters. The government was required to further establish that the pollution “would obstruct or otherwise impede navigable capacity or the suitability of the water for interstate commerce.”¹⁹¹ It is impossible to square such a crabbed view of the intended reach of the Clean Water Act—rooted in nineteenth-century notions of obstructions to navigation—with the Act’s expressly stated purpose “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁹²

The intended implications for the Endangered Species Act are no less stark. Six different federal courts of appeals in seven cases over the past quarter century have rejected arguments that the Act’s prohibition on the taking of an endangered or threatened species exceeds Congress’s authority under the Commerce Clause.¹⁹³ Moreover, the Supreme Court has denied review in all those cases. Justice Gorsuch has now joined Justice Thomas in signaling to potential plaintiffs and the lower courts that at least the two of them, and possibly others on the Court, are open to questioning the Endangered Species Act’s constitutionality fifty years after its congressional enactment.

C. *Personal Liberty and Autonomy*

The final set of cases concerns the relationships among environmental protection regulation and personal liberty and

189. *Id.* at 1359.

190. *Id.*

191. *Id.* at 1357.

192. 33 U.S.C. § 1251(a).

193. *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011), *cert. denied*, 565 U.S. 1009 (2011); *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 649 (2018).

private property rights. These relationships are presented primarily in two settings: cases of statutory construction and regulatory takings cases. Justice Gorsuch's environmental record to date includes both kinds of cases.

Justice Gorsuch plainly harbors deeply held concerns about governmental intrusions on personal autonomy and liberty. His recent separate statement in *Arizona v. Mayorkas*,¹⁹⁴ commenting on the Court's dismissal of the case upon the lapse of the federal government's emergency COVID-19 policy, is stunning in that respect. The Court's dismissal of a pending case based on mootness is not typically a moment for significant commentary. Gorsuch, however, used the occasion to address issues far broader in reach than those raised in the case being dismissed. He launched no less than a broadside attack on the actions taken by federal, state, and local government officers across the country over the past three years in response to the COVID-19 pandemic. According to the Justice, those officials' repeated invocations of emergency authority to close down businesses, schools, and places of worship to reduce the risk of the spread of a deadly contagious disease constituted "the greatest intrusions on civil liberties in the peacetime history of this country."¹⁹⁵ That is quite a statement given the obvious competition over the nation's history and the more than one million deaths from COVID-19 in the United States.¹⁹⁶

Gorsuch further explained that an essential safeguard against such overreaching by executive branch officials was to require "laws to be adopted by our legislative representatives However wise one person or his advisors may be, that is no substitute for the wisdom of the whole of the American people that can be tapped in the legislative process."¹⁹⁷ In this striking way, Justice Gorsuch's strongly held views on separation of powers combined with his equally strongly held views on protecting individuals from governmental overreach to reinforce his overarching view that significant lawmaking should be done by legislatures. This same liberty theme was evident in Justice Gorsuch's promotion of the

194. 143 S. Ct. 1312 (2023) (statement of Gorsuch, J.).

195. *Id.* at 1314.

196. See Jamelle Bouie, Opinion, *Neil Gorsuch Has Given Himself Away*, N.Y. TIMES (May 23, 2023), <https://perma.cc/8GSQ-EY8V> (referring to government-compelled forced sterilizations of tens of thousands, "McCarthyite purges," "Palmer Raids," and "Southern legislatures . . . strip[ping] voting and civil rights from huge swaths of their states' populations").

197. 143 S. Ct. at 1315–16 (statement of Gorsuch, J.).

nondelegation doctrine in the dissenting opinion he filed in *Gundy v. United States*¹⁹⁸ not long after he joined the Court. For Gorsuch, the “detailed and arduous processes for new legislation” were “to the Framers” the “bulwarks of liberty,”¹⁹⁹ which is why the Constitution exclusively provided lawmaking authority to Congress and barred Congress from delegating that power to executive branch officials.²⁰⁰

This same hostility to government actions that impede individual liberty interests is evident in Justice Gorsuch’s record in environmental law cases. As discussed above, Justice Gorsuch’s partial concurrence in *Atlantic Richfield* reflected these concerns in a statutory construction case, in the context of a Supremacy Clause challenge to the application of a state common law restoration damages remedy competing with a cleanup remedy ordered by EPA pursuant to CERCLA.²⁰¹ Justice Gorsuch also expressed these same kinds of policy concerns in three other environmental cases—*County of Maui v. Hawaii Wildlife Fund*,²⁰² *West Virginia v. EPA*,²⁰³ and *Sackett v. EPA*²⁰⁴—in support of the legal conclusion that Congress did not intend in the Clean Water Act to regulate certain activities of private individuals.

At issue in *County of Maui* was the meaning of the word “discharge” in the Clean Water Act and, in particular, whether the Act’s requirement for a permit for any “discharge” that added pollutants to navigable waters applied to pollutants that reached those waters only by first traveling through groundwater or over the land.²⁰⁵ The County of Maui ran a facility to collect and treat wastewater, which the facility then pumped into the ground.²⁰⁶ After that, the treated wastewater flowed through groundwater into the ocean.²⁰⁷

Justice Gorsuch dissented from the Court’s majority opinion, written by Justice Breyer, that rejected both EPA’s and the County’s views that the Clean Water Act’s permit requirement never applied

198. 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

199. *Id.* at 2134.

200. *Id.* at 2134–35.

201. See *supra* text accompanying notes 150–157.

202. 140 S. Ct. 1462 (2020).

203. 142 S. Ct. 2587 (2022).

204. 143 S. Ct. 1322 (2023).

205. 33 U.S.C. §§ 1311(a), 1362(12)(A).

206. *County of Maui*, 140 S. Ct. at 1469.

207. *Id.*

to additions of pollutants that, like the County's, reached navigable waters only after first traveling through groundwater. The majority held "that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge."²⁰⁸ Guideposts for identifying functional equivalence included "[t]ime and distance," plus "statutory purposes."²⁰⁹ The Court remanded the case to the Ninth Circuit for application of this new test.²¹⁰ On remand in turn from the court of appeals, the federal district court ruled in favor of the environmental plaintiffs.²¹¹

Justice Gorsuch instead joined Justice Thomas's dissent.²¹² Justice Thomas viewed the majority's test as a "depart[ure] from the statutory text."²¹³ He focused on the statutory definition of "discharge of a pollutant," reasoning that the pollution at issue was more naturally understood as an addition from groundwater than as one from a point source.²¹⁴ Foreshadowing *Sackett*, he noted that expanding EPA's ambit would brush up against authority reserved in the states to regulate non-point sources of pollution and non-jurisdictional waters like groundwater.²¹⁵ And foreshadowing *HollyFrontier* and *West Virginia*, Justice Thomas also declined to defer to EPA's interpretation, noting both that "[n]o party requests it," and that "deference under *Chevron* . . . likely conflicts with the Vesting Clauses of the Constitution."²¹⁶

Justice Gorsuch's comments at oral argument were revealing of his thinking about the case. The Justice repeatedly questioned the environmental respondents' counsel about the fairness to individual landowners of a broad reading of the regulatory reach of the Clean Water Act's permitting requirement.²¹⁷ Justice Gorsuch's questions seemed designed to extract a concession from counsel that the respondents' proffered reading of the law would

208. *Id.* at 1476 (emphasis omitted).

209. *Id.* at 1476–77 (enumerating seven of "just some of the factors that may prove relevant").

210. *Id.* at 1478.

211. *See* *Haw. Wildlife Fund v. County of Maui*, 550 F. Supp. 3d 871, 887–94 (D. Haw. 2021).

212. *County of Maui*, 140 S. Ct. at 1479 (Thomas, J., dissenting).

213. *Id.*

214. *Id.* at 1479–80.

215. *Id.* at 1480.

216. *Id.* at 1482.

217. *See* Transcript of Oral Argument at 42–44, *County of Maui*, 140 S. Ct. 1462 (No. 18-260), <https://perma.cc/XQ7S-ED89>.

make unsuspecting private landowners with septic tanks subject to the Clean Water Act's permit requirements and its severe penalties for violations.

Unless Justice Gorsuch thought these policy concerns were relevant to the legal issue before the Court, there was no reason for him to raise the issue. Long gone are the days when the Justices during argument merely played “devil’s advocates.” The questions posed by a Justice during argument are, like Justice Gorsuch’s in the *County of Maui* case, almost always strategically designed to promote the result in the case that the particular Justice asking the question favors.²¹⁸

Justice Gorsuch’s separate concurring opinion in *West Virginia* further expressed his overriding concerns with personal liberty even though, unlike in *County of Maui*, the environmental law provision at issue in *West Virginia* had no potential applicability to individual behavior. It applied to fossil-fuel-fired power plants and other major stationary sources of air pollution. For Gorsuch, however, one of the primary reasons why the Major Questions Doctrine required rejection of EPA’s Clean Power Plan was that, absent such a limitation on executive branch authority, “[i]ntrusions on liberty would not be difficult and rare, but easy and profuse,” “pos[ing] a serious threat to individual liberty.”²¹⁹

Justice Gorsuch’s questions during oral argument in the other Clean Water Act case, *Sackett v. EPA*,²²⁰ evinced precisely the same concerns as his questions in *County of Maui*. As described above, at issue before the Court in *Sackett* was the geographic reach of the Clean Water Act.²²¹ Justice Gorsuch’s questions struck the same theme as his questions in *County of Maui*, but even more pointedly and once again with apparent disdain for EPA.

The Justice asked about the plight of an owner of land with a sewer hookup and how the landowner “is supposed to know that that’s a water of the United States” as well as asking “what are the penalties associated with this?”²²² He later pressed the federal government’s counsel: “So does a reasonable landowner have any

218. Timothy R. Johnson & Ryan C. Black, *The Roberts Court and Oral Arguments: A First Decade Retrospective*, 54 WASH. U. J.L. & POL’Y 137, 137 (2017); see also LAZARUS, THE RULE OF FIVE, *supra* note 61, at 185–87.

219. *West Virginia v. EPA*, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).

220. 143 S. Ct. 1322 (2023).

221. See *supra* text accompanying notes 109–117.

222. Transcript of Oral Argument at 49, *Sackett*, 143 S. Ct. 1322 (No. 21-454), <https://perma.cc/EQ86-GW6A>.

idea” that the government considers his private property a “water of the United States” subject to Clean Water Act jurisdiction?²²³ When government counsel, moreover, failed in response to a series of probing questions from Justice Gorsuch to offer a precise test for where navigable waters end and land begins, the Justice chided: “[s]o, if the federal government doesn’t know, how is a person subject to criminal time in federal prison supposed to know?”²²⁴ The import of Justice Gorsuch’s questioning seemed clear: the Justices should reject a broad reading of the Clean Water Act’s geographic reach.

The Court’s majority opinion in *Sackett*, which Gorsuch joined, repeatedly emphasizes all these same concerns.²²⁵ Most particularly, these worries are evident in the majority’s embrace of two new canons of statutory construction that disfavor agency interpretations that threaten to impinge on individual liberty. The first canon “require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power *and the power of the Government over private property*.”²²⁶ Because environmental restrictions regularly impose significant limitations on the exercise of private property rights in natural resources, this canon has the potential to make it even harder than under the Major Questions Doctrine for a government agency to prevail in a case challenging its construction of language in an environmental statute. *West Virginia*’s version of the Major Questions Doctrine demanded that the agency meet a “clear congressional authorization” standard.²²⁷ Now, the Court’s newly coined property rights canon has apparently upped the ante further by requiring that the agency’s statutory construction be supported by “exceedingly clear language.”

The second canon provides that “[w]here a penal statute could sweep so broadly as to render criminal a host of what might

223. *Id.* at 83–84.

224. *Id.* at 86.

225. *See, e.g., Sackett*, 143 S. Ct. at 1335 (“This puts many property owners in a precarious position . . .”); *id.* at 1342 (“This freewheeling inquiry provides little notice to landowners of their obligations under the [Clean Water Act].”).

226. *Id.* at 1341 (alteration in original) (emphasis added) (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1849–50 (2020)). This new canon was extracted from dictum joined by Justice Gorsuch in *Cowpasture* about whether National Park Service administration of trails crossing state-owned and private land would impose an easement on such land or bring it into the National Park System instead—a question, at least as framed by the majority, implicating property rights much more directly than the garden-variety use restrictions intrinsic to much environmental regulation.

227. *See supra* text accompanying notes 83–91.

otherwise be considered ordinary activities, we have been wary about going beyond what ‘Congress certainly intended the statute to cover.’”²²⁸ According to the Court, the federal government’s “freewheeling inquiry” about what is and is not a navigable water “provides little notice to landowners of their obligations under the [Clean Water Act].”²²⁹

This latter concern was not without force as applied to environmental law. The jurisdictional reach of many of the federal pollution control laws is often infused by nature’s own ambiguities—such as “waters of the United States” in the Clean Water Act²³⁰—or the uncertainties inherent in classifying the nature of many economic activities—such as the meaning of “solid waste” in the Resource Conservation and Recovery Act.²³¹ Moreover, most federal environmental laws provide for criminal sanctions absent heightened *mens rea* requirements, which can raise serious questions of fairness when a violation turns on the application of one of those blurry jurisdictional boundaries.²³²

What is nonetheless unpersuasive is Justice Gorsuch’s, and the Court’s, response to that fairness issue—using an environmental statute’s criminal provision as basis for reading the entire law in an exceedingly narrow fashion. The federal environmental laws are primarily civil laws. Potential criminal enforcement has never historically been a major dimension of these laws. And overbreadth problems can be fixed without cutting back on the entire law. Indeed, that is precisely what the Court held in 1995 in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.²³³ The decision in that case expressly rejected the argument that the potential for criminal prosecution for some Endangered Species Act violations warranted application of the rule of lenity to cut back on the statute’s reach overall.²³⁴ The Court stated that the possibility of such unfairness in a discrete application was not a basis for cutting back the law generally, and moreover suggested that a regulation

228. *Sackett*, 143 S. Ct. at 1342 (quoting *Skilling v. United States*, 561 U.S. 358, 404 (2010)).

229. *Id.*

230. 33 U.S.C. § 1362(7).

231. 42 U.S.C. § 6903(27).

232. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2507–21 (1995) (recommending heightened *mens rea* requirements for environmental criminal offenses).

233. 515 U.S. 687 (1995).

234. *Id.* at 704 n.18.

could provide the notice that the statutory language by itself might lack.²³⁵ Justice Gorsuch and the majority ignored this applicable precedent.²³⁶

The final cases that implicate the relationship between environmental protection and personal liberty and property are regulatory takings cases.²³⁷ Here too, there is an inherent relationship between environmental protection laws and regulatory takings. As mentioned above, environmental laws regularly limit the exercise of private property rights, especially rights in land and other natural resources, in order to limit spillover effects that cause harmful consequences outside the property's physical borders or to future generations. When the government gradually introduces and increases such restrictions over time, their impact on the private expectations protected by the Takings Clause is naturally tempered. However, when, as has been true for environmental law for the past several decades, the pace of such regulatory change is accelerating in light of new understanding of the seriousness of such spillover effects, the collision between private property expectations and environmental law becomes stark. That is why it is no mere happenstance that environmental restrictions on land use have generated so many regulatory takings challenges.²³⁸

The Court has decided two regulatory takings cases since Justice Gorsuch joined: *Knick v. Township of Scott*²³⁹ and *Cedar Point Nursery v. Hassid*.²⁴⁰ In both cases, the Court ruled in favor of private property owners, and Justice Gorsuch was with the majority.²⁴¹

235. *Id.*

236. Justices Scalia and Thomas had previously recognized *Sweet Home*'s applicability in such cases, arguing that the Court should reject the decision's reasoning as a mere "drive-by ruling." See *Whitman v. United States*, 574 U.S. 1003, 1005 (2014) (statement of Scalia, J., respecting the denial of certiorari).

237. Richard J. Lazarus, *Fairness in Environmental Law*, 27 ENV'T L. 705, 722–32 (1997).

238. *Id.*

239. 139 S. Ct. 2162 (2019).

240. 141 S. Ct. 2063 (2021).

241. Admittedly, neither *Knick* nor *Cedar Point* neatly fits into the narrow definition of an "environmental law" case established above in Part II, so their inclusion here bends the definition slightly. The reason for their inclusion is that, without parallel to other areas of constitutional law that regularly cut across environmental law matters, the regulatory takings issue has proven to be at environmental law's core because of the latter's implications for property law. See Lazarus, *Restoring What's Environmental About Environmental Law*, *supra* note 14, at 752–55.

At issue in *Knick* was the longstanding Supreme Court precedent *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,²⁴² which required a landowner claiming that a government regulation amounted to a regulatory taking to bring that claim first in state court.²⁴³ The basic rationale of *Williamson County* was that until a state court had considered and rejected a federal regulatory takings claim, and therefore denied the availability of just compensation, a landowner could not fairly argue in federal court that the state had taken their property without just compensation. The *Knick* Court overruled *Williamson County*, stating that “a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it,” and that a landowner therefore need not exhaust state court remedies before proceeding to federal court.²⁴⁴ Justice Gorsuch’s questions at oral argument in *Knick* reflected his apparent view that *Williamson County*’s exhaustion requirement was unfair to “the victim of state takings.”²⁴⁵

The Court’s ruling in *Cedar Point Nursery* was similarly a big win for regulatory takings plaintiffs. California law allowed labor organizers to solicit farmworkers on private property.²⁴⁶ Under the Court’s precedents, physical appropriations of property are “assess[ed] . . . using a simple, *per se* rule: The government must pay for what it takes.”²⁴⁷ Regulation that merely impairs the use of property by way of a regulatory restriction of its uses may also be a taking, but absent the rare instance of a complete deprivation of all “economically viable use,”²⁴⁸ only if it “goes too far”²⁴⁹ as assessed by the far more generous three-factor balancing test set forth in *Penn Central Transportation Co. v. City of New York*.²⁵⁰

In *Cedar Point Nursery*, the Supreme Court held that California’s regulation amounted to a *per se* physical taking even if the regulation allowed only intermittent physical access rather than

242. 473 U.S. 172 (1985).

243. *Id.* at 196–97.

244. *Knick*, 139 S. Ct. at 2170; *see id.* at 2179.

245. Transcript of Oral Argument at 53–54, *Knick*, 139 S. Ct. 2162 (No. 17-647), <https://perma.cc/TX7M-UGQU>.

246. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069 (2021).

247. *Id.* at 2071.

248. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992).

249. *Cedar Point Nursery*, 141 S. Ct. at 2072 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

250. 438 U.S. 104, 124 (1978).

permanent physical occupation. According to the Court, the state regulation had effectively “appropriated a right of access to the growers’ property,” which was sufficient to establish a governmental taking of private property requiring the payment of just compensation.²⁵¹ The majority reasoned that requiring the taking of something like a formal easement for labor organizers “would allow the government to appropriate private property without just compensation so long as it avoids formal condemnation.”²⁵²

The implications of these rulings for cases involving government restrictions on private property rights that further environmental protection goals are not yet clear. The *Cedar Point Nursery* Court acknowledged limits on its newly announced *per se* regulatory takings test for “government-authorized physical invasions” that “are consistent with longstanding background restrictions on property rights.”²⁵³ The understandable concern of governmental environmental regulators will be that this exception—like the similarly phrased one in *Lucas* providing that a “pre-existing limitation upon the landowner’s title” could defeat a *per se* takings challenge based upon deprivation of all economically viable use²⁵⁴—can be read as limiting governmental authority to do what government has always done in the past. It accordingly risks failing to recognize government’s legitimate need to address newly identified threats to public health and welfare that were unknown centuries ago, such as those presented by climate change.

V. CONCLUSION

Justice Gorsuch has sat on the Court for only seven years as of this spring and, as of this past fall, for six full Terms. He has not faced the full panoply of legal issues that can arise under the rubric of environmental law. Nevertheless, if recent past is prologue, the Justice’s longer-term impact on environmental law may well realize some of the worst fears expressed by many environmentalists when they opposed his confirmation. Indeed, those fears already have been realized in some important areas.

Whether assessed quantitatively or qualitatively, Justice Gorsuch is clearly a solidly conservative vote in ways that are likely

251. *Cedar Point Nursery*, 141 S. Ct. at 2074.

252. *Id.* at 2076.

253. *Id.* at 2079.

254. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992).

to skew against the legal positions favored by environmentalists. Justice Gorsuch does not evince hostility to environmentalism *per se*, but has shown deep skepticism about the heightened roles that the national government and federal executive branch officials serve in administering environmental law. Indeed, Gorsuch has essentially volunteered, in the opinions he has joined and written separately, his readiness to upend completely the administrative state upon which federal environmental law depends. To be sure, there will no doubt be occasions when Justice Gorsuch's views on cross-cutting issues of constitutional law lead him to vote in favor of outcomes more protective of the environment. However, those seem likely to become the exceptions rather than the rule, as was true for his proclaimed judicial role model, Justice Scalia.

Justice Gorsuch's views on the separation of powers seem ready to persuade him to reject the efforts of EPA and other federal agencies to assert the kind of expansive authority necessary to meet today's compelling environmental problems. At least so long as Congress remains largely dysfunctional, it seems unlikely that Congress will pass new laws capable of meeting Justice Gorsuch's clear congressional authorization hurdle. Environmental federalism will likely present its own hurdles, given the tendency for the achievement of many environmental protection objectives to depend upon a strong national government. Justice Gorsuch's evident belief, moreover, that federal environmental law is "uniquely" dependent on an untenably expansive reading of congressional Commerce Clause authority makes it clear that he stands ready to cut back on the reach of federal environmental pollution control and natural resource management laws.

To be sure, Gorsuch's interest in federalism suggests that there is potential for some votes favorable to environmentalists when state and local governments champion environmental causes rather than the federal government. He takes a dim view of far-reaching arguments under both the Dormant Commerce Clause's "undue burden" balancing test and the Supremacy Clause's "frustration" of congressional objectives test. Even that mitigating potential, however, seems likely to be dampened given Justice Gorsuch's concern for individual liberty and private property, unless the Justice were somehow converted to the view of many environmentalists that there can be no meaningful liberty and property absent a sustainable environment. Such a conversion seems highly unlikely.

What would Justice Gorsuch's mother, the former EPA

Administrator, think about all of this? She might well be understandably stunned by the extraordinary turn of events in the aftermath of her own unceremonious exit from EPA and her subsequent exile from public service almost exactly forty years ago. Her son now sits on the nation's highest court in the same city where political leaders in both the White House and the Congress so readily dismissed her when she became politically inconvenient. As a Justice, moreover, he seems to harbor many of the same concerns about the perceived excesses of EPA's pollution control regulations as the former Administrator. And, in the separate concurring opinions he joined in both *West Virginia* and *Sackett*, he seems ready to dismantle the constitutional underpinnings of the nation's most important and successful federal environmental laws.

The biggest difference, however, lies in their respective roles. Administrator Gorsuch served at the pleasure of the President, and she was subject to and ultimately lost her position due to the characteristically tumultuous nature of the politics surrounding environmental law and policy. By contrast, the views of Justice Gorsuch cannot be so readily dismissed. Depending on future appointments to the Court, those views may well determine the future of federal environmental law.