DIALOGUE

ANNUAL SUPREME COURT REVIEW AND PREVIEW

SUMMARY

The Supreme Court's October Term 2022 had major implications for environmental law, including its most significant Clean Water Act decision ever. Upcoming cases in October Term 2023 have the potential to be just as impactful. On September 25, 2023, the Environmental Law Institute hosted a panel of experts who provided an overview of key rulings and major take-aways from the Court's prior term, and discussed cases that have been granted review or are likely to be considered by the justices in the upcoming term. Below, we present a transcript of that discussion, which has been edited for style, clarity, and space considerations.

Jay Austin (moderator) is a Senior Attorney at the Environmental Law Institute and Editor-in-Chief of the *Environmental Law Reporter*.
Sharon Jacobs is a Professor of Law at Berkeley Law School.
Gerald Torres is Professor of Environmental Justice at the Yale School of Environment and a Professor of Law at Yale Law School.
Robert Percival is the Robert F. Stanton Professor of Law at the University of Maryland's Carey School of Law.

Jay Austin: It's been a little over a year since the U.S. Supreme Court decided the *West Virginia* Clean Air Act (CAA)[1] "major questions" case.[2] It's been only four months since it issued its most impactful Clean Water Act (CWA)[3] decision ever.[4] The beginning of the Court's term is a week away, and there seems to be a lot more to come. Lately, I've found I have been unlearning environmental and administrative law faster than I can manage to learn it. So, to help me out today, we are bringing in three panelists who are leading experts in those fields.

First, we have Sharon Jacobs, a professor at Berkeley Law School, where she teaches energy law, environmental law, and administrative law. Gerald Torres is a professor at the Yale School of Environment and Yale Law School. And Robert Percival is the Robert F. Stanton professor of law at the University of Maryland's Carey School of Law, where he directs the Environmental Law Program. Bob also was a law clerk for Justice Byron White.

I'll ask each of our panelists to start by highlighting a decision or two from the Court's past term. We'll then have a panel discussion on the just-concluded term, with some focus on the *Sackett* wetlands decision and its larger implications. We'll then preview the upcoming term and discuss things to come. Sharon, would you kick off our review with the *National Pork Producers* case?[5]

Sharon Jacobs: I would be delighted. I'm coming to you this morning from California, so it seems appropriate. *National Pork Producers Council v. Ross* was decided in May 2023. It's a case about animal welfare and public health, but it's also a case about the so-called dormant Commerce Clause—a doctrine that's been used to limit states' ability to legislate, and one that I think could have important implications for other environmental and even energy statutes and regulations going forward.

The facts of this case are pretty straightforward. California has an initiative process that is the version of direct democracy where citizens can qualify initiatives for the ballot. Those initiatives can become law. We adopted one such initiative in 2018, Proposition 12,[6] with about a 63% share of the vote. It was quite popular. It became part of the Health and Safety Code.

It's a law that prevents in-state sale of pork products from pigs that were confined in a cruel manner. The statute defines "cruelty" as including preventing the pigs from lying down, standing up, fully extending their limbs, or turning around freely. It would essentially eliminate sales of pork if producers used gestation crates for pigs, which are very, very small cage-like structures that prevent pigs from turning around. They're widely used across the industry.

The goal of this initiative was to prevent animal cruelty, but proponents also suggested there would be health benefits for consumers by shifting methods. The challenge

1. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
2. West Virginia v. Environmental Prot. Agency, No. 20-1530, 52 ELR 20077 (U.S. June 30, 2022).
3. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
4. Sackett v. Environmental Prot. Agency, 143 S. Ct. 1322, 53 ELR 20083 (2023).
5. National Pork Producers Council v. Ross, 598 U.S. 356, 53 ELR 20076 (2023).
6. Prevention of Cruelty to Farm Animals Act (Cal. 2018).

was brought by two out-of-state organizations representing pork producers. Their argument was that the law violated the dormant Commerce Clause. This is the doctrine derived from the Commerce Clause of the U.S. Constitution—the implication being that, if the U.S. Congress is given the power to regulate interstate commerce, the states no longer have that power. The tricky part is trying to figure out when a state law constitutes regulation of interstate commerce.

Prior to the decision in *National Pork Producers*, there were a few ways that a law could run afoul of the dormant Commerce Clause. One is that it could expressly discriminate against out-of-state producers in favor of in-state businesses. Another is that it could regulate outside of the state's borders. This is the so-called extraterritoriality doctrine. Third, if neither of those applied, the law could still violate the dormant Commerce Clause if it imposed a substantial burden on interstate commerce—that is, if it were clearly excessive in light of the local benefits of the law, which has become known as the *Pike* balancing test.[7]

The petitioners weren't alleging intentional discrimination. They acknowledged that the burdens on in-state pork producers were facially the same as burdens on out-of-state pork producers, but the catch is that most of the pork sold in California comes from out of state. And California is a huge market. It accounts for about 15% of pork sales nationwide.[8]

In addition, because of the way the pork market and pork processing work, apparently it's really hard to figure out what pork is destined for what state. So, the out-of-state producers claim they're going to effectively have to change their practices across the board to comply with California's law, and they say that the law therefore constitutes extraterritorial regulation, that California is trying to regulate operations in states that have nothing to do with California or where the product isn't even going to California.

The producers are also claiming that, under *Pike* balancing, the local benefits of Prop 12 don't outweigh the burdens that the law imposes on interstate commerce. They say the local benefits are illusory. The moral benefits and health benefits are dubious, and the out-of-state burdens are significant. It's going to increase their costs dramatically, and those costs will be passed on to consumers.

The district court dismissed the challenge for failure to state a claim.[9] The U.S. Court of Appeals for the Ninth Circuit affirmed.[10] The Supreme Court affirmed the dismissal of the challenge by a 5-4 vote, but the opinion is a mess. It's highly fractured. It features some unusual coalitions as well. Justice Neil Gorsuch writes for the majority for many pieces of his opinion, but not all the pieces of his opinion. The pieces that have a majority say essentially, let's simplify the test for the dormant Commerce Clause.

The core of the dormant Commerce Clause, according to the majority, is that states shall not, through their laws, show any kind of economic protectionism. The opinion calls this the antidiscrimination principle. Justice Gorsuch is not a big fan of the extraterritoriality argument that the pork producers are making, as he finds that the cases in this area do not establish anything like a per se rule that extraterritorial regulation violates the dormant Commerce Clause.

Most state laws, he says, have the practical effect of controlling at least some extraterritorial behavior to some extent. So, the extraterritoriality test can't be used as an effective test for violations of the dormant Commerce Clause without invalidating whole swaths of state regulation. The majority leaves the door open for claims of extraterritorial regulation, but just a crack. There is certainly now nothing close to a per se rule that laws with extraterritorial effects violate the dormant Commerce Clause.

Then also, there was a majority for the position that it doesn't make sense to think about *Pike* balancing separately from the antidiscrimination principle, that *Pike* really reminds us that a law's practical effects could disclose the presence of a discriminatory purpose, and that laws without much local benefit at all, but that impose a substantial burden on interstate commerce, may in fact be designed to discriminate.

The Court finds that there is no discrimination in this case, as the companies that choose to sell their products in various states normally have to comply with the law in those states. We have a long history of state animal welfare laws just like this one. So, the California law survives.

We get a lot of interesting discussion in sections of the Gorsuch opinion that don't have a majority, about where certain members of the Court would go further in changing the test for the dormant Commerce Clause. There's an interesting section in which Justice Gorsuch, joined by Justice Clarence Thomas and Justice Amy Coney Barrett, says that courts are just not well-suited to do the kind of benefit-cost balancing required by *Pike* when we're dealing with incommensurable values. Think of things like the moral benefits of the law to Californians.

When we're dealing with such incommensurable values, Justice Gorsuch says, these are ultimately policy choices. This is not where courts should be getting involved. In other words, Justice Gorsuch is skeptical of *Pike* balancing, full stop. He can't get a majority for that proposition, but that is something that at least several members of the Court are wrestling with.

Then, there is this question of whether or how you show a burden in light of these challenges. We do have six votes, and Justice Brett Kavanaugh is careful to call this out in his separate opinion, for keeping the *Pike* balancing analysis as part of the dormant Commerce Clause analysis, including a separate opinion by Justice Sonia Sotomayor and joined by Justice Elena Kagan. That opinion

7. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
8. Julie Creswell, *Pork Industry Grapples With Whiplash of Shifting Regulations*, N.Y. Times (Sept. 5, 2023), https://www.nytimes.com/2023/09/05/business/pork-prices-california.html; *U.S. Pork Producer to Limit Sales in California Over New Pig Law*, Reuters (Dec. 17, 2021), https://www.reuters.com/markets/commodities/us-pork-producer-limit-sales-california-over-new-pig-law-2021-12-17/.
9. National Pork Producers Council v. Ross, No. 3:19-cv-02324-W-AHG (S.D. Cal. Apr. 27, 2020).
10. National Pork Producers Council v. Ross, No. 20-55631 (9th Cir. July 28, 2021).

wouldn't close the door to invalidation of some state laws that are genuinely nondiscriminatory if they impose significant burdens on commerce.

Justice Barrett wrote separately to emphasize that the burdens here are incommensurable and hard to balance. But that's not always going to be the case. There are plenty of benefits and burdens that courts are going to be well-qualified to assess and balance.

Chief Justice John Roberts, writing separately and joined by Justices Samuel Alito, Kavanaugh, and Ketanji Brown Jackson—I told you there were strange coalitions in this case—has a different view on *Pike*. The Chief still thinks it's still quite important. That it's still possible even to weigh seemingly incommensurable things.

Finally, Justice Kavanaugh wrote separately not only to note that *Pike* is still part of the dormant Commerce Clause, but to argue that, in Prop 12, California sought to unilaterally impose its moral and policy preferences for pig farming and pork production on the rest of the nation. He offered a parade of horribles: the laws we might see coming down the pike in the future—no pun intended—if this type of law is allowed to stand and doesn't violate the dormant Commerce Clause. He foresees a new era where states shutter their markets to goods produced in a way that offends their moral or policy preferences, and predicts that this will shut down interstate commerce.

The upshot is that Prop 12 survives. The dormant Commerce Clause analysis is slightly altered to de-emphasize extraterritoriality and to maybe limit *Pike* balancing in some ways. But the votes are too muddled to really tell what's happening on *Pike* balancing.

I have a few observations about the implications. One is that there doesn't seem to be the kind of judicial self-aggrandizement here that we're used to seeing from this Court. In other words, this is not an aggressive reading of the dormant Commerce Clause in the way that would allow the Court to insert itself into policy debates around the country and invalidate laws that it thinks go too far in affecting commerce.

This is, if anything, a pulling back from an aggressive version of dormant Commerce Clause analysis. This is going to leave California and other states much more room to shape policy around the kinds of products they want to see in their state. That means more flexibility to enact state environmental or energy laws that affect out-of-state actors. I think of things like plastic bag bans, or the low-carbon fuel standard that's already been upheld in California against a dormant Commerce Clause challenge.[11]

It's also interesting to see the back-and-forth among the justices here about how to assess the incommensurable benefits and burdens that *Pike* balancing requires. We haven't seen that kind of humility or skepticism about judicial ability in the context of arbitrary and capricious review—looking at cost-benefit analyses, for example. Does that mean that judges are also ill-equipped to second-guess an agency's choices when it comes to cost-benefit analysis? I'm really curious about how much judicial humility there is in this opinion, and where we'll see it in other places.

Jay Austin: Thanks, Sharon, for helping make sense of that one. It is indeed an odd coalition of justices. It will be interesting to see whether or how well it hangs together in other environmental law-type cases.

Let me toss out a question that popped up specific to this case, asking whether there were amicus briefs from other industries with regard to dormant Commerce Clause issues. The audience member used the example of textbook manufacturers, which apparently are largely centered in Texas. But I imagine there are any number of other industries that might have seen their interests at stake in this decision.

Sharon Jacobs: There were a lot of amicus briefs in this case. They came from organizations whose interests extended far beyond animal welfare and animal production, including worker safety advocates, the National League of Cities, and professors interested in trade law. So, it's fair to say that everyone understands that this case is going to have implications far beyond health and safety regulation.

Jay Austin: Potentially some more contentious interstate issues as well, when you bring in the moral dimension. Next up, Gerald is going to talk about *Arizona v. Navajo Nation*,[12] an important decision on treaty water rights.

Gerald Torres: The case of *Arizona v. Navajo Nation* involved the question of whether the United States needs to assist the Navajo Nation in securing the rights to water that it claimed were guaranteed in the 1868 treaty that it signed with the United States. This litigation actually started in 1952,[13] so it's been a long series of efforts. I don't think we're done yet, but it involved two really important questions. I also want to discuss the challenge that Justice Thomas posed in his concurrence.

The first issue is the issue of reserved water rights. The *Winters* doctrine[14] in federal Indian law says that, when land is set aside for tribes, one of the things that accompanies that land is the water necessary to make the land productive. The Court in *Winters* intervened in a stream adjudication to ensure that the tribes who were excluded from that adjudication would have their share of water.

One of the issues in this case arises over the disposition of water to the Colorado River. As you may know, the Colorado River states were just involved in comprehensive

11. Rocky Mountain Farmers Union v. Corey, Nos. 17-16881 and 17-16882, 49 ELR 20010 (9th Cir. Jan. 18, 2019).

12. No. 21-1484, 53 ELR 20095 (U.S. June 22, 2023).

13. In 1952, Arizona filed an original action against California in the Supreme Court seeking a division of the water of the Colorado River. The United States intervened to protect federal water rights, including rights reserved for tribes. The case, styled *Arizona I*, was decided in 1963, Arizona v. California, 373 U.S. 546 (1963). The decision essentially adopted the recommendations of a special master who was appointed to oversee negotiations.

14. Winters v. United States, 207 U.S. 564 (1908).

negotiations over that.[15] One of the points that the Navajo Nation made is in the distribution of the water rights to the Colorado River. They were left out. Since their interests are represented by the federal government, the argument that they were making was that the federal government has an obligation to represent the water claims that the Navajo Nation would make consistent with the needs and the promises that were made in the treaty of 1868.

That implicated, as the *Winters* doctrine itself does, the idea that the federal government has a trust obligation, and a variety of obligations, in relation to tribes to manage resources. In essence, it stands as a trustee for the tribes. In this case, the tribe said the United States violated the trust duty by failing to vigorously represent the claims of the Nation in adjudication of the water rights that would have benefitted the reservation as a whole.

The way it was characterized in the decision is that the Navajo were requesting affirmative steps on the part of the federal government to ensure that they would have adequate water for the needs of the reservation. Justice Kavanaugh in his opinion suggested that this might include pipelines, pumps, and various other infrastructure for the delivery of water. But all of those questions are merely secondary questions to the principal issue of whether the Navajo's percentage of water that is due to them has been correctly adjudicated. That was at the heart of it, that the adjudication of the water rights has left the Navajo Nation short of what they need and of what was promised in the treaty.

Let's step back. The question is whether the treaty speaks directly to the needs of the Navajo. The answer is that the treaty creates a trust obligation on the part of the United States to ensure that, in light of *Winters*, the tribe would have sufficient water for the needs that were outlined in the treaty.

Does the treaty require the United States to build pipelines, pumps, wells, and so on? No. The treaty merely creates an obligation on the part of the United States to ensure that the tribe has adequate access to the resources necessary to ensure that the land reserved for the Navajo can function as the homeland that it was designed to be.

The characterization of the request by the Navajo was critical, because one of the requirements in the application of the trust duty is whether there is a specific law that would support the claim the tribe is making. So in a series of cases, the Supreme Court decided that there wasn't a naked trust obligation, but that the obligation of the trust had to be tied to certain assurances that the federal government had made either through statute or regulation or some other legally binding hook.

But what Justice Kavanaugh, and Justice Thomas in his concurrence, point to is the lack of any specific language that would obligate the federal government to undertake protection of additional rights beyond those that the Navajo currently have. One of the problems with that analysis is that it moves away from the question of what the treaty itself obligated the federal government to do. The question that has to be answered first is whether the federal government acted with sufficient vigor to protect the claims of the Navajo to the river, to support the reservation that was created.

It's important to remember some of the history. One of the complaints of the Navajo when they were initially dislocated, before they were allowed to return to some of their homelands, was that the place that they had been dislocated to, Bosque Redondo, was, in fact, poorly suited to the kind of agriculture the tribe wanted to undertake, and it had bad water. So, one of the things that would have been at the top of mind for the tribal negotiators would have been access to good water—and some history indicates that that was true.

Notwithstanding those claims, notwithstanding *Winters*, the majority opinion of the Court turned on whether there was a specific legal obligation that would require the federal government to take affirmative steps to protect the water claims of the Navajo. And because they found none, they reversed the Ninth Circuit and held against the Navajo.

I want to turn to Justice Thomas' concurrence because he makes two points that are potentially far-reaching. First, he thinks that the idea of the trust at all is misplaced, and that the language of trust obligations arising from the relation between the federal government and the tribes has no constitutional warrant. It's been used loosely. It is used as though it represents something like a common-law trust, but it does nothing of the type. There are obligations that are statutorily required of the federal government, and the Court ought to focus on those.[16]

Second, Justice Thomas goes one step further. He says not only is there no constitutional warrant for this trust duty, but that what has come to be called the "Indian canons of construction"—statutory construction and treaty construction—which the Court has historically used in analyzing statutes and treaties that apply to the tribes, grows out of the trust duty and sets out a separate interpretive framework. He wants to reject that interpretive framework because it's rooted in the trust duty. He believes that because the trust duty has no constitutional warrant, the application of these interpretive guidelines that the Supreme Court has adopted isn't sound either.

As you might suspect, Justice Gorsuch had a long and strong dissent. I think he makes the point very clearly that if you tee up the ball wrong, you're going to hit it wrong.

15. On May 22, 2023, the Colorado River states and the federal government agreed to a plan to apportion the waters of the Colorado River. Although the plan is temporary, it buys time for a comprehensive negotiation to take place. *See* Letter from Colorado River Basin States Representatives of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, to Camille Calimlim Touton, Commissioner, Bureau of Reclamation (May 22, 2023), https://www.doi.gov/sites/doi.gov/files/seven-states-letter-5-22-2023.pdf; Letter from Colorado River Basin States Representatives of Arizona, California, and Nevada, to Camille Calimlim Touton, Commissioner, Bureau of Reclamation (May 22, 2023), https://www.doi.gov/sites/doi.gov/files/lower-basin-plan-letter-5-22-2023.pdf.

16. Arizona v. Navajo Nation, No. 21-1484, 53 ELR 20095 (U.S. June 22, 2023) (Thomas, J., concurring).

And he accuses Justice Kavanaugh of teeing up the wrong question. He relies heavily on history, and unlike Justice Thomas, he recognizes that the trust duty arises out of the constitutionally driven relationship that the Court identified in the early Indian cases.

So, where do we stand? The Navajo Nation is going to continue to push the claims that it has for additional water. We'll see how that turns out. It's not over yet.

Jay Austin: Thanks, Gerald. How many votes did the Thomas concurrence attract?

Gerald Torres: Just his. Justices Kavanaugh, Alito, Barrett, and Roberts joined the majority opinion. Justice Thomas joined it, but filed a concurrence. Justices Gorsuch, Sotomayor, Kagan, and Jackson dissented.

Jay Austin: Turning to Bob, people who watched this webinar last year might recall he filed a fairly dramatic report fresh from the steps of the Supreme Court, having watched the oral argument in *Sackett*. So we were able to get almost real-time details on that. Now the case has been decided. It is quite impactful and meaningful, as I think we anticipated.

Robert Percival: This case is a doozy, and it's had a very long history. It involves the reach of federal authority under §404 of the CWA, which requires a permit to deposit dredge or fill material in wetlands. When the Court first confronted this issue in 1985, in *United States v. Riverside Bayview Homes*,[17] it unanimously deferred to the regulations that the U.S. Army Corps of Engineers had adopted, which many thought had been ratified quite quickly by Congress in the 1977 amendments.

In that unanimous decision, Justice White, writing for the Court, cautioned against doing precisely what Justice Alito did in his 5-4 majority opinion here. Justice White said:

> 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.[18]

What ends up happening in this case is based on an extraordinarily narrow interpretation of the word "waters" in "waters of the United States," the jurisdictional hook for §404 and also for §402's reach of the CWA, to discharges to other surface waters. The Court significantly rewrites the CWA.

Sixteen years after it decided *Riverside Bayview*, the Court, for the first time, restricted federal jurisdiction over wetlands. In the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* decision,[19] another 5-4 decision, the Court ruled that a truly isolated wetland that was not near navigable waters could not be subject to federal jurisdiction just because of the presence of migratory birds. Then mass confusion ensued following the *Lopez* decision[20] in 2005 that, for the first time struck down a federal statute, the Gun-Free School Zones Act, on the grounds that it exceeded Congress' commerce power.

Rapanos v. United States was a 2006 case in which wetlands were adjacent to a non-navigable tributary of navigable waters.[21] The Court split 4-1-4. In a plurality opinion by Justice Antonin Scalia, four justices argued that a dictionary definition of "waters" meant that only waters with continuous surface connections could be regulated under the CWA.

Four other justices dissented, deferring to the existing Corps regulations. But the justice in the middle was Justice Anthony Kennedy, who did not accept either of those positions. Instead he proposed his own "significant nexus" test, requiring case-by-case determinations of whether or not pollution of particular wetlands could affect the quality of navigable waters. The eight other justices all rejected Kennedy's significant nexus test, but it became the de facto rule because it could provide the crucial fifth vote to uphold federal jurisdiction. What ensued then was mass confusion for well over a decade as courts tried to apply the *Rapanos* decision.

Sackett first came before the Supreme Court in 2012.[22] The Sacketts were trying to build a home on property right next to Priest Lake in northern Idaho. They had tried to fill it without getting a §404 permit, and the Corps had issued an administrative compliance order telling them to stop. They went to the Supreme Court and argued that they should be able to get preenforcement judicial review of the administrative compliance order, and the Court ruled unanimously that they could do so. On remand, the lower courts essentially applied the significant nexus test and found that the Sackett property included wetlands requiring a CWA permit.

The significant nexus test also had been embraced by the Barack Obama Administration when it promulgated its "waters of the United States" (WOTUS) rule.[23] But to add more confusion, there was a dispute over whether challenges to the rule should first go to the courts of appeal or to the district courts. That precipitated another Supreme Court decision in *National Ass'n of Manufacturers v. Department of Defense*.[24] The Court held that since the WOTUS rule wasn't really a rule but merely an interpretation of the extent of federal jurisdiction, those challenges should first be filed in the district court. This spawned numerous chal-

17. 474 U.S. 121, 16 ELR 20086 (1985).
18. *Id.* at 132.
19. 531 U.S. 159, 31 ELR 20382 (2001).
20. United States v. Lopez, 514 U.S. 549 (1995).
21. 547 U.S. 715, 36 ELR 20116 (2006).
22. Sackett v. Environmental Prot. Agency, 566 U.S. 120, 42 ELR 20064 (2012).
23. U.S. EPA and Army Corps of Engineers, Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015).
24. 138 S. Ct. 617 (2018).

lenges in the district courts with judges reaching different results, meaning that the reach of federal jurisdiction varied from one part of the country to another.

Then, the Donald Trump Administration came in and promulgated its Navigable Waters Protection Rule,[25] which greatly cut back on federal jurisdiction, although arguably even that rule would have required the Sacketts to obtain a CWA permit. The *Sackett* case then came before the Supreme Court again. The result essentially is a 5-4 decision written by Justice Alito. He has nothing but contempt and harsh criticism for CWA §404. Justice Alito asserts that criminal and civil penalties that can be imposed for even inadvertent filling of wetlands could be potentially crushing. He maintains that a clear rule is needed, and the rule he adopts is even narrower than Justice Scalia's plurality opinion in *Rapanos*.

Justice Alito concludes that the only wetlands that can be regulated under the CWA are those that are directly connected to relatively permanent bodies of water connected to traditional navigable waters. Thus, the wetland has to have a continuous surface connection making it difficult to determine where the water ends and the wetland begins.

Justice Kavanaugh joins the three liberal justices—Kagan, Sotomayor, and Jackson—in rejecting Justice Alito's interpretation. Their argument is that the Act has essentially been rewritten by the *Sackett* majority, because the Act states by its very terms that adjacent wetlands can be regulated, and yet what the majority is saying is that the adjacent wetlands have to be adjoining. In her dissent, Justice Kagan says "adjacent" means in the neighborhood. It doesn't mean that the wetland has to be directly connected. Justice Kagan maintains that this is just like *West Virginia v. Environmental Protection Agency*,[26] where the Court imposed its own policy preferences and not Congress', effectively rewriting a major environmental law.

The Court's treatment of the CWA in *Sackett* is a sharp departure from its decision in 2020 in *County of Maui*.[27] In that case, both Chief Justice Roberts and Justice Kavanaugh had joined the four liberal justices at the time to avoid blowing a huge hole in §402 of the CWA. The Court held 6-3 that Maui had to get a permit before it could discharge its wastewater from a sewage treatment plant through groundwater that quickly passed into the ocean, which is clearly part of the waters of the United States.

In *Maui*, Justice Kavanaugh wrote a concurrence emphasizing that he was following an observation Justice Scalia made in *Rapanos*. Justice Scalia responded to criticism that a narrower interpretation of "waters of the United States" in §404 could open up a loophole in §402's permit program. He noted that the CWA does *not* say there has to be a *direct* discharge to covered waters for a §402 permit to be required. Thus, Justice Kavanaugh in *Maui* said that §402 permits can be required for pollutants that first pass through groundwater. In *Maui*, Justices Gorsuch and Thomas were willing to blow a hole in the CWA that would say, as long as a discharge pipe isn't directly in the water, you don't need to get a §402 permit.

One other interesting fact about *Sackett* is that in his majority opinion, Justice Alito, while talking about the crushing consequences of §404, cites the 2002 *Borden Ranch* decision.[28] In *Borden Ranch*, a wealthy landowner rented a "deep ripping" machine to blow apart the clay pan underneath a wetland in order to convert it from a wetland into a place where he could grow grapes. When the Corps claimed that a §404 permit was required, the landowner bragged that he was going to beat them in court because he was a personal friend of Justice Kennedy.

When the case got to the Supreme Court, Justice Kennedy had to recuse himself because he was a close friend. Justice Alito recently announced that he would not recuse himself from a case being argued by a lawyer who interviewed him in the *Wall Street Journal* and who has written gushing op-eds about him. Justice Alito's sense of propriety is quite different from Justice Kennedy's.

Jay Austin: The Environmental Law Institute (ELI) has held two prior webinars on *Sackett*: one on the implications of the decision when it first hit, and one quite recently on how the U.S. Environmental Protection Agency (EPA) has addressed the decision through its revised rule.[29] For now, I want to zoom the lens out a bit and address in particular Sharon and Gerald before coming back to Bob with a case-specific question.

Bob pointed out something I found quite striking about *Sackett*: that Justice Kagan, in her concurrence in the judgment that essentially serves as a dissent, literally cut-and-pasted an entire paragraph of her decision from last year's *West Virginia* case, saying she was only going to change one word—from Clean *Air* Act to Clean *Water* Act—and that her same dissent effectively stands.[30]

I thought that was really emblematic of a lot of the recent disagreement, even tension, among the justices that has spilled over into a lot of other areas. In very broad terms, why is she yoking those two cases together? What in her view is the cardinal sin that the majority has been committing here?

Sharon Jacobs: I should disclose that Justice Kagan was my administrative law professor, and I am a big fan of her opinions and the way she crafts them. I also thought this was interesting. One thing that she's calling out here is the use of substantive canons of interpretation by osten-

25. U.S. EPA and Army Corps of Engineers, The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (Apr. 21, 2020).
26. No. 20-1530, 52 ELR 20077 (U.S. June 30, 2022).
27. County of Maui v. Hawaii Wildlife Fund, 140 S. Ct. 1462, 50 ELR 20102 (2020).
28. Borden Ranch P'ship v. Army Corps of Eng'rs, 537 U.S. 99 (2002).
29. ELI, *Analyzing the Consequences of* Sackett v. EPA *and Looking Ahead to the Future*, ELI (June 8, 2023), https://www.eli.org/events/analyzing-consequences-sackett-v-epa-and-looking-ahead-future; ELI, *Unpacking the Revised WOTUS Rule*, ELI (Sept. 14, 2023), https://www.eli.org/events/unpacking-revised-wotus-rule.
30. Sackett v. Environmental Prot. Agency, 143 S. Ct. 1322, 53 ELR 20083 (2023) (Kagan, J., dissenting).

sibly textualist judges to put a thumb on the scale for certain outcomes.

In *West Virginia*, it was the new major questions doctrine. In *Sackett*, it's canons to do with federalism. But the idea is that these canons, some of which have been around for a long time and some of which are very new, can be used to tilt the analysis before statutory interpretation even begins in the guise that we know it. In other words, before a classic textual analysis of the provisions in the CWA or in the CAA even starts. I think that was why she was emphasizing the link between these two cases and warning against that kind of, as she sees it, tilted statutory construction.

Gerald Torres: That's exactly right. Perhaps a less cautious way to put it is that she's saying she knows a willful court when she sees it. Being able to make that easy substitution is a demonstration, and that's unfortunately I think where we are.

Sharon Jacobs: If I can take us back to some of the focus on environmental regulation specifically. Justice Kagan makes the important point that a lot of these canons are general in nature. They're designed to be general. Even the ones that are specifically tailored to particular areas, like lenity, are being applied in a very general way, which is in direct contradiction to the majesty and specificity of these environmental statutes. Congress in the 1970s especially created statutes to solve big environmental problems, taking a lot of care in how they did so.

Justice Kagan sees the contrast between using these big general canons and the real clarity of Congress' intention in crafting these statutes to address actual real-world problems. There is a saying in statutory interpretation that the specific governs the general. It's not exactly the same, but the idea is, let's look at what Congress did in the CAA, the CWA, and these other statutes, and let's honor that. As opposed to invoking big doctrines that have little, if anything, to do with environmental protection.

Gerald Torres: If I can underline that point—it's important to recognize that the Acts were amended in the 1970s to add greater clarity and for Congress to explicitly say what it meant. So paying attention to what Congress actually says, certainly, if you're a textualist, you would think that would take priority.

Robert Percival: With respect to the CWA, Congress' statement of goals is absolutely breathtakingly broad—to restore the chemical, physical, and biological integrity of the nation's waters. It would be hard to be much broader than that. That certainly validates the claim by Justice Kagan that the Court is totally ignoring the real purpose of the statute in trying to interpret it.

Jay Austin: As well as the scientific and ecological values that underlie that statement of purpose.

Gerald Torres: It also ignores the incredible progress that the CWA has produced. I mean, put aside the legal arguments. If you look at what the law has actually accomplished, it's been quite effective. And it's been effective because Congress outlined the approach it wanted the Agency to take in regulating the quality of America's waters. To put that in jeopardy is breathtaking.

Jay Austin: We need to move on to the preview of the coming term. *Sackett* is a pivotal decision in that regard. Bob mentioned Justice White's unanimous 9-0 opinion in the *Riverside Bayview* case back in 1985, the first holding that wetlands could be included in "waters of the United States." But in addition to that statutory interpretation, that decision also hinged on deferring to an agency definition of "adjacent" wetlands, which—at least to my eye—may no longer be wholly compatible with Justice Alito's new test in *Sackett*.

So, what is going on there? In this move from 9-0 to 5-4 over 40 years, is the Court essentially overturning *Riverside Bayview* without saying so? And if so, what does that say about the future of *Chevron* deference,[31] which I think in turn brings us into the upcoming term?

Robert Percival: It certainly is one of the big cases that the Court has already granted certiorari on, *Loper Bright Enterprises v. Raimondo*.[32] What was interesting about that grant was that the case involves a question on the validity of a regulation by the U.S. Department of Commerce requiring fishing companies to bear some of the cost of having the monitors that are legally required by the Magnuson-Stevens Act to be on their boat, just to make sure they fish in accordance with the law.

The Court only granted cert on the question that was phrased as, should *Chevron* be overruled or reinterpreted in a much narrower way? So it looks like, for the first time, the Court has decided to bite the bullet and make a judgment about *Chevron*. Since all six of the conservatives on the Court, or at least five of them—I don't know how you count Chief Justice Roberts on that—have criticized *Chevron*, if they want to overturn it, they certainly could. I think Roberts is the one who would try to be a little cautious.

The interesting thing about *Sackett* is that in *Rapanos*, Roberts—who had just been on the Court one year, and at his confirmation hearing had said, "I worry when I see that the Supreme Court's opinions are so fractured" and "there is a unifying theme in my approach"[33]—had written a concurrence that said we wouldn't have such a confusing result in *Rapanos* if the Court had adopted its own definition of "waters of the United States." Well, that's exactly what both the Obama and Trump Administrations did. Now, the Joseph Biden Administration is doing it also. The

31. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984).
32. 45 F.4th 359 (D.C. Cir. 2022), *cert. granted* 598 U.S. __ (May 1, 2023).
33. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Senate Committee on the Judiciary*, 109th Cong. 384, 393 (2005), https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ROBERTS.pdf.

Court almost completely ignored that, and there is no discussion in *Sackett* of the validity of those regulations at all. Clearly, no deference.

I've argued for quite a while that *Chevron* is a dead man walking in the Supreme Court because, knowing that a majority of the justices don't like it, few advocates cite *Chevron*. That's not true in the lower courts; it still has some purchase there. But we'll see in this case, which probably won't be argued until the spring, if the Court finally decides to bite the bullet and overturn *Chevron*.

What's so ironic is that, when *Chevron* was decided initially, it was a defeat for environmentalists because it was during the Ronald Reagan Administration when they had adopted the "bubble" policy that made it easier for corporations to avoid having to install advanced air pollution controls. Many have asked, well, what's really changed then? You see Justice Thomas having admitted that, in fact, he was once a fan of *Chevron*, as was Justice Scalia, but now he doesn't like it. Maybe it depends on what administration is in power. If it's one that's rolling back regulations, the Court's happy to defer to it. But if it's one that is trying to implement the law with broad regulations, then the current conservative majority doesn't want to give it deference at all.

Sharon Jacobs: I'll link these conversations about the future of *Chevron* to a couple other cases that are coming up next term, which also threaten the operations and even the existence of parts of the administrative state.

I think that the *Loper* case is a symptom of this overall movement on the Court to question and to challenge what many of us had thought had become settled wisdom or settled doctrine when it comes to agencies and administrative law. Obviously, rolling back *Chevron* would shift expectations that have been in place since well before the 1984 *Chevron* decision insofar as *Chevron*, at least according to the Court that wrote it, was just trying to codify existing practice in the way the courts treat agency interpretations.

But we're seeing this in a variety of areas. Two cases coming out of the U.S. Court of Appeals for the Fifth Circuit are set for argument this term. One is about the Consumer Financial Protection Bureau (CFPB), which has not been a favorite of conservatives, I think it's fair to say, since it was created. This challenge in *Consumer Financial Protection Bureau v. Community Financial Services Ass'n*,[34] interestingly, is to the funding of the agency. A number of agencies are funded in part or even in whole through fees levied on the parties who are regulated. This in fact is one of the key criteria that scholars, like Rachel Barkow,[35] highlighted in describing an agency as independent versus more squarely part of the executive branch.

The CFPB is funded in this way through fees. The challenge claims that this is unconstitutional, that it violates the Appropriations Clause because it takes the power of the purse away from Congress. It means that agencies no longer have to go back to Congress for their funding because they're getting their funding in other ways. This really gets at the legitimacy of these agencies and the way that they're constituted.

The other case is *Securities & Exchange Commission v. Jarkesy*,[36] for which cert was granted last June. This is a challenge to the Securities and Exchange Commission's (SEC's) structure and processes by petitioners who are subject to an SEC administrative enforcement action for securities fraud. There are a whole variety of challenges here: a Seventh Amendment challenge, a choice of forum challenge; a challenge to having the claims adjudicated within the agency as opposed to in the federal courts; and a removal challenge to the for-cause removal protection for administrative law judges coming on the heels of the *Lucia* case.[37] That was a challenge to the appointment of administrative law judges.

There is also a nondelegation challenge, which is a challenge to Congress' delegation of authority to the agency to essentially choose whether to enforce the laws it's tasked with administrating through agency adjudication or through district court action. It is the idea that there is no intelligible principle there to guide the agency's choice, and so it's essentially a delegation of legislative power.

This is a hit list of all of the challenges that you would want to bring if you were highly skeptical of administrative agencies, full stop, and especially of so-called independent agencies that have a little bit of distance from the political branches. The idea, I suppose, is that now is the right time to bring all these challenges.

Jay Austin: Sharon, you've touched on a host of issues there. There's a question here that gets to the broader issue about the implications if some or all of these challenges to administrative agencies are successful. The audience member is asking, what would the implications be of overturning *Chevron*? What would it mean for, as you said, the sort of previously codified guiderails the courts used in interpreting statutes delegating authority to agencies? They talk about deference, but there are a number of other judge-made rules, some of which have been elaborated on recently or more than others.

But to your broader point, if some or all of these attacks are successful and if the administrative layer is removed or at least limited, hobbled greatly, and you're left with Congress on the one hand and judges on the other, what does that world look like where judges are essentially inserting themselves more—as you suggested—self-aggrandizing in directly interpreting statutes?

Sharon Jacobs: I think it's even more dramatic than you suggest. What we have here is actually a challenge not only to agencies' authority, but to Congress' authority to create

34. No. 21-50826 (5th Cir. Oct. 19, 2022).
35. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 42-45 (2010), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1717037.
36. No. 20-61007 (5th Cir. May 18, 2022), *cert. granted* 600 U.S. __ (June 30, 2023).
37. Lucia v. Securities & Exch. Comm'n, 138 S. Ct. 2044 (2018).

agencies and to delegate tasks. Or I would say even to task agencies with a lot of the authority that we've become so used to agencies wielding since the founding. If you look at the work of some of Gerald's colleagues at Yale—like Jerry Mashaw and Nick Parrillo[38]—they are talking about agencies that have been there since the beginning. Why? Because you can't administer a country without them.

I think the challenges are not just to what agencies can do, what kinds of claims they can adjudicate, how they can interpret their statutes, how they can interpret their own regulations, but also to what kinds of agencies Congress can create. That hobbles Congress *and* agencies. And who does that leave? That leaves us with the Court, of course. That leaves us with the president in some respects. In some areas, it limits maybe what the president can do through administration, which creates an interesting tension. But it leaves us with the courts and the states. It's a really interesting world to consider. The fact is we may get to that world more quickly than any of us imagined, given what the Court has on the docket for next term.

Robert Percival: I also should mention that Justice Thomas writes a concurrence in *Sackett* where he has very narrow views of Congress' commerce power. He said that the CWA is actually not based on substantial effects on interstate commerce, but on Congress' longtime ability to protect truly navigable waters. And that's the only source of authority. He goes on to say many environmental laws have been assumed to be based on the commerce power. But if his view prevails about how narrow that power is, there could be fundamental threats to Congress' ability to protect the environment through a whole host of laws, particularly the Endangered Species Act (ESA).[39]

Sharon Jacobs: I think that's a project for some of the justices. Justice Gorsuch certainly and Justice Thomas. Justice Gorsuch is very clear about this in his dissent in *Gundy*,[40] which was about the nondelegation doctrine, and a variety of other cases. He believes that a smaller federal government is a better federal government. A Congress that can do less is a better Congress that better preserves liberty, in his view.

All of these efforts—shrinking the authority of Congress under the Commerce Clause and limiting the ability of Congress to delegate to the agencies—are going to result in less legislation at the federal level, less for agencies to do. The question is, what does that new status quo look like? It's not that there is nothing happening. Who is in charge? It's a lot of either states stepping in to fill the gap or less regulation in general.

This gets back to one of the questions in the queue about what happens with wetlands after *Sackett*. States could step in to fill the gap or not, in which case it's private industry and private decisions that are shaping the future of environmental law in these areas.

Robert Percival: And like the late Chief Justice William Rehnquist, Justice Gorsuch does seem to be fairly principled about the importance of protecting federalism. I think that comes through in the *National Pork Producers* decision. Also, I think one of the great things the Court did last year was denying cert in all the state-law climate litigation in light of the oil companies trying to remove it to federal court.

There had been at least a couple dozen lawsuits filed by cities, counties, and states, including a big one just filed by California, suing the oil companies under state tort law and arguing that they violated consumer protection laws by deceiving the public about the implications of their products for climate change. They tried to remove all those cases to federal court. They lost in every single case, and on April 24, the Court denied all the cert petitions in those cases, which I think was a powerful indication that they are going to stay out of state tort law. That has traditionally been what the Court has done, to stay out of state tort law.

A couple of interesting footnotes to that, though. Justice Kavanaugh dissented from the denial of cert, so he may be much more sympathetic to the oil companies' views that the Supreme Court should just wipe out all the climate litigation because it's a global problem. The other footnote is that Justice Alito apparently holds substantial stock in fossil fuel companies, so he always recuses himself in these cases.

Gerald Torres: I think the point that Sharon made, and we really need to take seriously, is to ask how the powers are going to be distributed among the various branches and what kinds of things did the Constitution intend Congress to do. If their powers are constrained, then the nondelegation doctrine is one way to do it. But also, essentially, it's a jurisdictional limit to the range of things they can legislate on. It means we're in a new day.

Jay Austin: Certainly, for the federal government. There are a couple of questions asking what this world looks like with regard to the states. Quite simply, are the states up to the challenge?

Another question is, are we just forever going to be reduced to this world of, in the case of wetlands, pink and green maps on EPA's website about state authority to regulate wetlands? Which was elaborated, I have to add, with some research by my ELI colleagues. Are we forever going to be looking at these fractured maps, or is California going to become the sort of very large shaggy tail that's wagging the dog?

That's a concern certainly, Sharon, as you mentioned in the *National Pork Producers* case. But it's also taking place in the form of arguments about the California waiver for the tailpipe rules. How does this landscape look going for-

38. Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law (Yale Univ. Press 2012); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Regulatory Power: New Evidence From the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288 (2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696860.
39. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
40. Gundy v. United States, 139 S. Ct. 2116 (2019).

ward? For that matter, isn't that the next pivotal case, the tailpipe cases that were argued in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit recently and that seemed likely to land in the Supreme Court?[41]

Sharon Jacobs: I'll start the discussion by increasing the complexity of the scenario in which we find ourselves. In some ways, you'd expect the natural consequence of all the jurisprudence we've been discussing to be that the states have renewed vigor and power to pursue their individual plans, and that we get robust experimentation and all the goods that are supposed to come with state authority.

On the other hand, you see cases like the tailpipe waiver case that you were talking about. The question of whether California can impose its own more stringent emission standards from new cars and trucks under the CAA. You also have the issue of cities in California and the state itself considering bans on new natural gas hookups and new construction, both of which would seem to be consistent with this new narrative of state authority. And those are running into problems in court too.

The waiver provision is being challenged as unconstitutional. The argument is that it gives California an unfair leg up against other states. We don't know how or whether that argument has actual legs, but it's being made in a serious fashion even though the waiver was written right into the statute by Congress.

In the case of natural gas hookups, the Ninth Circuit just invalidated the city of Berkeley's ban on natural gas hookups in new construction,[42] saying that it was preempted by a federal statute from the 1970s, the Energy Policy and Conservation Act,[43] which regulates appliances and their use of fuels. Whereas this Berkeley ordinance regulates how natural gas comes into or does not come into properties.[44]

There are other ways to constrain states' efforts that may not be favorable along a particular dimension. It's more complicated than just thinking about states and their renewed authority versus the federal government.

Gerald Torres: The distinction that Sharon drew between what the statute said and what the city was trying to do, those are not in alignment. But it's a source of power to regulate what these subnational legislative bodies can do.

Sharon Jacobs: It's a test case to see what are some of the commitments to federalism that we see in the dormant Commerce Clause context. And I think Bob is right, they're quite principled commitments to federalism. Whether those show up as well in the context of preemption and statutory interpretations is something I will be watching very closely.

Jay Austin: Here's yet another set of constitutional issues, drawing from beyond the environmental law arena, and this is something Bob previewed for us last year. The Supreme Court decided the North Carolina and Harvard affirmative action cases.[45] It is a very definitive statement about the long history, the long arc of attempts to create policy there. It's clearly already had a chilling effect on environmental justice initiatives. I think that predated the actual decision, knowing that the cases were coming before the Court. There is also lower court litigation that seems designed to try to put squarely before these justices the question of EPA's authority for Title VI Civil Rights Act enforcement designed to implement environmental justice. Any thoughts on where that's headed?

Gerald Torres: One of the challenges facing this administration was how it would structure Title VI litigation, and whether there'd be an affirmative litigation section set up in the U.S. Department of Justice's Environment and Natural Resources Division to do what the private attorneys general cannot, given the existing law. Given the potential interpretation or extension of the *Students for Fair Admissions* case, I think there are two sets of concerns. One is whether the Fourteenth Amendment analysis they did in that case will, in fact, be the analysis that guides Title VI, whether it will bleed over into §1981 cases, and whether that will then affect the way private foundations or subnational units try to use their powers where federal funds are implicated.

I think we're going to be in a period when charitable foundations or corporations are reevaluating the risk. The Biden Administration, in their environmental justice screening tool,[46] did that before the opinions are even cited by taking race out of the equation. They took race out of the equation because they knew they'd be walking around with a target on their chest if they left it in. So empirically, the question is whether they get the job done given the tools they have. But now, with this case, even if the federal government can't, how is this going to affect the activity of private actors? I think the jury is out, but people are reassessing the litigation risk they want to absorb.

The other thing that it has done is it's given a license for states to pass their own bills. This ties back to our federalism discussion. There have been 89 bills passed in 28 states to limit affirmative action, to bend diversity, equity, and inclusion training in government, to bend environmental, social, and governance investment, and so on. The movement on that front is, in some ways, given more force by the *Students for Fair Admissions* case. I think we're going to see both private actors acting more cautiously and state actors running aggressively to limit these initiatives.

41. Transcript of Oral Argument, Ohio v. Environmental Prot. Agency, Nos. 22-1081, 22-1083, 22-1084, and 22-1085 (D.C. Cir. Sept. 15, 2023).
42. California Restaurant Ass'n v. City of Berkeley, No. 21-16278, 53 ELR 20064 (9th Cir. Apr. 17, 2023).
43. Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871.
44. Berkeley, Cal., Mun. Code ch. 12.80 (2019).
45. Students for Fair Admissions v. University of N.C., No. 21-707 (U.S. June 29, 2023); Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023).
46. Climate and Environmental Justice Screening Tool, *About*, https://screeningtool.geoplatform.gov/en/about (last visited Nov. 13, 2023).

My hunch is that affirmative action activists will continue to challenge where they can, likely at the state level, the ways in which environmental decisions get made to the detriment of identifiable environmental justice communities. That hasn't changed yet, but who knows whether it will. There certainly is a chilling effect that flows not just from the opinion, but from the shadow that that opinion casts.

Robert Percival: I've been impressed at how prepared EPA seemed to be for that decision and had taken steps, like you mentioned, in the environmental justice screening tool. The president of our university announced that we were not going to let this decision have a chilling effect on our commitment to diversity. The university actually changed the admission's application form to quote Chief Justice Roberts directly from the opinion, stating that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life."[47] It invites applicants to write an optional essay precisely directed to that, about how race and racial discrimination have affected their lives, which I thought was a nice touch.

Gerald Torres: You can predict the next case though, which is you can't do indirectly what you can't do directly. That was the Fifth Circuit in the *Fisher* opinion,[48] which said any attempt to circumvent the decision is going to be met with harsh repercussions. If people want to take the invitation that Chief Justice Roberts offered seriously, you can see the next case being teed up.

Jay Austin: One more broad question is back to the topic of common law. The audience member writes, as power shifts to the states, some states are more lax regulators than others, as seen in the EPA wetlands maps we were discussing. But many environmental harms cross state boundaries. If the shift to regulatory authority goes back to the states, will this also open the door for more suits between states for environmental harm? Are we really going to go back to the pre-1970 or early 1970s world of state versus state in federal common law?

Gerald Torres: There is a reason that Congress passed those environmental statutes. They didn't do it just because there were 20 million people marching for Earth Day. No. There were hard, substantive problems that they were trying to address, and to adjudicate or to regulate the competition between states, and to pull all those cases out of the kind of litigation that the question suggests. You can say these are just environmental pieces of legislation. But they were solving a lot of problems. And they were solving a lot of problems that resorting to a federalism mantra is not going to make go away.

Robert Percival: The federal common-law issue comes up in all the state climate litigation where the oil companies are saying, because it's a global problem, that it has to be governed by the federal common law of nuisance. Then they want to reference the *American Electric Power* decision,[49] which says that corporations cannot be sued to reduce their greenhouse gas emissions because regulation of these emissions has been delegated to EPA under the CAA. But the courts just don't seem to be buying that argument.

In the *Mayor and City Council of Baltimore* case decided by the Supreme Court in 2021,[50] the oil companies asked the justices to forget about the technical removal reviewability issue and to just preempt all state climate litigation. Even Justice Amy Coney Barrett, whose father worked for Shell Oil, said that would be awfully aggressive for the Court to do. So for now, I think the state common law still has the potential to be very robust in punishing actors who deceive the public about the environmental implications of their products.

Jay Austin: Do you think the *Suncor Energy* cert denial is likely going to be the Court's last word on that issue?[51] They certainly have been fairly consistent in denying cert. But the one time they did look at the issue, they raised a host of other possible ways there might be jurisdiction in federal courts and remanded to the lower courts to consider all those factors. But then those courts have been consistent in not finding federal jurisdiction.

Robert Percival: Under the federal removal statutes, the grounds that the oil companies have for removal are incredibly weak. They argue for federal officer removal, where they claim that, because they sell oil to the U.S. Department of Defense, that somehow the feds made them do it and therefore it should be heard in federal court. But no one's buying that. That's almost laughable.

The oil companies' strategy is to delay the inevitable trials that are going to be greatly embarrassing to them. I've argued that this may turn out to be like the tobacco litigation, where the proliferation of state lawsuits against the tobacco companies resulted in a master settlement agreement requiring them to pay the states hundreds of billions of dollars in compensation.

Jay Austin: Let's go back into *Sackett*, as there is so much interest in this, and the CWA. At the top level are some of the biggest implications still unresolved. What does it mean for §402 and discharge permits under the National Pollutant Discharge Elimination System? Bob pointed out that the *Maui* case might cover those, or at least provide an

47. University of Maryland Francis King Carey School of Law, *Apply to the JD Program*, https://www.law.umaryland.edu/admissions--aid/apply/jd-admissions/first-year-applicants/ (last visited Nov. 8, 2023).
48. Fisher v. University of Tex., 579 U.S. 365 (2016).
49. American Elec. Power Co. v. Connecticut, 564 U.S. 410, 41 ELR 20210 (2011).
50. BP P.L.C. v. Mayor & City Council of Balt., 141 S. Ct. 1532, 51 ELR 20086 (2021).
51. Suncor Energy (U.S.A.), Inc. v. Board of Cnty. Comm'rs of Boulder Cnty., No 21-1550, 52 ELR 20020 (10th Cir. Feb. 8, 2022), *cert. denied* 598 U.S. __ (Apr. 24, 2023).

off-ramp for people who still want to enforce against pollution in streams if not necessarily wetlands fill.

Another question is that the whole question of tributaries still seems a bit muddled and undefined in the wake of Justice Alito's opinion. EPA's rule did not stretch too hard to try to clarify that, I think, for fear of being too specific or being forced to be too specific.

Robert Percival: In *Sackett*, I don't think the majority directly addressed §402. But there is the problem that's illustrated by *Maui*. Even if you're not initially discharging directly into a water of the United States, if the discharge quickly flows into one you still may be required to have a §402 permit. Justice Stephen Breyer's majority opinion in *Maui* said that if it is the functional equivalent of a direct discharge, you need a §402 permit.

Justice Breyer articulated a seven-factor test that only a law professor could love about how to decide what is the functional equivalent of a direct discharge, but I don't see anything in *Sackett* that directly implicates that. You still have Justice Kavanaugh, who was in the majority in *Maui*, rejecting Justice Alito's interpretation of the reach of federal jurisdiction in *Sackett.* But certainly *Sackett* will give comfort to those who think that the conservative supermajority will be open to some wild, new interpretation that will create a loophole in the environmental laws. In *Maui*, both Justice Kavanaugh and Chief Justice Roberts were unwilling to do that. It was quite obvious to them what was going on.

Jay Austin: What about the question of tributaries? Do we yet know what a continuous surface connection that may only be temporarily interrupted means? Because that seems to go to the question of "waters" as well as "adjacent" wetlands.

Robert Percival: That's what Justice Kavanaugh raised in his opinion rejecting Alito's interpretation. He said there are all these unanswered questions that this decision opens up. I don't think the majority gave any real consideration to how those are going to be resolved in the real world. It certainly seems that in just about any case where there is any question about the reach of federal jurisdiction, *Sackett* will be raised. It will be the new "major question" to try to deter aggressive federal permitting activity in the future.

Jay Austin: As to major questions, that's another issue that still seems to be just over the horizon, but clearly on its way back to the Court. It's been raised in any number of contexts ever since *West Virginia* was decided. There have been some very novel district court decisions that are trying to apply it to a wide variety of subject matter.

But the one case that really seems to be the next major test is the tailpipe case. I don't know how closely any of you have followed the specific arguments in that case, but clearly they are attempting to draw an analogy to the beyond-the-fence-line regulation in *West Virginia*, between that and going from regulating tailpipe emissions to electrification of vehicles. Does that seem likely to stand? It seemed like the D.C. Circuit was extremely skeptical, but then they just may be a pit stop on the way to the Supreme Court.

Robert Percival: I think that's right, that it's a pit stop on the way to the Supreme Court. Certainly, those portions of the CAA have been in existence for decades. If you look at the Act, there's never been a statute where it's been clearer that Congress wanted to have EPA enact regulations of vast economic and political significance. You can't guarantee healthy air quality for the entire nation unless you do so.

So, it's a little disingenuous to suggest that this is a major new question where EPA or the National Highway Traffic Safety Administration is breaking new ground because they're regulating tailpipe emissions. We've been doing that for half a century now under the CAA. The Administration's approach to encouraging a transition to electric vehicles through providing financial and tax incentives is a great way of avoiding the claims that this is some new regulation requiring everyone to have an electric car.

I have owned only totally electric cars for 11 years. I'm now on my second one. I love it. It's been one of the great experiences of my life, so I'm skeptical whether these attacks on efforts to facilitate the transition to green energy are going to succeed. Sen. Joe Manchin (D-W. Va.) had an op-ed where he said the Inflation Reduction Act is neither red nor blue, but it sure ain't green.[52] But it's certainly done a lot to facilitate the transition to renewable energy.

Sharon Jacobs: I agree, I think it's pretty easy to distinguish this major questions challenge from the one that the Court found persuasive in *West Virginia*. Here, it's just EPA doing business as usual, and the fact that that may produce more electric vehicles or alternative fuel vehicles is beside the point. The nuts and bolts of how they're doing the regulation are very similar, if not identical, to what they have been doing for decades and decades.

My hope is that this new spate of major questions challenges that we're seeing, which is absolutely everywhere in the lower courts as well as in the courts of appeal, is going to at least give the Court the opportunity to refine that doctrine and to double down on what I think of as the Roberts majority version of that doctrine from *West Virginia*, which emphasizes not only the scope of the question at issue, but also how distinct the Agency's action is from what they've done previously, and whether or not the matter is within the Agency's expertise. An essential component of that approach is asking whether the Agency is trying to locate expansive jurisdiction in a really narrow corner of a statute.

You can say what you want about §111(d). I think there are very persuasive arguments that that is not at all a narrow section of the statute. It was meant to be a broad catch-

52. Joe Manchin, *A Law That Isn't Red or Blue—and Sure Isn't Green*, Wall St. J. (Sept. 22, 2023), https://www.wsj.com/articles/a-law-that-isnt-red-or-blue-and-sure-isnt-green-manchin-inflation-reduction-act-a7d0fcc5.

all to accomplish the purposes of the Act. But certainly, with the auto emissions regulations in the CAA, these are some of the core provisions of the statute.

Another example of the major questions doctrine is the *Texas v. Nuclear Regulatory Commission* case,[53] which may make it to the Court in the coming term. The Fifth Circuit decided the Nuclear Regulatory Commission has no authority to license a private facility that is not at the site of an existing reactor for the storage of nuclear wastes.

The major questions argument there is essentially saying the storage of nuclear waste is a really big deal—and I am being just a bit glib in characterizing that argument. Again, my hope is that, at best, this will give the Court a chance to define the major questions doctrine in a way that makes it clear that the heart and the core of some of these traditional environmental regulatory statutes are not threatened.

Gerald Torres: The point that Sharon made is really important. Because if you think of the major questions doctrine and the way it's being deployed as really asking the question—has the agency illegitimately aggrandized its power in a way that Congress didn't intend?—that's a different question. It goes to the heart of agency management that doesn't tell Congress how it's going to write its statutes. That's a big difference.

Robert Percival: My favorite example of the absurd lengths to which major questions arguments are being made is Jeffrey Clark saying that whether or not he could be disbarred by the D.C. Bar is a major question.[54]

Gerald Torres: Well, it is to him!

Sharon Jacobs: The fact is that all of the environmental statutes that we have, and certainly all of the big statutes that we teach in our foundational courses and have talked about here today, all deal with major questions. If that is the version of the test, if the subject matter of the regulation is major enough or its effects are major—that is closer to the Gorsuch version I would say than the Roberts version—then anything an agency does under these big environmental statutes would qualify because we're dealing with issues that affect everyone, that affect our environment, that affect our economy. That's just the nature of the regulatory program. So, it can't mean that. I don't think that that's what *West Virginia* said either, but we need more detail about what the guardrails are.

Gerald Torres: You're exactly right. I think it can't mean that. And to a point you made earlier, which is the nature of the problem that Congress is attempting to address, it requires Congress to act in the way it's acting. They're not passing a statute that regulates crossing-guard hours. They're passing a statute that will implicate lots of different parts of the economy. But also, there is a lot of science that is going to be implicated as well. The statutes will necessarily be drawn to solve the problems they identify, and that's the key issue.

Jay Austin: And that's another of Justice Kagan's refrains. She says, I think on more than one occasion, that broad language does not necessarily mean vague or ambiguous.

This is a good way to end, because I think it is previewing what is doubtless going to be the headline on our discussion next year. We can just keep daisy-chaining these issues, for better or for worse.

53. No. 21-60743, 53 ELR 20141 (5th Cir. Aug. 25, 2023).
54. Answer of Respondent at 11, In re: Jeffrey B. Clark, No. 2021-D193 (2022), *available at* https://www.documentcloud.org/documents/22415395-jeff-clarks-answer-to-ethics-charges-redacted.