The Rise of Constitutional Alarmists on the Supreme Court and Its Portent for the Future of Environmental Law

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I. INTRODUCTION

A quarter-century ago, a leading environmental law scholar fairly responded to the question "how different would environmental protection be today" if "the Court had never granted certiorari in a single environmental case" by answering "not much."[1] No one could similarly answer that same question today. Indeed, that same author was recently asked whether the Supreme Court matters for environmental law, and their response was "[u]nfortunately, the answer is now yes. And not in a good way."[2]

In June 2022, the Court in *West Virginia v. EPA* significantly cut back the U.S. Environmental Protection Agency's authority to address the compelling issue of climate change within a time frame essential to avoid its worst consequences.[3] Less than a year later, in May 2023, the Court in *Sackett v. EPA* decimated the Clean Water Act by embracing a rigid view of the meaning of "waters of the United States"—which defines the Act's jurisdictional reach—that sharply reduced the Act's ability to protect the nation's waters.[4] And, a little more than a year later, in June 2024, the Court in *Loper Bright Enterprises v. Raimondo*,[5] a case arising under the Magnuson-Stevens Fishery Conservation and Management Act,[6] overturned its four-decades-old seminal ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[7]—a Clean Air Act case—that had served for forty years as the bedrock of administrative law in general and federal agency environmental lawmaking in particular. No less than the U.S. Solicitor General forecast the impact of any such overruling as a "convulsive shock to the legal system."[8]

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[1] Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547, 547 (1997).

[2] E-mail from Daniel A. Farber, Sho Sato Professor of L., Univ. of California, Berkeley, to Richard J. Lazarus, Charles Stebbins Fairchild Professor of L., Harvard L. Sch. (Oct. 15, 2023) (on file with author).

[3] *See* West Virginia v. EPA, 597 U.S. 697, 735 (2022).

[4] Sackett v. EPA, 598 U.S. 651, 684 (2023).

[5] Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

[6] 16 U.S.C. §§ 1801–1884.

[7] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984), *overruled by Loper Bright Enters.*, 603 U.S. 369.

[8] Brief for the Respondents at 10, *Loper Bright Enters.*, 603 U.S. 369 (No. 22-451).

The topic of this Article is not a happy one. Until very recently, the Court's environmental rulings during the past five decades reflected the views of its consistently conservative majority but were nonetheless tempered by moderate conservative Justices who, bounded by pragmatic concerns, were contextually open to account for the environmental protection exigencies present in particular cases. In the past few years, however, that dynamic has shifted significantly as the Court's majority has increasingly been captured by Justices whom I dub "constitutional alarmists"—motivated in their votes and reasoning by their shared perception that environmental laws peculiarly threaten no less than the constitutional foundations of how law should be made and applied.

The purpose of this Article is to describe this disturbing development while placing it in historical perspective. To that end, this Article is divided into three Parts. Part II highlights the central reason why environmental lawmaking is so challenging for our lawmaking institutions, including the Supreme Court. As described in Part II, making and applying environmental protection laws systematically present the Court with difficult questions regarding the Constitution's allocation of lawmaking authority—both between branches and between levels of government—and regarding the limits the Bill of Rights imposes on laws that interfere with personal liberty and private property. Part III considers how the Court generally resolved these legal issues over five decades from roughly October Term 1970, the dawning of modern environmental law in the United States, through the close of October Term 2019, immediately before President Trump added his third Justice to the Court. It describes how and why there was some modicum of balance in the Court's environmental rulings during those five decades, notwithstanding a persistent conservative majority. Finally, Part IV considers the Court's environmental rulings since the fall of 2020, when the Court became dominated by six Justices who, alarmed by the threats they perceive environmental lawmaking to present to the Constitution's very foundation, are joining majority opinions that unravel environmental law's past successes and erode its future promise.

II. WHY LAWMAKING FOR ENVIRONMENTAL PROTECTION PRESENTS SO MANY CHALLENGING LEGAL ISSUES FOR THE SUPREME COURT

The central reason why environmental lawmaking generates so many challenging legal issues is found in environmental law's defining feature: the significant and sometimes enormous temporal and spatial divide between cause and consequence in the natural environment that environmental protection requirements seek to bridge. The laws of nature drive that divide between cause and effect. And the challenge of environmental law is to prevent unacceptably adverse consequences to public health, welfare, and the natural environment by identifying and regulating those spatially and temporally removed causes.

The difficulty in constructing and applying laws that strive to bridge that spatial and temporal divide is reflected in the legal issues presented in almost every major Supreme Court case relating to environmental law. As described below and further illustrated by the cases discussed in Part III, laws that bridge that divide challenge separation of powers, federalism, limits on Article III courts' ability to hear cases and controversies, and the inviolability of private property rights. And they accordingly tee up for the Court a steady stream of cases that determine the nation's ability to enact and administer the kinds of demanding environmental laws needed to protect public health, welfare, and the natural environment.

Simply put, environmental laws regulate the "here and now" for the benefit of the "there and then." Whether seeking to limit degradation of land, air, water, species of animals and plants, or glorious scenic vistas, environmental protection laws restrict persons and activities at one time and place for the benefit of persons and activities at another time and place. Those times and places may be separated not by mere minutes and yards, but by months, years, decades, or even centuries and hundreds or even thousands of miles.

Environmental protection laws are for this reason radically redistributive inherently and riddled with the kind of scientific uncertainty regarding cause and effect that necessarily accompanies a temporal or spatial divide. Such redistributive laws are hard for any lawmaking system to make because the voices of the "here and now" invariably drown out the voices of the "there and then" in the relevant lawmaking fora, whether a democratically elected legislative body or a military junta. The United States' own peculiar form of representative government is no exception. Indeed, our constitutional design for lawmaking can make enacting and administrating effective environmental protection laws especially hard to accomplish.

In the first instance, the Constitution establishes the terms of office for members of the House of Representatives, members of the Senate, and the President at two, six, and four years respectively, requiring elected officials to run for reelection within relatively short time periods, especially for members of the House.[9] Nothing's inherently wrong with that, of course. But there are necessary implications for environmental lawmaking because of the sharp temporal and spatial contrast between the concerns of environmental law and elected officials.

People in the "here and now" vote and provide donations needed to support campaigns, and their primary interests relate to what elected officials have done for them since the last election cycle and will do for them in the

[9] U.S. CONST. art. I, § 2, cl. 1 (House terms of two years); *id.* art. I, § 3, cl. 1 (Senate terms of six years); *id.* art. II, § 1, cl. 1 (presidential terms of four years).

near future.[10] What is the price of gasoline? How much do utilities cost for a home? What is the current rate of unemployment? Human cognition readily grasps these short-term, immediately imposed costs. And people naturally struggle to comprehend and take into account how there might be consequences in the distant future and in distant parts of the globe as a result of human activities now, such as what occurs with climate change.[11]

It is not a classic recipe for electoral success to campaign on the promise that, if elected, you will support laws that address the interests of the "there and then" over the "here and now." President Jimmy Carter's colossal loss to Ronald Reagan in 1980 made clear the perils of such political messaging. The President admonished the American people to turn down their home thermostats and don cardigan sweaters, while candidate Reagan promised the American people "freedom" from government regulation.[12] The demands of electoral politics similarly explain why, after the Democratic Party suffered what President Obama acknowledged was a "shellacking" in the 2010 midterm elections, the President shied away from any further mention of the climate change issue until after he was reelected in 2012.[13] And that is why Donald Trump in 2016, borrowing a page from Reagan's 1980 playbook, promised to "make America great again" in part by lifting the shackles of environmental regulation on American business.[14]

The Constitution's lawmaking design also deliberately makes it hard to pass and enforce the kind of significantly redistributive laws upon which environmental protection depends, let alone to regularly modify those laws over time in light of new information regarding environmental cause and consequence. For national legislation, success depends on navigating the pathways of three distinct branches of government, none of which is a sure thing.

Just like any other congressional legislation, enacting an environmental law requires in the first instance passing a bill in two distinct congressional chambers, each heavily influenced by short-term interests.[15] Next, the bill must be signed by the President, who is under their own set of political

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[10] *See* Lisa Friedman & Rebecca F. Elliott, *Biden and Big Oil Had a Truce. Now, It's Collapsing*, N.Y. TIMES (May 21, 2024), https://www.nytimes.com/2024/05/21/climate/trump-campaign-oil-gas.html.

[11] *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 209–14 (2d ed. 2023) [hereinafter LAZARUS, THE MAKING OF ENVIRONMENTAL LAW]. *See generally* ARDEN ROWELL & KENWORTHEY BILZ, THE PSYCHOLOGY OF ENVIRONMENTAL LAW 219–60 (2021).

[12] LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 11, at 116–17.

[13] Richard J. Lazarus, *The Super Wicked Problem of Donald Trump*, 73 VAND. L. REV. 1811, 1829–30 (2020).

[14] *Id.* at 1840–43.

[15] *See* JONATHAN BOSTON, GOVERNING FOR THE FUTURE: DESIGNING DEMOCRATIC INSTITUTIONS FOR A BETTER TOMORROW 65 (Evan Berman ed., 2017).

pressures to attend to supporters representing the here and now.[16] It is no happenstance that congressional environmental lawmaking has essentially shut down for more than thirty years. The last time the Clean Air Act was substantially amended was 1990,[17] the Clean Water Act in 1987,[18] and federal hazardous waste laws in 1984.[19] As a result, executive branch agencies are relegated to relying on increasingly dated language to deal with modern problems not specifically contemplated by legislators decades earlier. The obvious upshot is that those agency actions are more susceptible to reversal by courts on the grounds that they lack the necessary congressional authorization.[20]

The Constitution's assignment of lawmaking authority between the federal government and the states also disfavors the kinds of laws environmental protection can require. Environmental protection's spatial concerns promote national laws irrespective of state borders, while federalism concerns reflected in the Constitution's text limit the scope of the national government's power, denying it the general police powers of the individual states in favor of less sweeping and evolving notions of Commerce Clause, Property Clause, spending, and taxing authorities. At the same time, because environmental cause and consequence are not readily confined to any one state's borders, the Dormant Commerce Clause threatens to limit the ability of individual states to ensure protection within their own jurisdictions from environmental threats originating outside their borders.

Nor are the constitutional tensions generated by environmental lawmaking temporary and spatial dimensions limited to separation of powers and federalism lawmaking concerns. Environmental protection laws heavily depend on citizen suits for their effective enforcement because of the tendency of government, yielding to powerful economic and political forces reflecting the concerns of the "here and now," to shy away from their full enforcement. Yet the very far-flung spatial and temporal dimensions that define environmental cause and effect can quickly erect major obstacles to citizen plaintiffs' ability to satisfy Article III standing requirements of demonstrating "imminent," "concrete" injuries, a "causal nexus," and "redressability."[21]

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[16] *See id.* at 90.

[17] Clean Air Amendments Act of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended in scattered sections of 42 U.S.C.).

[18] Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.).

[19] Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984) (codified as amended in scattered sections of 42 U.S.C.).

[20] Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 27 (2014).

[21] *See* Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 749–52, 751 n.250 (2000) [hereinafter

Injuries that cross tens, hundreds, and thousands of miles and require months, years, decades, and sometimes even centuries are unavoidably riddled with scientific, economic, and political uncertainties inconsistent with strict notions of imminence, linear causality, or direct redress.

So, too, environmental protection's disruption of the expectations of the "here and now" in favor of safeguarding the interests of the "there and then" regularly finds expression in the Fifth Amendment's Just Compensation Clause. It is no happenstance that the "regulatory takings doctrine" was first announced in *Pennsylvania Coal v. Mahon*, a 1922 challenge to a state law that sought to prevent subsidence from coal mining that would otherwise harm future generations of land users.[22] It is likewise no coincidence that the regulatory takings doctrine largely laid dormant for decades until the 1970s and has served ever since as a basis for challenging environmental laws that restrict the exercise of private property rights in natural resources that have harmful temporal and spatial spillover effects.[23]

All these tensions between the demands of environmental lawmaking and the demands of the Constitution are evident in the Supreme Court's docket over the past five-plus decades. That has been a constant. As discussed next in Parts III and IV, what has not been a constant is how the Court has chosen to resolve those tensions.

III. THE COURT'S ENVIRONMENTAL RECORD FROM OCTOBER TERM 1970 THROUGH OCTOBER TERM 2019

Beginning in the 1970s and ending in 1990, Congress enacted by overwhelming bipartisan majorities no less than thirty sweeping, transformative environmental laws.[24] These laws were demanding and

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Lazarus, *Restoring*] (describing difficulty squaring the nature of environmental injury with the Court's contemporary tests for assessing a plaintiff's Article III standing).

[22] Pa. Coal Co. v. Mahon, 260 U.S. 393, 412–13 (1922).

[23] *See* Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 767–83 (2006); *see also, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 263 (1980); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 625 (1981); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 474 (1987); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42 (1987); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992); Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Suitum v. Tahoe Reg'l Plan. Agency, 520 U.S. 725, 734 (1997); Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 313 (2002); Murr v. Wisconsin, 582 U.S. 383, 392 (2017).

[24] *See* LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 11, at 83–84, 124–25, 145–47, 174–77; Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 L. & CONTEMP. PROBS. 311, 323 (1991) [hereinafter Lazarus, *Tragedy of Distrust*] ("The average vote in favor of major federal

uncompromising in their promise to reduce pollution in the air, in water, and on land; to impose strict conservation measures on the development and exploitation of natural resources on public lands and the outer continental shelf; and to preserve and protect our wilderness areas, national parks, and threatened and endangered species.[25] Since 1970, the Supreme Court has decided more than three hundred environmental law cases, the vast majority of which are directly traceable to those same laws, extending to state and local laws precipitated by federal legislation.[26] During that time, three different Chief Justices and twenty-three Associate Justices have served on the Court.[27]

Unsurprisingly, the individual Justices approached the varied legal issues arising on the Court's docket—generated by the tensions between the demands of environmental lawmaking and federal constitutional law—in different ways. Based on my surveys of their votes, the Justices generally fall into four different camps, albeit with some shifting of their views over time:

Constitutional alarmists, whose votes suggest a threshold hostility to environmental protection laws because of both skepticism of the laws' necessity and the perceived heightened threat they pose to constitutionally mandated limits on lawmaking;

Environmental agnostics, whose votes profess, more or less persuasively, that context, including the importance of environmental protection, plays no role in proper legal analysis and therefore does not justify any departure from strict application of constitutionally mandated lawmaking limits;

Environmental pragmatists, whose votes reflect their view that the Constitution does not mandate lawmaking limits that practically defeat lawmakers' ability to enact effective environmental protection laws;[28] and

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environmental legislation during the 1970s was seventy-six to five in the Senate and 331 to thirty in the House.").

[25] *See* LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 11, at 84–88, 124–28, 145; Lazarus, *Tragedy of Distrust*, *supra* note 24, at 323–28.

[26] *See* Lazarus, *Restoring*, *supra* note 21, at 773–83; Richard J. Lazarus, *Justice Breyer's Friendly Legacy for Environmental Law*, 95 S. CAL. L. REV. 1395, 1434–36 (2022) [hereinafter Lazarus, *Justice Breyer*]; Richard J. Lazarus & Andrew Slottje, *Justice Gorsuch and the Future of Environmental Law*, 43 STAN. ENV'T L.J. 1, 16–17 (2024) [hereinafter Lazarus & Slottje, *Justice Gorsuch*].

[27] The numbers in the text above count William Rehnquist only once, even though he could fairly be counted twice: first as an Associate Justice and later as Chief Justice. *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/U7FN-7QFU].

[28] For the purposes of this Article, I define "pragmatic" by borrowing the approach of retired Justice Breyer: "A good pragmatic decision must take account, to the extent practical, of the way in which a proposed decision will affect a host of related legal rules, practices, habits, institutions, as well as certain moral principles and practices, including the practical consequences of the decision . . . ." STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM 29 (2024).

Environmental progressives, whose votes reflect their view that the Constitution provides lawmakers with broad authority to enact the kinds of strong environmental protection laws necessary to address the serious threats to public health, welfare, and the natural environment posed by pollution and natural resource degradation.

The Court's bench during those first fifty years was marked by a shifting combination of environmental progressives, environmental pragmatists, environmental agnostics, and constitutional alarmists.[29] To be sure, a majority of the Court during almost that entire period could be fairly described as "conservative" as opposed to "liberal" or "progressive." President Nixon was responsible for that overall shift away from the progressivism of the Warren Court by his appointment, during his first term in office, of four new Justices, including the Chief Justice.[30] But no one category of conservative Justices, whether environmental pragmatists, professed environmental agnostics, or constitutional alarmists, dominated the Court. The result was five decades of environmental rulings that, while certainly tilting conservative and never proactively looking for opportunities to make environmental lawmaking easier, reflected surprising balance and included some major environmental wins.

A. *The Constitutional Alarmists*

Until President Trump's nominees joined the Court, beginning with Justice Gorsuch in 2017, there were three Justices who can be fairly described as constitutional alarmists in their outlook on environmental law: Justices Powell, Scalia, and Alito. A fourth, Justice Thomas, is harder to classify only because, while his voting record sharply and disproportionately disfavors the needs of environmental lawmaking, his separation of powers concerns have long been so much more extreme than any other member of the Court that it is

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[29] Of the twenty-six Justices who have served on the Court since 1970, one, William Douglas, could be fairly characterized as an "environmental alarmist." *See* Lazarus, *Restoring*, *supra* note 21, at 764–65. Entirely consistent with his national reputation as an ardent environmentalist off the Court, Justice Douglas voted while on the Court in support of the legal position favored by environmentalists in every case before the Court, seemingly without much regard to the strength of opposing arguments. *See id.* at 812. *See generally* M. MARGARET MCKEOWN, CITIZEN JUSTICE: THE ENVIRONMENTAL LEGACY OF WILLIAM O. DOUGLAS—PUBLIC ADVOCATE AND CONSERVATION CHAMPION (2022). As Douglas himself noted, "I am filled with prejudices, for I love the call of the horned owl in the darkness of night, the howl of the coyote, the call of the mourning dove, and the whistle of the bull elk." Peter Manus, *Wild Bill Douglas's Last Stand: A Retrospective on the First Supreme Court Environmentalist*, 72 TEMP. L. REV. 111, 140 (1999) (quoting William O. Douglas, The Conservation of Man 7 (1970–1972) (unpublished essay) (on file with the Library of Congress)).

[30] *See Justices 1789 to Present*, *supra* note 27.

hard to disaggregate his possible environmental agnosticism from his possible constitutional alarmism. Until the last few years, the impact on the Court's rulings of these four Justices was largely muted by the votes of various combinations of those more environmentally pragmatic or largely agnostic. Each is discussed below.

1. *Justice Powell*

Justice Powell was no stranger to environmental law when he joined the Court in January 1972, and his well-known hostility to what he perceived as unduly demanding environmental laws may even have led to his otherwise-unlikely nomination. Prior to his nomination, Powell had been an attorney at Hunton & Williams in Richmond, Virginia. Hunton & Williams (now Hunton Andrews Kurth) was then and remains today one of the nation's leading law firms representing industry in major air and water pollution control matters.[31]

At Hunton, Powell personally represented industry clients, including the Albemarle Paper Company and Ethyl Corporation.[32] Nor were these incidental clients.[33] They were instead among the first of his major clients that "made Powell an independent force" at the firm.[34] Indeed, that is why Powell recused himself from several major environmental cases before the Court for several years once he became a Justice.[35] Either his former clients were the parties in those cases or his former law firm was the counsel representing industry in the cases.[36]

Nor were Powell's critical views on the newly enacted federal environmental laws and the entire environmental movement any mystery to business interests at the time of his nomination. Although he never expressed it in public settings, Powell took pains to make his alarm about environmental laws clear to those in the business community who felt threatened by the then-looming passage of those laws. On August 23, 1971, two months before

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[31] *See* Lazarus, *Restoring*, *supra* note 21, at 729. Recent examples of major air and water pollution cases at the Supreme Court in which Hunton Andrews Kurth participated include *West Virginia v. EPA*, 597 U.S. 697, 702 (2022), and *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 169 (2020).

[32] *See* JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL, JR. 126, 189–93 (1994); *see also* Lazarus, *Restoring*, *supra* note 21, at 729.

[33] *See* JEFFRIES, *supra* note 32, at 126.

[34] *See id.*

[35] Powell recused himself from the following cases. United States v. Students Challenging Regul. Agency Procs. (SCRAP), 412 U.S. 669, 699 (1973); Train v. Nat. Res. Def. Council, Inc., 421 U.S. 60, 99 (1975); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 271 (1975); Aberdeen & Rockfish R.R. v. Students Challenging Regul. Agency Procs. (SCRAP), 422 U.S. 289, 328 (1975); E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 139 (1977); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 558 (1978).

[36] *See* Lazarus, *Restoring*, *supra* note 21, at 729–30.

President Nixon nominated Powell to fill a vacancy on the Court, Powell provided a confidential memorandum to the U.S. Chamber of Commerce with the ominous title "Attack on American Free Enterprise System."[37] Its direct, hard-hitting, conservative rhetoric was in keeping with a paper and a speech Powell had written a year earlier, *Political Warfare*[38] and *The Attack on American Institutions*,[39] both of which Powell had provided to Nixon.[40]

The August 1971 memorandum described a "broad attack" on the "American economic system" launched by "extremists of the left" and supported by "perfectly respectable elements of society: from the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences, and from politicians."[41] The Powell memorandum singled out the "stampedes by politicians to support almost any legislation related to . . . the environment" as illustrative of the "impotency of business, and of the near-contempt with which businessmen's views are held."[42] Powell's prescription to address the problem was for the business community to be more active in litigation, including before the Supreme Court, where, "especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change."[43]

Within two months, Nixon had nominated Powell to serve on the Court, even though Powell was at the time sixty-four years old, which was then (and

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[37] Memorandum from Lewis F. Powell Jr., to Eugene B. Sydnor Jr., Chairman, Educ. Comm., U.S. Chamber of Com., on Attack on American Free Enterprise System (Aug. 23, 1971) [hereinafter Powell Memorandum], https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo [https://perma.cc/JCN5-Y79M].

[38] Lewis F. Powell Jr., President's Blue Ribbon Defense Panel, Political Warfare (June 30, 1970), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1021&context=powellspeeches [https://perma.cc/M3ET-3FPC] (confidentially prepared and submitted to President Nixon).

[39] Lewis F. Powell Jr., Address at the Southern Industrial Relations Conference: The Attack on American Institutions (July 15, 1970), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1008&context=powellspeeches [https://perma.cc/7MFE-9YWX].

[40] According to a letter from Alexander Haig, President Nixon took "great interest" in Powell's comments in *Political Warfare* and "asked the National Security Council staff to give them most careful study." Letter from Alexander M. Haig, Brigadier Gen., U.S. Army, to Lewis F. Powell Jr., Att'y, Hunton, Williams, Gay, Powell & Gibson (Sept. 9, 1970), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1003&context=powellcorrespondence [https://perma.cc/PK9N-DRYS]. Nixon himself later wrote to Powell regarding Powell's speech, *The Attack on American Institutions*, noting, "I can see that we share many similar attitudes concerning the problems we are facing in America today." Letter from President Richard Nixon to Lewis F. Powell Jr., Att'y, Hunton, Williams, Gay, Powell & Gibson (Oct. 26, 1970), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1003&context=powellcorrespondence [https://perma.cc/PK9N-DRYS].

[41] Powell Memorandum, *supra* note 37, at 1–3.

[42] *Id.* at 25.

[43] *Id.* at 26.

even more so now) considered too old.[44] Only one other Justice, Horace Lurton, who joined the Court at age sixty-five in 1910 and served for only four years, had been older.[45] Only two months after his nomination, Powell was a newly minted Justice.[46]

The historical record does not make clear to what extent, if any, Nixon specifically considered the Powell memorandum and Powell's obvious skepticism of environmentalism in his decision to nominate Powell to the Court despite his relatively advanced age. What is clear is how Powell's voting in cases reflected his views. Although the impact of Powell's votes in environmental cases was muted by the significant number of cases in which his prior professional activities prompted his recusal, Powell was a reliable and outspoken voice in favor of industry concerns in the significant environmental cases in which he did participate.[47]

For example, in *Union Electric Co. v. EPA*, Powell referred to the Clean Air Act as "Draconian" and went so far as to suggest the propriety of its congressional revision.[48] In *Tennessee Valley Authority v. Hill*, Powell similarly decried the Court's interpretation of the Endangered Species Act as an "absurd result" that "casts a long shadow over the operation of even the most important projects, serving vital needs of society and national defense."[49] As with the Clean Air Act, Powell effectively invited Congress to overrule the majority ruling from which he was dissenting.[50]

Powell's most significant influence on environmental law, however, may have occurred in non-environmental cases with significant import for environmental law, perhaps because he was precluded from doing so directly in light of his recusal from so many of the environmental pollution control cases. During the 1970s, Justice Powell, along with then-Justice Rehnquist, crafted a series of rulings on Article III standing in non-environmental cases that provided the precedential foundation the Court relied upon years later to

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[44] Indeed, in the months prior to Powell's nomination, Nixon had himself expressed concern about Powell's age. For example, in a recorded conversation with Secretary of State William Rogers on September 20, 1971, Rogers commented that "if Lewis Powell were ten years younger, he would be great, but he's about sixty-three," and Nixon interjected, "No, we can't do that." Audiotape: Conversation Between President Richard M. Nixon and William P. Rogers, Conversation 009-103, at 04:50, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM (Sept. 20, 1971), https://www.nixonlibrary.gov/white-house-tapes/009/conversation-009-103 [https://perma.cc/T3WW-ZYJ2].

[45] *See FAQs - Supreme Court Justices*, SUP. CT. OF THE U.S., https://www.supreme court.gov/about/faq_justices.aspx [https://perma.cc/G3U9-CDEP].

[46] *See* Fred P. Graham, *Powell and Rehnquist Take Seats on the Supreme Court*, N.Y. TIMES (Jan. 8, 1972), https://www.nytimes.com/1972/01/08/archives/powell-and-rehnquist-take-seats-on-the-supreme-court.html.

[47] *See* Lazarus, *Restoring*, *supra* note 21, at 731.

[48] Union Elec. Co. v. EPA, 427 U.S. 246, 271–72 (1976) (Powell, J., concurring).

[49] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195–96 (1978) (Powell, J., dissenting).

[50] *See id.* at 210.

cut back on environmental citizen-suit standing.[51] The promise of that precedent in application to environmental citizen suits was finally consummated when Justice Scalia joined the Court just as it opened its October Term 1986.[52] At the end of that same term, in June 1987, Powell resigned from the bench.[53]

2. *Justice Scalia*

Justice Scalia joined the Court in September 1986.[54] He had served for four years on the U.S. Court of Appeals for the District of Columbia Circuit.[55] Upon his confirmation by a unanimous Senate vote, Scalia nominally replaced then-Associate Justice Rehnquist, whom President Reagan had nominated to succeed Warren Burger as Chief Justice.[56]

During the Senate confirmation hearings, there was not the barest hint of any interest in Scalia's views on environmental law. The word "environmental" was not uttered once in those hearings or in any legislative report accompanying the nomination.[57] One might fairly assume that this was because then-Judge Scalia's views on environmental law were largely unknown, akin to a stealth nominee. But just the opposite is true. Scalia's views were both well-known and openly and publicly hostile to aggressive environmental protection requirements.[58] He was sounding the alarm. Characteristically, there was nothing subtle about it.

a. *Article III Standing*

In 1983, three years before his Supreme Court nomination, Scalia published a law review article that unabashedly mocked what he described as

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[51] *See* Warth v. Seldin, 422 U.S. 490, 502 (1975); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 37 (1976).

[52] *See* Stuart Taylor Jr., *Rehnquist and Scalia Take Their Places on Court*, N.Y. TIMES (Sept. 27, 1986), https://www.nytimes.com/1986/09/27/us/rehnquist-and-scalia-take-their-places-on-court.html.

[53] *See* Stuart Taylor Jr., *Powell Leaves High Court; Took Key Role on Abortion and on Affirmative Action*, N.Y. TIMES (June 27, 1987), https://www.nytimes.com/1987/06/27/us/powell-leaves-high-court-took-key-role-on-abortion-and-on-affirmative-action.html.

[54] *See* Taylor, *Rehnquist and Scalia Take Their Places on Court*, *supra* note 52.

[55] *See generally Antonin Scalia*, HIST. SOC'Y OF THE D.C. CIR., https://dcchs.org/judges/scalia-antonin [https://perma.cc/4PDN-EV58].

[56] *See* Taylor, *Rehnquist and Scalia Take Their Places on Court*, *supra* note 52.

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

[58] *See* Richard J. Lazarus, *The Scalia Court: Environmental Law's Wrecking Crew Within the Supreme Court*, 47 HARV. ENV'T L. REV. 407, 441, 449–50 (2023) [hereinafter Lazarus, *The Scalia Court*].

"the judiciary's long love affair with environmental litigation."[59] Scalia argued for heightened Article III standing requirements that would cut off the ability of environmentalist plaintiffs to bring citizen suits against those violating federal environmental protection requirements.[60] Scalia also freely boasted that the practical import of those heightened standing requirements would be to defeat full enforcement of the objectives of the nation's environmental protection laws: "Does what I have said mean that, so long as no minority interests are affected, 'important legislative purposes, heralded in the halls of Congress [can be] lost or misdirected in the vast hallways of the federal bureaucracy?' Of *course* it does—and a good thing, too."[61]

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

> Their greatest success in such an enterprise—ensuring strict enforcement of the environmental laws . . . —met with approval in the classrooms of Cambridge and New Haven, but not in the factories of Detroit and the mines of West Virginia. It may well be, of course, that the judges know what is good for the people better than the people themselves; or that democracy simply does not permit the *genuine* desires of the people to be given effect; but those are not the premises under which our system operates.[62]

Even before joining the Court, Scalia placed a bull's-eye on environmental law, yet no one apparently cared at the time of his nomination. He publicly rang the alarm bell.

Consistent with his 1983 law review article, Scalia wasted no time once on the Court championing opinions that significantly cut back on environmental citizen-suit standing. Before Scalia joined the Court, environmental plaintiffs had faced few obstacles in securing Article III standing.[63] Building upon the foundation of standing law established by Justice Powell for the Court, Scalia authored three major environmental standing cases, *Lujan v. National Wildlife Federation*,[64] *Lujan v. Defenders of Wildlife*,[65] and *Steel Co. v. Citizens for a Better Environment*,[66] which together erected unprecedentedly high

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

[60] *See* Lazarus, *The Scalia Court*, *supra* note 58, at 449–50.

[61] Scalia, *supra* note 59, at 897 (alteration in original).

[62] *Id.*

[63] *See* United States v. Students Challenging Regul. Agency Procs. (SCRAP), 412 U.S. 669, 686–90 (1973).

[64] Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

[65] Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

[66] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

jurisdictional barriers that blocked environmentalists from obtaining a federal judicial forum.

b. *Regulatory Takings*

Scalia also successfully resurrected the 1922 *Pennsylvania Coal v. Mahon* regulatory takings doctrine[67] as a basis for challenging environmental restrictions on private property interests in land. Soon after he joined the Court, he authored the opinion for the Court in *Nollan v. California Coastal Commission*, which sharply restricted the use of land through permit conditions that deprived landowners of exclusive physical use of their property.[68] But it was Scalia's blockbuster regulatory takings opinion for the Court five years later in *Lucas v. South Carolina Coastal Council* that announced a per se regulatory takings doctrine for environmental land-use restrictions that deprived landowners of all economically viable use of their property.[69]

c. *Congressional Commerce Clause Authority*

Scalia's views on the narrow scope of congressional authority might be fairly considered agnostic in application to environmental law, given its clear origins in a series of Court rulings in the 1990s decided in the context of federal criminal law.[70] Scalia's apparent eagerness to apply similar restrictions to the scope of federal environmental law, however, suggests something other than mere neutrality.

In *Gonzales v. Raich*, the Court considered and rejected a Commerce Clause challenge to the constitutionality of a federal law that made producing and using homegrown marijuana subject to criminal punishment.[71] There was nothing remotely environmental about it. Yet at oral argument, Scalia directly raised the question of whether an argument regarding the constitutionality of the federal narcotics law could similarly be made in favor of the constitutionality of the Endangered Species Act.[72] The fact that the Justice was thinking about the Endangered Species Act in the midst of a case involving federal narcotics law made clear that environmental law was very much on his

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[67] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922).

[68] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987) (holding a permanent public access easement was a "permanent physical occupation" under the Takings Clause).

[69] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015–19 (1992).

[70] *See* United States v. Lopez, 514 U.S. 549 (1995) (striking down the federal Gun-Free School Zones Act); United States v. Morrison, 529 U.S. 598 (2000) (striking down portions of the federal Violence Against Women Act).

[71] Gonzales v. Raich, 545 U.S. 1, 15 (2005).

[72] Transcript of Oral Argument at 27, *Raich*, 545 U.S. 1 (No. 03-1454).

mind in terms of the import of the Court's ruling in *Raich* on the Commerce Clause issue. Three years later, Scalia authored a plurality opinion in *Rapanos v. United States* that questioned whether the broad jurisdiction that EPA sought to exercise over wetlands through the Clean Water Act exceeded congressional Commerce Clause authority.[73]

d. *Separation of Powers*

Scalia's views on the relevance of separation of powers concerns to environmental lawmaking shifted dramatically over time. He initially harmonized his antipathy to judicial activism with his commitment to separation of powers. Both, for the Justice, required limiting statutory construction to the strict text of the statute, without resort to legislative history, and deferring to an agency's reasonable interpretation of that language where the meaning of the text was ambiguous. The latter view, of course, was the approach set forth in the Supreme Court's 1984 decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, *Inc.*, which Scalia openly championed.[74] Indeed, during roughly his first fifteen years on the bench, the Justice proudly boasted of instances where his commitment to those neutral principles led him to vote in favor of environmental policy outcomes that otherwise appeared antithetical to the Justice's own policy views[75]: "If you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong."[76] He similarly rejected an aggressive application of the nondelegation doctrine—promoted by industry and ideological opponents of the modern regulatory state—that had the potential to sharply cut back on the rulemaking authority of agencies like EPA.[77]

But over time, marked roughly by his final fifteen years on the Court, Justice Scalia's views on the separation of powers shifted dramatically. He abandoned any pretense of being agnostic in favor of ringing alarm bells about the threat to democratic lawmaking principles posed by expansive views of

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[73] Rapanos v. United States, 547 U.S. 715, 738 (2006) ("[T]he Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power.").

[74] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–19.

[75] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); City of Chicago v. Env't Def. Fund, 511 U.S. 328 (1994).

[76] Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. L. REV. 905, 906 n.3 (2016) (alteration omitted) (quoting Justice Antonin Scalia, Madison Lecture at the Chapman University School of Law (Aug. 29, 2005)).

[77] *See Whitman*, 531 U.S. at 472.

agency authority.[78] To that end, he began to question the constitutionality of the *Chevron* deference framework he had previously embraced. And he undermined any pretense of strict textual construction by relying on judicially invented canons of statutory construction that took direct aim at environmental law. For instance, he assumed that some consideration of cost-benefit analysis was necessary to establish a regulation's presumptive reasonableness or "appropriate[ness]" and declared that rules of economic and political significance required clear congressional authorization.[79]

3. *Justice Alito*

Justice Alito joined the Court twenty years after Justice Scalia.[80] The Alito confirmation hearings were highly contentious and sharply partisan, with Democrats labeling Alito as a far-right, hardcore conservative.[81] Most of the Democratic criticism focused on civil rights issues, rooted in part in Alito's association with a conservative Princeton alumni group.[82] Alito's distinct record on environmental law was fairly sparse,[83] but unlike for Justice Scalia in 1986, that record was subject to close scrutiny.

The limited environmental case law record that existed suggested that Alito, on the Court, would likely be an environmental agnostic with no particular ideological axe to grind. A Congressional Research Service review of thirty-four environmental cases in which Alito had participated as a Third Circuit judge revealed "no obvious sentiment as to environmental suits per se."[84] That study found that of the twenty environmental cases in which there was a "clear 'environmental' side," Judge Alito took that side in half the cases.[85] And with the exception of insurance-coverage cases, Judge Alito did

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[78] *See* Lazarus, *The Scalia Court*, *supra* note 58, at 451–54, 452 nn.283–85.

[79] *See id.* at 452–54.

[80] *See* David Stout, *Alito Is Sworn in as Justice After 58–42 Vote to Confirm Him*, N.Y. TIMES (Jan. 31, 2006), https://www.nytimes.com/2006/01/31/politics/politicsspecial1/alito-is-sworn-in-as-justice-after-5842-vote-to.html.

[81] *See id.*; David D. Kirkpatrick, *On Party Lines, Panel Approves Alito for Court*, N.Y. TIMES (Jan. 25, 2006), https://www.nytimes.com/2006/01/25/politics/politicsspecial1/on-party-lines-panel-approves-alito-for-court.html.

[82] *See, e.g.*, *Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 333–34, 361–63, 455–57, 495, 512–13, 522–23, 558, 570, 594, 647, 753, 757 (2006) [hereinafter *Alito Confirmation Hearing*]; *see also* Stout, *supra* note 80.

[83] *See* Interview by Bruce Gellerman with Professor Richard Lazarus, Professor, Georgetown Univ. L. Ctr., in Somerville, Mass. (Nov. 4, 2005), https://www.loe.org/shows/segments.html?programID=05-P13-00044&segmentID=1 [https://perma.cc/VK8M-9HBY].

[84] CONG. RSCH. SERV., RS22359, THE ENVIRONMENTAL OPINIONS OF JUDGE SAMUEL ALITO 2 (2006).

[85] *Id.*

not dissent in a single environmental case.[86] As for the substance of the thirty-four environmental decisions, the study concluded they were "based on straightforward readings of statutes and regulations" and "contain[ed] little in the way of broad philosophical statements."[87] Both this author and Professor Cass Sunstein commented at the time of Alito's nomination that Alito did not appear to have any particular "ideological agenda one way or the other with respect to the environment"[88] and was "not someone who, like some judges, has a kind of pro-business orientation" or was otherwise "on any kind of rampage against the environmental laws."[89]

More than fifty environmental groups, however, sharply disagreed.[90] Having failed to step up and oppose Scalia's confirmation, they were apparently not about to repeat that mistake. They formally opposed Alito's nomination based on their heightened concerns about his record while a judge on the U.S. Court of Appeals for the Third Circuit.[91] They pointed to his joining the majority opinion in *Public Interest Research Group v. Magnesium Elektron*, *Inc.*, which rejected the Article III standing of environmental plaintiffs alleging violations of the Clean Water Act[92] and, environmentalists believed, threatened to undermine citizen-suit standing.[93] They further highlighted Alito's decision to join the majority in *W.R. Grace v. EPA*, which vacated as arbitrary and capricious an EPA emergency cleanup order under the Safe Drinking Water Act.[94] The environmentalists worried that this decision evidenced Alito's lack of deference to EPA's expertise in protecting public health and his preference for "[c]orporate [i]nterests."[95] And they singled out

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[86] *Id.*

[87] *Id.*

[88] Interview by Bruce Gellerman with Professor Richard Lazarus, *supra* note 83.

[89] Telephone Interview by Bruce Gellerman with Professor Cass Sunstein, Professor, Univ. of Chi. L. Sch. (Nov. 4, 2005), https://stream.loe.org/audio/051104/sunstein.mp3 [https://perma.cc/N62L-YKZE].

[90] *See* Letter from Paul Schwartz, Nat'l Pol'y Coordinator, Clean Water Action et al., to the U.S. Senate (Jan. 25, 2006) [hereinafter Environmental Letter Opposing Judge Alito's Nomination], https://www.judgingtheenvironment.org/library/letters/Alito-Environmental-letter-opposing-Alito-nomination-01-25-06.pdf [https://perma.cc/24D8-F7R8].

[91] *See id.*; *see also* CONG. RSCH. SERV., RS22359, THE ENVIRONMENTAL OPINIONS OF JUDGE SAMUEL ALITO 3–6 (2006).

[92] *See* Pub. Int. Rsch. Grp. v. Magnesium Elektron, Inc, 123 F.3d 111, 125 (3d Cir. 1997); CONG. RSCH. SERV., RS22359, THE ENVIRONMENTAL OPINIONS OF JUDGE SAMUEL ALITO 3 (2006).

[93] Environmental Letter Opposing Judge Alito's Nomination, *supra* note 90, at 3.

[94] W.R. Grace & Co. v. EPA, 261 F.3d 330, 344 (3d Cir. 2001); CONG. RSCH. SERV., RS22359, THE ENVIRONMENTAL OPINIONS OF JUDGE SAMUEL ALITO 4 (2006).

[95] *See More than 50 Environmental & Conservation Groups Oppose Alito*, EARTHJUSTICE (Jan. 24, 2006), https://earthjustice.org/press/2006/more-than-50-environmental-conservation-groups-oppose-alito [https://perma.cc/L2DD-5BZL]; *see also* Environmental Letter Opposing Judge Alito's Nomination, *supra* note 90, at 3.

his dissent in *United States v. Rybar*, a non-environmental case, in which Alito contended that a federal ban on the possession or transfer of machine guns exceeded Congress's authority under the Commerce Clause.[96] His *Rybar* dissent was particularly troubling because of its potential to question the constitutionality of environmental laws.[97]

No doubt because environmental groups had raised the alarm, senators questioned Alito about his environmental record. Senator Dianne Feinstein referred to Alito's *Rybar* dissent and expressed concern that "if this march to restrict Congress continues, you could strike down the Endangered Species Act, you could strike down the Clean Water Act, you could strike down the Clean Air Act, and I think that would be catastrophic for the United States."[98] Senator Feinstein also expressed concern that Judge Alito's position on citizen-suit standing in *Public Interest Research Group*, "if broadly applied, would have gutted the citizen lawsuit provision of the Clean Water Act."[99] Senator Patrick Leahy similarly criticized Alito based on his environmental record, focusing primarily on his views regarding citizen-suit standing.[100]

With the benefit of almost twenty years of hindsight, the concerns of environmental groups at the time of Alito's nomination turned out to have been well directed. While Justice Alito may have initially appeared to be or in fact may have been merely agnostic, his record has plainly become that of a constitutional alarmist in application to all aspects of environmental lawmaking and administration: on Article III standing, regulatory takings, congressional Commerce Clause authority, and separation of powers.

Alito has voted against the standing of environmental plaintiffs in every environmental law case in which the issue has been raised since he joined the Court. He has favored the position of private property plaintiffs in every takings case before the Court. He has joined opinions questioning the constitutionality of federal environmental laws under the Commerce Clause. And, like Justice Scalia before him, he has pivoted away from traditional plain-meaning textual analysis in statutory interpretation cases in favor of judicially invented canons of statutory construction that baldly reflect the tension he perceives between broad readings of environmental law and the limits on federal lawmaking authority.

For example, in Justice Alito's recent opinion for the Court in *Sackett v. EPA*, the Court justified its narrow reading of Clean Water Act's geographic scope on two classic claims of constitutional alarmists about federal environmental law: first, a broad reading of the Clean Water Act's scope

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[96] United States v. Rybar, 103 F.3d 273, 287 (3d Cir. 1996); CONG. RSCH. SERV., RS22359, THE ENVIRONMENTAL OPINIONS OF JUDGE SAMUEL ALITO 5 (2006).

[97] Environmental Letter Opposing Judge Alito's Nomination, *supra* note 90, at 2–3.

[98] *Alito Confirmation Hearing*, *supra* note 82, at 533.

[99] *Id.* at 532.

[100] *Id.* at 486.

would "significantly alter the balance between federal and state power and the power of the Government over private property."[101] Second, "[r]egulation of land and water use," Alito's opinion emphasized, "lies at the core of traditional state authority."[102]

Through the end of October Term 2022, which ended in October 2023, the Court has decided forty environmental cases since Justice Alito joined the Court.[103] In how many cases has Alito voted in favor of the legal position favored by environmentalists? The answer is only four times,[104] or in merely 10% of the cases. And in three of those four cases, the vote was unanimous,[105] and only Justice Thomas declined to join the majority opinion in full in the fourth case.[106]

The median corresponding percentage of the number of votes favorable to environmentalists for the fourteen Justices with whom Alito has served on the Court over the past eighteen years is 50%, five times higher than Alito's.[107] The percentages for some of the other conservative Justices on the Court with whom Justice Alito served are 19, 21.5, 23.4, 33.3, and 35.7%, for Chief Justice Roberts and Justices Thomas, Scalia, Gorsuch, and Kavanaugh respectively.[108]

If one examines, moreover, only six recent Terms, beginning in October 2017 and ending with the close of October Term 2022, Alito's percentage of votes in favor of the legal arguments favored by environmentalists borders on the preposterously low. Alito voted in favor of the side favored by environmentalists in only one of fifteen environmental cases decided during that time period, and the vote in that case was unanimous.[109] That is 6.7%, a far lower percentage than that of any other Justice.[110]

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[101] Sackett v. EPA, 598 U.S. 651, 678–79 (2023) (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 590 U.S. 604, 622 (2020)).

[102] *Id.* at 679.

[103] Lazarus & Slottje, *Justice Gorsuch*, *supra* note 26, at 16–17. In prior scholarship, beginning in 2000 and extending to as recently as 2024, I have developed and applied criteria for what constitutes an "environmental law" case before the Court and, on that basis, assessed the votes of individual Justices in those cases over time to compare and contrast how different Justices may (or may not) respond to the challenges presented by environmental lawmaking. *See id.* at 11–14; Lazarus, *Justice Breyer*, *supra* note 26, at 1409–12; Lazarus, *Restoring*, *supra* note 21, at 744–63.

[104] Lazarus & Slottje, *Justice Gorsuch*, *supra* note 26, at 17.

[105] *See* S.D. Warren Co. v. Me. Bd. of Env't Prot., 547 U.S. 370, 371 (2006); United States v. Atl. Rsch. Corp., 551 U.S. 128, 129 (2007); Guam v. United States, 593 U.S. 310, 310–11 (2021).

[106] Env't Def. v. Duke Energy Corp., 549 U.S. 561, 582 (2007).

[107] *See* Lazarus & Slottje, *Justice Gorsuch*, *supra* note 26, at 16–17.

[108] *Id.*

[109] *Guam v. United States*, 593 U.S. at 311.

[110] *See* Lazarus & Slottje, *Justice Gorsuch*, *supra* note 26, at 16–17.

Justice Alito's degree of alarm over environmental law suggested by his votes is confirmed by the rhetoric of his opinions, whether for the Court or for himself, and of his questions at oral argument. In both, Justice Alito routinely exhibits disdain for strict enforcement of environmental laws, rooted in his concern that they unduly burden individual liberty and private property rights. For instance, Justice Alito in written opinions has referred to the Clean Water Act's civil penalties as "crushing" and has described how the Clean Water Act "can sweep broadly enough to criminalize mundane activities" or "inadvertent violations," placing "a staggering array of landowners . . . at risk of criminal prosecution or onerous civil penalties."[111] According to Alito, the Federal Government's position "would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees."[112]

Alito's questions at oral argument similarly reflect his obvious concern that environmental protection restrictions are unfairly burdensome to economic interests. For instance, in a 2012 Clean Water Act case, Alito asked the government counsel representing EPA, "if you related the facts of this case as they come to us to an ordinary homeowner, don't you think most ordinary homeowners would say this kind of thing can't happen in the United States?"[113] In *County of Maui v. Hawaii Wildlife Fund* in 2020, Alito expressed his sustained concern over the impact of the federal government's interpretation of the Clean Water Act on an "ordinary family out in the country that has a septic tank."[114] Justice Alito's alarm about the tendencies of environmental law to override property rights was clear.

4. *Justice Thomas*

Justice Thomas is harder to pigeonhole than Justices Powell, Scalia, and Alito. There is no question that Thomas is a constitutional alarmist in the broadest sense possible. What is less obvious is whether there is anything about environmental lawmaking in particular that triggers that alarm. Thomas's concerns are so broadly directed to all aspects of the federal administrative state that he might be fairly considered "agnostic" to environmental protection law, notwithstanding the potentially devastating implications for environmental law of the Justice's views on separation of powers and the nondelegation doctrine.

The import for environmental law of then-Judge Thomas' views was front and center during his 1991 confirmation hearings. Joseph Biden, then-Senate

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[111] Sackett v. EPA, 598 U.S. 651, 660, 669–70 (2023) (citation omitted).

[112] Sackett v. EPA, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

[113] Transcript of Oral Argument at 37, *Sackett*, 566 U.S. 120 (No. 10-1062).

[114] Transcript of Oral Argument at 40, County of Maui v. Haw. Wildlife Fund, 590 U.S. 165 (No. 18-260).

Chair of the Judiciary Committee, raised the environmental issue in his opening statement on the first day of the hearing.[115] The focus of then-Senator Biden's concern was the import for environmental law, among other areas of law, of Thomas's "view that natural law philosophy should inform the Constitution."[116] Biden posited that Thomas's views on natural law, especially its heavy emphasis on the protection of economic and property rights, "called into question many of the most important laws enacted in this century."[117] The first of Biden's listed examples were "[l]aws protecting the environment, our water and our air," and he stressed the need for Government to "limit the freedom to pollute."[118]

Then-Senator Biden's concerns have since been realized by Thomas's record on the Court during the past thirty-three years. To be sure, Thomas's record is not nearly as lopsided as Alito's—since joining the Court, Thomas has voted in favor of the legal positions supported by environmentalists in 21% of the cases, compared to Alito's 10%[119]—mostly because Thomas's antipathy to the federal administrative state can prompt him to conclude that federal law does not override state environmental protection laws. But Justice Thomas voted against the more environmentally protective outcome in almost every other area of environmental law, whether relating to the environmental lawmaking authority of federal agencies like EPA based on separation of powers or federalism concerns;[120] the standing of environmental plaintiffs under Article III;[121] or the constitutionality of government restrictions on the use of private property to prevent environmental harm under the Fifth Amendment's Just Compensation Clause.[122] In all those instances, Justice Thomas resolved the perceived tension between environmental lawmaking and

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[115] *See Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 2 (1991).

[116] *Id.* at 2.

[117] *Id.* at 3.

[118] *Id.*

[119] Lazarus & Slottje, *Justice Gorsuch*, *supra* note 26, at 16–17.

[120] *See, e.g.*, Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 161 (2001); Rapanos v. United States, 547 U.S. 715, 718 (2006); West Virginia v. EPA, 597 U.S. 697, 705 (2022); Sackett v. EPA, 598 U.S. 651, 684 (2023) (Thomas, J., concurring).

[121] *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 85–86 (1998); Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 198 (2000) (Scalia, J., dissenting); Massachusetts v. EPA, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting).

[122] *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1005, 1007 (1992); Dolan v. City of Tigard, 512 U.S. 374, 375, 389 (1994); Palazzolo v. Rhode Island, 533 U.S. 606, 610–11 (2001); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 343 (2002) (Rehnquist, J., dissenting); Murr v. Wisconsin, 582 U.S. 383, 386, 406–07 (2017) (Roberts, C.J., dissenting).

his deeply held views on the structural and substantive limits on lawmaking in favor of strict application of the latter.

Most recently illustrative of the bull's-eye that Thomas has placed on environmental lawmaking in this regard is his separate concurring opinion in *Sackett*—the Clean Water Act case described above in which Alito authored the majority opinion.[123] Thomas joined the opinion of the Court in full but took the opportunity to address a constitutional issue not formally before the Court: the scope of congressional Commerce Clause authority. Thomas described the Clean Water Act as "indicative of deeper problems with the Court's Commerce Clause jurisprudence," which had "significantly departed from the original meaning of the Constitution."[124] Justice Thomas then went further still in declaring that "[p]erhaps nowhere is this deviation more evident than in federal environmental law, much of which is *uniquely* dependent upon an expansive interpretation of the Commerce Clause."[125]

B. *The Environmental Agnostics*

There have been three Justices on the Court in the past five decades who, like the constitutional alarmists, both harbor deeply conservative views on the structural and substantive limits on federal lawmaking and vote disproportionately in opposition to the legal positions favored by environmentalists. Their votes can similarly be explained by the tensions between the demands of environmental lawmaking—promoting the dilution of Article III standing, the erosion of private property rights, and the aggrandizement of national government and executive branch power—and their conservative values, which favor limiting access to the federal courts, protecting property rights, and guarding against the federal government's encroachment on state sovereignty. But, unlike the alarmists, the statements, opinions, and oral argument questions of the environmental agnostics do not evince the same degree of heightened skepticism of, or direct hostility toward, environmental law in particular.

Interestingly, all three of the environmental agnostics are Chief Justices: Burger, Rehnquist, and Roberts.[126] And no one would mistake any one of

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[123] *Sackett*, 598 U.S. at 684 (Thomas, J., concurring); *see supra* notes 101–02 and accompanying text.

[124] *Sackett*, 598 U.S. at 708 (Thomas, J., concurring).

[125] *Id.* at 709 (emphasis added).

[126] Of the three, Chief Justice Roberts comes closest to the border of the constitutional alarmist. Justice Potter Stewart, who sat on the Court from 1959 through 1981 and therefore during the first decade of modern environmental law in the United States, might also be fairly dubbed an environmental agnostic. A moderately conservative Justice, there is no clear pattern to his votes in environmental law cases that suggests any particular overarching sensitivity to or heightened skepticism toward environmental lawmaking. *See* Lazarus, *Restoring*, *supra* note 21, at 725, 787–97.

them for being either progressive or pragmatic. Perhaps their shared distinct role as Chief Justice—albeit only for Chief Justice Rehnquist's final nineteen years on the bench—made each more institutionalist in outlook and, accordingly, tempered somewhat their votes and opinions. Or perhaps their votes could be explained by the less-sympathetic notion that they supplied votes beyond the five-Justice majority required in order to retain the power to assign the opinion.[127] Whatever their motivation, each of these three Chiefs on occasion were in the majority in a distinct number of instances in major rulings favoring environmentalists. They followed their consistently held views regarding lawmaking limits even when, as applied to the legal issues raised in an environmental case, their application of those limits supported the legal arguments advanced on the side favored by environmentalists.

In *Tennessee Valley Authority v. Hill*, one of environmentalists' biggest Supreme Court victories, Chief Justice Burger wrote the opinion for the Court, holding that the Endangered Species Act required protecting the endangered snail darter even if it meant barring the operation of an essentially completed dam, which had cost hundreds of millions of dollars to construct.[128] According to Burger's majority opinion, "the explicit provisions of the Endangered Species Act require precisely that result."[129] And "[i]t is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated."[130] Chief Justice Burger's majority opinion rejected the argument made by Powell in dissent that the relevant statutory language lacked the "clear declaration of that intention" necessary to support what he plainly viewed as a ridiculous policy proposition.[131]

In *Friends of the Earth v. Laidlaw*, Chief Justice Rehnquist sided with the environmentalists in joining a majority opinion that upheld the Article III standing of the environmental citizen-suit plaintiffs suing for violations of the Clean Water Act.[132] As the senior Justice in the majority, the Chief could have assigned the opinion to himself and then drafted a very narrow ruling in the plaintiffs' favor. Instead, he assigned the opinion to Justice Ginsburg, who embraced the opportunity to write a sweeping ruling that sharply cut back on three prior rulings for the Court, authored by Justice Scalia, which had denied

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[127] Richard J. Lazarus, *Back to "Business" at the Supreme Court: The "Administrative Side" of Chief Justice Roberts*, 129 HARV. L. REV. F. 33, 38 n.40 (2015).

[128] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 156, 195 (1978).

[129] *Id.* at 173.

[130] *Id.* at 185.

[131] *Id.* at 207 n.16 (Powell, J., dissenting).

[132] Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 171–74 (2000).

standing to environmental plaintiffs.[133] Unlike Chief Justice Rehnquist, Scalia never voted once in favor of environmental plaintiffs' standing. Nor did Justice Powell or Justice Alito.[134]

Finally, Chief Justice Roberts's vote and opinion assignments in *EPA v. EME Homer City Generation, L.P.*, are similarly illustrative.[135] At issue in *EME Homer* was EPA's authority to allocate emissions allowances among states contributing to interstate air pollution based on the costs of pollutant emissions reduction.[136] The rule was immensely important to EPA because, absent such authority to rely on reduction costs, it was unclear whether EPA would be able to develop any kind of effective program to address the major problem of interstate air pollution.[137] The EPA was effectively compelled to seek the Court's review after then-D.C. Circuit Judge Kavanaugh authored an opinion striking down EPA's rule as departing so much from the statutory text as to raise both separation of powers and federalism lawmaking concerns.[138] Kavanaugh's opinion relied expressly on an early version of what has since been formally declared the "major questions doctrine."[139]

In joining the majority ruling reversing Kavanaugh's opinion, Chief Justice Roberts embraced the more contextual view that the relevant language contained sufficient ambiguity to support EPA's approach and, like Chief Justice Rehnquist in *Friends of the Earth*, declined to assign the opinion to himself, but instead assigned it to Justice Ginsburg, who wrote a broader opinion. Indeed, Justice Ginsburg's opinion for the Court, which the Chief joined, relied heavily on the Court's *Chevron* precedent in upholding the validity of EPA's program. The Court stressed the enormous administrative

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[133] *Id.* at 180–81 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992)); *id.* at 183 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990)); *id.* at 187 (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)).

[134] Unlike the record of Powell or Alito, Rehnquist's record reveals many examples of cases in which he voted in favor of stricter environmental protection. *See* Lazarus, *Restoring*, *supra* note 21, at 717–18 (citing United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 675–76 (1973) (Rehnquist, J., dissenting); City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 650–54 (1973) (Rehnquist, J., dissenting); Hancock v. Train, 426 U.S. 167, 199 (1976) (Rehnquist, J., dissenting); City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (Rehnquist, J., dissenting); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 241 (1986) (Marshall, J., dissenting, joined by J. Rehnquist); Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 579–94 (1987)).

[135] EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 493, 496 (2014).

[136] *Id.* at 500–03.

[137] *See* Petition for a Writ of Certiorari at 28–29, *EME Homer*, 572 U.S. 489 (No. 12-1182) (describing the extraordinary difficulty of promulgating interstate air pollution rules consistent with the court of appeals' ruling).

[138] *See* EME Homer City Generation, L.P., v. EPA, 696 F.3d 7, 11, 23–34 (2012).

[139] *Id.* at 28 ("We 'are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.'").

challenge facing EPA in establishing a fair scheme for allocating allowable pollutant emissions among the States and explained, quoting from *Chevron*, that EPA's selected approach was "a 'reasonable' way of filling the 'gap left open by Congress.'"[140]

In contrast, Justice Scalia's dissent in *EME Homer* had all the contrasting trappings of a constitutional alarmist.[141] Gone was any notion grounded in *Chevron* that a court might properly read ambiguity into statutory language in application to serious environmental problems the sheer complexity of which Congress had not anticipated. Gone for that same reason was the central teaching of *Chevron* that such ambiguity provided a legitimate basis for judicial deference to the expert agency's effort to make the statute operative so long as the corresponding interpretation could be considered "reasonable."

The very first sentence of Scalia's dissent instead sounded the alarm: "Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress."[142] The majority ruling, Justice Scalia asserted, was "undemocratic,"[143] and it was no excuse that, absent approval of EPA's approach, it could be impossible for the agency to effectively address the problem of interstate air pollution: "If that were true, I know of no legal authority and no democratic principle that would derive from it the consequence that EPA could rewrite the statute, rather than the consequence that the statute would be inoperative."[144]

C. *The Environmental Pragmatists and the Environmental Progressives*

As noted above, the Supreme Court has decided more than three hundred environmental cases since 1970.[145] What is most striking about those rulings through October Term 2019 is how, notwithstanding the Court's consistently and increasingly conservative tilt during that period, its rulings were more balanced than extreme. To be sure, environmentalists lost some big cases[146]

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[140] *EME Homer*, 572 U.S. at 520 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984)).

[141] *Id.* at 525 (Scalia, J., dissenting).

[142] *Id.*

[143] *Id.*

[144] *Id.* at 530–31.

[145] *See supra* note 26 and accompanying text.

[146] *See, e.g.*, Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 266 (2009); Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 12 (2008); Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756 (2004); Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 525 (1978); Sierra Club v. Morton, 405 U.S. 727, 741 (1972).

and did not view the Court as a welcome forum,[147] but the legal positions they favored prevailed in a substantial number of cases.[148] They won some and they lost some. And the Court played no major role in cutting back on environmental protection law.[149] The Court's rulings regarding Article III standing, regulatory takings, the scope of judicial review of agency statutory interpretation, and congressional Commerce Clause authority each demonstrate a fair amount of moderation in their result. No conservative juggernaut overwhelmed the Court's rulings.

The answer to the riddle posed by this seemingly paradoxical result is the longstanding split in the Court's conservative majority between the constitutional alarmists and the environmental pragmatists. Through October Term 2018, there was almost always at least one conservative pragmatist on the Court sensitive to environmental lawmaking needs, and there were more often two such Justices. Moreover, because the environmental pragmatists on the Court could join in cases with the four more environmentally progressive Justices who were strongly sympathetic to environmental lawmaking concerns, the pragmatists controlled the outcome in all of the Court's environmental cases through October Term 2018. Environmentalists required only one conservative environmental pragmatist to join the four progressive Justices to get a favorable result.

The identifying feature of the conservative environmental pragmatists was their willingness to depart from absolutist, uncompromising conservative lawmaking principles to avoid what they perceived as nonsensical or otherwise unjust results in certain matters related to environmental protection. The latter test was very much driven by the facts of particular cases and, accordingly, supportive of legal balancing tests rather than the hard-and-fast, rigid rules favored by the constitutional alarmists. For those pragmatists, unlike the professed environmental agnostics, the ability of the law to address serious environmental issues was relevant to legal analysis and therefore, in their view, an environmental plaintiff had Article III standing, a government environmental regulation was not an unconstitutional taking of private property, and pressing national environmental problems were not outside the constitutional authority of Congress and the statutory authority of executive branch agencies.

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147 *See, e.g.*, Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 347, 361–62 (1989) (documenting increasing judicial activism benefitting anti-environmental interests).

148 *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 534–35 (2007); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 486 (2001); Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 173–74 (2000); United States v. Students Challenging Regul. Agency Procs. (SCRAP), 412 U.S. 669, 698–99 (1973).

149 *See* Farber, *supra* note 1, at 547–49 (arguing that Supreme Court decisions had not substantially affected environmental regulation).

Justices O'Connor and Kennedy were the two highly influential conservative environmental pragmatists on the Court. They effectively controlled the outcome in environmental cases for a whopping thirty-seven years: from October Term 1981, when O'Connor joined the Court,[150] through October Term 2018, when Kennedy retired from the Court.[151] Kennedy was in the majority in environmental cases in all but one case during his tenure, and in that one case, O'Connor supplied the fifth vote the majority needed.[152] Environmentalists were hard-pressed to win a case without Justice O'Connor's support, and they almost never won without Justice Kennedy's.

Although their votes, standing alone, were never sufficient to control the outcome, the votes of the Justices who were environmental progressives were of course necessary to the wins that the environmentalists did enjoy. The environmental progressives differed from the pragmatists in that they affirmatively embraced the legal evolution in administrative law, constitutional law, property rights, and judicial access precipitated by the emergence of highly ambitious and demanding environmental laws enacted by the federal, state, and local governments in waves beginning in the early 1970s. The new environmental laws were the natural successors to the New Deal legislation of the 1930s and, like those earlier laws, could be easily accommodated within the Constitution's structural and substantive limits on lawmaking. In flatly rejecting the Court's own *Lochner*-era precedent decades prior, the Court had already rejected the notion that the environmental laws somehow flouted constitutional limits.

The environmental progressives from the 1970s to the early 1990s included liberal icons such as Justices Brennan and Marshall, champions of civil rights and criminal justice causes. They also included Justices Blackmun, Stevens, and Souter, who joined the Court in 1970, 1975, and 1990, respectively.[153] What ties these three Justices together is that when the President nominated them and the Senate confirmed them, no one anticipated that they would end up playing environmentally progressive roles on the Court. Environmental law concerns played no reported role in any of their nominations or confirmations. Presumably, the safe assumption was instead that they were conservative jurists who, once on the Court, would vote in a reliably conservative way. With no known views on environmental matters, they were assumed to be agnostics.[154]

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[150] *See Justices 1789 to Present*, *supra* note 27.

[151] *Id.*

[152] Alaska Dep't of Env't Conservation v. EPA, 540 U.S. 461 (2003).

[153] *See Justices 1789 to Present*, *supra* note 27.

[154] As exemplified by the record of these five Justices, the "environmentally progressive" label does not suggest that such a Justice necessarily votes in support of legal positions favored by environmentalists. *See* Lazarus, *Restoring*, *supra* note 21, at 718–21.

By contrast, President Clinton nominated both Justices Ginsburg and Breyer to the Court because each was perceived *not* to be an environmental progressive. For each of the openings in the first two years of the Clinton administration, in 1993 and 1994, President Clinton reportedly favored then-Secretary of the Interior Bruce Babbitt, a champion of environmental protection supported by environmentalists.[155] But the President faced strong opposition from Republican leadership in the Senate because they considered Babbitt too much of an environmentalist, and they threated to block a Babbitt nomination.[156] Clinton did not want to take up that fight.[157]

While then-Judge Ginsburg was clearly a celebrated liberal in many areas and a hero to the women's rights movement in particular, her record on environmental cases on the D.C. Circuit was decidedly mixed and reliably moderate. An internal review of her votes on the appellate bench, conducted by the White House in deciding who to nominate, described Ginsburg as likely "slightly more aggressive [than] that [of] the middle of the current Supreme Court" on economic issues.[158] The analysis characterized Ginsburg's "economic opinions" as "pragmatic, fact-specific, non-ideological. Her opinions neither favor nor disfavor regulation (versus the free market)."[159] In comparing Judge Ginsburg to Judge Breyer, a subsequent White House memo concluded that "Judge Ginsburg is moderate (or perhaps slightly conservative), while Judge Breyer is clearly conservative."[160] The memo identified only two environmental cases, including one in which Ginsburg "deferred to [the National Highway Traffic Safety Administration] on whether statutory fuel-efficiency standards were economically impracticable and thus upheld laxer

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[155] Thomas L. Friedman, *Latest Version of Supreme Court List: Babbitt in Lead, 2 Judges Close Behind*, N.Y. TIMES (June 8, 1993), https://www.nytimes.com/1993/06/08/us/latest-version-of-supreme-court-list-babbitt-in-lead-2-judges-close-behind.html.

[156] Gwen Ifill, *President Is Said to Pick Babbitt for Court Despite Senate Concern*, N.Y. TIMES (May 11, 1994), https://www.nytimes.com/1994/05/11/us/president-is-said-to-pick-babbitt-for-court-despite-senate-concern.html.

[157] Thomas L. Friedman, *The 11th-Hour Scramble; After Hoping for a 'Home Run' in Choosing a Justice, Clinton May Be Just Home Free*, N.Y. TIMES (June 15, 1993), https://www.nytimes.com/1993/06/15/us/supreme-court-analysis-11th-hour-scramble-after-hoping-for-home-run-choosing.html; Gwen Ifill, *Pragmatic Jurist: Bipartisan Support Seen as Clinton Sidesteps Risky Senate Fight*, N.Y. TIMES, (May 14, 1994), https://www.nytimes.com/1994/05/14/us/supreme-court-president-chooses-breyer-appeals-judge-boston-for-blackmun-s-court.html.

[158] Memorandum from Joel Klein to Bernard Nussbaum, Couns. to the President, on Judge Ginsburg's View in Selected Areas 3 (June 11, 1993), https://clinton.presidentiallibraries.us/items/show/14693 [https://perma.cc/HN9D-DPP6].

[159] *Id.*

[160] Memorandum from Joel Klein to Bernard Nussbaum, Couns. to the President, on Judge Ginsburg's Opinions and Legal Scholarship 2 (June 11, 1993), https://clinton.presidentiallibraries.us/items/show/14693 [https://perma.cc/HN9D-DPP6].

regulatory standards."[161] In announcing her nomination at the White House, President Clinton emphasized just that: "Let me say in closing that Ruth Bader Ginsburg cannot be called a liberal or conservative. She has proved herself too thoughtful for such labels."[162] The lack of any suggestion in her record that she favored environmental regulation was a plus in favor of her nomination and subsequently her confirmation, which sailed through Congress by a vote of ninety-six to three, with one abstention.[163]

President Clinton nominated Justice Breyer one year later to fill a second opening. While the lack of any suggestion that Ginsburg favored environmental protection interests had been a major plus, what promoted Breyer's nomination was that Senate Republican leadership and the business community, consistent with the White House's own assessment of Breyer's record when the President ultimately opted for Ginsburg a year earlier, viewed Breyer as affirmatively supportive of regulatory reform that would cut back on environmental regulation. An internal White House assessment of Breyer's views, including on environmental regulation, described his views as "conservative" and described a recent book he had published, recommending "a government-wide cost/benefit approach," as mirroring the views of conservative Republicans favoring regulatory reform of environmental protection laws.[164] Another internal memo concluded that "[c]onservatives will be thrilled if Judge Breyer is appointed."[165] Republican Senate minority leader Bob Dole promised "smooth sailing" were President Clinton to nominate Breyer rather than Secretary Babbitt, and that is precisely what

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[161] *Id.* at 16. In another environmental case not cited in the Klein memorandum, Judge Ginsburg joined in full the majority ruling that upheld EPA's decision not to take action to address interstate air pollution on the grounds that Congress "has left unchecked the EPA's current approach to interstate air pollution." New York v. EPA, 852 F.2d 574, 581 (D.C. Cir. 1988).

[162] Richard L. Berke, *A Surprise Choice: President Hails Judge as Force for Consensus and Rights Pioneer*, N.Y. TIMES (June 15, 1993), https://www.nytimes.com/1993/06/15/us/supreme-court-overview-clinton-names-ruth-ginsburg-advocate-for-women-court.html.

[163] *Roll Call Vote 103d Congress–1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1031/vote_103_1_00232.htm [https://perma.cc/5BAK-VYF4]; *see also* 139 CONG. REC. 18,414 (1993).

[164] Memorandum from Joel Klein to Bernard Nussbaum, Couns. to the President, on Judge Breyer's Opinions and Legal Scholarship 6 (June 10, 1993), https://clinton.presidentiallibraries.us/items/show/14693 [https://perma.cc/HN9D-DPP6].

[165] Memorandum from Tom Perelli & Ian Gershengorn to Joel Klein, on Judge Breyer's Civil Rights, Privacy and National Security Opinions 8 (June 7, 1993), https://clinton.presidentiallibraries.us/items/show/14693 [https://perma.cc/HN9D-DPP6].

happened.[166] The Senate confirmed Breyer by a vote of eighty-seven to nine.[167]

Ironically, both Justices Ginsburg and Breyer proved to be stalwart supporters of environmental protection laws. And the then-young attorneys who wrote the critical comments about Breyer freely admitted decades later their error: "That shows why you shouldn't have second-year associates evaluating Supreme Court nominees."[168] To be sure, neither Ginsburg nor Breyer voted uniformly in favor of the legal positions supported by environmental groups, presumably because they found their arguments in some cases simply unpersuasive on the merits. And Breyer proudly embraced the "pragmatist" label, which prompted him on several occasions to moderate his views when he considered environmental protection requirements out of whack with cost-benefit analysis. In none of those cases, however, did Breyer's heightened interest in cost-benefit analysis change the outcome of the case.[169]

But neither Justice displayed any skepticism of environmental protection requirements in particular, and their votes and opinions never suggested any heightened concern regarding the tension between the demands of environmental protection law and the Constitution's structural and substantive limits on lawmaking. In almost all of the major environmental cases relating to Article III standing, regulatory takings, and statutory construction of agency authority implicating separation of powers and federalism concerns, they voted reliably in favor of environmental advocates' arguments.[170] That is why, when

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[166] Ifill, *supra* note 157.

[167] *Roll Call Vote 103d Congress–2d Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1032/vote_103_2_00242.htm [https://perma.cc/MGJ2-7TEN]; *see also* 140 CONG. REC. 18,704 (1994).

[168] *See* Robert Barnes, *Clinton Library Release of Papers on Ginsburg, Breyer Nominations Offer Insight, Some Fun*, WASH. POST (June 8, 2014) (quoting Tom Perrelli), https://www.washingtonpost.com/politics/clinton-library-release-of-papers-on-ginsburg-breyer-nominations-offer-insight-some-fun/2014/06/08/3aac9276-ed8d-11e3-9b2d-114aded544be_story.html.

[169] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 490 (2001) (Breyer, J., concurring in part) (reasoning that "other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, [rather than] forbidding" regulatory agencies from adopting "rational regulation" that considered a proposed regulation's adverse economic effects); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 233 (2009) (Breyer, J., concurring in part and dissenting in part) ("[I]n an age of limited resources available to deal with grave environmental problems, . . . too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.").

[170] *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 173–74 (2000) (standing); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 111 (1998) (Breyer, J., concurring in part) (standing); *id.* at 134 (Ginsburg, J., concurring in the judgment) (standing); Palazzolo v. Rhode Island, 533 U.S. 606, 645–46 (2001)

at least one or two conservative environmental pragmatist Justices agreed in particular matters, environmentalists won some big cases before the Court.

The final two environmental progressive Justices added before October Term 2019, Justice Sotomayor in 2009 and Justice Kagan in 2010, did not offer any pretense of moderation on environmental issues during their Senate confirmation hearings.[171] By the time of their nominations, Presidents no longer sought to appease opposition party leaders in the Senate. Sotomayor had a limited record on environmental issues, and Kagan, a legal academic who had never served as a judge, had none. But, unlike with Ginsburg and Breyer, no one was under any illusion that either Sotomayor or Kagan would be anything but a steadfast environmental progressive on the Court.

D. *Major Environmental Wins Notwithstanding the Court's Conservative Majority*

As described above, conservative environmental pragmatist Justices joined environmental progressive Justices in a striking number of important cases to produce big environmental wins from October Term 1970 to October Term 2019. Highlighted below are several of those significant environmental victories on questions of Article III standing, regulatory takings, separation of powers, and federalism.

1. *Article III Standing*

As described above, Chief Justice Rehnquist joined the majority in favor of environmental standing in the *Friends of the Earth* case in 2000, which significantly cut back on the standing rulings previously authored for the Court by Scalia that had made it much harder for environmental plaintiffs to establish standing.[172] While the Chief joining the majority was icing on the

(Ginsburg, J., dissenting) (regulatory takings); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 342 (2002) (regulatory takings); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 530 (2005) (regulatory takings); Murr v. Wisconsin, 582 U.S. 383, 406 (2017) (regulatory takings); Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174, 192 (2001) (Stevens, J., dissenting) (statutory construction); Rapanos v. United States, 547 U.S. 715, 787–88 (2006) (Stevens, J., dissenting) (statutory construction); West Virginia v. EPA, 597 U.S. 697, 753 (2022) (Kagan, J., dissenting) (statutory construction); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 490 (2001) (Breyer, J., concurring in part) (separation of powers).

[171] *See The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 111th Cong. 101–02, 188 (2010); *Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 111th Cong. 107–08 (2009).

[172] *See supra* notes 63–66 and accompanying text.

cake and underscored the extent of Justice Scalia's overreaching, the votes of Justices O'Connor and Kennedy made the critical difference. The even greater environmentalist win on Article III standing came seven years later in one of the biggest environmental cases ever decided by the Court, the climate change case of *Massachusetts v. EPA*.[173] Justice O'Connor was no longer on the Court, and it was Justice Kennedy, standing alone, who supplied the critical fifth vote that Justice Stevens needed to author the historic opinion.

2. *Regulatory Takings*

The conservative environmental pragmatists similarly eroded Justice Scalia's earlier regulatory takings precedent for the Court. And he ultimately lost the support of both Justices O'Connor and Kennedy. The first hint was Justice Kennedy's refusal to join Scalia's 1992 *Lucas* opinion on the grounds that Justice Scalia had too narrowly described the authority of government to address environmental protection regulations of ecologically sensitive and fragile lands.[174] The second shoe dropped more than a decade later in *Palazzolo v. Rhode Island*, where both Justices O'Connor and Scalia joined Justice Kennedy's narrowly written ruling for the Court in favor of the landowner, but they took sharp aim at each other in separate concurring opinions, highlighting the depth of their break.[175]

The fuller erosion of *Lucas* occurred in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Commission*[176] in 2002 and *Murr v. Wisconsin*[177] in 2017. The two cases together significantly cut back on the import of Justice Scalia's *Lucas* per se takings doctrine. In *Tahoe-Sierra*, Justice Stevens authored the majority opinion, joined by Justices O'Connor and Kennedy and from which Justice Scalia dissented, which rejected claims that *Lucas* meant that any temporary limitation on the use of private property amounted to a per se temporary taking requiring the payment of just compensation.[178] And in *Murr*, a case granted while Justice Scalia was on the Court but decided by an eight-Justice bench after his passing, the Court rejected a *Lucas* per se takings claim by adopting an analytical framework for

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[173] Massachusetts v. EPA, 549 U.S. 497 (2007).

[174] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring in the judgment).

[175] *Palazzolo*, 533 U.S. 606; *compare id.* at 636 (Scalia, J., concurring) ("I write separately to make clear that my understanding . . . is not Justice O'Connor's."), *with id.* at 632, 635 n.* (O'Connor, J., concurring) ("Justice Scalia's inapt 'government-as-thief' simile is symptomatic of the larger failing of his opinion . . . .").

[176] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 305 (2002).

[177] Murr v. Wisconsin, 582 U.S. 383, 386 (2017).

[178] *Tahoe-Sierra*, 535 U.S. at 321–23.

defining the relevant property, making future *Lucas* claims far less likely to succeed.[179] Justice Kennedy authored the *Murr* opinion.[180]

3. *Separation of Powers and Federalism*

When the Court cut back on the scope of congressional Commerce Clause authority in *United States v. Lopez* in 1995,[181] environmentalists immediately understood that two important federal environmental programs were now at constitutional risk: Section 404 of the Clean Water Act's wetlands protection program and Section 9 of the Endangered Species Act's restriction on the "taking" of endangered species.[182] By the close of October Term 2019, however, neither fear had been realized over the ensuing quarter-century since *Lopez* had been decided. Six different federal courts of appeals by then had rejected arguments that Congress exceeded its authority under the Commerce Clause by protecting wholly intrastate species under Section 9 of the Endangered Species Act.[183] And the Supreme Court had repeatedly denied petitions to review those lower court rulings.[184]

Nor had the Court ruled that the Clean Water Act's wetlands protection program exceeded the bounds of congressional Commerce Clause authority.[185] Justice Scalia, moreover, fell one critical vote short of a majority in *Rapanos v. United States*[186] in 2006, and, accordingly, of a Court ruling that would have severely cut back on the Act's reach and reinvigorated a narrow reading of

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[179] *Murr*, 582 U.S. at 397–99.

[180] *Id.* at 386.

[181] United States v. Lopez, 514 U.S. 549, 585 (1995) (striking down the federal Gun-Free Zones Act as exceeding congressional Commerce Clause authority).

[182] Lori J. Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 DUKE ENV'T L. & POL'Y F. 321, 323 (1997).

[183] People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 852 F.3d 990, 1006–08 (10th Cir. 2017); San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1175–77 (9th Cir. 2011); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 639–41 (5th Cir. 2003); Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1068–70 (D.C. Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483, 492–97 (4th Cir. 2000); Nat'l Ass'n of Homebuilders v. Babbitt, 130 F.3d 1041, 1047–55 (D.C. Cir. 1997).

[184] People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 583 U.S. 1083 (2018) (mem.), *denying cert. to* 852 F.3d 990; Stewart & Jasper Orchards v. Salazar, 565 U.S. 1009 (2011) (mem.), *denying cert. to* 638 F.3d 1163; GDF Realty Invs. v. Norton, 545 U.S. 1114 (2005) (mem.), *denying cert. to* 326 F.3d 622; Rancho Viejo, LLC v. Norton, 540 U.S. 1218 (2004) (mem.), *denying cert. to* 323 F.3d 1062; Gibbs v. Norton, 531 U.S. 1145 (2001) (mem.), *denying cert. to* 214 F.3d 483; Nat'l Ass'n of Homebuilders v. Babbitt, 524 U.S. 937 (1998) (mem.), *denying cert. to* 130 F.3d 1041.

[185] *See* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985).

[186] Rapanos v. United States, 547 U.S. 715, 719 (2006).

congressional authority to enact environmental laws.[187] As in other environmental cases, it was Justice Kennedy who deprived Justice Scalia of that fifth vote by writing a separate concurring opinion. In that opinion, Justice Kennedy agreed with Justice Scalia's bottom line—that the lower court judgment should be reversed—but he embraced a potentially expansive view of the Act's jurisdiction with generous application to the nation's wetlands, finding no serious Commerce Clause issue.[188]

Finally, the constitutional alarmists' efforts to invoke separation of powers to cut back on federal executive branch lawmaking authority had likewise been stymied. As described above, with Justice Kennedy's support, the Court had rejected the views of Justices Scalia and Thomas, who argued that EPA was transgressing those limits in the Good Neighbor interstate air pollution rule the Court instead upheld in *EME Homer*.[189] And the Court in *Massachusetts v. EPA* soundly rejected the views of Justices Scalia, Thomas, and Alito, joined by the Chief Justice, that the Clean Air Act's definition of "air pollution" was not sufficiently clear to require the inclusion of greenhouse gases causing climate change.[190] Once again, it was Justice Kennedy who supplied Justice Stevens with the critical fifth vote rejecting that view.

In sum, by mid-September 2020, as October Term 2019 was only two weeks from coming to a close and October Term 2020 was about to begin, almost fifty years of an increasingly conservative Supreme Court had failed to make much of a dent in the ambitious implementation of the extraordinary environmental laws of the 1970s. Efforts to resurrect insurmountable barriers to Article III standing for environmental citizen suits had fallen short. Regulatory takings challenges to environmental restrictions had largely failed. Environmentalists had successfully invoked the plain meaning of federal environmental laws to resist EPA interpretations that threatened to weaken those laws, and environmentalists also successfully defended reasonable EPA interpretations of ambiguous statutory language that supported tougher environmental protections. Concerns that the courts would upend important federal environmental programs on the grounds that they exceeded congressional Commerce Clause authority had largely been stymied.

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187 *See id.* at 739.

188 *Id.* at 759, 782 (Kennedy, J., concurring in the judgment).

189 EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 516–20 (2014).

190 Massachusetts v. EPA, 549 U.S. 497, 549–60 (2007).

IV. THE PORTENT OF THE CURRENT COURT FOR THE FUTURE OF ENVIRONMENTAL LAW

On September 18, 2020, Justice Ginsburg died.[191] And only a few weeks later, one week before the Presidential election and three weeks into the Supreme Court's October Term 2020, President Trump's third nominee to the Court, Justice Barrett, was confirmed and joined the Court.[192] The addition of a sixth conservative justice fundamentally changed the Court.

For decades, the environmentalists had countered the Court's constitutional alarmists and periodically secured significant wins by convincing either Justice O'Connor or Justice Kennedy of the persuasiveness of their legal arguments.[193] With Justice Gorsuch succeeding to Justice Scalia's seat, the Court traded one constitutional alarmist for another who is both much younger and potentially even more alarmist than Justice Scalia. But with Justice Kavanaugh, another constitutional alarmist, succeeding Justice Kennedy in 2018, the entire calculus changed. And then with Justice Barrett replacing Justice Ginsburg, the Court's previous balance for nearly the past four decades seemed destroyed altogether.

In the four years since Justice Barrett replaced Justice Ginsburg, environmentalists have suffered three huge defeats—each greater than any other loss during the past fifty years of environmental law in the United States. Moreover, during that same time period, environmentalists have seen no wins, whether large or small.

Those three cases share a common root: a fundamental lack of appreciation of the compelling importance of the problems the nation's environmental laws are designed to address, coupled with the majority's professed alarm over executive branch administration of federal environmental laws on the grounds that it raises serious separation of powers and federalism concerns. In all three instances, moreover, the underlying reason for the sweep of government authority troubling to the Court can be found in executive branch agency efforts to effectively address the enormous spatial and temporal dimensions presented by modern environmental problems such as climate change, water pollution, and species protection. While it is too soon for the Court to have further addressed Article III standing and regulatory takings in environmental protection contexts, the Court has already issued several rulings

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[191] Press Release, Sup. Ct. of the U.S., Regarding Justice Ginsburg (Sept. 18, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-18-20 [https://perma.cc/7732-6LNL].

[192] Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html.

[193] *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring in the judgment); Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001) (O'Connor, J., concurring).

that are portentous in terms of their future application to environmental enforcement.

A. *Separation of Powers and Federalism*

The three big environmental losses, *West Virginia v. EPA* in 2022,[194] *Sackett v. EPA* in 2023,[195] and *Loper Bright Enterprises v. Raimondo* in 2024,[196] involve two of the nation's most important environmental laws followed by an overturning of one of the most important environmental law cases ever decided by the Court. The first, *West Virginia*, threatens the authority of EPA under the Clean Air Act to address climate change in a timely manner.[197] The second, *Sackett*, dramatically reduces the geographic scope of the Clean Water Act and, accordingly, the Act's ability to protect the nation's water from harmful pollution.[198] Even more important than the immediate impact on both the Acts is the potential sweep of the Courts' reasoning in both *West Virginia* and *Sackett*, which places at risk of future judicial unraveling many of the important Supreme Court and lower court rulings favorable to environmentalists. This past June, moreover, the Court in *Loper Bright* effectuated just that risk by overruling its 1984 decision in *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*,[199] a case that, while decided during the Reagan administration, had become in recent years the linchpin of the regulatory authority of Democratic administrations to address important matters like climate change in the absence of congressional passage of new legislation.[200]

In *West Virginia v. EPA*, the Court effectively struck down the Obama Administration's signature climate change program by reversing the D.C. Circuit's ruling that the Trump Administration had acted unlawfully in repealing that program.[201] During the Obama Administration, EPA had promulgated the program at issue, the Clean Power Plan, pursuant to its claimed authority under the Clean Air Act to restrict greenhouse gas emissions from existing fossil-fueled power plants.[202]

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[194] West Virginia v. EPA, 597 U.S. 697, 734–35 (2022).

[195] Sackett v. EPA, 598 U.S. 651, 657–59 (2023).

[196] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

[197] *West Virginia*, 597 U.S. at 706, 711–14.

[198] *Sackett*, 598 U.S. at 671–73, 676–79.

[199] *Loper Bright Enters.*, 603 U.S. at 412 (2024) (overruling Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

[200] *See infra* notes 219–28 and accompanying text.

[201] *See West Virginia*, 597 U.S. at 734–35.

[202] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

No one disputed EPA's authority to restrict greenhouse gas emissions from those sources. What had made EPA regulation so controversial was that EPA claimed the relevant statutory language permitted the agency to restrict the amount an individual power plant could emit based on the capacity of other sources of the nation's electricity grid with lower greenhouse gas emissions to replace the individual plant's electricity.[203] More precisely, EPA claimed that the Act's mandate that EPA could base its restriction on the "best system of emissions reduction" permitted the agency to treat the national grid itself as the "system" and accordingly shift electricity generation on the grid from individual coal-fired facilities with higher greenhouse gas emissions to lower emission facilities dependent on natural gas, wind, solar, and hydropower.[204] In this manner, the EPA rule sought to address the enormous spatial and temporal dimensions of climate change, rooted in the fact that greenhouse gases are emitted from thousands of sources across the United States and contribute to one common global concentration of climate-change-causing gases in the troposphere.

What made the Court's decision in *West Virginia* so concerning was the sweep of its rationale. Chief Justice Roberts's opinion for the Court invoked for the first time the major questions doctrine—a doctrine of the Court's own invention—to reason that the Clean Power Plan must fail because "the history and the breadth of the authority that [the agency] has asserted" and "'the economic and political significance' of that assertion" require "clear congressional authorization" for the reviewing court to sustain the agency's action.[205] The Court further reasoned that the agency had failed to produce the required evidence of "clear congressional authorization."[206] The majority's reasoning mirrored that which the Court had rejected in *Massachusetts v. EPA* fourteen years earlier, when Justice Stevens had the benefit of Justice Kennedy's critical fifth vote.

As underscored by the *West Virginia* Court's reasoning, the extraordinary spatial and temporal dimensions of the environmental problem EPA sought to address—global climate change—are what triggered application of the major questions doctrine. Those dimensions underlie EPA's decision to extend the Clean Power Plan's reach to electricity providers across the nation's electric grid. And the Plan's reach was what prompted the Court to conclude that the Plan's validity raised a major question because it sought to "substantially

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[203] *See id.* at 64795–811 (describing generation shifting).

[204] *Id.* at 64760–68.

[205] *See West Virginia*, 597 U.S. at 721–23 (first quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000); and then quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[206] *Id.* at 732–35 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

restructure the American energy market," which the Court deemed "a 'transformative expansion in [EPA's] regulatory authority.'"[207]

The *West Virginia* Court's ruling has potentially devastating consequences. The nation—indeed, the entire planet—faces the most pressing and intractable lawmaking challenge in addressing climate change,[208] with the direst consequences if we fail to address the issue expeditiously.[209] Yet, as the Court also knows, this is a time when our most important lawmaking branch, Congress, is close to dysfunctional because of partisan gridlock that is itself rooted in climate change's overwhelming spatial and temporal dimensions.[210]

The Court's more recent Clean Water Act ruling in *Sackett v. EPA*[211] is worse still. The Court upended EPA's longstanding effort to address the spatial dimensions of water pollution by extending the Act's coverage beyond merely traditional navigable waters to waters that had a "significant nexus" to those waters—the test that Justice Kennedy had endorsed in 2006 in denying Justice Scalia the majority he sought in *Rapanos* for a sharply reduced view of the Water's Act geographic reach.[212] *Sackett* effectively provided Scalia's view with that fifth vote seventeen years later. Justice Alito authored the majority opinion for the Court and, as described above, relied on canons of statutory construction—rooted in concerns about property rights and federalism—to justify declining to give EPA any deference in support of its more expansive reading.

Here, too, water pollution's vast spatial dimensions underlie the Court's majority ruling. In rejecting EPA's interpretation of the geographic scope of the Clean Water Act, Justice Alito's majority opinion stressed the harsh implications for individual rights under EPA's approach: "[B]ecause the [Clean Water Act] can sweep broadly enough to criminalize mundane activities like moving dirt, this unchecked definition of 'the waters of the United States' means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties."[213] In rejecting the EPA rule, the Court further stressed its "truly staggering" and "vast" reach, with wetlands alone covering an area of the United States "greater than the combined surface area of California and Texas."[214]

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[207] *Id.* at 724 (quoting *Util. Air Regul. Grp*., 573 U.S. at 324).

[208] *See* LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 11, at 214–16.

[209] *See generally* Hans-O. Pörtner et al., *Summary for Policymakers*, *in* CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY (Hans-O. Pörtner et al. eds., 2022).

[210] *See* Transcript of Oral Argument at 19, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (No. 22-451) (Justice Sotomayor: "[Y]ou end up in gridlock, which we have now."); Lazarus, *The Scalia Court*, *supra* note 58, at 459.

[211] Sackett v. EPA, 598 U.S. 651 (2023).

[212] *Id.* at 671 ("[W]e conclude that the *Rapanos* plurality was correct.").

[213] *Id.* at 669–70.

[214] *Id.* at 680.

By requiring EPA to ignore water pollution's actual spatial dimensions, *Sackett* threatens to decimate the Act's ability to protect the nation's water from pollution.[215] Preliminary estimates suggest that the Court has reduced coverage of the nation's streams by as much as 80% and of the nation's wetlands by at least 50%.[216] More unsettling still, the Court's ruling will make it exceedingly hard, if not practically impossible in many circumstances, to protect those waters that the *Sackett* Court acknowledged are covered.[217] All a polluter needs to do is discharge pollution into a water body that, while no longer a statutorily covered navigable water body, is hydrologically connected to a water body that the majority agreed is covered by the Act. The government's ability to trace and restrict that remote source of pollution from contaminating the hydrologically connected covered body of water is effectively stymied because of the lack of any clear federal jurisdiction outside covered water bodies.[218]

The Court's most recent ruling in *Loper Bright*, overruling *Chevron*, confirms some of the worst fears generated by the *West Virginia* and *Sackett* decisions.[219] As described above, Justice Scalia did an about-face on the viability of *Chevron* once it became the primary basis for defending ambitious, pro-environmental regulations, especially during the Obama administration.[220] And in both *West Virginia* and *Sackett*, the Court declined to provide EPA with the kind of deference to its statutory construction that might have been supported by *Chevron*. The Court reasoned in those two cases that, wholly apart from its view that the plain meaning of the relevant statutory language in both instances defeated EPA's position, any deference to which EPA might otherwise have been entitled was defeated by the opposing major questions doctrine, federalism, and property rights canons of statutory interpretation.[221]

Relying heavily on separation of powers concerns,[222] *Loper Bright* put the final nail in *Chevron*'s coffin. The case had been the most important

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[215] *See* Richard J. Lazarus, *Judicial Destruction of the Clean Water Act:* Sackett v. EPA, 2023 U. CHI. L. REV. ONLINE 1, 2–3, https://lawreview.uchicago.edu/sites/default/files/2023-08/Lazarus%20ESSAY%20POST.pdf [https://perma.cc/BB4D-2Q8N]; *Sackett*, 598 U.S. at 720–22 (Kavanaugh, J., concurring) (collecting Army Corps' definitions of "adjacent wetlands" from 1977 to 2023).

[216] Lazarus, *supra* note 215, at 4–5.

[217] *Id.* at 6–7.

[218] Brad Plumer, *Study Finds Small Streams, Recently Stripped of Protections, Are a Big Deal*, N.Y. TIMES (June 27, 2024), https://www.nytimes.com/2024/06/27/climate/small-streams-pollution-supreme-court.html.

[219] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

[220] *See supra* notes 78–79 and accompanying text.

[221] West Virginia v. EPA, 597 U.S. 697, 716, 719–24 (2022) (major questions doctrine); Sackett v. EPA, 598 U.S. 651, 679 (2023) (federalism and private property canons).

[222] *Loper Bright Enters.*, 603 U.S. at 412 ("Judges have always been expected to apply their 'judgment' *independent* of the political branches . . . .").

administrative law precedent for nearly half a century, upon which Congress, agency officials, and courts had long relied.[223] The ruling is of enormous significance to federal environmental protection law because, in the absence of congressional passage of new national environmental legislation,[224] The EPA under Democratic administrations has relied heavily on deference to agency expertise on the meaning of existing statutory provisions to support the validity of ambitious agency regulations that have addressed problems like climate change, hazardous chemicals, and water pollution.[225] Certainly, lawyers representing regulated industry are not missing a beat. In the immediate aftermath of the *Loper Bright* ruling, they broadcast guidance inviting clients to challenge EPA's regulations, including "disobey[ing] the rule and challeng[ing] its substance as a defense to an enforcement proceeding."[226]

While no doubt significant, how large an impact *Loper Bright*'s overruling will ultimately have on federal environmental regulatory agencies' ability to do their necessary work is still far from clear. After all, the major questions doctrine had already cut back dramatically on agency deference, many existing environmental laws may fairly be read to provide the kind of express delegation of lawmaking authority outlined by *Loper Bright*, and the Court's substitute *Skidmore* deference test based on *Skidmore v. Swift & Co.*[227] will

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[223] *See generally, e.g.*, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 902 (2013); *see also* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1005, 1020 (2015).

[224] *See* Freeman & Spence, *supra* note 20, at 20–22.

[225] *See, e.g.*, California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision, 87 Fed. Reg. 14332 (Mar. 14, 2022); Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328); Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39124 (May 8, 2024) (to be codified at 40 C.F.R. pt. 302); National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35422 (May 1, 2024) (to be codified at 40 C.F.R. pts. 1500–08); New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 89 Fed. Reg. 39798 (May 9, 2024) (to be codified at 40 C.F.R. pt. 60).

[226] *See* Sean Marotta & Danielle Desaulniers Stempel, *Five Things Companies Can Do Now that* Chevron *Deference Is Dead*, BLOOMBERG L. (June 28, 2024), https://news.bloomberglaw.com/us-law-week/five-things-companies-can-do-now-that-chevron-deference-is-dead; Tony Romm, *Corporate Lobbyists Eye New Lawsuits After Supreme Court Limits Federal Power*, WASH. POST. (June 30, 2024), https://www.washingtonpost.com/business/2024/06/30/chevron-supreme-court-corporate-lobbying.

[227] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

still allow for some judicial deference, most likely depending on how friendly a particular judge is to the agency's action.[228]

Finally, separate concurring opinions by constitutional alarmists in both *West Virginia* and *Sackett* are even more troubling because they suggest future imposition of absolute limits on Congress's ability to enact laws that authorize federal expert agencies to address important environmental issues. In *West Virginia*, Justice Gorsuch filed a separate opinion, which Justice Thomas joined, that stressed the major questions doctrine's central role in "protect[ing] foundational constitutional guarantees,"[229] including that the nondelegation doctrine requires that "important subjects . . . must be entirely regulated by the legislature itself."[230] Those nondelegation doctrine roots, if subsequently brought to the surface, could limit Congress's ability to delegate significant environmental lawmaking authority to agencies because the temporal and spatial sweep of environmental protection laws necessarily have the kind of enormous economic implications for vast parts of the American economy that trigger Justices Gorsuch's and Thomas's concern. Similarly, as previously described, Justice Thomas filed a separate opinion in *Sackett*, which Justice Gorsuch joined, that cast doubt on the constitutionality of much of federal environmental law on the grounds that Congress had for decades relied on an unduly expansive view of the Commerce Clause in passing such laws.

For neither Justice, in either case, were the potentially devastating implications of such a massive reduction in governmental environmental lawmaking authority even relevant to the legal question presented. Their overriding concern was to "safeguard that foundational constitutional promise" regarding the limits on lawmaking grounded in both separation of powers and federalism.[231]

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[228] Ann Carlson, *Is* Loper v. Raimondo *Really the Power Grab Commentators Assume?*, LEGAL PLANET (June 28, 2024), https://legal-planet.org/2024/06/28/is-loper-v-raimondo-really-the-power-grab-commentators-assume [https://perma.cc/UK2D-WNW4]; Dan Farber, *Judicial Review After Loper Bright*, LEGAL PLANET (July 2, 2024), https://legal-planet.org/2024/07/02/judicial-review-after-loper-bright [https://perma.cc/U8V2-FZ45]; Andrew C. Mergen & Sommer H. Engels, *The World Goes On: What's Next for the Agencies*, YALE J. ON REG.: NOTICE & COMMENT (July 12, 2024), https://www.yale jreg.com/nc/the-world-goes-on-whats-next-for-the-agencies-by-andrew-c-mergen-sommer-h-engles [https://perma.cc/GUE3-UTZG].

[229] West Virginia v. EPA, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring).

[230] *Id.* at 737 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 20 (1825)).

[231] *Id.* at 753; *see* Sackett v. EPA, 598 U.S. 651, 708–09 (2023) (Thomas, J., concurring) ("By departing from this limited meaning [of the Commerce Clause], the Court's cases have licensed federal regulatory schemes that would have been 'unthinkable' to the Constitution's Framers and ratifiers.").

B. *Article III Standing*

During the most recent four completed Supreme Court Terms, the Court has not decided any Article III standing case arising in the environmental context in which the standing of environmental plaintiffs was at issue.[232] The Court, however, has decided three Article III standing issues with potentially significant implications for the standing of environmental plaintiffs in future cases.[233] The import of all three rulings, moreover, is to further limit environmental plaintiffs' Article III standing consistent with the views of Justice Scalia, as expressed in his opinion for the Court in *Lujan v. Defenders of Wildlife* and in his law review article before joining the Court.

The first, *TransUnion LLC v. Ramirez*,[234] was decided during Justice Barrett's first year on the Court, October Term 2020, and underscores the significance of a six- rather than five-Justice conservative majority. At issue in *TransUnion* was the Article III standing of a class of plaintiffs who alleged violations of the Fair Credit Reporting Act.[235] The Court ruled that those who could allege only the risk for future harm, and not current harm, could not satisfy the standing requirement for "concrete harm" in a suit for damages.[236] The Court made clear that the standing requirement in a suit for injunctive relief was different: a risk of future harm that is sufficiently imminent and substantial *can* satisfy the concrete harm requirement.[237] The Court rejected the plaintiffs' contention that the existence of a citizen-suit provision in the relevant statute shifted the analysis in favor of their standing.[238]

The relevance to environmental law is twofold. First, much environmental injury alleged by environmental plaintiffs is based on risk of future harm, which by definition makes it hard to characterize as "imminent" in nature. Indeed, guarding against the risk of such future harm is precisely the goal of many environmental protection statutes.[239] The *TransUnion* Court's reasoning,

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[232] Standing was at issue in *West Virginia v. EPA*, but only with respect to regulated parties. *See* 597 U.S. at 718–20. The Court thus did not consider the Article III standing of *environmental* parties.

[233] *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021); United States v. Texas, 599 U.S. 670, 676 (2023); Food & Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367 (2024).

[234] *TransUnion*, 594 U.S. at 417.

[235] *Id.* at 417–18.

[236] *Id.* at 433–38.

[237] *Id.* at 435.

[238] *Id.* at 426.

[239] *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 104, 42 U.S.C. § 9604 (authorizing action to respond to "substantial threat of release" of "any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare"); National Environmental Policy Act of 1969 § 2, 42 U.S.C. § 4321 ("The purposes of this chapter are . . . to promote efforts which will prevent or eliminate damage to the environment . . . .").

however, casts doubt on the sufficiency of such an allegation of risk of future injury, absent obvious "imminence" to satisfy Article III requirements. In *Massachusetts v. EPA*, a five-Justice majority concluded that the allegations of climate injury, though often rooted in future risks and lacking classic "imminence," were nonetheless sufficient to meet Article III requirements.[240] No Justice in that five-Justice majority, however, is still on the Court; three who dissented still are,[241] and three of the five new Justices who have joined the Court since *Massachusetts* seem more inclined to agree with the dissent than the majority. All of those three (Justices Gorsuch, Kavanaugh, and Barrett) voted with the majority in *TransUnion*.[242]

The second recent Article III case is *United States v. Texas*.[243] In that case, the Court held that Texas and Louisiana lacked Article III standing to challenge new immigration-enforcement guidelines issued by the U.S. Department of Homeland Security.[244] The Court flatly rejected the states' claim that the Court's decision in *Massachusetts v. EPA* supported their standing in *Texas*.[245]

Although the majority plausibly distinguished the two cases, both a separate concurring opinion and a dissenting opinion were having none of it. And their reasoning may well forecast the demise of the important climate standing analysis endorsed by the Court in *Massachusetts*. In his concurring opinion, Justice Gorsuch left no doubt of his disagreement with the standing analysis in *Massachusetts* and his agreement with the dissent in that case.[246] Indeed, notwithstanding the majority's effort to distinguish *Massachusetts* from *Texas*, Justice Gorsuch advised the "lower courts" to "just leave . . . on the shelf in future [cases]" *Massachusetts*'s core notion that States enjoy "special solicitude" in standing analyses.[247]

Justice Alito, by his nature, was even more direct and brutal. In an arguably mocking fashion, Alito described *Massachusetts* as "the most important environmental law case ever decided by the Court."[248] He sharply criticized the majority's effort to distinguish *Massachusetts* from *Texas* and suggested "most importantly" that "this monumental decision has been quietly interred" by the *Texas* majority.[249]

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[240] Massachusetts v. EPA, 549 U.S. 497, 521–24 (2007).

[241] *See id.* at 535 (Roberts, C.J., dissenting, joined by Thomas & Alito, JJ.).

[242] *TransUnion*, 594 U.S. at 415.

[243] United States v. Texas, 599 U.S. 670 (2023).

[244] *Id.* at 674–76.

[245] *Id.* at 685 n.6.

[246] *Id.* at 688 (Gorsuch, J., concurring in the judgment).

[247] *Id.* at 688–89.

[248] *Id.* at 722 (Alito, J., dissenting) (quoting RICHARD J. LAZARUS, THE RULE OF FIVE: MAKING CLIMATE HISTORY AT THE SUPREME COURT 1 (2020)).

[249] *United States v. Texas*, 599 U.S. at 724 (Alito, J., dissenting).

The third and most recent case, *Food and Drug Administration v. Alliance for Hippocratic Medicine*,[250] may be the most portentous of all for environmental standing, even though the circumstances of that case would seem on their face to bear no remote relation to environmental law. The Court in *Alliance* ruled against the standing of the plaintiffs who challenged the legality of the FDA's approval of mifepristone, an abortion drug.[251] What is significant for environmental citizen-suit standing is that Justice Kavanaugh's opinion for the Court in *Alliance* cited favorably and quoted from Justice Scalia's (in)famous 1983 law review article that called for limiting environmental citizen-suit standing.[252] Justice Kavanaugh's citation was not happenstance. He effectively used a case that reached results that the progressive Justices favored—dismissing on standing grounds a challenge to federal approval of the abortion pill—to smuggle into the Court's precedent a strikingly hostile view of environmental citizen-suit standing.

C. *Regulatory Takings*

Since Justice Barrett joined the Court four years ago, the Court has decided one regulatory takings case arising in the context of an environmental controversy and one other takings case not arising in the context of environmental protection. Both strongly suggest that the current Court's conservative makeup is on track to expand regulatory takings doctrine to the detriment of environmental protection.

At issue in *Cedar Point Nursery v. Hassid*,[253] decided in 2021, was the constitutionality under the Fifth Amendment's Just Compensation Clause of a state law that provided labor organizations the right of physical access to the private property of an agricultural business to solicit support from that business's employees for their unionization.[254] By a vote of six to three, the Court ruled that the state access requirement amounted to a per se physical taking requiring the payment of just compensation.[255]

What made the Court's ruling concerning to environmentalists was the majority's readiness to equate what government regulators viewed as a provision for temporary access, sharply limited in duration and frequency, to a physical appropriation. As characterized by the three dissenting Justices, such an access regulation "does not 'appropriate' anything . . . [it instead] allows only a *temporary* invasion of a landowner's property [that] amounts to a taking

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[250] U.S. Food & Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367 (2024).

[251] *Id.* at 372.

[252] *Id.* at 379 (quoting Scalia, *supra* note 59, at 882); *see supra* notes 59–62 and accompanying text.

[253] Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021).

[254] *Id.* at 143.

[255] *Id.* at 149–52.

only if it goes 'too far.'"[256] The related concern of governmental regulators and environmentalists is that the *Cedar Point* rationale will promote claims that efforts by government officials to enter private property to inspect for violations—including violations of pollution control laws—will be declared as per se takings, frustrating environmental enforcement efforts.[257]

More recently, in *Sheetz v. County of El Dorado*,[258] the Court expanded the reach of the Court's regulatory takings ruling in *Nollan v. California Coastal Commission*, authored by Justice Scalia in his first term as a Justice, from administrative permit conditions to legislative permit conditions.[259] In *Nollan*, the Court held that conditioning a state permit allowing the addition of a second story on a home located between the Pacific Ocean and a state scenic highway on the landowner allowing the public physical access to his beach amounted to a taking requiring the payment of just compensation.[260] The *Nollan* Court ruled that such a condition was a taking of property because of the lack of an "essential nexus" between the government's claimed need (loss of visual access) to its required condition (physical access), given the paramount right of a landowner to exclude others from their property.[261] In *Sheetz*, the Court agreed that the *Nollan* takings doctrine on unconstitutional permit conditions applied to a California county legislative law that required applicants for certain types of development permits to pay a traffic impact mitigation fee.[262] The potential extension of *Nollan* and *Dolan* to governmental impact fees may cast a cloud over local land-use laws that routinely impose impact fees on developers "to support vital public health and environmental services like the provision of safe, reliable drinking water and sanitation."[263]

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[256] *Id.* at 165 (Breyer, J., dissenting).

[257] *See* Aziz Z. Huq, *Property Against Legality: Takings After* Cedar Point, 109 VA. L. REV. 233, 261–62 (2023); Brief of Senators Sheldon Whitehouse et al. in Support of Respondents at 19–22, *Cedar Point*, 594 U.S. 139 (No. 20-107). *But see* Olivia Johnson, Note, *Let the Exceptions Do the Work: How Florida Should Approach Environmental Regulation After* Cedar Point Nursery v. Hassid, 77 U. MIAMI L. REV. 258, 286–92 (2022) (framing environmental regulation as part of public health and safety exceptions constituting traditional background legal principles).

[258] Sheetz v. County of El Dorado, 601 U.S. 267 (2024).

[259] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827 (1987).

[260] *Id.* at 831.

[261] *Id.*

[262] *Sheetz*, 601 U.S. at 276–77.

[263] Brief of Amici Curiae National Association of Clean Water Agencies and Association of Metropolitan Water Agencies in Support of Respondent at 10, *Sheetz*, 601 U.S. 267 (No. 22-1074).

V. CONCLUSION

It is, to say the least, a portentous time for environmental law. While there is much reason to celebrate U.S. environmental law's achievements during the past fifty years, its future is not bright. Congress remains broken and unable to offer an effective forum to pass needed legislation and update statutes that Congress enacted decades ago.[264] And a Supreme Court increasingly dominated by constitutional alarmists seems ready to strike down needed federal agency lawmaking efforts absent the very clear congressional authorization that a paralyzed Congress displays no ability to provide.

To be sure, the Court has tilted significantly toward conservatism ever since the dawning of the modern environmental law era of the United States in the early 1970s. Until recently, however, even a consistently and increasingly conservative Supreme Court did not stand much in the way of the nation's environmental laws because of the persistent presence on the bench of conservative yet environmentally pragmatic Justices. That all dramatically changed between October 2018 and October 2020 when Justice Kavanaugh replaced Justice Kennedy and Justice Barrett succeeded Justice Ginsburg. For the first time, the Court became dominated by six conservative Justices absent the environmental pragmatism of the past.

During the past three years, the Court has handed down three of the worst defeats ever suffered by environmentalists in the past five-plus decades.[265] The Court also seems ready to do more. During the final weeks and days of October Term 2023, the Court granted review in two more cases in which it seems at least initially inclined to rule against environmental protection concerns. One case threatens to undermine the ability of the Clean Water Act to address water quality concerns.[266] And the second case threatens to dramatically cut back on the ability of the National Environmental Policy Act

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[264] The obvious exceptions to the longstanding congressional logjam are the passage of the Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58, 135 Stat. 429 (codified in scattered sections of 42, 26, and 23 U.S.C.), and the Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (codified in scattered sections of 42, 26, and 23 U.S.C.), both of which provide hundreds of billions of dollars in new federal spending and economic incentives to accelerate a transition to a more carbon free economy. Such omnibus budget reconciliation measures, which avoid Senate filibusters, can sidestep the kind of executive branch action that is more readily subject to judicial review, though there are clear practical limits on Congress's ability to spend enough on an ongoing basis to achieve necessary levels of environmental protection.

[265] The Court's ruling in *Ohio v. EPA*, 603 U.S. 279, 300 (2024), staying EPA's interstate air pollution rule, is also a major defeat with foreboding consequences for future environmental protection rules, especially as it calls into question the ability of federal agency rules to survive arbitrary-and-capricious review. But the case formally pertains only to a threshold procedural matter, which can be discussed in future scholarship.

[266] City & Cnty. of San Francisco v. EPA, 75 F.4th 1074 (9th Cir. 2024), *cert. granted*, 144 S. Ct. 2578 (mem.) (2024).

to require agency consideration of all environmental impacts of agency action, including those effects both upstream and downstream of the action itself.[267]

Nor could this have happened at a worse time. The Court's rulings threaten to undermine the government's ability to address the pressing issue of climate change, among other important environmental issues. For climate change in particular, however, the price of such lawmaking delays may well prove catastrophic. The longer it takes to reduce otherwise-increasing concentrations of atmospheric greenhouse gases, the exponentially harder it will be to bring those concentrations down before irreversible consequences make it practically impossible to do anything at all.

Perhaps more moderate voices will emerge from within the conservative wing of the Court to allow for the return of the effective environmental lawmaking the nation now very much needs.[268] But for those who care as much as I do about these issues, there seems little reason to expect the Court will offer any rescues. For the first time in modern U.S. environmental law's history, the Court presents a major obstacle to protecting public health and the environment. The Court, for worse and not for better, now matters a lot. It will ultimately require the votes not of judges or Justices, but of individual Americans, to reestablish the environmental lawmaking apparatus that the current Court now threatens.[269]

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[267] Eagle County v. Surface Transp. Bd., 82 F.4th 1152 (D.C. Cir. 2023), *cert. granted sub nom.*, Seven County Infrastructure Coal. v. Eagle County, 144 S. Ct. 2680 (mem.) (2024) (No. 23-975).

[268] Justice Barrett's recent dissent from the Court's June 27, 2024, ruling in *Ohio v. EPA*, staying EPA's interstate air pollution rule, suggests the possibility that Barrett may ultimately provide such a moderating voice. *See, e.g.*, *Ohio v. EPA*, 603 U.S. at 301–23 (Barrett, J., dissenting).

[269] Unfortunately, the results of the November 2024 elections, which came in as this Article went to final press, provide little reason for hope that the nation's voters are yet ready to do so. Domenico Montanaro, *Where Things Stand in the 2024 Election*, NPR, https://www.npr.org/2024/11/06/nx-s1-5182290/2024-election-results-where-things-stand [https://perma.cc/DS4U-VUTW] (Nov. 7, 2024); Jason Mark, *Six Climate and Environment Takeaways from the Election*, SIERRA CLUB (Nov. 7, 2024), https://www.sierraclub.org/sierra/trump-election-six-climate-and-environment-takeaways [https://perma.cc/D56R-NY2V].