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The Supreme Court, Environmental Regulation, and the Regulatory Environment

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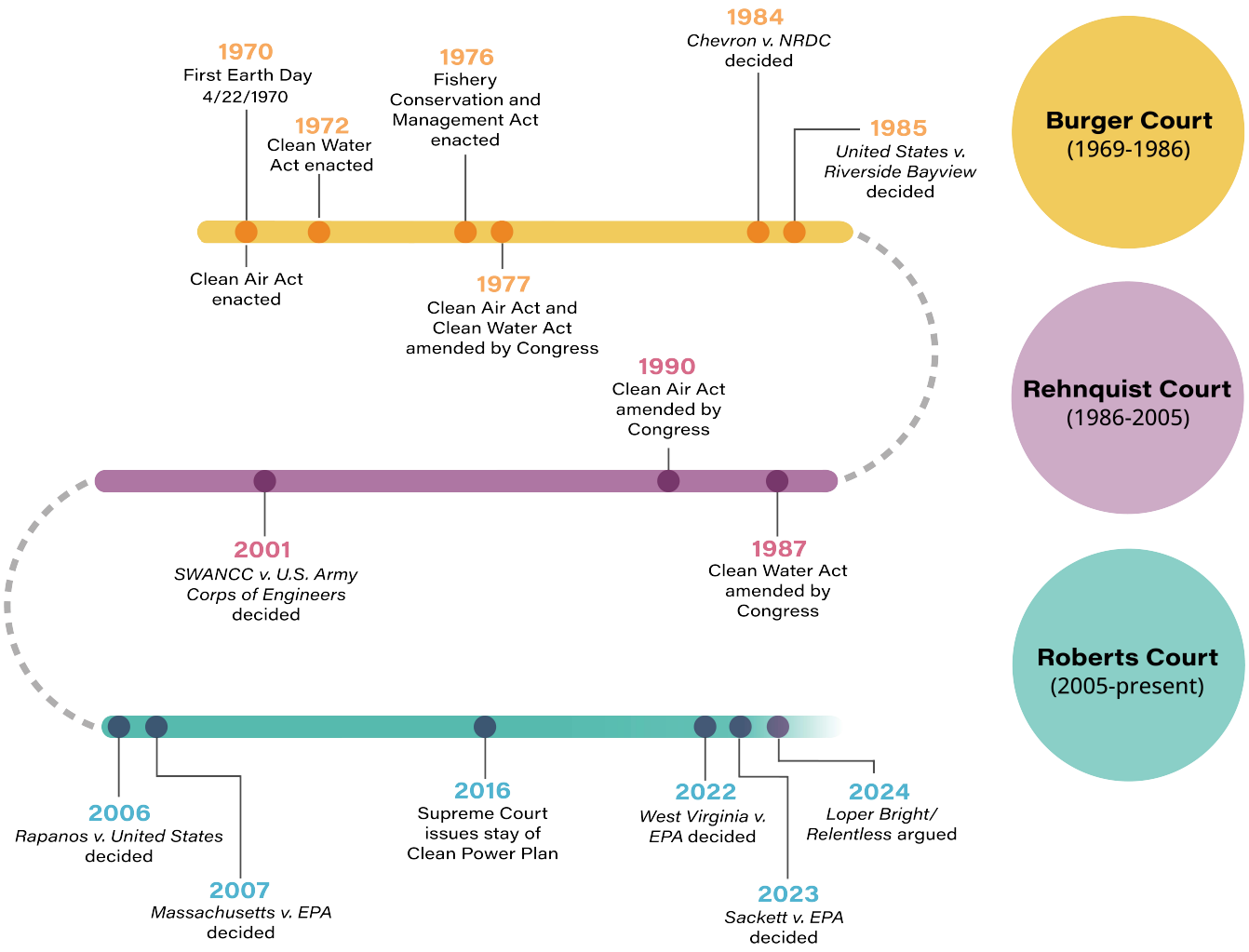

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The Environmental Law Institute makes law work for people, places, and the planet. Since 1969, ELI has played a pivotal role in shaping the fields of environmental law, policy, and management, domestically and abroad. Today, in our sixth decade, we are an internationally recognized, non-partisan publishing, research, and education center working to strengthen environmental protection by improving law and governance worldwide.

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The Supreme Court, Environmental Regulation, and the Regulatory Environment

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Prologue

This report surveys recent and past decisions of the United States Supreme Court, examines their impact on the fields of environmental law and regulatory law, and evaluates how they might affect various conservation strategies. Given the present period of rapid, highly impactful change in the Court's jurisprudence, it outlines the 50-year arc of federal environmental protection, documenting the shift from a widely held societal consensus on strong national authority to the more constrained, piecemeal approach unveiled in recent decisions.

Section I begins by discussing the Clean Air Act and *Chevron v. Natural Resources Defense Council*, the 1984 opinion that has dominated environmental and administrative law for four decades, which the Court is now deciding whether to overturn. Section II continues with the Clean Water Act and *United States v. Riverside Bayview Homes*, a seminal 1985 wetlands case that has been cast into doubt by the Court's 2023 decision in *Sackett v. EPA*. Section III looks at federal fisheries law and the pending cases of *Loper Bright Enterprises* and *Relentless*, which were argued in January 2024 and will likely be the vehicle for the Court's eventual decision about *Chevron*.

Two brief "Interludes" address the Supreme Court's recent handling of its docket and its precedents, respectively. Since the Court has near-total discretion over which cases it hears, its choices whether to accept an appeal and how to then shape the legal and factual questions presented for decision are an important, if sometimes overlooked, component of its work. Likewise, since the Court's opinions are often final — absent a subsequent act of Congress or constitutional amendment — the way it treats its prior precedents and the doctrine of *stare decisis* is also crucial to the outcomes. These two sections draw on cases beyond environmental and regulatory law to illustrate the justices' internal debate about those technical aspects, rather than for the subject matter described.

Section IV explores the potential implications of the Court overruling *Chevron*, both for environmental law and for federal regulation generally. Section V delves in-depth into the post-*Sackett* legal and policy landscape, canvassing alternative approaches being discussed for protecting streams and wetlands left exposed by that opinion's newly restrictive definition of "waters of the United States." Section VI looks broadly at remaining and future paths for environmental governance in light of the new legal backdrop.

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I. The Court and the Clean Air Act — From *Chevron* (1984) to *West Virginia* (2022)

April 22, 1970, marked the first-ever Earth Day, with an estimated 20 million Americans participating in rallies and other events across the country.[1] By July, President Richard Nixon called for assembling the U.S. Environmental Protection Agency from existing bureaus across the federal government, and by early December the first EPA Administrator, William Ruckelshaus, was sworn into office.[2]

Congress was equally quick to take action. Having enacted the National Environmental Policy Act (NEPA) at the end of 1969, it followed up the next year by enacting the Clean Air Amendments of 1970. This bipartisan legislation passed both chambers overwhelmingly,[3] and President Nixon signed it on December 31.

Often considered the first modern pollution control statute, the 1970 Clean Air Act (CAA) was a deliberate departure from earlier federal laws. It gave the newly created EPA broad authority to define and enforce national air quality standards, to be administered in cooperation with state, local, and tribal governments. Congress amended the Act in 1977 and again in 1990, each time ratifying or strengthening dozens of EPA's administrative decisions about which air pollutants were harmful to public health, what levels were acceptable, and how they should be regulated.

Despite this legislative action, executive branch policy took a deregulatory turn in 1980 following the election of Ronald Reagan. Reagan's first EPA Administrator, Anne Gorsuch, cut the Agency's budget, reduced the number of enforcement actions, and weakened environmental regulations.[4] Among other things, a 1981 EPA rulemaking interpreting the 1977 Clean Air Act Amendments eventually led to the Supreme Court decision in *Chevron v. Natural Resources Defense Council.*[5]

Chevron in Context

Chevron began as a case about a technical issue but came to hold much larger meaning. The 1977 CAA Amendments required states that are out of compliance with air quality standards to enact a permitting program for "new or modified major stationary sources" of pollution. Under Administrator Gorsuch, the EPA issued a regulation that allowed "stationary source" to be defined plantwide, looking at the total emissions across a regulated facility rather than from its individual pieces of equipment. The Natural

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[1] *Earth Day*, LIBRARY OF CONGRESS, https://www.loc.gov/item/today-in-history/april-22/ (last visited Feb. 22, 2024).
[2] *The Origins of EPA*, ENVTL PROTECTION AGENCY, https://www.epa.gov/history/origins-epa (last updated June 5, 2023).
[3] Initial bills passed 374-1 in the House of Representatives and 73-0 in the Senate before a House-Senate conference committee produced the final version. See E. W. Kenworthy, *Tough New Clean-Air Bill Passed by Senate, 73 to 0*, N.Y. TIMES (Sept. 23, 1970), https://www.nytimes.com/1970/09/23/archives/tough-new-cleanair-bill-passed-by-senate-73-to-0-a-tough-cleanair.html.
[4] Patricia Sullivan, *Anne Gorsuch Burford, 62, Dies; Reagan EPA Director*, WASH. POST (July 22, 2004), https://www.washingtonpost.com/wp-dyn/articles/A3418-2004Jul21.html. Gorsuch was the mother of current U.S. Supreme Court Justice Neil Gorsuch.
[5] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

Resources Defense Council challenged this so-called "bubble" approach, and the U.S. Court of Appeals for the D.C. Circuit voided the regulation.[6]

On appeal, the U.S. Supreme Court reversed. Writing for a unanimous Court, Justice John Paul Stevens formulated what became known as the "*Chevron* two-step":

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter…. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute…. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[7]

Here, dancing the two-step meant the regulation would stand; by declining to elaborate on the application of "stationary source," Congress had in effect delegated that authority to EPA, and the bubble concept was "a reasonable policy choice for the agency to make." As Justice Stevens pointed out, this "principle of deference" to an agency interpretation was not something new, but "well-settled" in the Court's precedents going back decades.[8]

Chevron's Legacy

The Court's 1984 decision in *Chevron* had an immediate effect on implementation of the Clean Air Act, upholding the Reagan Administration's and industry's position on the permitting question. But Justice Stevens' restatement of how courts should review agency actions had broad impact across the entire federal government. By a recent tally, the Court has cited *Chevron* in 244 subsequent decisions and applied its two-step framework at least 100 times over three decades, not to mention countless instances in the lower courts.[9] Those cases include a variety of environmental issues, but also run the gamut from labor law to health care, financial regulation, consumer protection, and many other topics.[10]

There are a number of reasons asserted for why the *Chevron* test has proliferated and endured. For starters, it acknowledges the reality that members of Congress often lack the time, technical knowledge, or political will to legislate in detail; rather, "they rely, as all of us rely in our daily lives, on people with greater expertise and experience."[11] Nor can they always anticipate the path of complex issues or respond to every future development in real time. Given this reality, where Congress chooses to delegate its authority to agencies through broad or open-ended statutory provisions, the *Chevron* framework serves to honor that intent.

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[6] Id. at 839-41.
[7] Id. at 842-43.
[8] Id. at 844-45 and cases cited; See Brief of Professor Thomas W. Merrill as Amicus Curiae in support of neither party, Loper Bright Enterprises v. Raimondo, 143 S. Ct. 2429 (2023), at 4 ("the much-cited paragraphs were not a fundamental break with the past and are traceable to important rule-of-law values.").
[9] *Loper Bright,* Merrill Amicus Brief, at 26-27.
[10] E.g., *Loper Bright*, Brief for Respondents at App. B.
[11] West Virginia v. EPA, 597 U.S. 697, 781 (2022) (Kagan, J., dissenting).

Courts have had their own reasons for employing *Chevron* and other forms of deference. Federal judges also are generalists, tasked with a heavy caseload that covers wide swaths of federal and state law. While the Supreme Court gets to choose its own limited docket, other judges must grapple with the same complex issues using a fraction of the time and resources. Rather than having them second-guess agencies, "[t]he *Chevron* framework has served as a method allowing the lower courts to engage in meaningful review of agency interpretations without having to resolve every such issue from scratch."[12] And this shared starting point has helped minimize occasions when different courts disagree about how to interpret federal law, thus promoting uniformity across the judicial system.[13]

A final reason for according respect to agencies' statutory interpretations is accountability. While not themselves elected, both political and career executive-branch employees' actions remain subject to the electoral cycle, unlike decisions by the lifetime federal judiciary. In Justice Stevens' words:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices…. When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do.[14]

This political accountability is underscored by the fact that most federal agency actions are governed by the Administrative Procedure Act (APA), a comprehensive set of procedures agencies must follow when issuing regulations and other decisions that affect private parties. Enacted in 1946, this statute predates *Chevron* but evinces a similar concern for democratic values, requiring transparency in agency decisionmaking and public participation through notice and an opportunity to comment on proposed rules. It likewise sets a deferential standard for judicial review of agency actions, providing that courts may only set aside ones that are "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."[15]

All of these principles underlying *Chevron* — gap-filling, delegation to expert agencies, judicial economy, and political accountability — are neutral: they neither dictate deference in every case nor favor a particular substantive outcome. As noted above, the result in *Chevron* was deregulatory, and over the years its legal test has been applied by conservative and liberal justices alike, yielding a variety of results even in Clean Air Act cases.[16]

Still, after nearly 40 years of *Chevron* (and almost 80 years of the APA), its framework is often identified with federal regulation. While agency delegation dates back to the very beginning of the Republic,[17] in the popular imagination it is linked to the New Deal era, when increasingly complex social and economic problems led Congress to create a number of specialized agencies. And for proponents such as Justice

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[12] *Loper Bright,* Merrill Amicus Brief, at 27.
[13] Id. at 28.
[14] *Chevron*, 467 U.S. at 865-66.
[15] 5 U.S.C. § 706(2)(A).
[16] David D. Doniger, West Virginia*, The Inflation Reduction Act, and the Future of Climate Policy*, 53 ELR 10553, 10556 (July 2023) and cases discussed.
[17] *West Virginia*, 597 U.S. at 780 (Kagan, J., dissenting).

Elena Kagan — who was an administrative law professor before she was appointed to the Supreme Court — that history is synonymous with progress:

> Over time, the administrative delegations Congress has made have helped to build a modern Nation. Congress wanted fewer workers killed in industrial accidents. It wanted to prevent plane crashes, and reduce the deadliness of car wrecks. It wanted to ensure that consumer products didn't catch fire. It wanted to stop the routine adulteration of food and improve the safety and efficacy of medications. And it wanted cleaner air and water. If an American could go back in time, she might be astonished by how much progress has occurred in all those areas. It didn't happen through legislation alone. It happened because Congress gave broad-ranging powers to administrative agencies, and those agencies then filled in—rule by rule by rule—Congress's policy outlines.[18]

Chevron in Eclipse?

Perhaps because of this association with the "administrative state," in recent years *Chevron* has fallen out of favor at an increasingly conservative Supreme Court. The Court's decisions have not used *Chevron* to defer to an agency interpretation in seven years.[19] Instead, the new majority has preferred to find signs of clear Congressional intent at *Chevron* "step one"; carved out exceptions to the *Chevron* test in a number of circumstances; and signaled, through various dissents and concurrences, its willingness to reconsider the entire doctrine.[20]

Chevron is still valid law and still holds sway in lower federal courts, notably the D.C. Circuit, which hears a large portion of the cases about regulatory law. But the Supreme Court's signals on *Chevron* have encouraged litigation arguments and judicial opinions that further undermine it. In the Court's current term, that effort has come to a head in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*,[21] a pair of fisheries cases that for the first time are openly inviting the justices to discard the *Chevron* framework.

But even before agreeing to hear those appeals (and regardless of their outcome), the Court had already weakened agency deference and greatly expanded federal judges' power to second-guess regulations. As with *Chevron*, this far-reaching development arrived in the context of a Clean Air Act case.

West Virginia and "Major Questions"

On January 19, 2021, the last full day of the Trump Administration, the D.C. Circuit issued a decision vacating the Affordable Clean Energy (ACE) Rule. The ACE Rule represented that Administration's attempt to regulate greenhouse gases from fossil fuel-fired power plants, and was challenged as too lenient by a coalition of environmental groups, 23 states, and even some power companies. The court found the Trump EPA had read the Clean Air Act narrowly to limit regulation to individual plant sites, as opposed to systemic measures such as fuel-switching or emission credit trading. It rejected EPA's legal

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[18] Id. at 782.
[19] Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves,* YALE J. ON REG. (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended/; Doniger, 53 ELR at 10557.
[20] McKinney (2022); Doniger, 53 ELR at 10560-62; see Section III below.
[21] *Loper Bright*, 143 S. Ct. 2429; Relentless, Inc. v. U.S. Dep't of Commerce, 62 F.4th 621 (1st Cir. 2023). These cases are discussed in more detail in Section III below.

assertion that including such measures would have posed a "major question" left unanswered by Congress when it passed the Act.[22]

The decision at first appeared to clear the way for the incoming Biden Administration, which had been planning to repeal the ACE Rule in favor of more expansive policies. However, despite the Biden EPA's assurance that no rule was in effect and its own effort was still under development, the ACE Rule's proponents — some utilities and a group of states led by West Virginia — moved ahead and appealed the ruling to the Supreme Court.

West Virginia v. Environmental Protection Agency involves Section 111 of the Clean Air Act, a broad provision directing EPA to regulate stationary air pollution sources using the "best system of emission reduction which … has been adequately demonstrated." This provision was the basis for both the ACE Rule and the prior Clean Power Plan, an Obama-era regulation that interpreted "best system" to include shifting generation to cleaner sources. That effort had first been stayed in court, then repealed by the Trump Administration; but West Virginia argued that its potential reinstatement, no matter how speculative, warranted judicial intervention.[23] The Supreme Court accepted the case, in the process transforming it into a vehicle for opining on the past, present, and future of greenhouse gas regulation.

In 2022, in a landmark 6-3 ruling, the Court held that the Act's "best system of emission reduction" can't include the sort of measures embodied by the Clean Power Plan. Writing for the conservative supermajority, Chief Justice John Roberts declared that "this is a major questions case"[24] requiring extra scrutiny: "there are extraordinary cases that call for a different approach—cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."[25] Since fuel-switching or emission trading would implicate the energy system as a whole, Roberts concluded, "it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d)."[26]

Justice Kagan argued in dissent that the majority's analysis conflates the question of *whether* Congress has delegated authority with the question of the delegation's *breadth*. In her view many statutory delegations are clear yet "major" and open-ended by design, particularly where the subject matter, such as air pollution, is itself open-ended: "Congress wanted and instructed EPA to keep up. To ensure the statute's continued effectiveness, the 'best system' should evolve as circumstances evolved—in a way Congress knew it couldn't then know. EPA followed those statutory directions to the letter when it issued the Clean Power Plan."[27] By failing to recognize this, she lamented, "the Court substitutes its own ideas about policymaking for Congress's."[28]

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[22] Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021); see Doniger, 53 ELR at 10563.
[23] See the first Interlude below for the procedural history.
[24] *West Virginia*, 597 U.S. at 724.
[25] Id. at 721.
[26] Id. at 735.
[27] *West Virginia*, 597 U.S. at 778 (Kagan, J., dissenting).
[28] Id. at 783.

The Aftermath

The *West Virginia* decision simultaneously put the final nail in the Clean Power Plan's coffin and established constraints for the Biden Administration's forthcoming proposed power plant rule.[29] And its broader implications for agency action have already spawned more reactions and commentary than any administrative law case since *Chevron* itself. Tellingly, Roberts' opinion made no mention of *Chevron*, favorable or unfavorable; in crafting the major questions exception, his majority in effect created a step outside the *Chevron* framework, with the meaning of "major question" left to be fleshed out case-by-case and judge-by-judge.

Despite Roberts' claim that it is limited to "extraordinary cases," *West Virginia* has led to an explosion of major questions litigation across all areas of federal regulation. There is a Clean Air Act sequel, the challenge to the Biden Administration's vehicle emission rules, spearheaded by most of the same state attorneys general who brought *West Virginia*.[30] There has been a grab bag of suits in the lower courts,[31] ranging from challenges to federal vaccination requirements, to Clean Water Act cases,[32] to the Fifth Circuit's novel holding that the Nuclear Regulatory Commission lacks authority to license temporary storage of nuclear waste.[33] And the Supreme Court followed up by striking down, again by a 6-3 vote, President Biden's cancellation of federal student loan debt.[34]

As these arguments and opinions emerge, the major questions doctrine is beginning to take shape. Some observers have pointed to two distinct aspects of Roberts' legal test: first, "economic and political significance," which, taken by itself, would encompass almost any regulation of any consequence; but also second, "the history and the breadth of the authority … asserted," which should allow for some consideration of long-standing practice.[35] Simply put, is the agency staying in its own well-trodden lane? This distinction appeared to resonate with the D.C. Circuit panel that heard oral argument on the vehicle rules, who questioned whether Biden's EPA is attempting anything all that new.[36] That case too is likely destined for the Supreme Court.

To be sure, the doctrine's defenders argue it merely restores separation-of-powers principles—that Congress remains free to more clearly state its intent on major issues and to correct any judicial errors of statutory interpretation. And indeed, one response to *West Virginia* was inclusion in the 2022

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[29] U.S. EPA, 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, 88 Fed. Reg. 33240 (May 23, 2023); Doniger, 53 ELR at 10571-73.

[30] Texas v. EPA, No. 22-1031 (D.C. Cir., filed Feb. 28, 2022).

[31] Dan Farber, *What's a Major Question? (Judicial) Opinions Differ*, LEGAL PLANET (Sept. 25, 2023), https://legal-planet.org/2023/09/25/whats-a-major-question-opinions-differ/.

[32] North Carolina Fisheries Reform Group v Cap't. Gaston LLC, No. 21-284 9 (4th Cir. Aug. 7, 2023); see discussion in Section IV, below.

[33] State of Texas v. NRC, No. 21-60743 (5th Cir. 2023); see Ian Millhiser, *America's Trumpiest Court Just Put Itself In Charge of Nuclear Safety*, VOX (Aug. 29, 2023), https://www.vox.com/2023/8/29/23849054/supreme-court-nuclear-safety-fifth-circuit-james-ho-radioactive-texas-commission.

[34] Biden v. Nebraska, 600 U.S. ___, slip op. (2023); see further discussion in the first Interlude, below.

[35] E.g., Jay Austin, Sharon Jacobs, Gerald Torres, & Robert Percival, *Dialogue: Annual Supreme Court Review and Preview*, 54 ELR 10005 (Jan. 2024).

[36] Avalon Zoppo*, DC Circuit Grapples With 'Major Questions Doctrine' in Vehicle Emissions Case*, LAW.COM (Sept. 15, 2023), https://www.law.com/nationallawjournal/2023/09/15/dc-circuit-grapples-with-major-questions-doctrine-in-vehicle-emissions-case/.

Inflation Reduction Act of provisions reaffirming EPA's authority to regulate greenhouse gas emissions from power plants and other sources.[37] But these increasingly rare moments stand in sharp contrast to Congress' overall inability to legislate in detail, and they argue for even greater respect for the overwhelmingly bipartisan Clean Air Act consensuses of 1970, 1977, and 1990.

Another emerging challenge is the potential increase in judicial caseloads. "Major questions" is already an invitation to parties and judges predisposed to read federal statutes anew, though Congress and the agencies may yet find ways to adapt to it. But litigants' next target, the demise of *Chevron*, would impose that interpretive task on any judge weighing a challenge to an agency regulation.[38] Plaintiffs would be emboldened, caseloads would increase, and lower courts might need to revive other deference frameworks, or create new ones, to avoid being swamped by matters beyond their expertise or venturing into policymaking. Meantime, the work of the federal agencies will be hobbled.

Ultimately, the arc from the Court's unanimous *Chevron* opinion to the hotly contested opinions in *West Virginia* reflects a fundamental disagreement about who, the executive or the judiciary, is entitled to implement Congress' intent in something closer to real time. Justice Stevens resolved that disagreement in favor of "the political branch,"[39] while the current Court majority has nominated itself. As David Doniger, who argued the original *Chevron* case for NRDC, recently summed up:

> the major questions doctrine has broad and ominous implications for the federal government's capacity to meet the many complex challenges of our modern economy and society … the real effects of the new doctrine are to make judges the principal arbiters of whether our government can meet big new challenges.[40]

[37] Greg Dotson & Dustin J. Maghamfar, *The Clean Air Act Amendments of 2022: Clean Air, Climate Change, and the Inflation Reduction Act*, 53 ELR 10017 (Jan. 2023); Doniger, 53 ELR at 10568-71.
[38] See Sections III and IV.
[39] *Chevron*, 467 U.S. at 865.
[40] Doniger, 53 ELR at 10554.

II. The Court and the Clean Water Act — From *Riverside Bayview* (1985) to *Sackett* (2023)

Just one year after deciding *Chevron*, the Supreme Court heard its first major case under the Clean Water Act (CWA). Enacted in 1972, that Act was also a product of the Earth Day movement;[41] it amended earlier, ineffective federal water pollution laws[42] that had left most implementation and enforcement to the states. In another explicit departure from the past, Congress declared its intent "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," including an ambitious goal "that the discharge of pollutants into the navigable waters be eliminated."[43]

To further that intent, Congress also redefined the long-standing statutory term "navigable waters" to mean "waters of the United States"[44] (often shortened to "WOTUS"). While it did not elaborate, both legislative history and early court decisions make clear that

> [i]n adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.[45]

The meaning of WOTUS is central to the two main CWA permitting programs: Section 402's National Pollutant Discharge Elimination System, which prohibits the discharge of pollutants from "point sources" (like factories or sewer systems) into WOTUS without a permit; and Section 404's prohibition on discharging "dredged or fill material" (typically from construction or other waterside or instream activity) into WOTUS without a permit.[46] U.S. EPA administers the former together with state environmental agencies, and the latter in coordination with the U.S. Army Corps of Engineers, which issues the dredge-and-fill permits.

Calm Waters — *Riverside Bayview*

In 1985, in *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court was asked to decide whether an Army Corps regulation could legally include in WOTUS "freshwater wetlands" that are adjacent to other covered waters. The regulation further defined wetlands as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support … a

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[41] The CWA initially passed the House by a vote of 366-11, and the Senate 74-0. President Nixon vetoed the bill but his veto was overridden by votes of 247-23 and 52-12. Ellen Simon, *The Bipartisan Beginnings of the Clean Water Act*, WATERKEEPER ALLIANCE (Jan. 30, 2019), https://waterkeeper.org/news/bipartisan-beginnings-of-clean-water-act/.

[42] *History of the Clean Water Act*, ENVTL PROTECTION AGENCY, https://www.epa.gov/laws-regulations/history-clean-water-act (last updated June 22, 2023).

[43] 33 U.S.C. § 1251.

[44] 33 U.S.C. § 1362(7).

[45] U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (citing the 1972 Senate Conference Report); see also Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

[46] 33 U.S.C. §§ 1342, 1344.

prevalence of vegetation typically adapted for life in saturated soil conditions."[47] The Sixth Circuit had denied the Corps jurisdiction over "80 acres of low-lying, marshy land" in Michigan, stating that the regulation was "overbroad and inconsistent with the language of the Act."[48]

By a 9-0 vote, the Supreme Court upheld the Corps' definitions. While acknowledging that the statutory text was inconclusive, Justice Byron White applied the recently decided *Chevron* opinion to hold that "the language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act."[49] Notably, he gave much less weight to semantic analysis than to Congress' "broad, systemic view" of the ecological problem:

> On a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters." Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under §404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat.[50]

In Justice White's unchallenged view, not only can wetlands reasonably count as waters, their presence or absence is vitally important to WOTUS as a whole: "the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water."[51] And this conclusion was unaltered by the 1977 amendments to the Clean Water Act, which resulted in Congress leaving the WOTUS definition intact.[52]

In short, 15 years after the first Earth Day, all three federal branches were still in alignment: a unanimous Supreme Court found itself embracing Congress' capacious grant of regulatory authority, while deferring to the Corps' and EPA's scientific expertise in implementing it.

Making a Splash — *Rapanos*

Despite rumblings from the regulated community — primarily agricultural and real estate interests — the *Riverside Bayview* consensus persisted for at least another 15 years. "No net loss of wetlands" remained executive branch policy through both George H.W. Bush's and Bill Clinton's presidential administrations.[53] In 2001, the Rehnquist Court set one outer limit to WOTUS, ruling 5-4 that the Corps could not apply its migratory bird rule to "an abandoned sand and gravel pit" (not a wetland) with no other connection to covered waters.[54] Lower courts remained steadfast in upholding federal wetlands jurisdiction, and the Supreme Court declined to hear subsequent appeals. But following George W. Bush's two appointments to the Court, the remaining consensus came undone.

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[47] *Riverside Bayview*, 474 U.S. at 124.
[48] Id. at 124 and 125 n.3.
[49] Id. at 139.
[50] Id. at 132.
[51] Id. at 135.
[52] Id. at 135-39.
[53] E.g., J.B. Ruhl & James Salzman*, No Net Loss? The Past, Present, and Future of Wetlands Mitigation Banking*, 73 CASE W. RSRV. L. REV. 411 (2022).
[54] Solid Waste Agency of Northern Cook Cty. v. Army Corps of Eng'rs, 531 U.S. 159 (2001). Justice Stevens, the ardent defender of *Chevron* deference, authored the dissent.

On February 21, 2006, the Court held oral argument on *Rapanos v. United States*, the first environmental case heard by new Chief Justice John Roberts and Associate Justice Samuel Alito (and Alito's first day on the bench). Again arising in Michigan, *Rapanos* raised the question of whether wetlands adjacent to tributaries of navigable waters, or adjacent wetlands separated by a man-made berm, could be regulated as WOTUS. With Justice Stevens the only remaining signer of the *Riverside Bayview* opinion, the issue was now in front of a completely different Court.

This time the justices split along ideological lines, producing a 4-1-4 vote, five separate opinions, and no clear outcome.[55] Justice Antonin Scalia, writing for himself, Roberts, Alito, and Justice Clarence Thomas, used precisely the kind of dictionary analysis rejected in *Riverside Bayview*, opining that WOTUS "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] … oceans, rivers, [and] lakes,'" — a definition he found not just clear, but indeed the "only plausible interpretation" of Congress' intent.[56] In his view, only wetlands adjacent to such prominent landscape features could be regulated by the Corps.

Justice Stevens and three other justices dissented, citing both *Chevron* and *Riverside Bayview* to find the Corps' action to be "a quintessential example of the Executive's reasonable interpretation of a statutory provision."[57] (Stevens also noted that, in contrast, "the plurality cites a dictionary for a proposition that it does not contain."[58]) And Justice Anthony Kennedy weighed in with his own "significant nexus" test which, while not deferring to the Corps, was an ecological standard that looks to hydrology, biology, and wetlands' overall impact on WOTUS on a broad scale.[59] Because the four dissenters acquiesced in this standard, Kennedy's opinion arguably controlled the case, yet he also agreed with Scalia in finding no federal jurisdiction over the Michigan parcels.

In general, lower courts solved the puzzle by concluding that waters and wetlands that do meet the Kennedy test were jurisdictional, with several circuits finding jurisdiction where *either* the Kennedy or Scalia tests were met.[60] For another 10-15 years, this inclusive approach somewhat masked the difference of opinion on the Supreme Court. But it still represented a loss, since both tests excluded "isolated" waters and wetlands that are ecologically important, such as prairie potholes in the upper Midwest; they cast doubt on the status of intermittent and ephemeral streams, especially in the arid Southwest; and the Kennedy test was also labor-intensive, placing the burden on the Army Corps to demonstrate a significant nexus case-by-case.

Chief Justice Roberts had urged the executive branch to clarify the situation with a new rule,[61] but agency efforts began to track the broader back-and-forth of electoral politics. The Obama EPA issued first a "connectivity study," summarizing the scientific literature that could flesh out the significant

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[55] Rapanos v. U.S., 547 U.S. 715 (2006).
[56] Id. at 739 (citing Webster's New International Dictionary (2d ed. 1954)).
[57] Id. at 788 (Stevens, J., dissenting).
[58] Id. at 801.
[59] Id. at 759. Kennedy also took issue with Scalia's semantic approach: "a full reading of the dictionary definition precludes the plurality's emphasis on permanence: The term 'waters' may mean 'flood or inundation,' Webster's Second 2882, events that are impermanent by definition." Id. at 770 (citation omitted).
[60] ENVTL. L. INST., *The Clean Water Act Jurisdictional Handbook* (2nd ed. 2012), at 46-47.
[61] *Rapanos*, 547 U.S. at 758 (Roberts, J., concurring).

nexus test, then a rule defining "waters of the United States" in light of those connections.[62] That rule was swiftly repealed by the Trump Administration, which in 2020 replaced it with a version that attempted to elevate the Scalia test ("relatively permanent … continuously flowing") as the sole definition of WOTUS.[63] The Biden EPA and Corps in turn reverted to a rule that employed both tests.[64]

Throughout this regulatory seesaw, a variety of lawsuits from both industry and environmental groups ensured that no WOTUS definition stayed in effect for very long, nor in every part of the country. While most challenges objected to specific aspects of the federal rules, others raised statutory and constitutional arguments designed to turn the Supreme Court's attention back to *Rapanos*. Despite the appellate courts' general agreement on significant nexus as the touchstone, litigants repeatedly attempted to portray the varying applications of the Kennedy and Scalia tests as a "split" or "conflict" that warranted Supreme Court action.[65] In early 2022, the Court agreed.

Sackett and "Clear Statement"

Sackett v. Environmental Protection Agency again involved freshwater wetlands deemed "adjacent" for permitting purposes. The Sacketts had already taken one trip to the Supreme Court, to settle the procedural question of whether they could challenge an EPA compliance order in federal court.[66] After gaining that right but losing on the merits in the lower courts, they were back asking simply whether Scalia's "relatively permanent, standing or continuously flowing" construction should become the sole, definitive interpretation of "waters of the United States."[67]

Accepting this open-ended invitation seventeen years after *Rapanos*, a greatly changed Roberts Court now seemed ready for a re-vote. Without a single mention of *Chevron* deference, a 5-4 majority led by Justice Alito turned directly to the Clean Water Act, broke out a different set of dictionaries[68] to define the term "waters," and newly embraced the Scalia test.

Scalia's statutory construction approach is justified, Alito wrote, by the absence of a "clear statement" in the Act's text: "this Court 'require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.'"[69] While this idea was touched on by Scalia in *Rapanos* and Rehnquist in the gravel-pit case, the Alito majority made it decisive — "waters" can extend no further than its most literal meaning. The statutory term "adjacent wetlands" likewise gets reduced to those with "'a continuous surface

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[62] U.S. EPA CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (FINAL REPORT). U.S. ENVIRONMENTAL PROTECTION AGENCY, WASHINGTON, DC, EPA/600/R-14/475F, 2015; CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES", 80 Fed. Reg. 37054 (June 29, 2015).

[63] THE NAVIGABLE WATERS PROTECTION RULE: DEFINITION OF ''WATERS OF THE UNITED STATES'', 85 Fed. Reg. 22250 (April 21, 2020).

[64] REVISED DEFINITION OF "WATERS OF THE UNITED STATES", 88 Fed. Reg. 3004 (Mar. 20, 2023).

[65] E.g. Sackett v. EPA, 21–454, cert. petition at 17–21 (Sept. 22, 2021).

[66] Sackett v. EPA, 566 U.S. 120 (2012). The Court ruled unanimously that they could.

[67] See *Sackett* cert. petition at i.

[68] These included not only Scalia's favorite, Webster's Second New International from 1954, but also Webster's Third (1976), Black's Law Dictionary (5th ed. 1979), Random House (2nd ed. 1987), and Oxford American (2d ed. 2009). *Sackett*, 598 U.S. at 671-72, 676.

[69] Id. at 679.

connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands.'"[70]

This watered-down notion of adjacency is perhaps *Sackett*'s most novel outcome. It potentially turns "wetlands" from a meaningful scientific concept to a mere semantic choice. It runs contrary to 45 years of consistent practice by both EPA and the Corps, under both parties' presidential administrations.[71] And it proved too much for Justice Brett Kavanaugh, who sharply disagreed with the majority's reasoning, rebuked his five conservative colleagues, and concluded "I would stick to the text."[72]

For Kavanaugh, the majority's error is straightforward: by requiring a continuous surface connection between wetlands and WOTUS, it in effect has replaced "adjacent" with "adjoining"; and "[t]he difference in those two terms is critical to this case."[73] Matching Alito at his game, Kavanaugh cites the same dictionaries (and a few others) to show that "two things need not touch each other in order to be adjacent."[74] He offers a common-sense illustration: "As applied to wetlands, a marsh is adjacent to a river even if separated by a levee, just as your neighbor's house is adjacent to your house even if separated by a fence or an alley."[75] And a real-world application:

> For example, the Mississippi River features an extensive levee system to prevent flooding. Under the Court's "continuous surface connection" test, the presence of those levees (the equivalent of a dike) would seemingly preclude Clean Water Act coverage of adjacent wetlands on the other side of the levees, even though the adjacent wetlands are often an important part of the flood-control project.[76]

Just as Justice White had found almost 40 years earlier, the very *absence* of a surface connection can be what makes a wetland an integral, functioning part of the water body as a whole.[77] But instead, the "simplistic response" that all nine justices had repudiated in *Riverside Bayview*[78] was now ascendant.

While agreeing with all this, Justice Kagan went further, again questioning the Alito majority's methods and motives. As she had with the Clean Air Act, she looked back to the Clean Water Act's 1970s origins and Congress' "'total restructuring and complete rewriting' of existing water pollution law,"[79] including protection of "nearby" wetlands. She chided Alito for relying on "a judicially manufactured clear-statement rule," despite statutory language that is "as clear as clear can be … as clear as language gets."[80]

In short, Kagan accused the majority of making another end-run around *Chevron* on a par with the major questions doctrine, and even went so far as to reiterate her *West Virginia* dissent:

> There, the majority's non-textualism barred the EPA from addressing climate change by curbing power plant emissions in the most effective way. Here, that method prevents

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[70] *Sackett*, 598 U.S. at 684 (2023) (quoting *Rapanos*, 547 U.S. at 742).
[71] Id. at 716 (Kavanaugh, J., concurring).
[72] Id. at 727. Kavanaugh was joined by Justices Kagan, Sotomayor, and Jackson.
[73] Id. at 719.
[74] Id. at 718.
[75] Id. at 719.
[76] Id. at 726.
[77] Id. at 727 (citing *Riverside Bayview*, 474 U. S. at 134).
[78] See above at text accompanying note 50.
[79] *Sackett*, 598 U.S. at 711 (Kagan, J., concurring) (quoting *Milwaukee* v. *Illinois*, 451 U. S. 304, 317 (1981)).
[80] Id. at 718.

> the EPA from keeping our country's waters clean by regulating adjacent wetlands. The vice in both instances is the same: the Court's appointment of itself as the national decision-maker on environmental policy.
>
> So I'll conclude, sadly, by repeating what I wrote last year, with the replacement of only a single word. "[T]he Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean [Water] Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much."[81]

Ripple Effects

With Justice Kagan doubling down on her language to underscore the Court majority's revolution in the settled understanding of law, observers have cataloged the potential implications, including the need for states to protect unprotected waters, loss of federal environmental and endangered species review, risk to intermittent streams, water management challenges, loss of compensatory mitigation, and future adverse court decisions.[82] More broadly, the one-two punch of *West Virginia* and *Sackett* has rocked the entire foundation of 20th- and 21st-Century environmental law, with particular concern directed at the *Sackett* majority's lack of regard for long-standing agency practice, court rulings, and science.[83]

EPA estimated that the decision could put up to 63% of U.S. wetlands, and between 1.2 and 4.9 million miles of ephemeral streams, beyond federal protection.[84] The Agency also has had to amend the Biden Administration's WOTUS rule to excise any remaining mention of the significant nexus test,[85] yet is still getting sued for being "impermissibly broad."[86] Whatever one's view of *Rapanos* and its progeny, some are asking whether the Court has also essentially overruled *Riverside Bayview*, a case with facts not very different from *Sackett*, without openly saying so.[87]

Others have been more explicit. In Professor Dave Owen's formulation, "The Court slanted the facts; distorted definitions and indulged basic logical fallacies; assumed some Congressional purposes while ignoring others; ignored obvious ambiguities; and grounded its reasoning in a vision of administrative governance rooted in activists' cliches rather than empirical evidence."[88] The *Sackett* decision, he continues, "is perhaps the largest regulatory rollback in the history of U.S. environmental law," surpassing the politically driven efforts of any Congress or President.[89]

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[81] *Sackett*, 598 U.S. at 715 (2023) (quoting *West Virginia*, 597 U.S. at 782 (Kagan, J., dissenting)).
[82] E.g. James M. McElfish, *What Comes Next for Clean Water? Six Consequences of Sackett v. EPA*, ENVTL. L. INST. (May 26, 2023), https://www.eli.org/vibrant-environment-blog/what-comes-next-clean-water-six-consequences-sackett-v-epa.
[83] See Jay Austin, Sharon Jacobs, Gerald Torres, & Robert Percival, *Dialogue: Annual Supreme Court Review and Preview*, 54 ELR 10005 (Jan. 2024).
[84] Allyson Chiu, *Biden Rule, Heeding Supreme Court, Could Strip Over Half of U.S. Wetlands' Protections*, WASH. POST (Aug. 29, 2023) https://www.washingtonpost.com/climate-environment/2023/08/29/epa-new-wetland-rule/.
[85] REVISED DEFINITION OF "WATERS OF THE UNITED STATES"; CONFORMING, 88 FR 61964 (Sept. 08, 2023).
[86] Miranda Wilson & Pamela King, *WOTUS Watchlist: Future Legal Fights Over Biden's Water Rule*, GREENWIRE (Jan. 3, 2024), https://subscriber.politicopro.com/article/eenews/2024/01/03/wotus-watchlist-future-legal-fights-over-bidens-water-rule-001b32468.
[87] Cale Jaffe, *Sackett and the Unraveling of Federal Environmental Law*, 53 ELR 10801 (Oct. 2023).
[88] Dave Owen, *Sackett v. Environmental Protection Agency and the Rules of Statutory Misinterpretation*, 48 Harv. Env. L. Rev. ___ (2023) (abstract).
[89] Id., pre-publication manuscript at 15 and n. 135.

Interlude: The Court's Docket — A Case of Selective Hearing?

Over the past several Supreme Court terms, the justices increasingly have reached out to shape and decide cases they arguably need not have taken.[90] This trend extends beyond environmental law, to issues such as presidential authority, religious freedom, and civil rights. While these topics are beyond the present scope (and often entail constitutional interpretation), the procedural histories are worth noting.

This pattern arguably began with the initial challenge to the Obama Administration's Clean Power Plan (CPP). In February 2016, days before he passed away, Justice Scalia cast his final vote, in favor of an emergency stay to prevent the CPP from going forward.[91] Scalia's deciding vote on the so-called "shadow docket"[92] stopped the rule cold; for the very first time, the Court had granted a request to stay a federal regulation before it could be reviewed by a federal appeals court.[93] As one commentator wrote at the time, the stay was "unprecedented, unexpected, and unexplained."[94] Yet as recent Supreme Court cases show, the ghost of Justice Scalia lingers.[95]

***West Virginia* and the Rule That Wasn't**

As outlined in Section I, challenges were also filed to the Trump Administration's subsequent power plant rule, and in January 2021, the D.C. Circuit invalidated it. But there remained a technical issue: would the CPP now apply by default? The court sent the matter back to EPA, which maintained the Agency had no plans to reinstate it.[96] Yet despite neither rule ever going into effect, the substance of both being overtaken by developments in the renewable energy market, and the Biden Administration's version still being drafted, West Virginia appealed the D.C. Circuit's decision to the Supreme Court. In April 2021, the Court accepted the petition.

Provocatively, the question presented did not focus on the Trump-era rule that had started the litigation, but rather on the Obama-era CPP and whether EPA generally could "issue significant rules — including those capable of reshaping the nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy — without any limits"; and do so through an allegedly "ancillary provision" of the CAA.[97] Thus, five years and three new justices after Scalia's vote had swung the initial stay of the CPP, the Court agreed to determine the validity of a rule that never came into force and had been repealed two years earlier, via a suit about a different rule.

In fact, by the time of *West Virginia v. EPA* the CPP "had become, as a practical matter, obsolete."[98] The Biden EPA stated it had no intention to reinstate the rule and was working on a new one. Meanwhile, emissions rates had fallen below those targeted by the CPP in 2019, a full decade before that plan would have required, as a

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[90] See*, e.g.,* Tonja Jacobi, *Introduction — The Fragile Legitimacy of the Supreme Court*, 73 EMORY L. J. 281 (2023); Mark A. Lemley, *The Imperial Supreme Court,* 136 HARV. L. REV. F. 97 (2022).
[91] See Jeffrey Toobin, *The Supreme Court After Scalia*, THE NEW YORKER (Sept. 26, 2016). Four justices — Justices Ginsburg, Breyer, Sotomayor, and Kagan — would have denied the application for a stay.
[92] See Robert V. Percival, *The Shadow Docket,* THE ENVTL. FORUM (Jan.-Feb. 2022).
[93] See Adam Liptak & Coral Davenport, *Supreme Court Blocks Obama's Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016).
[94] Michael Gerrard, *The Supreme Court Stay of the Clean Power Plan and the Paris Pledges,* CLIMATE LAW (Feb. 10, 2016), https://blogs.law.columbia.edu/climatechange/2016/02/10/the-supreme-court-stay-of-the-clean-power-plan-and-the-paris-pledges/.
[95] Richard Lazarus, *The Scalia Court: Environmental Law's Wrecking Crew Within The Supreme Court*, 47 HARV. ENVTL. L. REV. ___ (2023).
[96] *See* STATUS OF AFFORDABLE CLEAN ENERGY RULE AND CLEAN POWER PLAN, EPA MEMORANDUM (Feb. 12, 2021).
[97] West Virginia v. EPA, cert. granted, 20–1530 (U.S. Oct. 29, 2021).
[98] *West Virginia*, 597 U.S. at 755 (Kagan, J., dissenting).

result of market forces.[99] Moreover many energy companies, including traditional electricity providers, had supported the plan, as did a majority of the public.[100]

Nevertheless, the Court's conservative six-justice majority ruled the D.C. Circuit decision did reinstate the CPP, and thus "to the extent the Clean Power Plan harms the states" and requires them to "more stringently regulate power plant emissions within their borders," the case was a live one.[101] Yet as Justice Kagan noted in her dissent, the Clean Air Act requirement that states meet CPP targets lacked any real teeth, calling into question whether they were in fact injured. As she summarized:

> the Court's docket is discretionary, and because no one is now subject to the Clean Power Plan's terms, there was no reason to reach out to decide this case. The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering. That new rule will be subject anyway to immediate, pre-enforcement judicial review. But this Court could not wait — even to see what the new rule says — to constrain EPA's efforts to address climate change.[102]

While seemingly mild, Kagan's label "advisory opinion" is actually judicial name-calling; she is implying the majority abandoned the constitutional requirement that federal judges respond only to live "cases" and "controversies,"[103] not just any legal question that might get posed to them. That disagreement became explicit in later decisions.

Standing

As states file other suits challenging federal executive branch actions,[104] often before they can be implemented, a recurring issue is whether they are the right plaintiffs— whether they have "standing" to sue. Recent debates about standing also trace back to environmental law, such as the Supreme Court's 2007 climate decision in *Massachusetts v. EPA*.[105] Dissenting in that case, Chief Justice Roberts had criticized Justice Stevens' majority for demonstrating "how utterly manipulable" standing requirements are "if not taken seriously as a matter of judicial self-restraint."[106]

Sixteen years later, Roberts authored the majority opinion in *Biden v. Nebraska*, a sequel of sorts to *West Virginia v. EPA*. In this lawsuit, several states challenged as a "major question" the Biden Administration's student debt relief plan, which invoked the Department of Education's authority to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs"[107] in cases of national emergency (here, the pandemic). The state of Missouri asserted it had standing through a state-created body, the Missouri Higher Education Loan Authority (MOHELA). Though this claim was tenuous, and though MOHELA is a separate entity that disavowed the decision to sue,[108] all six conservative justices found the state had

[99] Id. (citing Brief for United States 47).
[100] See e.g., Ceres, LETTER RE: SUPPORT FOR STATE IMPLEMENTATION OF CARBON POLLUTION STANDARDS; Brief for the Edison Electric Institute and the National Association of Clean Water Agencies as Amicus Curiae, West Virginia v. EPA (2022); Barry G. Rabe et al., *Public Support For Regulation Of Power Plant Emissions Under The Clean Power Plan,* 18 ISSUES IN ENERGY AND ENVIRONMENTAL POLICY (January 2015).
[101] *West Virginia*, 597 U.S. at 719.
[102] *West Virginia*, 597 U.S. at 755 (Kagan, J., dissenting).
[103] U.S. Const. art. III, § 2, cl. 1.
[104] Pamela King et al., *Red states bet on 5th Circuit to take down Biden Agenda,* E&E NEWS (Feb. 15, 2023).
[105] E.g., U.S. v. Texas, 599 U.S. __, slip op. at 13 n.6; id. at 3 (Gorsuch, J., concurring); id. at 15 (Alito, J., dissenting).
[106] Massachusetts v. EPA, 549 U.S. at 548 (Roberts, J., dissenting).
[107] 20 U.S.C. § 1098bb(a)(1).
[108] See Biden v. Nebraska, No. 22-506 (June 30, 2023), slip op. at 6 (Kagan, J., dissenting).

standing.[109] They struck down the debt relief plan, holding that comprehensive loan forgiveness raised a major question not contemplated in the statute.

Picking up where she left off in *West Virginia*, Justice Kagan charged that "the Court acts as though it is an arbiter of political and policy disputes, rather than of cases and controversies." She criticized the states for "throw[ing] no fewer than four different theories of injury against the wall, hoping that a court anxious to get to the merits will say that one of them sticks." While these states might believe the loan forgiveness policy was "terrible, inequitable, wasteful," and might even be right, "that question is not what this Court sits to decide."[110]

Kagan's pointed language drew a response from the normally restrained Chief Justice Roberts, who wrote:

> It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary…. We do not mistake this plainly heartfelt disagreement for disparagement. It is important the public not be misled either. Any such misperception would be harmful to this institution and our country.[111]

Which in turn led Kagan to retort: "Justices throughout history have raised the alarm when the Court has overreached — when it has 'exceed[ed] its proper, limited role in our Nation's governance.' It would have been 'disturbing,' and indeed damaging, if they had not."[112]

Factual Incongruities

The Supreme Court also has drawn criticism for taking up fundamental rights cases with far-reaching consequences without fully considering the factual records below. In the free speech case *303 Creative v. Elenis,* the 6-3 majority held the First Amendment protects the petitioner, website designer Lorie Smith, from having to create sites with content she disagrees with, namely a wedding site for same-sex couples.

However, it was not entirely clear that Ms. Smith had ever been asked to design such a website. In 2016, she sued the state of Colorado alleging her concern that it might at some point apply the Colorado Anti-Discrimination Act against her, in violation of the First Amendment prohibition against "compelled speech." The state sought to dismiss, arguing there was no evidence anyone had actually requested Ms. Smith's services and been denied.[113] In a 2017 filing, Smith stated a man named "Stewart" had requested a same-sex wedding website,[114] a claim repeated in subsequent filings. But when contacted by journalists after the case reached the Supreme Court, this same man denied he had requested a website, and in any event has been married to a woman for more than a decade.[115] While this lack of a specific factual dispute did not surface in oral argument before the Court, it did get raised throughout the litigation.

Justice Sotomayor's dissent zeroed in on the majority's failure to probe any factual inconsistencies. While Justice Gorsuch's majority opinion cited Smith's "worries," framing the issue as "Colorado seek[ing] to compel an individual to create speech she does not believe,"[116] Sotomayor noted multiple times that "Smith's company has never sold a wedding web site to any customer."[117] Without an actual request, there would be no speech

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[109] See *Biden*, slip op. at 9.
[110] Id., slip op. at 2, 4, 8 (Kagan, J., dissenting).
[111] Id. at 25-26 (Roberts, J.).
[112] Id. at 29 (Kagan J., dissenting) (citation omitted).
[113] See 303 Creative LLC v. Elenis, 1:16-cv-02372, slip op. (D. Colo. May 17, 2019).
[114] See Sam Levine, *Key Document May Be Fake in LGBTQ+ Rights Case Before US Supreme Court*, THE GUARDIAN (June 29, 2023).
[115] See Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, THE NEW REPUBLIC (June 29, 2023).
[116] *303 Creative LLC*, 600 U.S. at 579.
[117] Id. at 624 (Sotomayor, J., dissenting).

to compel, and no real controversy before the Court. As Colorado Attorney General Phil Weiser stated: "This was a made-up case without the benefit of any real facts or customers."[118]

Similar questions surround *Kennedy v. Bremerton*, another 6-3 decision announced just days before *303 Creative.* As Justice Gorsuch, again writing for the majority, put it, "Petitioner Joseph Kennedy lost his job as a high school football coach in the Bremerton School District after he knelt at midfield after games to offer a quiet personal prayer."[119] Yet as the school district noted, Coach Kennedy was not fired, but put on paid leave; and then chose not to reapply to work the following season.[120] Unlike in *303 Creative*, this factual conflict was a point of contention during oral arguments before the Court.

In addition to the coach's job status, the justices differed in their accounts of the prayer activity at issue. According to Gorsuch, Kennedy "offered his prayers quietly while his students were otherwise occupied."[121] Justice Sotomayor again took issue with this characterization, arguing "the record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location."[122] Gorsuch's version prevailed, and led to the holding that the school district violated Kennedy's First Amendment rights.

On the Menu — *Loper Bright/Relentless*

As discussed in detail below in Section III, the Supreme Court's pattern of reaching out for cases may continue to have substantial impacts on environmental and regulatory law. On January 17, 2024, the Court heard over three hours of oral argument on *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce*. Plucked from obscurity by four or more justices and centered on a discontinued National Marine Fisheries Service program that, the government argued, ultimately had "no financial impact on regulated vessels,"[123] these cases show the Court nonetheless awarding itself an opportunity to decide whether to overrule *Chevron* deference.

[118] Schonfeld, *Man Denies Making Request Cited In Landmark Supreme Court LGBTQ Case*, THE HILL (July 3, 2023).
[119] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 512 (2022).
[120] See Danny Westneat, *The Story of the Praying Bremerton Coach Keeps Getting More Surreal,* Seattle Times (Sept. 17, 2022).
[121] *Kennedy,* 597 U.S. at 513-14.
[122] Id. at 546 (Sotomayor, J., dissenting).
[123] *Loper Bright,* Brief for Respondents at 5 (citation omitted).

III. Fisheries, Agency Decisionmaking, and the Courts

In early 1969, a prestigious blue-ribbon commission assembled by President Lyndon Johnson released *Our Nation and the Sea*, a landmark report two years in the making.[124] It recommended creating an independent agency, the National Oceanic and Atmospheric Administration, to manage and address various marine programs and activities. President Nixon carried the idea forward, and submitted to Congress a governmental reorganization plan that would assemble existing resources into a newly-minted NOAA. The agency ultimately ended up within the Department of Commerce, rather than an independent agency, but assumed many of the commission's recommended roles and responsibilities.[125]

With Congress' assent, and Commerce Secretary Maurice Stans' signature, NOAA was formally established by fall 1970. What had been the Department of Interior's Bureau of Commercial Fisheries was rebranded as the National Marine Fisheries Service (NMFS or NOAA Fisheries). So while the agency would be new, many of its functions were not, including roots that traced back to the 1870s and some of the earliest conservation efforts in the Nation's history.[126] In short order, Congress started to delegate additional authority to NOAA, enacting the Coastal Zone Management Act (1972), the Marine Mammal Protection Act (1972), and the Endangered Species Act (1973) in quick succession.

By the mid-1970s, then, Congress had addressed a host of natural resource challenges, including oceans, coastlines, and species, and deployed NOAA and its subsidiary agencies to do so. In 1976, the Fishery Conservation and Management Act added a structure for federal fisheries that relied on expertise provided by eight regional councils, who would take the lead on developing fishery management plans, following NMFS guidance and subject to the agency's review and approval.[127] (This bipartisan law was later renamed the Magnuson-Stevens Act, after Senators Warren Magnuson (D-WA) and Ted Stevens (R-AK), thus "the MSA.") Each council's voting members were drawn from NMFS, constituent states, and other "qualified individuals" submitted by the state governors, all administered by NMFS.[128]

Congress has amended the MSA several times since 1976, and over the years NMFS has reviewed and approved dozens of fishery management plans proposed by the regional councils. In crafting these plans, the agency was empowered by Congress "to use [measures] necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks."[129] In the 1990 amendments, Congress explicitly declared that "[t]he collection of reliable data is essential" to successful fisheries management, and further specified that management plans may "require one or more observers be carried on board a vessel…for the purpose of collecting data necessary for the

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[124] U.S. Commission on Marine Science, Engineering, and Resources, *Our Nation and the Sea: A Plan for Action* (1969).

[125] Historians point to Nixon's strained relationship with Interior Secretary Walter Joseph Hickel, and close relationship with Commerce Secretary Maurice Stans, as explanation for NOAA's inclusion within the Commerce Department rather than Interior. Aïcha Ghmouch, *Making NOAA Great (Again),* ENVTL. L. INST. (May 24, 2024), https://www.eli.org/vibrant-environment-blog/making-noaa-great-again.

[126] *About Us*, NOAA FISHERIES https://www.fisheries.noaa.gov/about-us#our-history (last visited Feb. 22, 2024).

[127] Pub. L. No. 94-256 (The bill passed the House 201-103 and the Senate 77-19).

[128] Pub. L. No. 94-256 § 302(b), (h).

[129] 16 U.S.C. § 1853(a)(1)(A); see also 16 U.S.C. § 1853(b)(14).

conservation and management of the fishery."[130] For certain fisheries, Congress expressly provided that industry would cover costs associated with observers.[131]

To assist with data collection needed to ensure healthy stocks, the New England Fishery Management Council in 2017 proposed an amendment to the management plan for Atlantic herring that would require regulated vessels to pay for third-party observers on the vessel. After notice and public comment, NMFS published a final rule in February 2020. The rule divided program costs between the agency and vessel operators, with NMFS covering the administrative costs of training and certifying the monitors, performance evaluations, and data processing. Operators could accommodate the observer requirement by using other government funds or, if covering costs out-of-pocket, could apply for various waivers, exemptions, or alternatives to offset some or all of the costs.[132]

Loper Bright Enterprises and *Relentless*

Dissatisfied with that arrangement, a group of New Jersey-based herring fishermen filed suit in Washington. In *Loper Bright Enterprises v. Raimondo*, District Judge Emmet Sullivan applied *Chevron* and upheld the NMFS regulation, finding at step one that the MSA unambiguously authorized adopting the type of industry-funded monitoring at issue.[133] The fishermen then appealed to the D.C. Circuit, where the three-judge panel hearing oral argument included then-Circuit Judge, now-Supreme Court Justice Ketanji Brown Jackson.

By a 2-1 vote, the panel agreed with the lower court's judgment, deferring to NMFS' implementation of the industry-funded on-board monitoring program.[134] Judge Judith Rogers applied the "familiar two-step *Chevron* framework," but resolved the case at step two rather than at step one; while the MSA did not unambiguously authorize NMFS' program, the agency interpretation was nevertheless a reasonable one. Before proceeding through the *Chevron* analysis, the court concluded that the new "major questions doctrine"[135] did not apply because the MSA delegates broad authority to NMFS, the agency was acting in an area of its expertise, and the relevant action was confined to specific instances and circumstances.

Judge Justin Walker dissented, arguing that the panel had found ambiguity where the statute was instead wholly silent. His dissent further argued that silence should never be a reason for judges to apply

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[130] 16 U.S.C. §1801(a)(8); 16 U.S.C. §1853(b)(8). Pub. L. No. 101–627, presumably in part because of the success of the initial legislation, enjoyed even broader bipartisan support than the original bill, sailing through the House 396-21 and the Senate unanimously, 98-0.
[131] 16 U.S.C. §§1862(a) (North Pacific fishery); 1821(h)(4) (foreign fishing); 1853a(e)(2) (limited access privilege programs).
[132] Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Industry-Funded Monitoring, 85 Fed. Reg. 7414 (Feb. 7, 2020).
[133] Loper Bright Enterprises, Inc. v. Raimondo, 544 F. Supp. 3d 82 (D.D.C. 2021). Judge Sullivan also would have reached the same conclusion at step two: "Even if Plaintiffs' arguments were enough to raise an ambiguity in the statutory text, the Court, for the same reasons identified above, would conclude that Defendants' interpretation is a reasonable reading of the MSA." Id. at 107.
[134] Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022). Chief Judge Sri Srinivasan was drawn to replace Judge Jackson, who by the time of the decision had been nominated to the U.S. Supreme Court.
[135] See Section I above.

Chevron, though it did not address how this approach might deviate from Justice Stevens' original formulation of the test, which (again, based on "well-settled" precedent) expressly included "silent."[136]

Seizing on this disagreement among the panel, the fishermen appealed to the Supreme Court and inserted an even bolder argument: that *Chevron* had outlived its usefulness.[137] And indeed, in May 2023 the Court granted review not on the narrower MSA issue,[138] but on the more considerable question of:

> Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.[139]

A parallel challenge to the same NMFS rule, *Relentless, Inc. v. Department of Commerce*,[140] followed a similar pattern. A Rhode Island federal court found that the statute was ambiguous, and resolved the case at *Chevron* step two: "the integral nature of catch estimates to the MSA's goals, along with the agency's financial incapacity to fully fund a monitoring program" meant that "it was reasonable…to conclude that industry-funded monitoring is permitted"— a conclusion reinforced by the legislative history.[141] On appeal, the First Circuit generally agreed, and "ha[d] no trouble finding that the Agency's interpretation" was a reasonable one, though the panel also declared they "need not decide whether we classify this conclusion as a product of *Chevron* step one or step two."[142]

Now stripped of much of their factual context, these cases center on the future viability of the interpretive framework first announced in *Chevron* and since solidified as bedrock administrative law. Their outcome could provide the Court's definitive word on who interprets and implements statutes (as described in Section I). Beyond the herring fishery, and even beyond environmental law, the decision could have implications across the federal government.

After Justice Jackson joined the Supreme Court, she recused from *Loper Bright* as a result of having participated in oral argument at the D.C. Circuit. Last October, the Court announced it would consider the case in tandem with *Relentless,* which will allow her to weigh in. Meanwhile Justice Thomas resisted calls to recuse himself in the wake of investigative reporting that he attended multiple fundraising events for the Koch Brothers' network, which has funded legal attacks on *Chevron*, including in *Loper*

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[136] See Section I for Stevens' full quote.
[137] See *Loper Bright*, Brief for Petitioners, 15.
[138] Adam Liptak, *Does the Supreme Court's Cherry-Picking Inject Politics Into Judging?,* N.Y. TIMES (Oct. 9, 2023), https://www.nytimes.com/2023/10/09/us/supreme-court-cases.html.
[139] Order granting certiorari, *Loper Bright*, 22-451 (May 1, 2023), https://www.supremecourt.gov/qp/22-00451qp.pdf.
[140] Relentless v. U.S. Dep't of Commerce, No. 22-1219 (U.S. 2023) This case is on appeal from the First Circuit.
[141] Relentless, Inc. v. U.S. Dep't of Commerce, 561 F. Supp. 3d. 226, 236-38 (D.R.I. 2021).
[142] Relentless, Inc. v. U.S. Dep't of Commerce, 62 F.4th 621, 633-34 (1st Cir. 2023).

Bright.[143] As a result, all nine justices heard argument on *Chevron*'s fate on the morning of January 17, 2024, for nearly three and a half hours.[144]

Justice Jackson's questions went to the crux of the matter, demonstrating the value of having a full bench weigh in on such an important issue. "Worried about the courts becoming uber-legislators," she probed where the interpretive line between law and policy might be drawn, suggesting that some issues of statutory interpretation are not purely legal and do require policy determinations Congress intended for agencies, not courts, to resolve.[145] This point was reminiscent of Justice Stevens' original conclusion, in *Chevron*, that EPA's interpretation of "stationary source" was "a reasonable policy choice to make."[146]

One pointed exchange between Justice Jackson and petitioner's counsel touched on what guidance the Court might deploy to help determine whether an interpretation raises a policy issue rather than a legal one. When counsel affirmed that "every statutory interpretation question is one of law that a court can decide," Jackson somewhat incredulously repeated: "There's never a statutory interpretation question that is one of policy that you see Congress may have been intending the agency to answer?" The response was the same, that "if we're talking about interpreting a statute, then you're talking about a legal question." Sensing the circularity, Jackson acknowledged that "maybe we just differ on this."[147]

By the end of June, the Court will issue its decision.

Fishing for Controversies?

Whatever the eventual outcome in *Loper Bright/Relentless*, the potentially vast sweep of the question presented is out of proportion to the case's actual impact on the herring fishery. Indeed (as in the cases discussed in the Interlude above), the fishermen and NMFS disagree about whether there are any injured parties or a live dispute at all.

Petitioners' brief notes that they are "small, family-owned businesses that have operated for decades," who stand "to fork over some 20% of their annual returns to pay those [observer] salaries."[148] And while these losses, if realized, would undoubtedly constitute a legally recognized injury, the petition sidesteps details of how *this* rule has affected *these* plaintiffs. Instead, skilled Supreme Court advocate and former U.S. Solicitor General Paul Clement, who crafted their briefs on behalf of the Cause of Action Institute

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[143] Joshua Kaplan, Justin Elliott, & Alex Mierjeski*, Clarence Thomas Secretly Participated in Koch Network Donor Events*, PROPUBLICA (Sept. 22, 2023) https://www.propublica.org/article/clarence-thomas-secretly-attended-koch-brothers-donor-events-scotus.

[144] See Jarryd Page, *Through the Looking Glass?: Chevron and the Future of the Regulatory Environment*, ENVTL. L. INST. (Jan. 18, 2024), https://www.eli.org/vibrant-environment-blog/through-looking-glass-chevron-and-future-regulatory-environment.

[145] Transcript of Oral Argument at 69:22-23, Relentless v. Department of Commerce, 144 S.Ct. 325 (Mem) (U.S. 2023) (No. 22-1219); audio of *Relentless* Oral Arguments available at supremecourt.gov/oral_arguments/audio/2023/22-1219.

[146] See Section I.

[147] Transcript of Oral Argument at 65-73, Relentless v. Department of Commerce, 144 S.Ct. 325 (Mem) (U.S. 2023) (No. 22-1219); audio of *Relentless* Oral Arguments available at supremecourt.gov/oral_arguments/audio/2023/22-1219.

[148] *Loper Bright,* Brief for Petitioners, 39 (italics omitted).

and delivered the oral argument, is weaving a story that "pick[s] up on some themes that are very important to the conservative Justices."[149]

In contrast, current Solicitor General Elizabeth Prelogar argues that "[p]etitioners have not identified a single fishing trip for which they have been required to pay for monitoring services under the rule."[150] And more broadly that the NMFS observer rule, in effect for less than two years, "had no financial impact on regulated vessels."[151] Indeed, NOAA records show that "100 percent of the industry's at-sea monitoring costs" for the program were reimbursed,[152] and the agency discontinued the program in April 2023, citing a lack of funds to cover its costs. As a result, she argues, Atlantic herring fishermen are neither hosting nor paying for on-board monitors, and "it is unclear at this time if and when monitoring coverage under the rule will resume."[153]

Despite these realities on the ground, at least four justices granted the petition and have locked eyes on the broader pitch—articulated by petitioners as "a perfect vehicle to reconsider *Chevron*, because it vividly illustrates the human costs of agency overreach."[154] Those costs, amounting to $30,334 over the two years of the program's existence, are vividly illustrated, notwithstanding whether or how directly they connect to petitioners. Neither party lingered on these aspects in the merits briefs or at oral argument, and the Court thus seems primed to issue an opinion on *Chevron* itself. An off-ramp that would resolve the case on standing or another procedural ground seems unlikely.

Chumming the Waters

Framed this way, both parties agree that the stakes are high and that the case's outcome could upend the status quo by reshaping the allocation of authority among government branches. In a setting where every word matters, both have focused their arguments almost entirely on whether *Chevron* should be entirely overruled; a few short pages were dedicated to the secondary question of clarifying the role of statutory silence.

According to the fishermen and Clement, *Chevron* "eventually took on a life of its own," and over time has "proved unworkable." Though birthed during the Reagan Administration and applied for decades by liberal and conservative judges alike, its interpretive methodology now "poses a triple threat to th[e] constitutional design." The petitioners argue that *Chevron* distorts the balance of government authority, through "lower courts [that] continue to feel obligated to afford agencies '*Chevron* deference'" and "agencies [that] continue to churn on out regulations premised on aggressive, newfound readings."[155]

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[149] Jody Freeman & Andy Mergen, *The Loper Bright Case and Fate of the Chevron Doctrine*, HARVARD ENVTL & ENERGY L. PROGRAM, CLEANLAW PODCAST (Aug. 23, 2023), https://eelp.law.harvard.edu/2023/08/cleanlaw-the-loper-bright-case-and-fate-of-the-chevron-doctrine-with-jody-freeman-and-andy-mergen/.

[150] *Loper Bright*, Brief for Respondents in Opposition, 13, 25. The district court had dismissed a claim under the National Environmental Policy Act, finding the law did not provide a cause of action for a *fear* of economic harm. *Loper Bright*, 544 F. Supp. 3d at 58.

[151] *Loper Bright*, Brief for Respondents, 5.

[152] NOAA, *Status of Industry Cost Reimbursement for Atlantic Herring Industry-Funded Monitoring* (Sept. 7, 2023), https://perma.cc/8J62-3376.

[153] *Loper Bright*, Brief for Respondents in Opposition, 25.

[154] *Loper Bright*, Reply Brief for Petitioners, 11.

[155] *Loper Bright,* Brief for Petitioners, 1-2, 5, 16, 24, 29.

Unsurprisingly, NMFS and Solicitor General Prelogar describe the situation differently. Rather than leading to unconstrained agencies developing rules that get judicially rubber-stamped, *Chevron* "sets clear ground rules for all three branches" that "give[] appropriate weight to the expertise, often of a scientific or technical nature, that federal agencies can bring to bear in interpreting federal statutes." It "promotes national uniformity in the administration of federal law and greater political accountability." Moreover, "reasonable jurists may disagree under any interpretive framework, and replacing *Chevron* with a regime of de novo review would draw federal courts into resolving policy questions and exacerbate the potential for inconsistent results."[156]

In addition, dozens of organizations and interested groups have weighed in with "friend of the court" (amicus) briefs. There are opposing state coalitions, with West Virginia leading a group of 27 states to support jettisoning *Chevron*, and the District of Columbia and 21 more arguing for its retention.[157] Members of the Senate have filed briefs on both sides, and the House of Representatives submitted a brief backing the position that statutory silence should not be construed as a grant of authority from Congress.[158]

Amicus briefs submitted "in support of neither party" can prove particularly useful to the Court. Here, administrative law professors — steeped in *Chevron* case law — have fulfilled that role, maintaining that the doctrine remains bedrock precedent and that, given its frequent use, "it would be difficult to explain why the *Chevron* framework has been discovered to be egregiously wrong, unworkable, in conflict with more recent developments in the law, or impervious to correction by Congress."[159] Another such brief reminds the Court that applied properly, *Chevron* does provide meaningful constraints, and that:

> courts fulfill their judicial duty when they police the statutory limits on that authority and verify that the agency acts reasonably and within the scope of its delegation. This sort of deference — respect for the statute as Congress wrote it rather than abdication to the agency to rewrite the statute — in no way offends the separation of powers.[160]

Navigating the Storm

The Supreme Court's acceptance of these cases has set the stage for another tempest in administrative law. In the wake of sweeping decisions like *West Virginia* and *Sackett*, it is difficult to predict what further course the justices will map for judicial deference. Multiple options are on the table, from a

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[156] *Loper Bright*, Brief for Respondents, 7-8.
[157] *Loper Bright*, Brief of Amici Curiae State of West Virginia and 26 Other States in Support of Petitioners; *Loper Bright*, Brief of District of Columbia, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin as Amici Curiae in Support of Respondents.
[158] *Loper Bright*, Brief for the U.S. House Of Representatives as Amicus Curiae in Support of Petitioners.
[159] *Loper Bright,* Merrill Amicus Brief, 26.
[160] *Loper Bright*, Brief of Amici Curiae Administrative and Federal Regulatory Law Professors in Support of Respondents, at 24.

narrow ruling that retains some or all of *Chevron*'s core, to a drastic revision that sets entirely new coordinates and launches agencies, judges, Congress, and countless citizens into uncharted waters.

Hinting at potential directions, at least four current justices have already recorded some level of discontent with *Chevron*. Justice Gorsuch has described it as "judicial abdication" and "fiction through and through," arguing judges should instead supply their own best reading of the law and apply the agency's interpretation only when it conforms with that reading. Justice Thomas affirmed *Chevron* in 2005, but has since reversed course. While a judge on the D.C. Circuit, Justice Kavanaugh suggested *Chevron* could be replaced with a "best reading" approach, with judges interpreting laws from scratch; agency interpretations of broad terms like "reasonable" and "practicable" would get more deference than their interpretations of other specific words or phrases.[161] And remarks from Justice Alito suggest he could align with this contingent,[162] bringing the tally to four likely votes to overturn *Chevron*.

Chief Justice Roberts has voiced worries about "the danger posed by the growing power of the administrative state,"[163] but has also exhibited reservations about overruling long-standing precedent.[164] To Roberts, *Chevron* is not a straitjacket; importantly, judges retain the primary role in determining whether it applies at all: *"*before a court may grant such deference, it must on its own decide whether Congress … has in fact delegated to the agency lawmaking power over the ambiguity."[165] He has also articulated a strong rationale for adhering to the doctrine: "[w]e give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities 'with the force of law.'"[166] With the three liberal justices likely to vote in favor of upholding *Chevron*, the Chief Justice and Justice Barrett are the ones expected to tip the scales.

Predicting the Court's decisions is a fraught exercise, but given the path thus far, the justices appear poised to say *something* that will revise the well-known deference framework. A decision that excises *Chevron* completely and replaces it with fresh review by individual judges would be a substantial departure from prior practice. Indeed, "[a]t no point in American history have courts applied an invariable rule of de novo resolution of all questions of law."[167] On the other hand, a decision limited to clarifying what judges should do when they conclude a law is "silent" might represent a more modest path, though still a departure from Justice Stevens' "silent or ambiguous" wording in *Chevron*.[168] But the Court paid little attention to this path at oral argument. Other options, including some version of the "best reading" prescription, are also on the table.

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[161] See Doniger, 53 ELR at 10560 and citations therein.
[162] See *Deference and its Discontents: Will the Supreme Court Overrule Chevron?* CONGRESSIONAL RESEARCH SERVICE (Oct. 11, 2018), https://crsreports.congress.gov/product/pdf/LSB/LSB10204.
[163] City of Arlington v. F.C.C., 569 U.S. 290, 315 (2013) (Roberts, J., dissenting).
[164] See Jodi Kantor and Adam Liptak, *Behind the Scenes at the Dismantling of* Roe v. Wade, N.Y. TIMES (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/us/supreme-court-dobbs-roe-abortion.html.
[165] *City of Arlington*, 569 U.S. at 317 (Roberts, J., dissenting).
[166] Id. at 317 (italics in original).
[167] *Loper Bright*, Brief for Respondents, 8.
[168] *Loper Bright*, Brief for Respondents, 45.

Trawling Beyond the Horizon

Even as the justices mull *Chevron*'s fate, other litigants are presenting arguments pushing against federal agencies' established structures and regulatory mechanisms.[169] In many instances, challenging individual agency actions has become secondary to broader challenges to agency authority. Some observers describe these cases as vehicles for the Court to advance an agenda that opposes environmental and public health actions and seeks to dismantle the regulatory bodies that issue them.[170]

In another Magnuson-Stevens case, plaintiffs' challenge to "the unconstitutional core of the Act's regulatory apparatus" dwarfs the nominal objection to incremental changes in amberjack catch limits. Filed on behalf of "local fishermen" by a global law firm, this suit aims for the center of the MSA's statutory structure, charging that "novel federal councils … violate the Constitution's structural protections in multiple respects," and leave plaintiffs "at the mercy of unaccountable bureaucrats who answer only to themselves." The complaint alleges that certain members of the fisheries councils are not properly appointed or subject to proper constitutional removal processes, a theory that calls into question the legitimacy of their decisions as well.[171]

In response, the agency has asserted that plaintiffs "fundamentally misapprehend the Magnuson Act, which makes clear that the Council's function is advisory," and thus that "none of the Council's actions carry legal effect without a corresponding review by the Fisheries Service."[172] Their brief emphasizes the role of the cabinet agency, "that only the [Commerce] Secretary, not the Council, has the authority to independently review, approve, and implement a Council proposal."[173] The case is still in district court in Mississippi, but an adverse decision there or in the very conservative Fifth Circuit[174] would render unconstitutional a central feature of the decades-old MSA structure, one going back to the initial 1976 bill and affirmed by multiple Congresses.

NOAA is not the only agency fending off such challenges. In fall of 2023 the Securities and Exchange Commission, an independent agency with a 90-year pedigree, had to defend its existence before the Supreme Court.[175] A cornerstone of the New Deal created in the wake of the 1929 stock market crash, the Commission plays a central role in stabilizing financial markets and protecting consumers from fraud. After it fined George Jarkesy and barred him from trading for multiple violations, he questioned not only his punishment, but the independence of the SEC official who heard his case, the administrative process by which it was adjudicated, and the entire authority of the SEC.

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[169] See Elizabeth Kolbert, *The Supreme Court Looks Set to Deliver Another Blow to the Environment*, THE NEW YORKER (Oct. 20, 2023), https://www.newyorker.com/news/daily-comment/the-supreme-court-looks-set-to-deliver-another-blow-to-the-environment.
[170] See David Kirkpatrick, *The Next Targets for the Group That Overturned Roe*, THE NEW YORKER (Oct. 2, 2023), https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade.
[171] Compl., Arnesen v. Raimondo, No. 23-00145 2-3 (S.D. Miss. 2023). The case is being heard with another, nearly identical challenge, Bell v. Raimondo. But see Lofstad v. Raimondo, No. CV227360RKTJB, 2024 WL 836392 (D.N.J. Feb. 28, 2024) (rejecting similar Appointments Clause challenge to the MSA).
[172] *Arnesen*, No. 23-00145 (S.D. Miss. 2023) (government motion for summary judgment).
[173] Arnesen, No. 23-00145 23 (S.D. Miss. 2023).
[174] See Stephen I. Vladeck, *Why the Fifth Circuit Keeps Making Such Outlandish Decisions*, THE ATLANTIC (Nov. 28, 2023), https://www.theatlantic.com/politics/archive/2023/11/fifth-circuit-conservative-supreme-court/676116/
[175] S.E.C. v. Jarkesy, No. 22-859 (U.S. 2022).

After losing before an SEC administrative law judge (ALJ), Jarkesy petitioned the Fifth Circuit, where a divided appellate panel ruled that the SEC procedures violated his constitutional right to a jury trial, raised issues with the ALJs' accountability, and held Congress had violated the "nondelegation" doctrine by failing to provide the SEC with an "intelligible principle" within which to exercise its power.[176] In reaching this conclusion, observers note, the panel's conservative judges applied a highly selective lens to the SEC's long history, relying on documents that supported their conclusion while ignoring other, contrary ones.[177]

At the Supreme Court, oral argument provided little indication of whether the justices will reverse and correct the Fifth Circuit's factual record, or instead affirm or limit the agency's use of well-established measures, such as adjudication by independent administrative law judges. Some observers suggested the Court may be receptive to the argument that agency adjudications run afoul of petitioner's Seventh Amendment right to a jury trial, if not necessarily to his theories about how ALJs are appointed or an improper delegation by Congress.[178] Either way, the Court is again positioned to issue a decision that refashions enduring federal administrative practice, with implications not only for the SEC but for agencies across the federal government, including EPA.[179]

[176] Jarkesy v. S.E.C., 34 F.4th 446 (5th Cir. 2022).
[177] See Noah Rosenblum, *The Case That Could Destroy the Government*, THE ATLANTIC (Nov. 27, 2023), https://www.theatlantic.com/ideas/archive/2023/11/securities-and-exchange-commission-v-jarkesy-supreme-court/676059/.
[178] See Pamela King, *Supreme Court leans toward curbing agency enforcement*, GREENWIRE (Nov. 29, 2023), https://www.eenews.net/articles/supreme-court-leans-toward-curbing-agency-enforcement/.
[179] See Cameron J. Bonnell, SEC v. Jarkesy *and Implications for Environmental Enforcement*, ENVTL L. REP. (May 2024). See also Compl., Ro Cher Enterprises, Inc. v. U.S. Environmental Protection Agency (N.D. Ill. 2023) (available at https://pacificlegal.org/wp-content/uploads/2023/11/2023-11-16-Ro-Cher-v-EPA-Complaint.pdf); Pamela King, *Supreme Court pressured to stop Congress from handing power to agencies*, GREENWIRE (Apr. 9, 2024).

Interlude: The Court and Precedent — Disturbing the Calm

Stare decisis et non quieta movere — stand by the thing decided and do not disturb the calm.[180]

Judges following the decisions established by prior cases, known in legal terms as *stare decisis*, is a well-established concept in U.S. law. While not an "inexorable command," the Supreme Court has declared its importance for preserving the "actual and perceived integrity of the judicial process."[181] Justice Scalia once expounded upon its role in his theory of judicial conservatism:

> The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of "an arbitrary discretion in the courts" is restrained, The Federalist No. 78. Who ignores it must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all).[182]

Recently, though, legal scholars have found the Court "willing, even eager, to reverse old, famous, and popular precedents."[183] The justices have both hollowed out prior decisions without explicitly overruling them, and overruled decisions with little regard to Scalia's demand for "reasons that go beyond" a belief that those decisions were simply wrong. And they have done so across precedents involving statutory interpretation, judicial decisionmaking frameworks such as *Chevron*, and the U.S. Constitution.

In the *statutory realm,* there is a strong presumption against the Supreme Court revisiting precedents, since "Congress can correct any mistake it sees" with the Court's interpretive decisions.[184] This was reaffirmed by a majority of the justices as recently as last year.[185] But presumptions aside, the current Court has shown a willingness to downplay statutory stare decisis.

As discussed in Section II, the *Sackett* majority displaced Justice Kennedy's 17-year-old significant nexus test, and narrowed the definition of "adjacent" wetlands. The latter shift, Justice Kavanaugh referred to as departing from "45 years of consistent agency practice, and from this Court's precedents."[186] While the prior 4-1-4 *Rapanos* decision was not binding on the Court, the majority abruptly dismissed it in a footnote,[187] ignoring that it has been applied in dozens of cases. And no other justice hinted at how far the majority's reasoning departed from Kennedy's *Rapanos* concurrence.[188]

Some have suggested *Sackett* also effectively overruled another foundational Clean Water Act decision, the unanimously decided *Riverside Bayview.*[189] While the *Sackett* majority claimed to align its definition of "waters"

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[180] Art. III.S1.7.2.1 Historical Background on Stare Decisis Doctrine, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-7-2-1/ALDE_00001187/ (last visited Feb. 26, 2024).
[181] Payne v. Tennessee, 501 U.S. 808, 828 (1991); Michigan v. Bay Mills Indian Cmty, 572 U.S. 782, 798 (2014).
[182] Hubbard v. U.S., 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part).
[183] Dave Owen, Sackett v. Environmental Protection Agency *and the Rules of Statutory Misinterpretation,* 48 HARV. ENVTL L. REV., at 17; *see also* Mark A. Lemley, *The Imperial Supreme Court,* 136 HARVARD L. REV. FORUM 97 (2022); Anita S. Krishnakumar, *Textualism and Statutory Precedents,* 104 VA. L. REV. 157 (2018).
[184] Kimble v. Marvel Entertainment, LLC, 576 U. S. 446, 456 (2015).
[185] Allen v. Milligan, 599 U.S. ___ (slip op. at 31) (2023); id., slip op. at 1. (Kavanaugh, J., concurring in part).
[186] *Sackett*, 598 U.S. at 716 (Kavanaugh, J., concurring).
[187] Id. at 659 n. 3 ("Neither party contends that any opinion in *Rapanos* controls. We agree.").
[188] See Jonathan Adler, *Does a Footnote in Sackett II Indicate How SCOTUS Will Resolve the Affirmative Action Cases?*, THE VOLOKH CONSPIRACY (June 1, 2023).
[189] Cale Jaffe, Sackett *and the Unraveling of Federal Environmental Law*, 53 ELR 10801, 10804 (Oct. 2023).

with that precedent,[190] it failed to acknowledge the deferential, science-based standard established there, replacing it with a geographical test that may make *Riverside Bayview* obsolete.[191]

Judge-made precedents also hang in the balance. As discussed in Section III, the *Loper Bright/Relentless* cases present the Court with an opportunity to reconsider *Chevron,* another 40-year-old, unanimous decision. One neutral brief notes the petitioners' request is to overrule not one case, but a "'long line of precedents' — each one reaffirming the rest," that "pervades the whole corpus of administrative law."[192] As another brief observes, overruling *Chevron* would raise concerns about "whether the legal community will retain confidence that legal methods long endorsed by this Court will not be lightly cast aside."[193] It would represent another data point in the justices' newfound willingness to upend long-settled rules and "the legitimate expectations" highlighted by Justice Scalia.

And this trend has been particularly apparent in the area of *constitutional law*, where the Court's word (short of a constitutional amendment) is final. This can sometimes justify revisiting outdated precedents, such as the classic example of *Brown v. Board of Education* overruling the Jim Crow-era doctrine of "separate but equal." But recent cases have come at a dizzying pace, overturning longstanding decisions on fundamental rights issues including affirmative action, free speech, and free exercise of religion.[194] Nowhere has the tension been more evident than abortion jurisprudence in the wake of *Roe v. Wade*.

For almost 50 years, out of respect for stare decisis, justices of both political parties, "regardless of their views as to whether *Roe* was correctly decided or properly reasoned, ha[d] been reluctant to jettison entirely the 1973 decision."[195] Yet in 2022 five justices — including the three newest — overruled *Roe* outright, in an opinion authored by Justice Alito.[196] The effects have been swift, significant, and likely long-lasting.[197] And at least one's view goes further still: as he indicated in *Dobbs,* Justice Thomas is open to reconsidering the basis for other constitutional precedents including the right to contraception, the right to engage in private, consensual sexual acts, and the right to same-sex marriage.[198]

In place of "calm," unsettling precedent sends ripples throughout the legal system. Overruling established doctrines across multiple spheres is at odds with the critical purposes of stare decisis. Filing a rare, jointly authored dissent in *Dobbs*, Justices Breyer, Sotomayor, and Kagan criticized "the majority's cavalier approach to overturning [the] Court's precedent," and issued a pointed reminder of the values underlying our system of judicial precedent:

> Stare decisis is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion.[199]

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[190] Sackett, 589 U.S. at 573.
[191] Jaffe, 53 ELR at 10807-08 (2023).
[192] *Loper Bright*, Brief of Law Professors Kent Barnett and Christopher J. Walker as amicus curiae in support of neither party at 6 (citation omitted).
[193] *Loper Bright,* Merrill Amicus Brief, 25, 26 n.14.
[194] See Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College, 600 U.S. 181 (2023); Janus v. Am. Fedn. of State, Cnty., and Mun. Employees, Council 31, 138 S. Ct. 2448 (2018); *Kennedy*, 597 U.S. 507.
[195] Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 310 (2020).
[196] Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of* Roe v. Wade, N.Y. TIMES (Dec. 15, 2023).
[197] See, e.g., Kim Bellware & Emily Guskin, *Effects of Dobbs on maternal healthcare overwhelming negative, survey shows*, THE WASH. POST (June 21, 2023).
[198] *Dobbs v. Jackson Women's Health Organization*, 586 U. S. 215, 332 (2022) (Thomas, J., concurring).
[199] Id. at 363 (Breyer, J., Sotomayor J., and Kagan, J., dissenting).

IV. A World Without *Chevron*?

Measured simply by its frequency of use over four decades, including by the Supreme Court, *Chevron* has clearly proven to have practical utility. And while the Court has not applied it to decide a case since 2016, the *Chevron* framework is still consistently and frequently adhered to in lower courts. Over time, judges have refined the doctrine into a considerable body of law,[200] such that any revision resulting from *Loper Bright*/*Relentless* will be consequential. Discarding *Chevron* outright would be a milestone in administrative law history.

Parties on both sides of these cases have emphasized the high stakes, not just for the MSA and fisheries, but for the whole of government. In the *Loper Bright* petitioners' words, "the importance of this case is by no means limited to NMFS or the fishing industry."[201] The Solicitor General's brief likewise notes that overruling *Chevron* "would threaten settled expectations in virtually every area of conduct regulated by federal law."[202] Clearly it would mean a vastly changed landscape for agencies, judges, legislators, private interests, citizen groups, and the rest of civil society.

All of these parties will be closely parsing the decision to see whether and how it departs from existing precedent. The Court may keep *Chevron*'s core intact, and limit its holding to the issue of statutory silence; or it may issue a broader opinion that overwrites the framework entirely.[203] This section examines the latter scenario — what might transpire if, via *Loper Bright*/*Relentless*, the Court does away with *Chevron* deference, requiring judges to consider anew federal agencies' interpretations of the laws they have been charged with carrying out, in some cases for decades.

That landscape will depend, of course, on the language of the Court's decision, but also on how the affected parties respond to it. It includes how agencies might adjust their rulemaking justifications and how lower courts grapple with developing alternative ways of weighing them. The consequences will take time to be realized, and the full weight and scope of the decision isn't likely to be understood right away. Compound that with the still-emerging major questions doctrine and clear statement rule, and the picture grows murkier still. But despite these long-term uncertainties, it's possible to sketch out what the rough contours of a world without *Chevron* might look for all three government branches: legislators, executive agencies, and the judiciary.

Legislative (In)Action

Of course, Congress remains free to expand statutes or revise judicial interpretations, and this ability is the Court majority's justification for their recent decisions. It could, for example, pass a bill invalidating the specific holding of *West Virginia* or a future *Loper Bright/Relentless* opinion and effectively reinstate agency rules. It could set specific standards of review to accompany each delegation of authority to a federal agency. But absent those unlikely scenarios, Congress will need to legislate not against the backdrop of *Chevron*, trusting that reasonable agency interpretations of its laws will be left alone by the

[200] See Section I.
[201] *Loper Bright*, Brief for Petitioners, 34.
[202] *Loper Bright*, Brief for Respondents, 10.
[203] See Section III.

courts, but against a new one where any arguable ambiguity in a law may be subject to challenge and judicial review.

In a no-*Chevron* world, Congress will need to speak with intricate precision to achieve its goals, whether in education, health care, food safety, or the environment. Broad directives, like the one to EPA to keep our air clean enough to protect public health while "allowing an adequate margin of safety," and leaving details to "the judgment of the Administrator," may no longer suffice.[204] Justice Kavanaugh has suggested that open-ended terms like "reasonable" could lead judges to be more deferential,[205] but this prescription runs the risk that certain language will be deemed to be lacking an "intelligible principle," thus reviving the nondelegation doctrine that has been disfavored since the New Deal.[206] Congress also may need to update existing laws to eliminate ambiguity and to delineate agency authority with clarity and specificity, somehow ensuring agencies still have flexibility to respond to unanticipated problems with certainty and confidence.

The reality, of course, is that recent Congresses have struggled to build robust bipartisan coalitions comparable to the ones that passed the landmark environmental laws of the 1970s. The rate of passing laws generally has slowed.[207] On the occasions when bills are able to break through partisan gridlock, they are rarely drafted with the level of precision and detail inherent in complex regulation. Even if the current Congress was able to spend more time on legislative drafting, researchers suggest the institution isn't equipped with the scientific resources needed to legislate in requisite detail.[208]

Though not a regulatory statute, one counterpoint to this narrative is the Inflation Reduction Act (IRA) enacted in 2022, the nation's most significant and ambitious climate action to date. Coming on the heels of *West Virginia*, the Act notably contained provisions granting EPA more explicit authority to address greenhouse gas emissions.[209] However, the IRA was fashioned as an appropriations bill, composed of spending, tax credits, and incentives rather than new authorities. And it passed on exclusively party lines, with Vice President Kamala Harris casting the tiebreaking vote in the Senate.[210] While the *Loper Bright* petitioners argue that ending *Chevron* will force Congress to face up to its legislative duties, present political reality suggests that would be extremely difficult in practice.

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[204] 42 U.S.C. 7409 (relevant standard for setting the national ambient air quality standards).
[205] Brett M. Kavanaugh*, Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016).
[206] Whitman v. Am. Trucking Associations, 531 U.S. 457, 472 (2001) ; but see *West Virginia,* 597 U.S. at 735-753 (2022) (Gorsuch, J., and Alito. J., concurring).
[207] Andrew Solender, *Capitol Hill stunner: 2023 led to fewest laws in decades*, AXIOS (Dec. 18, 2023), https://www.axios.com/2023/12/19/118-congress-bills-least-unproductive-chart.
[208] Maya Kornberg & Martha Kinsella, *Whether the Supreme Court Rolls Back Agency Authority, Congress Needs More Expert Capabilities*, BRENNAN CENTER (May 30, 2023), https://www.brennancenter.org/our-work/analysis-opinion/whether-supreme-court-rolls-back-agency-authority-congress-needs-more.
[209] Greg Dotson & Dustin J. Maghamfar, *The Clean Air Act Amendments of 2022: Clean Air, Climate Change, and the Inflation Reduction Act*, 53 ELR 10017 (Jan. 2023).
[210] Pub. L. No. 117-169 (2022) (passed the House 220-207, with four abstentions); Jordan Diamond, *A Down Payment on Climate Change*, ENVTL. L. INST. (Dec. 14, 2022), https://www.eli.org/vibrant-environmenta-blog/down-payment-climate-change.

Moving Forward at the Agencies

Absent new laws, at the agencies both political appointees and career staff responsible for day-to-day operations must move forward with the statutory authorities they have. They must engage in everything from long-term rulemakings to individual permit decisions, tackling complex issues such as simultaneous biodiversity loss and climate change, among other social, economic, and justice challenges. In a no-*Chevron* world, current laws will remain on the books, but agencies will need to approach their implementation differently to continue to fulfill their statutory mandates and effectively manage complicated and specialized areas of law. That includes thinking about how to incorporate Supreme Court decisions, past and future.

Making larger changes, however, already risks legal challenge and the likelihood that some court, somewhere, will raise the "major questions" flag. To reduce that litigation risk, it's possible that even agencies with broad statutory mandates may limit the expansiveness, real or perceived, of their rules. This might mean breaking regulatory actions into smaller pieces that don't approach a "significance" threshold, and avoiding arguably novel approaches even where they accord with a statute's clear purpose, structure, or legislative history. Messaging may shift as well, with agencies now on notice after the *West Virginia* majority pointedly cited Obama Administration rhetoric about the "aggressive transformation" of EPA's greenhouse gas emissions reductions program.[211]

In addition to being mindful of the major questions doctrine, federal agencies will thoroughly scrutinize any arguable ambiguity in the statutory provisions they implement, both in rulemakings and in court. Under *Chevron*, agencies put forth their reasonable interpretations, arrived at with public input and understanding they would receive some degree of deference if challenged in court. Absent *Chevron*'s reasonableness standard, judges might feel more free to substitute their own views of what Congress intended. Accordingly, ambiguities will take on heightened importance.

Sensing these shifting winds, agencies have already started to take a different tack, trending away from relying on *Chevron* deference. Observers have noticed it may now be petering out in practice, despite once being central to the process. As recently as 2013, a survey of agency staff found 90% reporting that *Chevron* played a role in their drafting;[212] in contrast, a recent count of major Biden Administration rules that expressly cited *Chevron* as justification amounted to less than 5 percent of the total, and even those mostly in passing.[213] In one instance, the Department of Health and Human Services excised a reference to *Chevron* between its draft and final versions of the rule. In another, the U.S. Fish and Wildlife Service offered not just a "reasonable" interpretation, but one the agency characterized as the "best."[214]

Thus, already taking these cues, agencies' rulemakings seem likely to evolve as they figure out how to leverage the deep expertise of their staff in a way that can result in durable actions. In addition, as in-house counsel, outside advocates, and others work to define the outer bounds of an agency's authority,

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[211] *West Virginia*, 597 U.S. at 714.
[212] Christopher Walker, *Inside Agency Statutory Interpretation*, 67 STANFORD L. REV. 999, 1062 (2015), available at https://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/05/67_Stan_L_Rev_999_Walker.pdf.
[213] James Kunhardt & Anne Joseph O'Connell, *Judicial deference and the future of regulation*, BROOKINGS (Aug. 18, 2022), https://www.brookings.edu/articles/judicial-deference-and-the-future-of-regulation/.
[214] Id.

those parameters may continue to reveal themselves through trial and error, case-by-case through the inevitable court challenges.

Some states have moved away from *Chevron*-like frameworks for state law as well; at least a dozen, through either court decisions or legislative action, have weakened or overturned state-level judicial deference doctrines.[215] Absent those, the extent to which judges defer to state agencies ranges from respectful deference to de novo review.[216] In Indiana courts, for example, agency interpretations receive "great weight," but will not be upheld merely on a "reasonable" finding.[217] In Wisconsin, legislators codified a Wisconsin Supreme Court decision that shifted the standard from "great weight" to "due weight," reducing the deference state agencies receive from a reviewing court.[218] And in Arizona, after a new law expressly removed any judicial deference to agency interpretations, judges on the state's highest court generated four separate opinions[219] — which may be relevant evidence of the potential confusion attending changes to the status quo, and of varying interpretations under any framework.

The Judicial Front Line

With regulatory cases a given, the question becomes how federal judges will resolve agency lawsuits absent *Chevron*'s familiar analytical framework. The lower courts have applied it thousands of times, in cases involving the authority of the Occupational Safety and Health Administration, the Fish and Wildlife Service, NASA, or any number of other federal agencies.[220] In a no-*Chevron* world, each judge potentially will take on a leading role. Agencies will still compile detailed factual records that support their actions, but instead of double-checking an agency's legal work to ensure it is reasonable, judges may be in the position of reviewing it anew.

Notably, not all agency interpretations will be affected. *Chevron* applies when agencies interpret statutes, but in other circumstances, other forms of judicial deference remain. When agencies interpret and apply their own regulations, for example, judges uphold them unless it is "plainly erroneous or inconsistent with the regulation" — so-called *Auer* deference.[221] For other agency interpretations, found in guidance documents, operating manuals, and elsewhere, courts can look at their "power to

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[215] Pamela King, *Supreme Court may end Chevron doctrine. These states have already done it*, POLITICOPRO (Nov. 8, 2023), https://subscriber.politicopro.com/article/eenews/2023/11/08/supreme-court-may-end-chevron-doctrine-these-states-have-already-done-it-00125871; Carrie Townsend Ingram, *Chevron Deference in the States: Lessons from Three States*, 38 J. NATL. ASS'N ADM. L. JUD. 2, 1 (2018), available at https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1648&context=naalj.

[216] Michael Pappas, *No Two-Stepping in the Laboratories*, MCGEORGE L. REV. 1002 (2008); Luke Philips, *Chevron in the States? Not So Much*, 89 MISS. L. J. 313, 342 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3602679.

[217] Ingram, 38 J. NATL. ASS'N ADM. L. JUD. 2 at 15.

[218] Jordan Diamond et al., Panel: The Future of Administrative Law: The *Loper Bright/Relentless* Cases' Potential Impact, ENVTL. L. INST. (Jan. 29, 2024), available at https://www.eli.org/events/future-administrative-law-loper-brightrelentless-cases-potential-impact.

[219] Ingram, 38 J. NATL. ASS'N ADM. L. JUD. 2 at 18-21, 27.

[220] Chevron *at the Bar: Supreme Court to Hear Challenges to* Chevron *Deference,* CONGRESSIONAL RESEARCH SERV. (Oct. 26, 2023), https://www.everycrsreport.com/files/2023-10-26_LSB11061_1071e75fabb2318a476b17a66193e8b6e1968b78.pdf.

[221] Auer v. Robbins, 519 U.S. 452 (1997); Kisor v. Wilkie, 588 U.S. __ (2019).

persuade" and accord weight to that interpretation without being bound by it[222] — the less-deferential *Skidmore* standard that could come back into fashion.[223] But *Chevron*'s absence would matter. Above all, the Court's *Loper Bright/Relentless* opinion will guide judges, along with pre-*Chevron* principles and precedent.

As noted by Justice Kagan and other scholars, federal agencies date back to the founding,[224] and for nearly that long the Supreme Court has looked to agency expertise and experience to help it answer questions of statutory interpretation. In the early 1800s, for example, Chief Justice John Marshall noted that if presented with an ambiguous provision he would look to executive department interpretations of similar laws.[225] In the 1870s, the Court confirmed that "construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration."[226] As Congress delegated authority to executive agencies throughout the 19th and 20th centuries, courts acknowledged the importance of listening to the experts who implement complex statutory schemes. It was this "well-settled" history that Justice Stevens cited when he articulated the *Chevron* test.[227]

Looking ahead, the "best reading" approach, already gaining a toehold among the justices and receiving considerable airtime at the *Loper Bright/Relentless* oral argument,[228] may offer some preview of what a post-*Chevron* test could look like. There, as the name suggests, each judge provides their own best reading of a contested provision using various tools of statutory interpretation. While conceptions vary, an article by then-Judge Kavanaugh provides a useful illustration: he wrote that the best interpretation of a law can be found by looking to "(1) the words themselves, (2) the context of the whole statute, and (3) any other applicable semantic canons."[229]

At Kavanaugh's second step, "once judges have arrived at the best reading of the text, they can apply — openly and honestly — any substantive canons (such as plain statement rules or the absurdity doctrine) that may justify departure from the text."[230] In his view the only deference to agency interpretations follows from "broad and open-ended terms like 'reasonable,' appropriate,' feasible,' or practicable'"; and "where an agency is instead interpreting a specific statutory term or phrase, courts should determine whether the agency's interpretation is the best reading."[231] At least one influential amicus endorsed this approach in *Loper Bright*.[232]

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[222] Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[223] Sean Donohue, *Reckoning with Chevron and everything after*, ABA SEC. OF ENV'T ENERGY AND RES. (Jan. 2, 2024), https://www.americanbar.org/groups/environment_energy_resources/resources/trends/2024-january-february/reckoning-with-chevron-everything-after/.
[224] See Section I above.
[225] *Loper Bright*, Brief for Respondents, 22 (quoting *United States v. Vowell*, 9 U.S. (5 Cranch) 368, 372 (1809)).
[226] *Loper Bright*, Brief for Respondents, 23 (quoting *United States v. Moore*, 95 U.S. 760 (1878)).
[227] See Section I at note 8.
[228] See Section III.
[229] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2145 (2016).
[230] Id. at 2144.
[231] Id. at 2154.
[232] See *Loper Bright*, Brief Of Professor Aditya Bamzai As Amicus Curiae In Support Of Neither Party; see also Marcia Coyle, *Kagan Gives UVA Prof Shoutout for Provoking 'Good and Hard Thinking',* LAW.COM (June 22, 2018), https://www.law.com/nationallawjournal/2018/06/22/kagan-gives-uva-prof-shoutout-for-provoking-good-and-hard-thinking/; Mike Fox, *U.S. Supreme Court Opinion Centers Largely on Professor Aditya Bamzai's Argument*, UVA LAW (June 26, 2018), https://www.law.virginia.edu/news/201806/us-supreme-court-opinion-centers-largely-professor-aditya-bamzais-argument.

Construction Costs

But critics have pointed to problems with administering some form of that prescription as well. While judges do already routinely engage in statutory interpretation, "lower courts do not have the decisional capacity to engage in an exhaustive review of every statutory interpretation question."[233] And although presumably guided by some set of factors or criteria, the individuality of the "best reading" approach "invite[s] a patchwork of conflicting interpretations of the same federal statute in different parts of the country," which will potentially "'render the binding effect of agency rules unpredictable.'"[234] This lack of uniformity poses a real challenge, and could promote greater "forum shopping" — the practice of strategically filing in jurisdictions where cases are more likely to draw a sympathetic judge or panel.[235]

One example, centered on the Bureau of Alcohol, Tobacco, and Firearms' (ATF's) interpretation of "machine gun,"[236] shows this approach playing out in real time. There, a 2018 rule banning "bump stocks" on semi-automatic weapons was subject to challenges in multiple circuits. In 2019, as the case was working its way through the courts, the D.C. federal district and appellate courts denied plaintiffs a preliminary injunction, relying on *Chevron*.[237]

In 2022, on a subsequent appeal, the D.C. Circuit panel looked elsewhere, determining they "need not wrestle with the *Chevron* framework." Instead these judges, "[u]sing a statutory interpretation lens," found "that the Bureau offered the best construction of the statute without wading into the subsidiary questions that the *Chevron* analysis poses." That was, after all, "how the Bureau engaged in the rulemaking exercise. The Bureau repeatedly described what it was doing as seeking to arrive at the 'best interpretation' of the statutory text, and it relied principally on that reasoning during the rulemaking."[238] In short, ATF didn't rest on the assertion that it had a reasonable interpretation, but that it had the best one.

It wasn't the last word on ATF's action, however, as the rule was challenged in multiple districts and generated several circuit court opinions.[239] This is predictable, as many disputes, especially on socially or politically controversial topics, prompt differing conclusions in the lower courts. And when the appellate courts conflict, Supreme Court intervention to settle federal law is more likely. Thus, ATF's divisive rule generated a circuit split, at which point the Court accepted the Solicitor General's petition to review the Fifth Circuit's 16-judge en banc decision invalidating ATF's interpretation of "machine gun."[240]

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[233] *Loper Bright,* Merrill Amicus Brief, 27.
[234] *Loper Bright,* Brief for Respondents, 18.
[235] Stephen I. Vladeck, *Don't Let Republican 'Judge Shoppers' Thwart the Will of Voters*, N.Y. TIMES (Feb. 5, 2023), https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html.
[236] BUMP-STOCK-TYPE DEVICES, 83 Fed. Reg. 66,514 (Dec. 26, 2018).
[237] Guedes v. ATF, 356 F. Supp. 3d 109, 126-27 (D.D.C. 2019); Guedes v. ATF, 920 F.3d 1, 17-28 (D.C. Cir. 2019).
[238] Guedes v. Bureau of Alcohol, Tobacco, and Firearms, No. 18-02988 9 (D.C. Cir. 2022), petition for rehearing en banc denied, No. 21-5045 (D.C. Cir. May 2, 2023); see James Kunhardt & Anne Joseph O'Connell, *Judicial deference and the future of regulation*, BROOKINGS (Aug. 18, 2022), https://www.brookings.edu/articles/judicial-deference-and-the-future-of-regulation/.
[239] The D.C. Circuit and Tenth Circuit upheld ATF's interpretation, Aposhian v. Barr, 958 F.3d 969 (10th Cir. 2020), but the Sixth Circuit did not. See Gun Owners of America, Inc. v. Garland, 992 F.3d 446, 450 (6th Cir. 2021).
[240] Garland v. Cargill, No. 22-976 (argued Feb. 28, 2024).

As agencies continue to produce rules and litigants challenge them apace, circuit splits may pile up. The Supreme Court, which selects its docket of 60-80 cases per term, will not be able to hear them all, which could leave persistent imbalances in federal law on the books. Some cases, often those with widespread national implications, may be on a faster track, but only subject to the justices' discretion.[241] According to one commentator, this situation has meaningful costs for the judiciary, including "reduced uniformity in federal law," "more decisions that are not well informed about highly technical or specialized areas of the law," and "decisions that do not cohere well with complicated statutory schemes."[242]

Major Questions Reprise

Even with *Chevron* still in place, "major questions" cases have been generating divergent results. In one instance, a Fifth Circuit panel found that President Biden's COVID vaccination requirement for federal contractors posed a major question, and invalidated it. The Ninth Circuit examined the same requirement but found no major question, ultimately concluding the doctrine doesn't apply to direct presidential actions.[243] The split on such a consequential matter might have guaranteed a showdown before the Supreme Court, but for a later Biden executive order revoking the vaccination policy.

Many other rules and actions, in various stages of development or implementation, may hit a similar hurdle. Observers have predicted that EPA's and the Department of Transportation's vehicle emissions and electrification standards, as well as the SEC's climate disclosure rule, will likely be among them.[244] EPA's efforts to use civil rights laws to reduce disparate environmental impacts on vulnerable and marginalized communities in Louisiana have likewise run into major questions headwinds.[245]

A recent Fourth Circuit decision likewise demonstrates the unexpected intersections between new judge-made doctrines and existing statutory schemes. In a Clean Water Act citizen suit, a North Carolina fishery conservation group alleged that discarded bycatch from commercial shrimpers' trawling practices amounted to an unpermitted "discharge" under the Act. While this claim was somewhat novel, it hinged on the ordinary definition and scope of CWA permitting provisions, which have been parsed in numerous routine precedents that offer ready analogies. Although the statutory interpretation here was being offered by plaintiffs, not by EPA or any other regulatory agency, and although "major questions"

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[241] Ben Johnson, *The Little-Known Rule Change That Made the Supreme Court So Powerful*, THE ATLANTIC (Dec. 19, 2023), https://www.theatlantic.com/ideas/archive/2023/12/loper-bright-enterprises-v-raimondo-supreme-court-questions/676353/.
[242] *Loper Bright,* Merrill Amicus Brief, 28-29.
[243] Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023), vacated as moot, 70 F. 4th 1167 (9th Cir. 2023); Louisiana v. Biden, 55 F. 4th 1017 (5th Cir. 2022); see Dan Farber, *What's a Major Question? (Judicial) Opinions differ*, LEGAL PLANET (Sept. 25, 2023), https://legal-planet.org/2023/09/25/whats-a-major-question-opinions-differ/.
[244] Jordan Diamond, *Framing West Virginia v. EPA for Tomorrow's Leaders*, ENVTL. L. INST. (Sept.-Oct. 2022), https://www.eli.org/the-environmental-forum/framing-west-virginia-v-epa-tomorrows-leaders; Michael Burger & Cynthia Hanawalt, *The Major Questions Doctrine is a Fundamental Threat to Environmental Protection. Should Congress Respond?,* SABIN CNTR. CLIMATE CHANGE L. (Oct. 19, 2023), https://blogs.law.columbia.edu/climatechange/2023/10/19/the-major-questions-doctrine-is-a-fundamental-threat-to-environmental-protection-should-congress-respond/.
[245] Louisiana v. EPA, No. 23-00692 70 (Jan. 23, 2024) (granting Louisiana's request for preliminary injunction).

appeared nowhere in their complaint or the district court opinion, it nonetheless popped up in the Court of Appeals' decision.[246]

A common thread in this growing line of major questions cases has been to assess the scope and scale of authority being asserted by the federal agency. In the Fourth Circuit case, Judge Richardson explicitly recognized that "EPA is not asserting … anything since this is a citizen suit between private parties," yet nonetheless found that:

> if we adopted [plaintiffs'] reading of the statute and held that bycatch falls within the Act's definition of pollutant, then that same reading would force the EPA to regulate not just all bycatch, but virtually all fishing, through the Act's permitting scheme. The economic and separation-of-powers stakes of our ruling thus mirror those at play in other major-questions cases.[247]

Judge Richardson went on to stress the potentially widespread, "crushing consequences" under the conservation group's interpretation, were "any fisherman — [who] returns a fish" to need a federal discharge permit.[248]

In the end, this decision simply affirmed the judgment of the lower court, which had dismissed the case. But as the Fourth Circuit opinion shows, "major questions" has become a tempting hammer in the construction toolbox, even without an agency party before the court. Since this case wasn't appealed, the Fourth Circuit's handiwork here will stand, and may serve to inspire and offer precedent for future extensions of the major questions doctrine.

[246] North Carolina Fisheries Reform Group v Cap't. Gaston LLC, No. 21-284 9 (4th Cir. Aug. 7, 2023).
[247] Id. at 12, n. 8.
[248] Id. at 13.

V. Environmental Protection in the Court's Wake — Responding to *Sackett*

The many significant changes in the federal courts' approach to environmental protection mean that new legal and organizing strategies may be needed to protect air, water, land, and ecological systems. Section IV discusses the possibility of Congressional enactment of new laws to address these issues directly. However, opportunities for legislating are limited in the near term, owing to a sharply divided Congress and divisions between Congress and the executive branch; procedural hurdles; and the interconnected, multi-sectoral nature of environmental legislation. [See box – Federal Legislation]

Federal Legislation

In the wake of *Sackett*, Congress can attempt to restore the clean water protections stripped by the Supreme Court's decision, or even expand coverage to include other waters and wetlands that were previously excluded (such as isolated wetlands and ephemeral tributaries that are important for water quality and ecological function). However, this is likely to be a drawn-out process given longstanding political divisions, procedural gridlock, and the many economic interests at play.

In undertaking a legislative response, members of Congress will need to take into account the new tests and interpretive doctrines — such as "major questions" and "clear statement" — being applied by the Supreme Court, as well as the Court's shifting view of what the U.S. Constitution allows the federal government to do using its authority to regulate interstate commerce.

The most recent attempt to address *Sackett* was introduced in the House in October 2023. This bill, the "Clean Water Act of 2023" (H.R. 5983), states its purposes as:

> (1) To reaffirm the commitment of Congress to restore and maintain the chemical, physical, and biological integrity of the Nation's protected water resources. (2) To clearly define the Nation's protected water resources … based on the best available scientific evidence and decades of partnership between the Federal, State, and Tribal governments to protect water quality. (3) To eliminate the confusion initiated by the Supreme Court's overly narrow interpretation of the term "navigable waters" and to reestablish the comprehensive authority necessary to meet the codified objective of the Clean Water Act. (4) To restore a national minimum standard of protection of the Nation's protected water resources to the fullest extent of the legislative authority of Congress under the Constitution.[249]

The bill recites numerous findings, including that the *Sackett* decision wrongly stripped protection from numerous waters, and that protection of these waters is necessary to prevent significant harm to interstate commerce and to sustain a robust system of interstate commerce in the future.

It is worth noting that federal legislative action need not be a wholesale bill; provisions could also be included in other laws, appropriations, or authorizations. Many past bills focused primarily on other topics have included conditions and policy provisions that attach additional requirements to federal funding to advance goals such as environmental improvement, environmental justice, or federal coordination with local and state governments.

Such legislative actions might not reverse the effects of *Sackett* on the nation's waters. However, it's possible they could provide a basis for reclaiming some of the losses by, for example, enacting protections to support the health of "state waters," such as non-adjacent wetlands and intermittent streams.

[249] H.R. 5983 — 118th Congress: Clean Water Act of 2023.

Any regulatory legislation would need to satisfy the narrow interpretive requirements recently announced by the Supreme Court. [See box – "Clear Statement"] Some environmental objectives can be pursued by legislation that is non-regulatory or that links environmental protection to funding programs, as in the recent Inflation Reduction Act.

"Clear Statement"

As discussed in Section II, the Supreme Court recently articulated a "clear statement" rule that makes it more difficult for federal agencies (and indeed, Congress) to exercise authority in areas where, the Court majority maintains, the states have traditional authority — such as the use of land and water by private property owners. This is new doctrine, most recently described by Justice Alito for the *Sackett* majority:

> [T]his Court requires Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property…. Regulation of land and water use lies at the core of traditional state authority…. An overly broad interpretation of the CWA's reach would impinge on this authority.[250]

Justice Kagan, in her *Sackett* concurrence for herself and Justices Sotomayor and Jackson, observed that the clear-statement rule is "judicially manufactured," and that "[t]here is, in other words, a thumb on the scale for property owners — no matter that the Act (i.e., the one Congress enacted) is all about stopping property owners from polluting."[251]

In contrast, in 1981 all nine members of the Court, in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, had confirmed the validity of federal environmental legislation affecting land and water, and easily rejected industry and state claims that these were traditional areas of state authority outside of Congress's Commerce Clause authority.[252] Now the Court's new clear-statement doctrine threatens to undo this long-settled understanding of the scope of federal environmental legislation.

Moreover, while joining the *Sackett* majority opinion requiring an "exceedingly clear statement," Justices Thomas and Gorsuch in their separate concurrence went on to characterize the 1981 *Hodel* holding as uniquely "expansive" of federal jurisdiction beyond even New Deal conceptions, and retrospectively questioned the validity of that expansion.[253] As with the justices' drift from 9-0 in *Riverside Bayview* to 4-5 in *Sackett*, their willingness to cast doubt on a 40-year-old unanimous precedent may bode ill not just for agency regulations, but for federal environmental legislation itself.

Because the timeline for any new federal legislation is long, not to mention uncertain, those looking to fill the conservation gaps left by the *Sackett* decision in the interim may want to consider a suite of near-

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[250] The majority referenced, among others, Justice Scalia's plurality opinion in *Rapanos*, where he said that Congress must make a "clear statement" when federal legislation makes an "unprecedented intrusion" into any area of traditional state authority, as well as when a federal agency interpretation "presses the envelope" of Congress's Commerce Clause authority. *Sackett*, 598 U.S. at 679-680 (citations omitted).

[251] Id. at 713 (Kagan, J., concurring).

[252] Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264 (1981). A companion case, Hodel v. Indiana, 452 U.S. 314 (1981) addressed these issues as well, rejecting a claim that federal environmental regulation of coal mining also violated the Tenth Amendment, which reserves certain powers to the states.

[253] *Sackett*, 598 U.S. at 709 (Thomas, J., concurring), citing *Hodel*, 452 U. S. at 309–313 (Rehnquist, J., concurring in the judgment).

term strategies. These could include use of state and local laws, other provisions of federal law, and common-law remedies, as well as support for tribal environmental interests in some settings. They would be enhanced by support for geographically targeted environmental scientific assessments to sustain promising legal and policy responses.

This Section illustrates these approaches by focusing on a single area of environmental law. It outlines some potentially effective responses to the loss of clean water and wetland protections resulting from the Supreme Court's decision in *Sackett v. EPA*.

State and Tribal Legislation

Efforts to adopt state and tribal legislation can help meet the conservation challenge created by the Sackett *decision.*

In *Sackett*, the Supreme Court majority limited federal Clean Water Act coverage of waters of the United States to "relatively permanent, standing or continuously flowing bodies of water," and wetlands "with a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[254]

In response, a substantial effort to protect excluded waters and wetlands could focus on establishing state and tribal regulatory protection for non-continuously flowing tributaries and non-contiguous wetlands. This would exercise states' and tribes' inherent authority to protect clean water, and support watershed and ecosystem health and resilience within the lands subject to their legislative and regulatory jurisdiction. Intermittent and ephemeral streams, and wetlands that lack continuous surface connections to navigable bodies of water, serve important ecological, water quality, flood resilience, and cultural functions that can be protected by state and tribal regulations even where federal coverage has been stripped.

The Clean Water Act expressly preserves and does not limit the power of states to impose their own requirements and permitting schemes, nor to protect waters that fall outside federal protection.[255] And federally recognized Indian tribes have power to adopt such schemes on Indian lands.[256] Existing state-law coverage varies among the fifty states, which we group into three broad categories below, based on extensive ELI research.[257]

Twenty-five states (Alabama, Alaska, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Utah) currently do not have state permitting programs that independently protect non-WOTUS wetlands and other waters

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[254] *Sackett*, 598 U.S. at 671, 678-79; see Section II above.
[255] 33 U.S.C. 1370.
[256] Indian tribes have regulatory authority over activities occurring on Indian lands, including authority over non-Indians where such activities have *direct effects* on the political integrity, economic security, or health and welfare of the tribe. Montana v. United States, 450 U.S. 544 (1981). See also CLEAN WATER ACT TREATMENT OF INDIAN TRIBES AS A STATE (TAS), 33 U.S.C. 1377(e), available at https://www.epa.gov/tribal/tribes-approved-treatment-state-tas (EPA authorized to treat federally recognized tribes as states for purposes of Clean Water Act regulatory programs).
[257] James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 ELR 10679 (2022). Discussion of state laws in this section relies on this article, which was prepared by ELI in advance of the *Sackett* decision.

from deposition of dredge or fill material.[258] In one of these, North Carolina, the legislature overrode the governor's veto and repealed existing state regulatory authority over non-WOTUS wetlands following the *Sackett* decision.[259]

Six states currently provide limited or targeted regulatory protection for some non-WOTUS waters exposed by *Sackett* while not addressing others. West Virginia asserts authority to require permits on an entirely ad hoc, case-by-case basis for non-WOTUS wetlands if it determines that pollution is likely. Illinois regulates only state-funded activities in non-WOTUS wetlands, for example highway projects; but the state does not regulate or require permits for activities that are not state-funded. Indiana, Ohio, and Wyoming require permits for discharges to certain "isolated" wetlands defined by statute. In 2021, the Arizona legislature authorized the state's environmental agency to require permits for point source discharges to specific non-WOTUS surface waters if they are placed on a list by the agency because of their importance for drinking water, fishing, or recreation.

The remaining nineteen states operate relatively robust permitting schemes, which nevertheless vary in the scope of their coverage and implementation. Some of these have notable limitations. For example, New York has a permitting scheme that does not apply to wetlands of 12.4 acres or less (except for smaller wetlands of "unusual importance"); the limitation is scheduled to drop to 7.4 acres by 2028. The most robust of these nineteen state permit programs include those operated by California, Virginia, Massachusetts, and Maryland, so *Sackett* places waters in these states at less risk. However, even these states will require additional funding and staffing support to pick up regulatory and wetland delineation functions no longer being provided by the Corps of Engineers and EPA.

Very few Indian tribes operate wetlands permitting programs that can protect their waters. Currently only 84 federally recognized Indian tribes have adopted water quality standards for use in reviewing *federal* permits, and only a few of these (*e.g.* Navajo Nation, Fond du Lac, Blackfoot) have enacted their own water or wetland permit programs, most having relied chiefly on federal permitting until now.[260]

State legislatures and tribal councils will need to adopt new permitting programs, or expand existing permitting programs, if their non-continuously flowing tributaries and non-adjacent wetlands are to be protected. For example, Illinois could consider enacting a permitting scheme that protects non-WOTUS wetlands threatened by private development, building on its existing capacity to evaluate similar activities when state funding is involved. Other Mississippi River basin states could enact permitting programs to protect all or some of the wetlands important for flood control, habitat, or water supply.

State permitting legislation can encompass as much or as little of the non-WOTUS waters as legislators deem prudent or feasible. Such action might entail the following:

- At a minimum, each state could audit its current coverage to determine which waters no longer have protection. Even in states with relatively robust permitting programs, not all wetland types

[258] These states have so far relied entirely under their authority under Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, to review and approve, deny, or condition *federal* permits to protect water quality. And where *Sackett* has now removed the federal permit requirement from numerous waters and wetlands, the states' related Section 401 authority also disappears.

[259] N.C. SESS. LAW 2023-63, SEC. 15(c) ("Wetlands classified as waters of the state are restricted to Waters of the United States.").

[260] U.S. EPA, TRIBES APPROVED FOR TREATMENT AS A STATE (TAS), available at https://www.epa.gov/tribal/tribes-approved-treatment-state-tas.

or tributaries are subject to current regulations. Such audit efforts might also be conducted by academic, governmental, or nonprofit entities that have credibility with lawmakers.

This is a critically needed first step to identify geographic and hydrologic areas of greatest concern, since the Supreme Court's decision simply stripped Clean Water Act protection but did not locate the effects of its decision on millions of acres of wetlands and stream miles. Such an audit is also a prerequisite to generating and building public and legislative support for state, tribal, and local protection of these water resources.

- State legislatures (and tribes with reservation lands) could consider enacting permitting schemes for discharge of dredge/fill pollutants into their non-WOTUS waters, to replace the loss of federal permitting authority and accompanying loss of the opportunity under CWA Section 401 to review, condition, or deny federal permits. Enactment of regulatory permitting programs or expansion of existing programs will be essential, especially since any federal legislative action is likely to take many years and be of uncertain scope even if enacted.[261]

- Tribes may need substantial technical and administrative support to enact permitting schemes, and many will also need support for professionally staffing such programs if enacted. Here, the effort might be focused on tribes that have substantial wetlands and waters in the context of larger watersheds and aquatic ecosystems, in order to increase the likely impact of the program and its durability within a larger landscape that is subject to potentially supporting or conflicting state regulation.

Each of these efforts could be supported by scientific and policy research, public outreach, education, and organizing. State-by-state efforts will require a focus on the resources and threats important to each state and of potential interest and leverage within the legislature.

State agencies may be able to take some interim measures to expand coverage where there is an existing general prohibition, or exercise underlying authority to expand existing permit programs to cover additional resources (not typical). Some state agencies have taken tentative steps on an interim basis, without legislation. However, many states have legislation that prohibits or limits their agencies' authority to adopt any regulations that are "more stringent than" federal regulations.[262] In these states, (including Mississippi, which has a total prohibition, and Iowa, which has a qualified prohibition), action by the legislature will be needed to provide authority to fill the *Sackett* gap. Even absent such limitations, legislative action will be required in most states to create a new permitting scheme or expand an existing one, as well as to staff such a program.

In some instances, state agencies may undertake partial measures while awaiting future legislation. For example, the state of Colorado has an existing broad definition of "waters of the state," but lacks a state permit program that can immediately protect the waters and wetlands excluded from federal permitting

[261] State legislative action would not begin on an entirely blank slate. All states have their own statutory definitions of "waters of the state" that include more waters and wetlands than WOTUS, and most have general statutory prohibitions against polluting such waters. However, states without permitting requirements can act only via an enforcement action when and if a pollution event is called to the state's attention. While such provisions can be useful for penalizing prominent and dangerous spills and pollution events, they provide no real mechanism to identify potential polluting activities prospectively, nor to regulate the terms and conditions of proposed activities that impair hydrologic function.

[262] James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 ELR 10679 (2022).

by *Sackett*. In July 2023, Colorado's Department of Public Health and Environment issued a new policy statement that encourages entities to disclose their intention to fill small areas of waters and wetlands left unregulated after *Sackett*. The policy provides assurances that the state will not take enforcement action under its general prohibition against water pollution, if the disclosing developer agrees to abide by conditions that would have been applicable under federal nationwide or general permits if the waters had remained WOTUS.[263]

This is no substitute for a permit program, but provides a way for low-impact projects to self-identify and proceed while the state pursues consideration of broader legislation. Such an administrative strategy could help some developers navigate uncertainty resulting from *Sackett* but does not comprehensively protect waters, and has no utility in cases where developers choose not to engage with the state at all in the absence of a state permitting scheme.

Protecting Wetlands and Tributaries With a *County of Maui* Strategy

Federal and state government enforcement policies, anticipatory scientific research, and citizen suit litigation could target the discharge of pollutants that actually affect relatively permanent standing or flowing WOTUS waters — by focusing on pollutants that initially enter non-adjacent wetlands or non-continuously flowing tributaries.

This approach would identify discharges from point sources into non-WOTUS waters where there is a discernible pathway for the pollutants to reach WOTUS, relying on the Supreme Court's 2020 decision in *County of Maui v. Hawaii Wildlife Fund*.[264] In that case, a 6-3 majority of the Court held that discharge of pollutants from a point source (defined as a "discrete conveyance") that traveled via groundwater to waters of the United States is subject to CWA Section 402 permitting and enforcement requirements, so long as it is the "functional equivalent" of a direct discharge to WOTUS. Importantly, the approach applies only where the travel of pollutants to WOTUS can be shown — conditions more likely to be met with respect to mobile chemical or biological pollutants than by deposition of dredge or fill material that mostly alters the non-WOTUS tributary or wetland itself.

The Supreme Court in *Maui* laid out a series of factors to be considered in determining functional equivalence to a direct discharge into WOTUS. These include:

> (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity.

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[263] WATER QUALITY CONTROL DIVISION IMPLEMENTATION POLICY NUMBER CW-17 (July 6, 2023), found at https://cdphe.colorado.gov/dredge-and-fill (applies to loss of no more than 0.1 acres wetland, 0.03 acres streambed): "This policy applies to unpermitted point source discharges of dredged or fill material into state waters that occur on or after the date of the Sackett decision."

[264] County of Maui v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020) This 6-3 decision was authored by Justice Stephen Breyer, since retired. The majority included Justice Ruth Bader Ginsburg, who has since died, and Justice Kavanaugh, who joined the majority opinion and added a concurrence. Justices Thomas, Gorsuch, and Alito dissented.

Time and distance, the Court said, will be the most important factors in most cases, but not in every case.[265]

The *Maui* Court noted that case-by-case decisions will provide guidance on these factors going forward. It emphasized that "the underlying statutory objectives also provide guidance," while warning that such decisions "should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives." The Court also observed that "EPA, too, can provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants of individual permits, promulgation of general permits, or the development of general rules."[266]

Professor Robin Craig has suggested that *Maui* provides an avenue by which CWA Section 402 (requiring a permit for discharge of a pollutant from a point source to WOTUS) offers potential opportunities for regulation that differ from those under Section 404 (requiring a Corps permit for placement of dredge and fill in WOTUS); and she notes that the latter program raises more "federalism and property rights" issues of concern to the current members of the Supreme Court.[267] Federal court cases both preceding and post-dating the *Maui* decision have provided clues as to how its test might be applied going forward. They show that some discharges to non-WOTUS waters that eventually reach WOTUS might be pursued successfully, but also suggest serious evidentiary hurdles.

In *Upstate Forever v. Kinder Morgan Energy Partners,* the Fourth Circuit in 2018 held that the Clean Water Act Section 402 permit requirement applied to a gasoline spill from a pipeline (clearly a point source) that seeped into soil and groundwater and thereby reached two tributaries of the Savannah River, 400 feet and 1,000 feet from the point of the discharge.[268] Following a remand from the Supreme Court for further consideration in light of *Maui*, the parties settled in favor of plaintiffs in October 2020, with a $1.5 million cleanup fund and further remediation. On the other hand, the Fourth Circuit in an earlier 2018 case had determined that a discharge from a coal ash waste pile via groundwater to a nearby navigable river was not a violation of the Act, because the waste pile was not a point source.[269]

A district court in Alabama rendered decisions in 2019 and 2022 (before and after *Maui*) determining that acid drainage leaking from a waste pile at an abandoned underground coal mine, and flowing both overland and through groundwater for 10 feet into a tributary of a navigable river, was a violation of

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[265] "Time and distance are obviously important. Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies. If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply." Id. at 1476.

[266] Id. at 1477. On November 20, 2023, EPA released for comment a draft guidance document for implementing *County of Maui:* EPA, *Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program to Discharges through Groundwater*, available at https://www.epa.gov/system/files/documents/2023-11/maui-draft-guidance.pdf. The comment period on the draft ended on Dec. 27, 2023.

[267] Robin Kundis Craig, *There is More to the Clean Water Act than Waters of the United States: A Holistic Jurisdictional Approach to the Section 402 and Section 404 Permit Programs*, 73 CASE W. RSRV. L. REV. 349 (2022).

[268] Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637 (4th Cir. 2018), cert. granted, judgment vacated, 140 S. Ct. 2736 (2020), abrogated by Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020). The status of the tributaries and their adjacent wetlands as WOTUS were not contested; the court focused on whether the discharge was "from" a point source "to" navigable waters.

[269] Sierra Club v. Virginia Electric & Power Co., 903 F.3d 403 (4th Cir. 2018) (waste pile not a "discrete conveyance").

Section 402.[270] The parties settled for a cleanup plus a million-dollar supplemental environmental project and two million dollars in attorneys' fees. The Ninth Circuit, in November 2023, recently allowed citizen-suit plaintiffs to pursue a Clean Water Act claim against a golf course operator for over-application of wastewater to fairways, where nitrogen pollutants in the water allegedly moved through groundwater to a water of the United States.[271]

And on January 3, 2024, the Tenth Circuit reversed a district court that had applied the *Maui* functional equivalence test to penalize a Colorado mine for discharging pollutants. The mine's unlined settling ponds were 20 feet higher than and within 90 feet of nearby WOTUS. The court ruled that the lower court should have made findings on all seven of the Supreme Court's new *Maui* factors, not just time, distance, and the nature of the material through which the pollutants travel. The court was particularly concerned that the ultimate discharge might be so diluted, or so indistinct in comparison with nearby pollution levels, that functional equivalence could not be shown. It emphasized that plaintiffs carry the burden of proof as to each of the factors and that the burden does not shift, even though the relative weight of the factors may vary. It remanded the case for further evidentiary hearings.[272]

The *Maui* approach thus depends upon whether the discharge originates from a point source, and then upon evidence that supports functional equivalence — a pathway that actually allows pollutants to enter a water of the United States. Because the Supreme Court has so significantly reduced the waters that qualify as WOTUS, the geographic and temporal chains that must be traced will often be much longer than before *Sackett*. And where the discharged pollutant is dredged spoil or fill material, it may not be possible to show migration of the pollutant all the way to WOTUS.

In the case of a citizen suit based on *Maui*, the plaintiff must also show "injury in fact" in order to demonstrate standing to bring the case. Thus, for citizen suits, the impact upon the receiving waters must be shown to cause harm, while the plaintiff's ability to do so may be diminished as the geographic and temporal chain grows more and more attenuated because of the distance to WOTUS.[273]

Activities that could support use of this under-recognized tool to protect non-WOTUS waters and wetlands include:

- Preemptively identifying and documenting the hydrologic interconnection of key non-WOTUS wetlands and waters with WOTUS in specific landscapes, in order to discourage or prevent actors from undertaking activities that would discharge pollutants to such wetlands and waters. This can be facilitated by actions that support collaborative scientific research and

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[270] Black Warrior River-Keeper, Inc. v. Drummond Co., 387 F. Supp. 3d 1271 (N.D. Ala. 2019) (overland), 579 F. Supp. 3d 1310 (N.D. Ala. 2022) (groundwater).

[271] Cottonwood Environmental Law Center v. Edwards, No. 22-36015 (9th Cir. Nov. 21, 2023). The court at the same time affirmed a summary judgment in favor of another defendant — the owner of holding ponds for the treated wastewater. It upheld the district court's ruling that there was no basis for a "direct discharge" theory, as there was no evidence of a direct conveyance via pipeline from the ponds to the WOTUS; and a jury trial had determined there was no indirect discharge from the ponds.

[272] Stone v. High Mountain Mining Co. LLC, No. 22-1340 (10th Cir. 2024).

[273] See James McElfish, "*Developments in Standing for Public Lands and Natural Resources Litigation*," 48 ELR 11098 (Dec. 2018); see also the first Interlude, above. This showing may be difficult where the pollutants reaching the WOTUS are attenuated. See, e.g., an opinion joined by then-Judge Alito when he was on the Court of Appeals for the Third Circuit, where that court found pollutants reaching the Delaware River had become so attenuated and intermingled with other pollutants that the plaintiffs could not show injury-in-fact. Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc., 123 F.3d 111 (3d Cir. 1997).

documentation of "functional equivalent" pathways in these watersheds by universities, state agencies, and others.

- Citizen advocacy to challenge actual or proposed discharges to non-WOTUS waters that will eventually pollute WOTUS.

In sum, it may be possible for the federal government, states, or citizen plaintiffs to show the hydrologic interconnection of certain non-WOTUS wetlands and tributaries with actual WOTUS. But this will require substantial investment of technical and scientific resources, and it may be difficult to do preemptively. However, such an investment perhaps could be focused on selected wetland complexes of particular public importance (e.g., Carolina bays of the Atlantic Coast, bermed or diked Mississippi Basin floodplain wetlands with seasonal flow to navigable waters), or some non-WOTUS tributaries (e.g., well-defined arroyos and seasonal rivers supplying water to southwestern communities' public water supplies or other important waters).

These technical investments would need to be carefully selected, given the likely time and expense required for the studies.[274] Such prospective studies and identification would potentially attract political and economic opposition labeling it an attempt to re-regulate waters that *Sackett* has just deregulated; and it may require substantial educational effort to create public understanding around at-risk resources.

Reviving Public Nuisance to Address Wetlands and Tributaries

Attention could be focused on actual harm to public resources, as a basis for efforts to invoke the historical, but still viable, public nuisance doctrine to protect these resources under state common law.

Long before the adoption of regulatory programs for protecting waters, the common law (case-by-case decisions based on pre-colonial English law and U.S. state law) provided remedies for injuries to natural resources, using the doctrine of public nuisance. Public nuisance is founded upon the power of a state to provide for protection of public health, safety, and welfare,[275] and does not depend upon the existence of a statute or regulatory scheme. But many states have also expressly identified pollution of their public resources as per se "nuisances," subject to judicial actions to secure abatement.[276] Public nuisance liability is founded entirely upon existence of a harmful condition, regardless of the presence or absence of "fault."

A nuisance may be abated by a court injunction against the entity responsible for creating the nuisance, requiring it to remove the nuisance condition. If the state can prove the existence of a public nuisance, "it need not demonstrate irreparable harm or the lack of an adequate remedy at law [e.g., damages] in

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[274] Such efforts may resemble the very substantial multi-year studies and assessments by U.S. EPA in a very few cases (only 14) over the five decades of the Clean Water Act, to support its exercise of authority to prescriptively designate an area of WOTUS as off-limits to dredge and fill. 33 U.S.C. § 1344(c); see *Clean Water Act: Section 404(c) "Veto Authority" Fact Sheet,* ENVTL. PROTECTION AGENCY, available at https://www.epa.gov/sites/default/files/2016-03/documents/404c.pdf.

[275] See generally, James McElfish, "State Environmental Law and Programs," section 7:4 in ENVTL L. INST., Law of Environmental Protection (Thomson Reuters, 2021) (summarizing law of public nuisance).

[276] See James M. McElfish Jr., Almanac of Enforceable State Laws to Control Nonpoint Source Water Pollution, ENVTL L. INST. (1998), available at https://www.eli.org/research-report/almanac-enforceable-state-laws-control-nonpoint-source-water-pollution.

order to obtain an abatement injunction."[277] In addition to an injunction requiring abatement, in most instances the state may also recover any funds it may itself have expended to abate the nuisance. Private individuals or groups may also bring nuisance claims on behalf of the public in many states, but harm to the public interest must be demonstrated.

Nuisance claims may be brought only *after* the harm has occurred and/or is ongoing. They provide no remedy for prospective behavior, nor can they set conditions for proposed activity (except in settlement of a claim regarding a nuisance). Thus, this remedy provides recourse for damage to wetlands and waters in the absence of federal or state regulation, but it is no substitute for a regulatory scheme. Advancing this approach might entail:

- Increased awareness of public nuisance claims under state common law as a means to protect wetland and water resources. This will enable state actors, typically state attorneys general and state agencies that have their own access to state courts, to take action to protect important resources even in the absence of legislation. It may also discourage private actors from damaging non-WOTUS waters and wetlands. Each state's case law and precedents differ, but the doctrine can be laid out in legal journals, by in-state law schools, and through legal education resources.

- Use of public nuisance claims by watershed groups, towns, cities, utilities, and citizens where harm is occurring from damage to non-WOTUS waters and wetlands. There is a long history of public nuisance claims in the water pollution context; and there is currently a scientific basis to support identification and proof of ecological injury to waters and wetlands as a basis for these claims.[278]

- Applying *federal* common-law nuisance to address *interstate* impacts in the wake of *Sackett*. In the early 1970s, the U.S. Supreme Court recognized a doctrine of federal common-law public nuisance, which allows states to protect public resources from pollution originating in another state when neither federal statute nor the law of the other state provide a remedy.[279] Federal common law gives way when a "comprehensive" federal regulatory scheme displaces it: in 1981, the Court found that enactment of the 1972 Clean Water Act did displace federal common law regarding pollution of the Great Lakes.[280] But under the Court's precedents, federal common law still may be identified to address an area of national concern where there is no applicable Act of Congress nor a viable state remedy.

  As interpreted by *Sackett*, the Clean Water Act no longer covers damage to certain tributaries and wetlands *despite* their demonstrable impact on important downstream resources;[281] nor the damage to non-navigable interstate wetlands impaired by pollutants discharged in a

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[277] James McElfish, "State Environmental Law and Programs," section 7:4 in ENVTL L. INST., Law of Environmental Protection (Thomson Reuters, 2021).
[278] J.B. Ruhl, *Making Nuisance Ecological*, 58 CASE W. RESERVE L. REV. 753 (2008), available at https://scholarship.law.vanderbilt.edu/faculty-publications/488
[279] Illinois v. Milwaukee, 406 U. S. 91 (1972) (Milwaukee I).
[280] City of Milwaukee v. Illinois, 451 U.S. 304, (1981) (Milwaukee II). Similarly, in American Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410 (2011), the Court found that the Clean Air Act had displaced any federal common law applicable to emission of greenhouse gases from stationary sources.
[281] See, e.g., EPA, PHYSICAL AND CHEMICAL CONNECTIVITY OF STREAMS AND RIPARIAN WETLANDS TO DOWNSTREAM WATERS: A SYNTHESIS (2021).

neighboring state. Thus, federal common law might again apply because no comprehensive federal scheme is any longer in place.[282] It would do so only in cases of actual damage from pollutants discharged to non-WOTUS waters or wetlands in one state that affects a downstream or neighboring state. Any test of federal nuisance law would likely be brought by a state plaintiff, as the Supreme Court has expressed uncertainty about whether a private party may obtain such relief.[283]

Local Regulatory Conservation to Protect Wetlands and Tributaries

Local governments could apply their land-use regulatory powers to protect waters and wetlands apart from federal jurisdiction, by establishing zoning and environmental rules for activities on lands adjacent to these features.

Local governments have varying degrees of authority to protect waters and wetlands within their boundaries. Their authority to do so may derive from state wetland and critical area conservation laws (such as those in Washington, New Hampshire, Massachusetts), or more commonly and widely from the general regulatory powers granted them by state planning and zoning laws for regulation of land use and development.[284] State laws may also preempt local governments from adopting regulations to protect certain types of resources. While local governments that have this authority can be effective, particularly where threats to resources result from new development, local governments in areas with the greatest remaining non-WOTUS waters may lack the political appetite or technical capacity needed to enact and administer environmentally oriented zoning and development limits.

There are numerous examples of local governments establishing wetland buffer areas[285] or overlay zones[286] to protect aquatic resource areas from incompatible development activities, but there is no comprehensive database of such information. For example, while Colorado state law does not protect non-WOTUS wetlands via state regulation, some local governments have enacted buffer protections. The City of Boulder provides for protection of streams and wetlands by ordinance, requiring a 25- to 50-foot buffer depending on their quality, while Park County requires for its wetlands a 50-foot buffer from any new construction. In Lake County, Illinois, "all waters such as lakes, ponds, streams, farmed wetlands, and wetlands that are not under U.S. Army Corps of Engineers jurisdiction" are protected by the county's Watershed Development Ordinance.[287] But it is important to note that local governments' powers may be expanded or restricted by state legislation.

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[282] See a similar argument in the climate context in Mark Nevitt & Robert V. Percival, *Could Official Climate Denial Revive the Common Law as a Regulatory Backstop?*, 96 WASH. U. L. REV. 441 (2018), available at https://ssrn.com/abstract=3140758.

[283] *American Elec. Power Co.,* 564 U.S. at 429.

[284] Rebecca Kihslinger, Jim McElfish, Heather Luedke, & Georgia Ray, *Filling the Gaps: Strategies for States/Tribes for Protection of Non-WOTUS Waters,* ENVTL. L. INST. (May 2023), available at https://www.eli.org/research-report/filling-gaps-strategies-statestribes-protection-non-wotus-waters.

[285] See, e.g., *Planner's Guide to Wetland Buffers for Local Governments*, ENVTL. L. INST. (Mar. 2008), https://www.eli.org/research-report/planners-guide-wetland-buffers-local-governments.

[286] Jim McElfish, *Nature-Friendly Ordinances*, ENVTL. L. INST. (2004) (see sections on buffers and zoning).

[287] Rebecca Kihslinger, Jim McElfish, Heather Luedke, & Georgia Ray, *Filling the Gaps: Strategies for States/Tribes for Protection of Non-WOTUS Waters,* ENVTL. L. INST. (May 2023), available at https://www.eli.org/research-report/filling-gaps-strategies-statestribes-protection-non-wotus-waters.

Because across the U.S. there are tens of thousands of local governments with authority to adopt land-use regulations, it will be critical to identify specific geographic areas within which to focus conservation efforts using this tool. Developing this approach might entail:

- Supporting research to determine (1) where there are critically important non-WOTUS waters that need protection, and (2) whether these are located within local government jurisdictions that have the legal and staff capacity to adopt land-use protections.

- Promoting adoption of wetland buffer protections by local governments (counties, cities, townships).

In the northeastern U.S. and upper Midwest, local government regulation of land and water-related activities is frequently at the town or township level, often covering relatively smaller areas (except in the largest cities). In the Southeast, Intermountain West, and Pacific regions, county governments tend to predominate, although cities may also have such powers. In the South, frequently county and city powers vary substantially. Thus, understanding the political jurisdictions overlying non-WOTUS wetland and freshwater complexes of greatest conservation concern will be key to determining whether local government-focused efforts can be effective at scale.

Non-Regulatory Conservation of Wetlands and Tributaries

Conservation activities for non-WOTUS (including applications for federal and state grant dollars) could be supported where a state, tribe, or other jurisdictions or private owners can be persuaded to identify and inventory waters and wetlands that contribute substantially to water quality or ecological health.

These efforts can support state funding, private philanthropic conservation funding, targeting of federal conservation grant dollars under Department of Interior[288] and Department of Agriculture[289] programs, and marshaling of private voluntary efforts. Several states have undertaken spatially explicit planning to identify key waters and wetlands to protect vulnerable or unique resource types or landscape matrices. ELI research shows that "some of these prioritization efforts are tied directly to funding prioritization schemes, while others are free-standing or multiple management or conservation purposes."[290]

Tribes can also undertake such efforts [see Box — Tribal Wetlands Governance]. For example, the Red Lake Band of Chippewa has conducted mapping in a high-priority geographic region of their reservation that is under threat of development. The mapping was conducted using GIS through interpretation of high-resolution aerial photographs, LiDAR, and soil and water data layers, forming the basis for the Tribe's wetland inventory and planned conservation efforts.[291]

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[288] E.g., NORTH AMERICAN WETLANDS CONSERVATION ACT GRANT PROGRAM, STATE WILDLIFE GRANT PROGRAM.

[289] E.g., REGIONAL CONSERVATION AND PARTNERSHIP PROGRAM, AGRICULTURAL CONSERVATION EASEMENT PROGRAM, HEALTHY FORESTS EASEMENT PROGRAM, ENVIRONMENTAL QUALITY INCENTIVES PROGRAM.

[290] Rebecca Kihslinger, Jim McElfish, Heather Luedke, & Georgia Ray, *Filling the Gaps: Strategies for States/Tribes for Protection of Non-WOTUS Waters,* ENVTL. L. INST. (May 2023), available at https://www.eli.org/research-report/filling-gaps-strategies-statestribes-protection-non-wotus-waters.

[291] RED LAKE BAND OF CHIPPEWA WETLAND PROGRAM PLAN, RED LAKE DEPARTMENT OF NATURAL RESOURCES OFFICE (2016), available at at https://www.epa.gov/sites/default/files/2018-01/documents/red_lake_band_of_chippewa.pdf.

Tribal Wetlands Governance

Federal Guidance for Tribal Wetland Programs. Tribes can play a key role in identifying, assessing, and protecting the wetlands and waters that lie within recognized tribal lands. EPA published a *Guide for Developing Tribal Wetland Management Programs* in 2022, tailored specifically to unique tribal interests in wetlands.

EPA hosted Tribal Roundtables with tribal representatives, EPA staff, and the National Association of Wetland Managers to develop the Guide. Tribal recommendations incorporated into the Guide included, among other subjects: guidance and case studies on adopting Indigenous knowledge and traditional ecological knowledge through collaboration between tribal and non-tribal entities; a description of EPA's framework and national resources for wetlands monitoring and assessment; an explanation of how tribes can integrate federal and tribal regulatory components into wetland protection strategies; case studies and lessons learned from voluntary wetland restoration and preservation activities; and detailed information for funding opportunities to develop tribal wetland programs.

The *Guide* serves as a tool for tribes at different stages of wetland program development and directs users to a variety of detailed and technical resources for wetland management and planning. Among these resources are EPA's Core Elements Framework, guidance on developing Wetland Program Plans, common "questions and answers" discussions, a wetland program funding matrix, and an appendix of 17 case studies of various tribal wetland program elements, such as the development of wetland water quality standards. EPA makes clear that the Guide is intended to be adaptable and applicable to tribe-specific needs.

Tribal Wetlands Working Groups. A Tribal Wetlands Working Group is a proven method used by tribes to create wetland protection programs for their lands and communities. These provide the opportunity for multiple tribes and their aquatic resource program staff to learn from each other and work collectively to address challenges specific to tribal wetland and aquatic resource programs, including the development of new permitting programs. Peer-to-peer technical transfer of knowledge and networking are important benefits of the working groups. A Tribal Wetlands Working Group can also provide training opportunities and other resources tailored to the needs of Tribes and wetlands staff.

The Pacific Northwest Tribal Wetlands Working Group, for example, has supported development of tribal wetland and aquatic resource programs since 2010. The Tribal Wisconsin Wetland Working Group was created in 2017 to support training, help tribal water programs achieve operational continuity despite staff turnover, and provide a forum for wetland tribal staff to convene, share ideas and challenges, and participate in training.

A group of tribes in EPA Region 5 (Great Lakes) has also recently created a Tribal Wetlands Working Group with the goal to build tribal program capacity and staff expertise related to wetland management, monitoring, restoration, and conservation. This group plans to provide training and other opportunities to learn from each other, and establish a collaborative network for additional tribes to connect and develop and improve skills.

Many states leverage the efforts of landowners, nonprofits, and the public in protecting and restoring wetlands and waters.[292] State voluntary conservation and restoration programs take a variety of forms, ranging from engaging citizens in wetland monitoring, to paying citizens to remove invasive species, to funding landowners to change their agricultural practices, to purchasing easements on private land, to providing technical assistance. These programs provide public and private organizations with valuable

[292] EPA, BASIC INFORMATION ABOUT VOLUNTARY WETLAND RESTORATION AND PROTECTION, available at https://www.epa.gov/wetlands/basic-information-about-voluntary-wetland-restoration-and-protection.

opportunities to protect and restore wetland ecosystems and ecosystem services in their area. EPA has also published a helpful worksheet on how states can establish volunteer conservation programs.[293]

Substantial non-regulatory efforts will be needed for effective protection of non-WOTUS wetlands and waters. Even with regulatory programs in place, these resources are only protected against immediate threats to deposit fill or to discharge other pollutants, assuming there is a robust and well-staffed regulatory entity. This alone does not assure watershed-wide ecological health and function, which fundamentally depends upon achieving sound understanding of the chemical, biological, and physical connections among these waters and the landscapes and systems within which they reside.

This means that inventorying and prioritization is needed. Targeting focused geographic areas can both assist in developing strong inventory and prioritization schemes, and provide the basis for voluntary and government-supported conservation efforts that will contribute to longer-term ecosystem health. Such an effort might:

- Support and provide technical inputs to geospatial planning efforts to identify priority water and wetland resources for future conservation.

- Support voluntary conservation campaigns in specific wetland areas, and provide matching funds as needed to facilitate use of governmental grant funds for landscape-level conservation and restoration activities.

[293] EPA, CORE ELEMENT: VOLUNTARY RESTORATION AND PROTECTION, available at https://www.epa.gov/sites/default/files/2015-09/documents/restoration_and_protection_cef_1.pdf.

VI. Environmental Protection in a New Judicial Era

It will take time to fully understand the impacts of the Supreme Court's recent decisions on environmental and regulatory law, as lower courts, federal agencies, Congress, and the public adjust their thinking to accommodate major questions, clear statements, and the uncertain future of *Chevron* deference. At first, as we are already seeing, this will play out issue by issue and case by case.

In this landscape, advancing environmental protection goals in ways that are effective and durable will require a multifaceted approach. It involves leveraging existing statutory and regulatory authorities and facilitating new ones to the fullest extent possible, in ways illustrated in detail above in the post-*Sackett* context. It entails engagement across levels of government, broad outreach to constituencies, supporting sustained research efforts focused on actionable science and policy, and conducting practical education programs for diverse audiences. And given the rapid rate of change over just the past few Supreme Court terms, groups focused on environmental protection may need to balance long-term planning based on current legal frameworks with an ability to nimbly adapt to changing circumstances.

Looking forward also involves looking around, to processes and tools that are available even absent strong federal regulation. This includes using the National Environmental Policy Act's environmental review and public participation requirements, as well as other, less formal ways to catalyze community organizing. It includes centering environmental justice in decisionmaking at all levels, and taking note of the growing trend to create state constitutional rights to a healthy environment. And it includes carrying out research on both science and policy topics, to understand what's happening in the field and the best responses from the state "laboratories of democracy." Perhaps most critically, trusted messengers must deliver meaningful education based on the results of that research, tailored so that each audience can make better-informed decisions about environmental protection in the twenty-first century and beyond.

Employing the NEPA Process in Planning and Permitting

The National Environmental Policy Act (NEPA), a federal law enacted in 1970 and amended in 2023 via the Fiscal Responsibility Act, requires all federal agencies to conduct an environmental review for federal actions "significantly affecting the quality of the human environment."[294] Notably, the 2023 legislation codified many concepts and requirements that had previously existed only in regulations, with an eye toward strengthening and streamlining the existing process. This means NEPA's statutory obligation would remain unchanged by alterations to *Chevron*, although the Council on Environmental Quality's (CEQ's) implementing regulations could be affected by reduced deference from the courts.

CEQ is currently considering comments on proposed regulations, which are due out in April 2024. Among other things, these would prioritize environmental justice,[295] restore requirements for agencies to consider indirect and cumulative effects of their action(s), call for "high-quality information, such as best available science and reliable data, models, and resources," and expressly include climate change in

[294] 42 U.S.C. § 4332(2)(C).

[295] James M. McElfish, Jr., *Proposed NEPA Rule Goes All-In on Environmental Justice*, ENVTL L. INST. VIBRANT ENVT. BLOG (Aug. 28, 2023), https://www.eli.org/vibrant-environment-blog/proposed-nepa-rule-goes-all-environmental-justice.

several places.[296] The new regulations themselves are likely to be challenged, and may also be subject to review and legislative repeal under the Congressional Review Act, depending on how late in the calendar year they are finalized.

While the level of environmental review depends on a program or project's scope and impacts, NEPA serves an important disclosure function because it requires documenting for the agency and the public the environmental impacts of a proposed action, along with "a reasonable range of alternatives."[297] The most detailed level of analysis takes the form of an environmental impact statement, which requires the agency to solicit public comment. Moreover, the federal agencies involved must consider and respond to these comments when adopting their final decision.

Although NEPA does not require an agency to adopt the least environmentally damaging alternative, it does allow interested stakeholders to inject ideas and elevate existing priorities into the conversation. For example, the NEPA process can facilitate the inclusion and adoption of natural and nature-based solutions, in large-scale infrastructure planning as well as in individual projects that require a federal permit.[298] Many water resources projects that require Clean Water Act permits or are supported by federal funds fall into this category.

However, NEPA is much broader in scope and will remain a key tool for federal agencies and stakeholders, making CEQ's forthcoming central repository of NEPA documents a valuable resource for tracking all NEPA-related federal environmental decisionmaking. In addition, some states have NEPA-like frameworks as well.[299]

Apart from its environmental review requirements, NEPA also provides a potential roadmap for discretionary decisionmaking, since it directs that all federal "policies, regulations, and public laws" be "interpreted and administered in accordance with" a set of values that include intergenerational equity, widespread availability of "safe, healthy, productive and culturally and esthetically" pleasing surroundings, and "diversity and variety of individual choice."[300] While not judicially enforceable, these provisions nevertheless can bolster federal planning, policy development, and environmental protection and environmental justice initiatives.

Public Outreach and Organizing

In a new era of environmental protection, finding ways to center people in the decisionmaking process through thoughtful, intentional outreach, engaging environmental justice communities through the NEPA process or otherwise, will inevitably continue. Indeed, given the complexity and magnitude of

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[296] NATIONAL ENVIRONMENTAL POLICY ACT IMPLEMENTING REGULATIONS REVISIONS PHASE 2 (July 31, 2023), available at https://www.federalregister.gov/documents/2023/07/31/2023-15405/national-environmental-policy-act-implementing-regulations-revisions-phase-2#sectno-reference-1502.23.

[297] 42 U.S.C. § 4332(2)(C)(iii).

[298] Regina Buono, Jarryd Page et al., *Unlocking Nature's Potential: A Guide to Navigating Federal Permits and Environmental Reviews to Facilitate Use of Nature-Based Solutions*, ENVTL. L. INST. (Dec. 2023), https://www.eli.org/research-report/unlocking-natures-potential-guide-navigating-federal-permits-and-environmental.

[299] *States and Local Jurisdictions With NEPA-like Environmental Planning Requirements*, CNTR. ENVTL CONTROL. https://ceq.doe.gov/laws-regulations/states.html (last visited Feb. 27, 2024). Most of these are far narrower in scope and application than NEPA.

[300] 42 U.S.C. §§ 4332(1), 4331(b).

many of current environmental challenges, many organizations will view this as more critical than ever. Whether formal or informal, public input clarifies the issues, builds a robust factual record, and strengthens democratic decision-making.

If environmental regulation notably shifts away from federal agencies and toward state and local governments, even for a time, then forums for discussion and sharing of lessons learned may become increasingly important. Community convening can inform stakeholders about the issues, build capacity, and equip them with knowledge and language to effectively comment and participate. Expert gatherings of academics and practitioners can unpack developments, share experiences, and shed additional light on the current status and future directions of environmental law and policy.

The information gathered and lessons learned from these efforts will benefit a wider audience through effective dissemination. These initiatives can lead to development of community toolkits or other resources that provide ongoing assistance, in other contexts and for other applications.[301] This means making resources available in multiple formats, including both written (in all relevant languages) and audiovisual formats, including social media.

Holistic Environmental Justice Solutions

Both the federal and state governments are advancing environmental justice efforts, including through policies and enforceable laws and regulations. The landmark Inflation Reduction Act is further driving investment in this area.[302] Originally rooted in a response to racist practices in the context of hazardous waste siting in the Southeast, the environmental justice movement has expanded to become a central force in the decisionmaking process for a wide range of programs and projects, both large-scale planning and individual permitting decisions. As such, it offers a viable cross-cutting lens for implementing more equitable solutions in a new environmental era.

In April 2023, President Biden issued an executive order that updated and built on President Clinton's groundbreaking 1994 Executive Order 12898 on Environmental Justice.[303] The Biden order "pursue[s] a whole-of-government approach to environmental justice," and sets a national policy that "every person must have clean air to breathe; clean water to drink; safe and healthy foods to eat; and an environment that is healthy, sustainable, climate-resilient, and free from harmful pollution and chemical exposure." It goes on to state that this is "a fundamental duty that the Federal Government must uphold on behalf of all people."[304]

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[301] E.g., Linda Breggin, Akielly Hu, & Sam Koenig, *A Toolkit for Incorporating Food Waste in Municipal Climate Action Plans*, ENVTL. L. INST. (July 2021), https://www.eli.org/research-report/toolkit-incorporating-food-waste-municipal-climate-action-plans.

[302] Skylar Bluestein, *Policy Drivers for Environmental Justice: What Businesses Need to Know*, HARVARD BUS. SCHOOL (Oct. 10, 2023), https://www.hbs.edu/environment/blog/post/environmental-justice-Bluestein.

[303] EXEC. ORDER NO. 12898 (Feb. 11, 1994) on Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.

[304] EXEC. ORDER NO. 14096 (April 21, 2023) on Revitalizing Our Nation's Commitment to Environmental Justice for All, available at https://www.federalregister.gov/documents/2023/04/26/2023-08955/revitalizing-our-nations-commitment-to-environmental-justice-for-all.

The executive order followed the announcement of an ongoing federal "Justice40 Initiative," which seeks to direct at least forty percent of regulatory benefits to disadvantaged communities,[305] with multiple federal agencies, including the Department of Transportation,[306] Department of the Interior,[307] Department of Energy,[308] and EPA,[309] currently integrating that into their existing processes. The Council on Environmental Quality also has released a Climate and Economic Justice Screening Tool that provides census-level data to help identify and prioritize environmental solutions.[310] But these executive branch actions could always be revoked by a subsequent executive order.

States have similarly begun to act. New York, New Jersey, California, Washington, and others have passed bills that establish committees, direct funds, and/or create permitting frameworks, all with the goal of ensuring more equitable environmental outcomes. New Jersey's law focuses on permitting, requiring the applicant to conduct an environmental assessment, including evaluating the cumulative impacts, that must be made available in advance of a hearing where the community can meaningfully participate. Washington requires its agencies to prepare an environmental justice assessment for all "significant agency actions," and mandates them to reduce environmental burdens while maximizing the benefits to vulnerable populations and overburdened communities.[311]

These laws are still in the initial implementation phases, but as state agencies begin to draft their own policies, and the programs and specific decisions pursuant to them are challenged in court, the contours of how the laws can be used will emerge. Even pending or absent robust legal frameworks, formal and informal networks can provide pathways to advance environmental justice objectives. Legal aid efforts and law clinics are another piece of the puzzle, striving to connect individuals, communities, and non-profits to ensure that viable legal matters get the representation they need.[312]

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[305] EXEC. ORDER NO. 14008 (Jan. 2, 2021) on Tackling the Climate Crisis at Home and Abroad, available at https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad.

[306] *Justice40 Initiative*, U.S. DEP'T OF TRANSP., https://www.transportation.gov/equity-Justice40 (last visited Feb. 27, 2024).

[307] *Justice40 Initiative*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/justice40-initiative (last visited Feb. 27, 2024); *2023 Equity Action Plan Summary: U.S. Department of the Interior*, WHITE HOUSE, https://www.whitehouse.gov/wp-content/uploads/2024/02/DOI-2023-EAP-Summary.pdf (last visited Feb. 27, 2024).

[308] *Justice40 Initiative*, U.S. OFFICE OF ENERGY AND EQUITY, https://www.energy.gov/justice/justice40-initiative (last visited Feb. 27, 2024); *2023 Equity Action Plan Summary: U.S. Department of the Interior*, WHITE HOUSE, https://www.whitehouse.gov/wp-content/uploads/2024/02/DOI-2023-EAP-Summary.pdf (last visited Feb. 27, 2024).

[309] *Justice40 at EPA*, U.S. EPA https://www.epa.gov/environmentaljustice/justice40-epa (last visited Feb. 27, 2024); *2023 Equity Action Plan Summary: U.S. Department of the Interior*, WHITE HOUSE, https://www.whitehouse.gov/wp-content/uploads/2024/02/DOI-2023-EAP-Summary.pdf (last visited Feb. 27, 2024).

[310] CLIMATE AND ECONOMIC JUSTICE SCREENING TOOL, available at https://screeningtool.geoplatform.gov/en/#3/33.47/-97.5. The U.S. EPA administers EJScreen, another mapping tool where users can access environmental and demographic information. California has its own screening tool, CalEnviroScreen, as well. CALENVIROSCREEN, available at https://oehha.ca.gov/calenviroscreen.

[311] Barry Hill & Jarryd Page, Fundamental Rights, Climate Science and Law for Judges, 21-25 (Jan. 2023).

[312] *ELI Pro Bono Clearinghouse*, ENVTL. L. INST. https://www.eli.org/probono (last visited Feb. 27, 2024); *Access to Justice Clinic - HEPA Environmental Justice Division,* GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, https://www.law.gwu.edu/access-justice-clinic-hepa-environmental-justice-division (last visited Feb. 27, 2024).

State Constitutional Environmental Rights Amendments

State constitutions exist outside the federal framework, and thus provide at best a patchwork response, but several states have constitutional provisions that guarantee a right to some variation of "clean air and water" or a "clean and healthy environment."[313] Commonly known as environmental rights amendments (ERAs), these provisions vary in substance and coverage, but send a signal of the highest order that environmental protection is critically important, both now and for future generations. In addition, ERAs can backstop and strengthen existing environmental statutes, foster greater state responsibility through their trust obligations over natural resources, and can also be used in litigation.[314]

In a recent high-profile case, *Held v. Montana*, sixteen youth plaintiffs obtained a declaratory judgment from a Montana trial court that relied on that state's ERA. Judge Kathy Seeley found that Montana's current statute, which prevented state agencies from considering the climate dimensions of projects in their environmental reviews, clashed with the state constitution and violated plaintiffs' right to a "clean and healthful environment."[315] Notably, Judge Seeley grounded the opinion in climate science, following extensive testimony from plaintiffs' expert witnesses on the links between fossil fuel use and climate change and on how a changing climate impacts Montanans, in particular the youth plaintiffs.[316] Another climate rights case, based on Hawaii's comparable constitutional provision, is scheduled to begin trial in June 2024 in Hawai'i state court.

While only a handful of states have explicit ERAs, mostly enacted during the 1970s environmental movement — with Pennsylvania, Montana, and Hawai'i among the most protective — there has been a resurgence of late. In 2022, New York became the most recent state to add environmental rights to its state constitution following a statewide voter referendum. One of the shortest to date, this amendment, placed in the Bill of Rights section alongside the rights of freedom of religion and freedom of speech, simply states that "Each person shall have a right to clean air and water, and a healthful environment."[317] Courts are already starting to interpret its scope and application,[318] with more cases certain to come.

Momentum is building elsewhere too, with at least a dozen states in various stages of considering or adopting their own ERA. California proposed one in early 2024, and Washington is similarly considering

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[313] *Green Amendments in 2023: States Continue Efforts to Make a Healthy Environment a Legal Right*, NAT'L CAUCUS OF ENVTL. LEGISLATORS (Mar. 27, 2023), https://www.ncelenviro.org/articles/green-amendments-in-2023-states-continue-efforts-to-make-a-healthy-environment-a-legal-right/.

[314] Held v. State of Montana, No. CDV-2020-307 (Mon. 1st Dis. Ct. 2023); *Our Children's Trust Homepage*, OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/ (last visited Feb. 27, 2024).

[315] Held v. State of Montana, No. CDV-2020-307 (Mon. 1st Dis. Ct. 2023). An earlier request for injunctive relief was denied.

[316] Sarah Backer, Jarryd Page & John Doherty, Podcast: *Not All Environmental Rights Amendments Are Created Equally: The Climate Science Behind Held v. Montana*, ENVTL. L. INST. (Sept. 13, 2023), https://www.eli.org/podcasts/not-all-environmental-rights-amendments-are-created-equally-climate-science-behind-held-v; Jarryd Page, *Unpacking the Headline: Climate Science and Held v. State of Montana*, ENVTL. L. INST. (Sept. 13, 2023), https://www.eli.org/vibrant-environment-blog/unpacking-headline-climate-science-and-held-v-state-montana. The case is currently on appeal before the Montana Supreme Court.

[317] N.Y. Const., Art. I, sec. 19.

[318] Michael B. Gerrard & Edward McTiernan, *New York's Green Amendment: The First Decisions*, N.Y.L.J. (2023), available at https://scholarship.law.columbia.edu/faculty_scholarship/3906/.

placing one on the ballot, although that resolution is presently before a House committee.[319] Proponents of ERAs point to their comprehensive nature, along with elevated placement in the state constitution, as a way to meaningfully address a host of environmental challenges, especially in an era of increasingly dire climate impacts.[320]

Coordinating Science and Policy Research

Most of this report has recounted the ways in which federal environmental and regulatory law is undergoing dramatic change. As a result, uncertainty now abounds in a field where clarity is needed to sufficiently address intersecting and compounding environmental challenges, such as biodiversity loss, climate change, and plastics pollution. Not just government agencies, but NGOs, universities, and other research institutions will need to consider how best to provide timely, objective information and analysis of relevant science and policy topics. A few examples of actionable, cross-cutting policy research include:

- **State and regional surveys**. One result of limiting federal authority to protect the environment is the enhanced role of states. With fifty "laboratories of democracy," in Justice Louis Brandeis' words,[321] as well as other subnational (regional and city) governance structures, it will be even more important to experiment, compare notes, and collaborate. State and regional surveys can set the stage and inform and give ecological context for the various law and policy patchworks. Even across widely differing states, it may be possible to identify specific natural resources or geographic areas that are collectively deemed important — coastal resources, areas important for tourism, drinking water sources, or for agriculture — as well as legislative or regulatory responses that can effectively protect them.

  Ecological surveys can help identify what has been working and what has not by highlighting case studies, and assist with agenda-setting by guiding resources to where they can be most impactful. They can further be used in coordination with information from the various environmental justice tools. Funding and facilitating collaboration among entities who do this work, and making space for them to regularly engage with each other, can bolster these efforts.

- **Gap-filling research**. Surveys can also illuminate existing gaps in protection. Researchers can suggest policy options to fill those gaps. For example, for the objective of better implementing nature-based solutions, research might explore permitting schemes, ways to prioritize among alternatives, how to integrate them into hazard mitigation plans, and ways to overcome barriers to access funding sources, and conduct state-by-state comparative gap analyses.[322] Canvassing existing authorities to address pressing problems, such as plastics pollution, can also help to fill existing gaps in enforcement and implementation.[323]

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[319] HJR 4210 - 2023-24, available at https://app.leg.wa.gov/billsummary?billnumber=4210&year=2023&initiative=False.
[320] Maya K. van Rossum, *Green Amendments For The Generations Homepage*, GREEN AMENDMENTS FOR THE GENERATIONS, https://forthegenerations.org/ (last visited Feb. 27, 2024).
[321] New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).
[322] Amy Reed, *Protecting Wetlands, Promoting Nature-Based Solutions*, ENVTL. L. INST. (Feb. 2, 2024), https://www.eli.org/vibrant-environment-blog/protecting-wetlands-promoting-nature-based-solutions.
[323] E.g., Margaret Spring, Cecilia Diedrich et al.*, Existing U.S. Federal Authorities to Reduce Plastic Pollution: A Synopsis for Decision Makers*, ENVTL. L. INST. (March 2024).

- **Model laws and policies**. Beyond general policy prescriptions, research organizations can help fill gaps by drafting and disseminating model laws and policies to achieve specific goals, for example decarbonization.[324] Policies developed after robust stakeholder engagement, including from the governmental body that will ultimately adopt the policy, can increase support by both public and private actors, and boost the chances of adoption and implementation.[325]

All of the above play a role. As discussed in detail in Section V, anticipating and then responding to the Supreme Court's Clean Water Act decision in *Sackett* provides just one example of how legal and policy research,[326] combined with convening experts,[327] timely publications,[328] and new media,[329] can combine to advance the policy agenda.

Educate, Educate, Educate

In a hyper-partisan political environment, the need for unbiased, objective information becomes more important than ever. A host of affected parties — the public, private-sector leaders, policymakers and their staff, and lawyers and judges — stand to benefit from it. Accordingly, educators should provide credible programming on the scientific dimensions of environmental and climate problems, and report on the wide array of proposed solutions, to enable all these constituencies to deploy good governance and rule-of-law principles to better and more effectively protect the environment.

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[324] *Model Laws for Deep Decarbonization in the United States*, SABIN CNTR. FOR CLIMATE CHANGE LAW, https://lpdd.org (last visited Feb. 27, 2024).
[325] Darby Hoover, *Model Ordinance on Mandatory Reporting for Large Food Waste Generators: With and Without Commentaries*, NATURAL RES. DEF. COUNCIL (July 12, 2022), https://www.nrdc.org/resources/model-ordinance-mandatory-reporting-large-food-waste-generators-and-without-commentaries.
[326] James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 ENVTL. L. REP. 10679 (2022).
[327] Analyzing the Consequences of *Sackett v. EPA* and Looking Ahead to the Future (webinar), ENVTL. L. INST. (June 2023), available at https://www.eli.org/events/analyzing-consequences-sackett-v-epa-and-looking-ahead-future.
[328] Rebecca Kihslinger, Jim McElfish, Heather Luedke, & Georgia Ray, *Filling the Gaps: Strategies for States/Tribes for Protection of Non-WOTUS Waters*, ENVTL. L. INST. (May 2023), available at https://www.eli.org/research-report/filling-gaps-strategies-statestribes-protection-non-wotus-waters.
[329] People Places Planet Podcast, *State Protection of Nonfederal Waters* (Oct. 5, 2022), available at https://www.eli.org/podcasts/state-protection-nonfederal-waters.

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