CHEVRON'S DEMISE AND ENVIRONMENTAL JUSTICE

by Barry E. Hill

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The Supreme Court of the United States has had at various times a troubling history in American jurisprudence. Among other things, the Court infamously defended the institution of slavery, holding that African Americans, whether freed men or slaves, could not be considered citizens, and could not enjoy the rights and privileges the U.S. Constitution conferred upon citizens[1]; upheld the "separate but equal" doctrine, giving constitutional sanction to laws designed to achieve racial segregation[2]; protected employer interests over worker welfare by striking down a New York law limiting bakers' hours, finding an implicit "liberty of contract" in the Due Process Clause[3]; and upheld a Virginia statute that ordered the forced sterilization of "feeble minded" people, while noting that "three generations of imbeciles are enough."[4] Moreover, the Court once upheld the internment of Japanese-American citizens in detention camps during World War II[5]; upheld a Georgia sodomy statute that criminalized private sexual conduct involving same-sex couples[6]; and shaped the outcome of the 2000 presidential election between George W. Bush and Al Gore, along ideological lines.[7]

Since 2005 the Court, presided over by Chief Justice John Roberts, determined that the Second Amendment, for the first time, guaranteed an individual's right to possess a firearm[8]; held that corporate political donations were speech protected by the First Amendment[9]; and eliminated critical voting protections for African Americans by holding that the "preclearance" requirement of the Voting Rights Act of 1965 now represented an unconstitutional violation of the power of states with a history of discrimination to regulate their elections.[10] Further, the Roberts Court has decided to establish a new standard by overturning decades of legal precedents,[11] eviscerating the right to an abortion and upending 50 years of settled law,[12] and prohibiting affirmative action in university admissions, casting aside 30 years of case law.[13]

The aphorism "might makes right" has been attributed to the ancient historian Thucydides,[14] who wrote: "Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must."[15] This terse statement means that the strongest group or individual, in any disagreement, is the "might" and has the most power because it/he/she will win. In short, dominance by the mightier over the weaker is right.[16] This observation has been described as the credo of totalitarian regimes.[17]

Today, a new aphorism might be "Might does not make right. Might makes the law." In short, this revised apho-

1. Dred Scott v. Sanford, 60 U.S. 393 (1857).
2. Plessy v. Ferguson, 163 U.S. 537 (1896).
3. Lochner v. New York, 198 U.S. 45 (1905).
4. Buck v. Bell, 274 U.S. 200 (1927).
5. Korematsu v. United States, 323 U.S. 214 (1944).
6. Bowers v. Hardwick, 478 U.S. 186 (1986).
7. Bush v. Gore, 531 U.S. 98 (2000).
8. District of Columbia v. Heller, 554 U.S. 570 (2008).
9. Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).
10. Shelby County v. Holder, 570 U.S. 529 (2013).
11. *See* Sarah Chayes, *It's Official: The Supreme Court Ignores Its Own Precedent*, Atlantic (July 19, 2024), https://www.theatlantic.com/ideas/archive/2024/07/supreme-court-immunity-corruption/679107/:
    > Democrats in Congress have been developing proposals for the reform of the Supreme Court for years—and this week, we learned that President Joe Biden is warming to the idea. Although a series of controversial cases recently decided by the Court has given new impetus to this movement, the need for an overhaul lies less in the rulings' seeming rightward swing and more in the pretexts the justices have used to reach them. The Court's reasoning is becoming more and more incoherent as the conservative majority tosses aside even its own recent jurisprudence in order to serve ideological dogma.
12. Dobbs v. Jackson, 597 U.S. 215 (2022).
13. Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023).
14. Thucydides (c. 460 to c. 400 B.C.) was an Athenian historian and general. His book *The History of the Peloponnesian War* recounts the fifth century B.C. war between Sparta and Athens until the year 411 B.C. Thucydides has been called the father of the school of political realism, which views the political behavior of individuals and the subsequent outcomes of relations between States as ultimately mediated by, and constructed upon, fear and self-interest. His book is still studied at universities and military colleges worldwide. Wikipedia, *Thucydides*, https://en.wikipedia.org/wiki/Thucydides (last edited Sept. 7, 2024).
15. Wikipedia, *Might Makes Right*, https://en.wikipedia.org/wiki/Might_makes_right (last edited Aug. 18, 2024).
16. According to John Peter Altgeld, the 20th governor of Illinois, who served from 1893-1897:
    > The doctrine that might makes right has covered the earth with misery. While it crushes the weak, it also destroys the strong. Every deceit, every cruelty, every wrong, reaches back sooner or later and crushes its author. Justice is moral health, bringing happiness, wrong is moral disease, bringing mortal death.

    AZ Quotes, *John Peter Altgeld Quote*, https://www.azquotes.com/quote/546967 (last visited Sept. 16, 2024).
17. Wikipedia, *supra* note 15.

rism means that those with power, such as the 6-3 conservative supermajority on the Roberts Court, make the law.[18] To reach this conclusion, an observer only needs to examine several decisions issued by the supermajority in the term that ended July 1, 2024. These 6-3 votes, along ideological lines, overturned decades of legal precedent. Legal scholars have referred to the Roberts Court as the "imperial Supreme Court,"[19] or in the words of the *New York Times* opinion columnist Jamelle Bouie:

> We have, in other words, a corrupt and lawless court [that], led by its conservative majority, has put itself above the constitutional system as the exclusive arbiter of constitutional meaning. The Constitution means whatever the Roberts [C]ourt says it means, even when the meaning conflicts with the basic principles of American democracy.[20]

Regrettably, it appears that the supermajority wholeheartedly embraced the notion of the "Imperial Presidency."[21] On July 1, 2024, the Court issued its ruling[22] that former president Donald J. Trump has absolute immunity for any official actions he took within his core constitutionally defined duties/powers as president, a decision that sent the federal election interference case back to District Judge Tanya S. Chutkan[23] to determine which activities were official or unofficial.[24] Astonishingly, Chief Justice Roberts, writing for the supermajority, ruled:

> If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the "intended effect" of immunity would be defeated. . . . The President's immune conduct would be subject to examination by a jury on the basis of generally applicable criminal laws. Use of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted.[25]

This would undoubtedly tie the hands of prosecutors, which would make it improbable, if not impossible, to obtain a conviction of a former president who allegedly engaged in criminal conduct.

Even conservative Justice Amy Coney Barrett could not accept this new set of rules of evidence created entirely out of whole cloth.[26] Concurring in part, she wrote:

> The Constitution does not require blinding juries to the circumstances surrounding conduct for which Presidents *can* be held liable. Consider a bribery prosecution—a charge not at issue here but one that provides a useful example. . . . The Constitution, of course, does not authorize a President to seek or accept bribes, so the Government may prosecute him if he does so. . . . Yet excluding from trial any mention of the official act connected to the bribe would hamstring the prosecution. To make sense of charges alleging a *quid pro quo*, the jury must be allowed to hear about both the *quid* and the *quo*, even if the *quo*, standing alone, could not be a basis for the President's criminal liability.[27]

Yet, the supermajority's high regard for the presidency does not extend to executive branch agencies. In *Securities & Exchange Commission v. Jarkesy*,[28] the same six justices limited federal regulators' ability to bring enforcement actions seeking civil penalties before administrative law judges, determining that a federal court—rather than an experienced and unbiased administrative law judge—should oversee a securities fraud case against the hedge fund manager and conservative radio host George Jarkesy. Chief Justice Roberts wrote:

> In sum, the civil penalties in this case are designed to punish and deter, not to compensate. They are therefore "a type of remedy at common law that could only be enforced in courts of law." That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims.[29]

Justice Sonia Sotomayor's dissent, joined by Justices Elena Kagan and Ketanji Brown Jackson, argued:

18. *See* Michael Waldman, The Supermajority: How the Supreme Court Divided America (2023).
19. *See* Mark A. Lemley, *The Imperial Supreme Court*, 136 Harv. L. Rev. F. 97 (2022), https://harvardlawreview.org/forum/vol-136/the-imperial-supreme-court/; *see also* Adam Liptak, *An "Imperial Supreme Court" Asserts Its Power, Alarming Scholars*, N.Y. Times (Dec. 19, 2022), https://www.nytimes.com/2022/12/19/us/politics/supreme-court-power.html.
20. Jamelle Bouie, *Biden Issues a Stinging Dissent*, N.Y. Times (Aug. 4, 2024), https://www.nytimes.com/2024/08/02/opinion/biden-supreme-court-reform-constitution.html.
21. The phrase "Imperial Presidency" was first introduced in a book by historian Arthur M. Schlesinger Jr., *The Imperial Presidency* (1973) (reissued in 2004). The book traced the growth of presidential power over two centuries, from George Washington to George W. Bush, examining how it had both served and harmed the Constitution, and what Americans could do about it in years to come.
22. Trump v. United States, 144 S. Ct. 2312, 2347 (2024). The Court stated:
    > The President enjoys no immunity for his unofficial acts, and not everything the President does is official. The President is not above the law. But Congress may not criminalize the President's conduct in carrying out the responsibilities of the Executive Branch under the Constitution. And the system of separated powers designed by the Framers has always demanded an energetic, independent Executive. The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts. That immunity applies equally to all occupants of the Oval Office, regardless of politics, policy, or party.
23. United States v. Trump, Criminal Action No. 23-257 (TSC) (D.D.C. Aug. 3, 2024).
24. *See* Alan Feuer, *Immunity Ruling Leaves Judge Facing Tough Calls on Trump's Election Indictment*, N.Y. Times (July 9, 2024), https://www.nytimes.com/2024/07/09/us/politics/trump-immunity-election-interference.html.
25. *Trump*, 144 S. Ct. at 2341 (U.S. July 1, 2024).
26. *See* Kaitlin Lewis, *Supreme Court Just Set New Rules of Evidence "Out of Thin Air"—Attorney*, Newsweek (July 5, 2024), https://www.newsweek.com/supreme-court-just-set-new-rules-evidence-out-thin-airattorney-1921317.
27. *Trump*, 144 S. Ct. at 2354-55.
28. 144 S. Ct. 2117, 54 ELR 20096 (2024).
29. *Id.* at 2130 (citations omitted).

> Beyond the majority's legal errors, its ruling reveals a far more fundamental problem: This Court's repeated failure to appreciate that its decisions can threaten the separation of powers. Here, that threat comes from the Court's mistaken conclusion that Congress cannot assign a certain public-rights matter for initial adjudication to the Executive because it must come only to the Judiciary.
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> *The majority today upends longstanding precedent and the established practice of its coequal partners in our tripartite system of Government. Because the Court fails to act as a neutral umpire when it rewrites established rules in the manner it does today, I respectfully dissent*.[30]

Justice Sotomayor referred to the ongoing assault by conservative advocacy groups and business organizations on what those critics have called the "administrative state,"[31] writing: "Litigants seeking further dismantling of the 'administrative state' have reason to rejoice in their win today, but those of us who cherish the rule of law have nothing to celebrate."[32]

Finally, on June 28, 2024, the supermajority issued its ruling in *Loper Bright Enterprises v. Raimondo*,[33] which overturned, after more than 40 years, the *Chevron* deference doctrine that held federal judges should generally defer to agencies' reasonable interpretations of ambiguities in statutes. This was the administrative framework of the federal government since 1984 that Chief Justice Roberts, again writing for the supermajority, summarily jettisoned.[34]

This Comment examines the potential impact of the demise of *Chevron* deference on the environment and the health of residents of communities disproportionately affected by "cumulative impacts."[35] Part I reviews the *Chevron* deference doctrine and the Court's overturning of that well-established legal precedent. Part II discusses the goal of environmental justice for *all* communities and how the U.S. Environmental Protection Agency (EPA) has sought to secure that goal in accordance with the environmental laws administered by EPA. Part III offers some conclusions.

I. "Is the Glass Half Empty or Half Full?"

It is generally understood that administrative law focuses on the exercise of governmental authority by the executive branch and its administrative agencies. Those agencies are created by the U.S. Congress through enabling legislation and are authorized to promulgate regulations that have the same force as statutory law.[36]

However, because of the Roberts Court's ideologically divided rulings, administrative law will be undergoing substantial changes in the years ahead.[37] As part of the *Loper Bright* decision, Chief Justice Roberts wrote: "At this point, all that remains of *Chevron* is a decaying husk with bold pretentions."[38]

Yet, Chief Justice Roberts also went on to state:

> [W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. . . . Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." . . . That is not enough to justify overruling a statutory precedent.[39]

In other words, mercifully, those past cases decided on *Chevron* grounds should not be affected by the supermajority's ruling. The Court's action suggests the idiom "Is the glass half empty or half full?" The following questions could be posed to different stakeholder groups. Should business[40]

30. *Id*. at 2155 (Kagan, J., dissenting) (emphasis added).
31. See Ballotpedia, which states: "The administrative state is a term used to describe the phenomenon of executive branch administrative agencies exercising the power to create, adjudicate, and enforce their own rules." Ballotpedia, *Administrative State*, https://ballotpedia.org/Administrative_state (last visited Sept. 16, 2024). *See also* Philip Wallach, Brookings Institution, The Administrative State's Legitimacy Crisis (2016), https://www.brookings.edu/wp-content/uploads/2016/07/Administrative-state-legitimacy-crisis_FINAL.pdf.
32. *Jarkesy*, 144 S. Ct. at 2174.
33. 144 S. Ct. 2244, 54 ELR 20097 (2024).
34. *See* Lawrence Hurley, *Supreme Court Delivers Blow to Power of Federal Agencies, Overturning 40-Year-Old Precedent*, NBC News (June 28, 2024), https://www.nbcnews.com/politics/supreme-court/supreme-court-delivers-blow-power-federal-agencies-rcna145344.
35. The U.S. Environmental Protection Agency (EPA) has been engaged in cumulative impacts research for decades to strengthen the scientific foundation for assessing cumulative impacts. According to EPA's Office of Research and Development:
    > In everyday life, some people are exposed to numerous pollutants from a wide array of sources through multiple media and pathways. Chemical stressors in environmental media (air, water, land) and non-chemical stressors (e.g., social determinants of health, extreme weather events) aggregate and accumulate over time from one or more sources in the built, natural, and social environments, affecting individuals and communities in both positive and negative ways—referred to as cumulative impacts. In communities, particularly those already overburdened, disproportionate impacts can arise from unequal environmental conditions and exposure to multiple stressors. Additionally, changes in climate can exacerbate many of these disproportionate impacts.

    U.S. EPA, *Cumulative Impacts Research*, https://www.epa.gov/healthresearch/cumulative-impacts-research (last updated May 23, 2024).
36. The author has taught an administrative law course at the Vermont Law and Graduate School.
37. *See* Arjun Singh, *With Chevron Overturned, Congress May Have to Adapt*, Epoch Times (July 23, 2024), https://www.theepochtimes.com/article/how-congress-might-adapt-post-chevron-scotus-ruling-5685424:
    > The Supreme Court's decision to strike down the Chevron deference, which had the effect of enhancing federal agency power, has been deemed a "seismic" change for U.S. administrative law. Members of Congress . . . believe the Supreme Court ruling will equally shake up the process of lawmaking.
38. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272, 54 ELR 20097 (2024). Justice Neil Gorsuch, in his concurring opinion, stated: "Today, the court places a tombstone on *Chevron* no one can miss. In doing so, the Court returns judges to interpretive rules that have guided federal courts since the Nation's founding." *Id.* at 2275. Justice Gorsuch called *Chevron* a "judge-made fiction." *Id*. at 2289.
39. *Id*. at 2273.
40. On June 28, 2024, U.S. Chamber of Commerce President and Chief Executive Officer (CEO) Suzanne P. Clark issued the following statement regarding the Court overruling *Chevron*:

and industry[41] feel pessimistic or optimistic because of the demise of *Chevron*?[42] Should environmental law and policy scholars[43] as well as practitioners[44] feel pessimistic or optimistic because of the demise of *Chevron*? Should policymakers in federal administrative agencies feel pessimistic or optimistic because of the demise of *Chevron*?[45]

A. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.

On June 25, 1984, the Court issued its 6-0 decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[46] which concerned EPA's interpretation of the 1970 Clean Air Act (CAA),[47] as amended, as applied to Chevron. The Court upheld a President Ronald Reagan-era EPA air regulation. 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 then-Administrator Anne Gorsuch, the Agency 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.[48]

The Natural Resources Defense Council challenged this so-called bubble approach, and the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit voided the regulation.[49] On appeal, the 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,

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> Today's decision is an important course correction that will help create a more predictable and stable regulatory environment. The Supreme Court's previous deference rule allowed each new presidential administration to advance their political agendas through flip-flopping regulations and not provide consistent rules of the road for businesses to navigate, plan, and invest in the future. The Chamber will continue to urge courts to faithfully interpret statutes that govern federal agencies and to ensure federal agencies act in a reasonable and lawful manner.

Press Release, U.S. Chamber of Commerce, U.S. Chamber President and CEO Suzanne P. Clark: Chevron Deference Ruling Is an "Important Course Correction" (June 28, 2024), https://www.uschamber.com/lawsuits/u-s-chamber-president-and-ceo-suzanne-p-clark-chevron-deference-ruling-is-an-important-course-correction.

41. *See* Pamela King, *Chevron's Death Gives Life to New Environment and Energy Lawsuits*, Greenwire (July 2, 2024), https://subscriber.politicopro.com/article/eenews/2024/07/02/chevrons-death-gives-life-to-new-environment-and-energy-lawsuits-00166196:

> The legal and regulatory landscape has transformed in the blink of an eye," said Jay Timmons, president and CEO of the National Association of Manufacturers, which has challenged EPA rules in court. "Manufacturers will not waste a moment in seizing this opportunity—an opportunity that we have never seen before—to leverage this decision to rein in the regulations that are holding back manufacturers from improving lives.

See also Maxine Joselow, *What the Supreme Court Chevron Decision Means for Environmental Rules*, Wash. Post (June 28, 2024), https://www.washingtonpost.com/climate-environment/2024/06/28/supreme-court-chevron-environmental-rules:

> A wide array of conservative advocacy groups have urged the court to overturn *Chevron*. But petrochemicals billionaire Charles Koch has played a particularly influential role.
>
> Both cases were backed by conservative legal organizations—the Cause of Action Institute and New Civil Liberties Alliance—that have received millions of dollars from the Koch network, founded by Charles Koch and his late brother, David Koch. Charles Koch is the CEO of Koch Industries and a fierce critic of federal regulations.

42. *See* Pamela King, *Supreme Court Chevron Ruling Hamstrings the Executive Branch*, E&E News (June 28, 2024), https://www.eenews.net/articles/supreme-court-chevron-ruling-hamstrings-the-executive-branch:

> Lawyers who had argued for the court to overrule *Chevron* celebrated.
>
> "Going forward, judges will be charged with interpreting the law faithfully, impartially and independently, without deference to the government," said Roman Martinez, a partner at the law firm Latham & Watkins who argued for challengers in *Relentless*. "This is a win for individual liberty and the Constitution."

43. *Id.* King also reported:

> "What this case does is it massively deregulates courts," James Goodwin, policy director at the Center for Progressive Reform, said of Friday's decision. "So now that the Supreme Court has given the lower courts all this extra leash to second guess agency decisions, the question is what do they do with it?"
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> He noted that former President Donald Trump prioritized stocking the federal courts with conservative judges—including three of the Supreme Court justices who voted to overturn *Chevron*.

44. *Id.* King also wrote:

> David Doniger, senior attorney at the NRDC [Natural Resources Defense Council] and the lawyer who made the losing argument in the 1984 *Chevron* case, said *Loper Bright* will make it harder for the federal government to function.
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> "Whether they're making food safer, air cleaner or safeguarding prescription drugs, agencies need to be able to respond to complex problems the modern world throws at us," he said. "This decision is profoundly destabilizing and leaves policy—and public health—up to the individual preferences and political biases of unaccountable judges."

See also Joselow, *supra* note 41:

> Two heavyweights in the environmental movement—the Environmental Defense Fund and the Natural Resources Defense Council—both submitted amicus briefs urging the justices not to overturn *Chevron*. The environmental law firm Earthjustice also filed a joint brief in defense of the doctrine on behalf of Conservation Law Foundation, Ocean Conservancy and Save the Sound.
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> Additional support for *Chevron* came from a wide range of other individuals and groups, including Democratic senators, the American Cancer Society and the Lawyers' Committee for Civil Rights Under Law.

45. *See* Melissa Quinn, *Why the Supreme Court's Decision Overruling Chevron and Limiting Federal Agencies Is So Significant*, CBS News (June 28, 2024), https://www.cbsnews.com/news/supreme-court-chevron-decision-federal-agencies:

> Supporters of Chevron deference have been sounding the alarm that a reversal of the 1984 ruling would hinder the ability of federal agencies to impose regulations that fill gaps in the laws passed by Congress. The Biden administration called Chevron a "bedrock principle of administrative law" that gave weight to the expertise of federal agencies and warned its reversal would create an "upheaval."

See also Matthew Daly, *What It Means for the Supreme Court to Throw Out Chevron Decision, Undercutting Federal Regulators*, AP News (June 28, 2024), https://apnews.com/article/supreme-court-chevron-regulations-environment-4ae73d5a79cabadff4da8f7e16669929.

46. 467 U.S. 837, 14 ELR 20507 (1984).
47. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
48. Environmental Law Institute (ELI), The Supreme Court, Environmental Regulation, and the Regulatory Environment 2 (2024), https://www.eli.org/sites/default/files/files-pdf/ELI%20SCOTUS%20May%202024_0.pdf.
49. *Chevron*, 467 U.S. at 839-41.

> 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.[50]

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."[51] As Justice Stevens pointed out, this "principle of deference" to an agency's interpretation was not something new, but "well-settled" in the Court's precedents going back decades.[52]

Researchers at the Environmental Law Institute (ELI) have noted:

> 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. 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.[53]

And indeed, *Chevron*'s jurisprudential legacy is unquestioned in that:

> [w]hen the Supreme Court first issued its decision in the *Chevron* case more than 40 years ago, the decision was not necessarily regarded as a particularly consequential one. But in the years since then, it became one of the most important rulings on federal administrative law, cited by federal courts more than 18,000 times.[54]

Thus, in 1984, a unanimous Court determined that EPA's experts were the best at interpreting complex and ambiguous environmental statutes, and that courts should generally defer to the expert administrative agencies if their interpretations were "reasonable."[55] This *Chevron* deference doctrine was the law of the land for the next 40 years.[56] Over that period, however, conservative advocacy groups and antiregulatory interests attacked this legal precedent as part of a broader assault on the growing size of the "administrative state,"[57] contending that *Chevron* allowed liberal Democratic administrations to enact sweeping regulatory reforms.[58]

B. Loper Bright Enterprises v. Raimondo

In *Loper Bright*, the supermajority determined that the power of administrative agencies to interpret the laws that they administer should be curtailed and that, instead, judges should rely on their own interpretations of ambiguous statutes. Chief Justice Roberts argued that *Chevron* deference was inconsistent with the Administrative Procedure Act (APA),[59] which instead directs courts to "decide legal questions by applying their own judgment"[60] and, therefore, "makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus 'remains the responsibility of the court to decide whether the law means what the agency says.'"[61] In short, Roberts rejected the notion that administrative agencies are better suited to determine what ambiguities in a federal law might mean, even when those ambiguities involve technical or scientific questions that fall within an agency's area of expertise.[62]

Justice Kagan's dissent was instructive, identifying the major legal and policy problems that the supermajority's

50. *Id.* at 842-43.
51. *Id.* at 845.
52. *Id.* at 844-45; *see* ELI, *supra* note 48, at 3.
53. ELI, *supra* note 48, at 3.
54. Amy Howe, *Supreme Court Strikes Down* Chevron*, Curtailing Power of Federal Agencies*, SCOTUSblog (June 28, 2024), https://www.scotusblog.com/2024/06/supreme-court-strikes-down-chevron-curtailing-power-of-federal-agencies/.
55. *See* Benjamin M. Barczewski, Congressional Research Service, R44954, Chevron Deference: A Primer (2023), https://crsreports.congress.gov/product/pdf/R/R44954.
56. *See* Thomas W. Merrill, The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State 1 (2022), https://www.hup.harvard.edu/file/feeds/PDF/9780674260450_sample.pdf:
    > After gradually consolidating its grip for over thirty-five years, the *Chevron* doctrine became a matter of intense controversy at the tail end of the Obama Administration. Conservative judges and lawyers—including two of the Justices named to the Supreme Court by President Trump—have argued that *Chevron* must be overruled or at least significantly modified. Liberal judges and lawyers—including the Justices named to the Court by Presidents Clinton and Obama—generally think *Chevron* should remain undisturbed or perhaps only modestly reformed. Both sides attribute great significance to the outcome of this debate.
57. *See* Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 Daedalus 33 (2021), https://www.amacad.org/sites/default/files/publication/downloads/Daedalus_Su21_03_Dudley.pdf.
58. *See* Rachel Frazin & Zach Schonfeld, *Supreme Court Takes Sledgehammer to Federal Agency Power in Chevron Case*, Hill (June 28, 2024), https://thehill.com/regulation/court-battles/4745680-supreme-court-chevron-case/.
59. *See* U.S. EPA, *Summary of the Administrative Procedure Act*, https://www.epa.gov/laws-regulations/summary-administrative-procedure-act (last updated July 22, 2024).
60. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261, 54 ELR 20097 (2024).
61. *Id.*
62. *See* Pamela King, *Kavanaugh Warns Against Reading Too Much Into Chevron's Demise*, E&E News (Sept. 30, 2024), https://subscriber.politicopro.com/article/eenews/2024/09/30/kavanaugh-warns-against-reading-too-much-into-chevrons-demise-00181660. Justice Brett Kavanaugh stated to a Catholic University Columbus School of Law audience that:
    > "What we did in Loper Bright, the chief justice's opinion was I think a course correction consistent with the separation of powers to make sure that the executive branch is acting within the authorization granted to it by Congress."
    >
    > But he warned his audience not to "overread" the ruling, which has been criticized as removing decision-making power from expert agencies and handing it to generalist judges.
    >
    > "It's really important, as a neutral umpire, to respect the line that Congress has drawn," he said, "and when it's granted broad authorization, not to unduly hinder the executive branch from performing its congressionally authorized functions—but at the same time, not allowing the executive branch, as it could with *Chevron* in its toolkit, to go beyond the congressional authorization."

ruling engendered. First, Kagan acknowledged the central role that *Chevron* has played in administrative law:

> For 40 years, *Chevron* . . . has served as a cornerstone of administrative law, allocating responsibility for statutory construction between courts and agencies. . . . That rule has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades. It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.
>
> And the rule is right. . . .[63]

Second, Kagan quoted from *Chevron* as to why the rule was necessary in the first place: "Judges are not experts in the field, and are not part of either political branch of the Government."[64] Third, she wrote that the supermajority offered "no special reasons"[65] for its radical decision to overturn *Chevron* based upon its incorrect reading of §706 of the APA.[66] Fourth, Justice Kagan argued that overturning *Chevron* was essentially a power grab by the Court:

> It gives courts the power to make all manner of scientific and technical judgments. It gives courts the power to make all manner of policy calls, including about how to weigh competing goods and values. . . . It puts courts at the apex of the administrative process as to every conceivable subject—because there are always gaps and ambiguities in regulatory statutes, and often of great import. . . . It is not a role Congress has given to them, in the APA or any other statute. It is a role this Court has now claimed for itself, as well as for other judges.[67]

In short, the supermajority decreed, in no uncertain terms, that henceforth it and other federal judges, rather than agencies staffed by individuals with deep subject matter expertise, will be the final arbiter of the meaning of every statute passed by Congress.

University of Pennsylvania Law Professor Kate Shaw has pointed out the extent of this power grab: "In a world without *Chevron*, the Court will rely not on expertise but on whatever tools catch its fancy, or whatever sources of evidence appear in amicus briefs filed by ideological fellow travelers. That is no exaggeration."[68] Her analysis is consistent with what Stanford University Law Professor Mark Lemley predicted well before *Loper Bright* was decided:

> There are certainly times in the past when the Court has been accused of pursuing an ideological agenda. But they have usually been doing it by siding with a group whose interests the justices are aligned with (federal over state power, or vice versa, individual rights versus government, or vice versa, Congress over the executive branch, or vice versa). *What is new about this era is that there aren't any clear winners in the Court except the views of the justices themselves*.[69]

In sum, depending on the stakeholder group—business and industry; environmental law and policy scholars, as well as practitioners; and policymakers in federal administrative agencies—the demise of the *Chevron* deference doctrine may leave the glass half empty or half full.

II. "If You Change the Way You Look at Things, the Things You Look at Change"

Since 1992, EPA has defined the term "environmental justice" as the *fair treatment* and *meaningful involvement* of *all people* regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This goal will be achieved when *everyone* enjoys (1) the same degree of protection from environmental and health hazards; and (2) equal access to the decisionmaking process to have a healthy environment in which to live, learn, and work.[70]

63. *Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting). Justice Kagan continued, regarding how many times *Chevron* deference has been used by federal courts as well as the Supreme Court in its decisions:
> Second, *Chevron* is by now much more than a single decision. This Court alone, acting as Chevron allows, has upheld an agency's reasonable interpretation of a statute at least 70 times. Lower courts have applied the *Chevron* framework on thousands upon thousands of occasions. The *Kisor* Court observed, when upholding *Auer*, that "[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law." So too does deference to reasonable agency interpretations of ambiguous statutes—except more so.

Id. at 2307-08 (citations omitted).

64. *Id.* at 2311 (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865, 14 ELR 20507 (1984)). Justice Kagan continued:
> Those were the days, when we knew what we are not. When we knew that as between courts and agencies, Congress would usually think agencies the better choice to resolve the ambiguities and fill the gaps in regulatory statutes. Because agencies *are* "experts in the field." And because they *are* part of a political branch, with a claim to making interstitial policy. And because Congress has charged them, not us, with administering the statutes containing the open questions. At its core, *Chevron* is about respecting that allocation of responsibility—the conferral of primary authority over regulatory matters to agencies, not courts.

65. *Id.* at 2306. Justice Kagan wrote:
> The majority's whole argument for overturning *Chevron* relies on Section 706. But the text of Section 706 does not support that result. And neither does the contemporaneous practice, which that text was supposed to reflect. So today's decision has no basis in the only law the majority deems relevant. It is grounded on air.

Id. at 2301-10.

66. *Id.* at 2306.

67. *Id.* at 2311.

68. Kate Shaw, *The Imperial Supreme Court*, Regul. Rev. (Aug. 7, 2024), https://www.theregreview.org/2024/08/07/shaw-the-imperial-supreme-court. This essay is an edited version of her commentary first published in the *New York Times* on June 29, 2024.

69. Mark Lemley, *Stanford Law School's Mark Lemley Argues the Supreme Court Is Making an Unprecedented Power Grab*, Stan. L. Sch.: Legal Aggregate (Nov. 29, 2022) (emphasis added), https://law.stanford.edu/2022/11/29/stanford-law-schools-mark-lemley-argues-the-supreme-court-is-making-an-unprecedented-power-grab/.

70. U.S. EPA, *Environmental Justice*, https://www.epa.gov/environmentaljustice (last updated Sept. 16, 2024).

The Agency's definition is focused primarily on the issuance of permits and the operation of pollution-generating facilities sited in disproportionately affected communities. A special concern of the Agency is the adverse impact on the health of residents of those sacrifice zones[71] who have been environmentally overburdened—exposed disproportionately to environmental harms and risks as compared with other communities. It should be clearly understood that the central issue is the instances of environmental injustice in disproportionately impacted communities being addressed: whereas the goal to be achieved is environmental justice for *all* communities, regardless of race, color, national origin, or income.[72]

Over the past 37 years,[73] numerous independent studies have consistently found that certain communities in the United States, including African-American, Hispanic, Native American, Alaska Native, Native Hawaiian, and working-class White communities, face a disproportionate burden of environmental harm and risks.[74] This disparity has been observed in relation to exposure to various environmental hazards because of historical factors, such as redlining,[75] zoning practices,[76] and the discriminatory policies of federal, state, and local governments.[77]

Most of the independent scholarly research was seeking to determine whether minority and/or low-income communities were, in fact, disproportionately exposed to environmental harms and risks. The federal government's effort to identify an "environmental justice community" was based solely on demographic information derived from the work of those researchers.

However, scholarly researchers attempting to determine the validity of the assertion and government decisionmakers who must issue permits to operate pollution-generating facilities have entirely different roles. The approach of the scholars could not be adopted by EPA decisionmakers in the context of environmental protection for one important reason—the federal government, based upon the Constitution and Supreme Court decisions,[78] including the recent supermajority's *Students for Fair Admissions v. Harvard* decision,[79] cannot make environmental decisions based upon racial classifications. EPA must adopt a race-neutral strategy: a color-blind approach with respect to environmental decisionmaking.[80]

71. According to the Climate Reality Project:

> Sacrifice zones are often defined as populated areas with high levels of pollution and environmental hazards, thanks to nearby toxic or polluting industrial facilities. These areas are called "sacrifice zones" because the health and safety of people in these communities is being effectively sacrificed for the economic gains and prosperity of others.

Climate Reality Project, *Sacrifice Zones 101*, https://www.climaterealityproject.org/sacrifice-zones (last visited Sept. 16, 2024). *See also* Barry E. Hill, *Sacrifice Zones*, Env't F., Nov./Dec. 2021, at 26-33; Steve Lerner, Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States (2010) (The author traveled to 12 communities from New York to Alaska to collect stories from residents who live in communities that are on the front line and in the middle of toxic "sacrifice zones"—some of the most polluted and poisoned places in America.).

72. *See* U.S. EPA, Toolkit for Assessing Potential Allegations of Environmental Injustice (2004) (EPA 300-R-04-002), https://www.epa.gov/sites/default/files/2015-02/documents/ej-toolkit.pdf:

> Simply stated, environmental justice is the goal to be achieved for *all* communities so that: (1) people of *all* races, colors, and income levels are treated fairly with respect to the development and enforcement of protective environmental laws, regulations, and policies; and (2) potentially affected community residents are meaningfully involved in the decisions that will affect their environment and/or their health. Conversely, allegations of environmental injustice describe the situations where communities believe that the goal has not been achieved because of their belief that there is disproportionate exposure to environmental harms and risks. These environmental harms and risks often include, for example, multiple sources of air pollution (indoor and outdoor), water quality concerns, and the cumulative impacts associated with living in some urban and rural areas.

73. *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities With Hazardous Waste Sites* was issued in October 1987. It was the first national report to comprehensively examine the presence of hazardous waste in minority and/or low-income communities in the United States. Commission for Racial Justice, United Church of Christ, Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities With Hazardous Waste Sites (1987).

74. *See* Christopher Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 PNAS 6001 (2019); Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 Am. J. Pub. Health 480 (2018); Jamie Vickery & Lori M. Hunter, *Native Americans: Where Is Environmental Justice Research*, 29 Soc'y & Nat. Res. 26 (2016); Liam Downey & Brian Hawkins, *Race, Income, and Environmental Inequality in the United States*, 51 Socio. Persps. 759 (2008); Melody Kapilialoha MacKenzie et al., *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, Nat. Res. & Env't, Winter 2007, at 37-42, 79; Commission for Racial Justice, *supra* note 73.

75. *See* Barry E. Hill, *Equal Protection for All*, Env't F., Sept./Oct. 2023, at 41:

> Redlining was state-sponsored segregation—it was federal housing policy starting in the 1930s and was also implemented by state and local officials. . . . Redlining was a discriminatory practice in which financial services—mortgages, insurance, loans, etc.—were denied to people who resided in neighborhoods classified as "hazardous" to investment. The federal government deemed these areas as places where property values were most likely to decline, and the areas were marked in red—a sign that they were not worthy of inclusion in ownership and lending programs. Not coincidentally, most of the "hazardous" areas were neighborhoods where Black residents lived. Banks used these maps to determine where people were able to get loans, based on racial makeup, while real estate agents would only show certain houses to certain families.

See also Haley M. Lane et al., *Historical Redlining Is Associated With Present-Day Air Pollution Disparities in U.S. Cities*, 9 Env't Sci. & Tech. Letters 345 (2022), https://pubs.acs.org/doi/10.1021/acs.estlett.1c01012; Cesar O. Estien et al., *Historical Redlining Is Associated With Disparities in Environmental Quality Across California*, 11 Env't Sci. & Tech. Letters 54 (2024), https://pubs.acs.org/doi/10.1021/acs.estlett.3c00870; Alexander C. Bradley et al., *Air Pollution Inequality in the Denver Metroplex and Its Relationship to Historical Redlining*, 58 Env't Sci. & Tech. 4226 (2024), https://pubs.acs.org/doi/10.1021/acs.est.3c03230; Eun-hye Yoo & John E. Roberts, *Differential Effects of Air Pollution Exposure on Mental Health: Historical Redlining in New York State*, 948 Sci. Total Env't 174516 (2024), https://www.sciencedirect.com/science/article/abs/pii/S0048969724046643.

76. *See* Julia Mizutani, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 Geo. Env't L. Rev. 363 (2019), https://www.law.georgetown.edu/environmental-law-review/wp-content/uploads/sites/18/2019/04/GT-GELR190004.pdf.

77. *See* Maudlyne Ihejirika, *What Is Environmental Racism?*, NRDC (May 24, 2023), https://www.nrdc.org/stories/what-environmental-racism.

78. Fisher v. University of Tex. at Austin, 570 U.S. 297 (2013); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); Grutter v. Bollinger, 539 U.S. 306 (2003).

79. Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023).

80. *See* Brenda Mallory & David Neal, *Practicing on Uneven Ground: Raising Environmental Justice Claims Under Race Neutral Laws*, 45 Harv. Env't L. Rev. 295 (2021), https://journals.law.harvard.edu/elr/wp-content/uploads/sites/79/2021/07/45-2-Mallory-Neal.pdf.

This race-neutral strategy was manifested recently by the White House Council on Environmental Quality (CEQ) when it launched, in November 2022, the geospatial mapping tool Climate and Economic Justice Screening Tool (CEJST),[81] and selected 27,000 "disadvantaged communities" that faced burdens related to climate change, energy, health, housing, legacy pollution, transportation, water and wastewater, and work force development.[82] According to an article by Thomas Frank[83]:

> Disadvantaged communities are census tracts—with a few thousand people in each one—that tend to have high poverty levels and environmental risks such as pollution, hazardous waste and dangerous flooding. Disadvantaged communities account for slightly more than a third of the 73,000 census tracts in the United States.
>
> An E&E News analysis shows that census tracts with large numbers of minority residents are much more likely to be listed by the White House as disadvantaged communities than largely white tracts.
>
> - Of the nearly 6,300 U.S. census tracts in which Black residents are a majority, 77 percent were identified by the White House as disadvantaged communities.
> - Of the nearly 8,000 U.S. census tracts in which Hispanic residents are a majority, 83 percent are disadvantaged communities.
> - Of the 14,200 census tracts where white residents make up more than 90 percent of the population, just 22 percent are disadvantaged communities.
>
> ****
>
> The Council on Environmental Quality responded to the E&E News analysis by saying it is "well-documented" that minority communities "suffer disproportionately from environmental and health burdens" and "face greater risks from climate change."
>
> "The tool reflects these on-the-ground burdens and realities that disadvantaged communities face," the Council said in a statement. "The tool does not use race in its methodology."
>
> Although the White House screening tool was favorable to minority communities, it also counted as disadvantaged mixed and largely white communities that are low-income and have high rates of pollution, potential climate impacts, housing or energy costs, or health problems.[84]

The question that was posed during my tenure as the director of EPA's Office of Environmental Justice (OEJ)[85] was how should the Agency address this major public policy issue utilizing this race-neutral strategy when there was also no environmental justice law? The answer to that question hinged on whether EPA could effectively utilize existing environmental laws and their implementing regulations to address instances of environmental injustice. This multidimensional initiative, in many respects, required an appreciation of Dr. Wayne Dyer's adage, "If you change the way you look at things, the things you look at change."[86]

To begin with, it is a fact that with respect to environmental justice legislation at the federal level, unfortunately, there has been little to no deliberation, compromise, and moderation in the legislative process between Republicans and Democrats. Little has been done legislatively, due largely to the fact that, according to environmental justice activists and advocates, Republicans have been in control of Congress from time to time and have not introduced or cosponsored any such legislation. Meanwhile, Democrats have been unable to move proposed environmental justice legislation out of committee for decades.[87] Thus, it was necessary to change the way the Agency looked at how to address instances of environmental injustice. The only office at EPA that could change the Agency's approach was the Office of General Counsel (OGC).[88]

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81. CEQ, Climate and Economic Justice Screening Tool: Frequently Asked Questions (2022), https://www.whitehouse.gov/wp-content/uploads/2022/02/CEQ-CEJST-QandA.pdf. CEQ answered:
    > Q: Is race included as an indicator?
    > The CEJST does not use racial demographic data as an indicator to help identify disadvantaged communities. The tool relies on [an] array of climate, environmental, and socioeconomic indicators to identify communities that are shouldering a disproportionate share of environmental burdens and climate risks and that have suffered from underinvestment. It is well-documented that communities of color suffer disproportionately from some of these burdens. Although the tool does not include race as an indicator, the CEJST endeavors to create a map that reflects on-the-ground burdens and realities that disadvantaged communities face.
82. U.S. Climate Resilience Toolkit, *Climate and Economic Justice Screening Tool*, https://toolkit.climate.gov/tool/climate-and-economic-justice-screening-tool (last visited Sept. 16, 2024) ("This interactive map shows information about the climate, environment, health, and socioeconomic burdens that communities are facing throughout the nation.").
83. Thomas Frank, *How the White House Found EJ Areas Without Using Race*, E&E News (Jan. 24, 2023), https://www.eenews.net/articles/how-the-white-house-found-ej-areas-without-using-race/.
84. *Id. See also* Kristoffer Tigue, *How the Affirmative Action Ban Affects Environmental Justice Policies*, Mother Jones (July 12, 2023), https://www.motherjones.com/environment/2023/07/supreme-court-affirmative-action-ruling-environmental-justice-impacts/.
85. The author served as the Director of the Office of Environmental Justice from 1998-2007.
86. BrainyQuote, *Wayne Dyer Quotes*, https://www.brainyquote.com/quotes/wayne_dyer_384143 (last visited Sept. 17, 2024).
87. Barry E. Hill, *Time Has Come Today for Environmental and Climate Justice Legislation*, 51 ELR 10103 (Feb. 2021). *See also* Barry E. Hill, *Environmental Justice and the Transition From Fossil Fuels to Renewable Energy*, 53 ELR 10317 (Apr. 2023):
    > Enacting comprehensive environmental justice legislation was the dream of the late civil rights icon Rep. John Lewis (D-Ga.), who through his 60-plus years of fearless activism was the unquestioned "conscience of [the U.S.] Congress." He introduced the Environmental Justice Act of 1992, which was designed for the first time in this nation's history to address racial discrimination in the enforcement of environmental laws, and the development and implementation of regulations and policies by EPA and other federal agencies and departments. Since 1992, there have been more than 50 environmental justice-related bills introduced in the U.S. House of Representatives or the U.S. Senate. In fact, Representative Lewis dutifully reintroduced his bill each year for more than a dozen years thereafter. Not one of the bills has become law.
88. U.S. EPA, *About the Office of General Counsel (OGC)*, https://19january2021snapshot.epa.gov/aboutepa/about-office-general-counsel-ogc_.html (last updated Jan. 19, 2021).

Working collaboratively with OEJ, the assistant administrators of the Office of Enforcement and Compliance Assurance, Office of Air and Radiation, Office of Solid Waste and Emergency Response, and Office of Water formally asked OGC in writing to opine on this question. On December 1, 2000, the EPA general counsel in the William Clinton Administration issued his memorandum, "EPA Statutory and Regulatory Authorities Under Which Environmental Justice May Be Addressed in Permitting."[89] OGC analyzed

> a significant number of statutory and regulatory authorities under the Resource Conservation and Recovery Act, the Clean Water Act, the Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act, and the Clean Air Act that the Office of General Counsel believes are available to address environmental justice issues during permitting.[90]

This was the first time that OGC issued a legal opinion stating that environmental justice, as a goal to be achieved for *all* communities, was imbedded in existing environmental laws that the Agency administered.

Moreover, in December 2011, the EPA general counsel in the Barack Obama Administration issued the treatise *Plan EJ 2014: Legal Tools*,[91] stating:

> *Plan EJ 2014* called for the Office of General Counsel to identify legal authorities under the federal environmental statutes that bear meaningfully on the environmental justice challenge. This document responds to that call. It identifies numerous legal tools that EPA may consider using to more fully ensure that its programs, policies, and activities fully protect human health and the environment in minority and low-income communities. Some of the tools we have identified are already in use today; others have not yet been applied in an environmental justice setting.[92]

Further, on May 26, 2022, the EPA general counsel in the Joseph Biden Administration issued the treatise *EPA Legal Tools to Advance Environmental Justice*,[93] stating:

> *Legal Tools* identifies a wide range of legal authorities that EPA can deploy to ensure its programs and activities protect the health and environment of all communities. It also addresses new statutory authorities promulgated since the earlier analysis, more consistent approaches to advancing environmental justice and equity through cooperative federalism, and additional opportunities to ensure civil rights compliance by recipients of EPA funding.[94]

Finally, in January 2023, the EPA general counsel in the Biden Administration issued the treatise *EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum*,[95] stating:

> This Addendum builds on the discussion of cumulative impacts in *EJ Legal Tools*, providing further detail and analysis on the Agency's legal authority to address cumulative impacts affecting communities with environmental justice concerns. In certain contexts, such actions include directly "addressing" cumulative impacts by taking cumulative impacts into account during decision-making or taking actions to avoid or mitigate cumulative impacts. In other contexts, the Agency action may involve the foundational steps of identifying and assessing cumulative impacts related to an Agency action. This Addendum is not an exhaustive or comprehensive compilation of the Agency's authority to address cumulative impacts in all contexts; rather it provides illustrative examples and serves as a guide for Agency attorneys examining the scope of the Agency's authority to address cumulative impacts in specific scenarios.
>
> EPA has a broad set of legal tools to address cumulative impacts to protect public health and the environment of communities with environmental justice concerns . . . .[96]

Pursuant to OGC's legal advice, EPA issued guidance documents to Agency staff to seek to address these instances of environmental injustice through, among other things, the rulemaking process. For example, in May 2015, EPA issued its final "Guidance on Considering Environmental Justice During the Development of Regulatory Actions."[97] In June 2016, EPA released its "Technical Guidance for Assessing Environmental Justice in Regulatory Analysis,"[98] outlining procedures for assessing environmental justice concerns associated with various Agency actions.

In sum, OGC has issued several legal treatises over the past 24 years indicating that the Agency has the legal authority under existing environmental laws and their implementing regulations to address instances of environmental injustice. As a result of changing the way the Agency looked at addressing this issue, instances of environmental

89. Memorandum from Gary S. Guzy, General Counsel, EPA OGC, to EPA Assistant Administrators, re: EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting (Dec. 1, 2000), https://www.epa.gov/sites/default/files/2015-02/documents/ej_permitting_authorities_memo_120100.pdf.
90. *Id.*
91. U.S. EPA, Plan EJ 2014: Legal Tools (2011), https://www.epa.gov/sites/default/files/2016-07/documents/ej-legal-tools.pdf.
92. *Id.*
93. U.S. EPA, EPA Legal Tools to Advance Environmental Justice (2022), https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf.
94. *Id.*
95. U.S. EPA, EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum (2023), https://www.epa.gov/system/files/documents/2022-12/bh508-Cumulative%20Impacts%20Addendum%20Final%202022-11-28.pdf.
96. *Id.*
97. U.S. EPA, *Guidance on Considering Environmental Justice During the Development of an Action*, https://www.epa.gov/environmentaljustice/guidance-considering-environmental-justice-during-development-action (last updated Dec. 26, 2023).
98. U.S. EPA, Technical Guidance for Assessing Environmental Justice in Regulatory Analysis (2016), https://www.epa.gov/sites/default/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf.

injustice could be addressed more effectively for people living in sacrifice zones throughout the United States.

III. "The Toothpaste Is Out of the Tube"

Given the supermajority's views, and given the well-documented legal authority for federal agencies to address instances of environmental injustice across this country, should disproportionately impacted communities, as stakeholders, feel pessimistic or optimistic because of the demise of *Chevron*? The answer depends on whether the *Loper Bright* decision will shake up the federal environmental justice regulatory landscape or whether "the toothpaste is out of the tube." That idiom refers to a situation where something has been said or done that cannot be taken back. Here, it implies that once something has been revealed, it cannot be hidden again by the federal government or state governments.

A. Federal Government

What has been revealed by OGC in its legal treatises is how existing federal environmental laws can be used effectively to address instances of environmental injustice.

First, EPA is a regulatory agency because, in 1970, Congress authorized the Agency to write regulations that explain the critical details necessary to implement environmental laws that protect human health and the environment.[99] According to OGC, the environmental statutes that EPA administers provide the Agency with the legal authority to consider and address environmental injustice concerns with respect to setting standards; permitting facilities; making grants; issuing regulations; and reviewing the proposed actions of other federal agencies. Moreover, although there is no specific federal environmental justice legislation and regulations, CEQ determined in 1997 that the National Environmental Policy Act (NEPA)[100] provides that agencies must consider environmental justice in their activities.[101] Additionally, NEPA requires agencies to consider the cumulative impacts of their proposed projects, which are important for understanding a project's contribution to environmental justice analyses.[102]

Second, disproportionately impacted communities now understand that environmental laws, like NEPA, can be used to rectify environmental injustices. According to an article by Adrienne L. Hollis:

> Through NEPA, communities—especially environmental justice communities—are provided a mechanism to engage in a meaningful way with federal agencies around actions that could impact their local environment and public health. . . .
>
> Environmental justice organizations and broader environmental organizations realize the impact of legislation that unambiguously calls for public participation. They realize the power provided by NEPA, to have input in agency decisions as stakeholders and even the right to use the statute in litigation.
>
> Many times[,] groups have pursued legal action where agency decisions do not sufficiently include the environmental review required by NEPA.[103]

Third, disproportionately impacted communities have been trained by ELI (and others[104]) on how to use environmental laws to address their concerns. For example, this author has noted:

> In the mid-1990s, ELI launched a 12-year project, "Demystifying Environmental Law," with funding from foundations and EPA. In partnership with the Southwest Network for Environmental and Social Justice, we developed a new model for training local leaders on environmental law and facilitated several workshops for communities in California, New Mexico, and Texas.
>
> In 2001, ELI published an in-depth study on using environmental laws to advance [environmental justice] goals, "Opportunities for Advancing Environmental Justice: An Analysis of U.S. EPA Statutory Authorities." Building on this detailed report, we developed *A Citizen's Guide to Using Federal Environmental Laws to Secure Environmental Justice*, and we partnered with the United Church of Christ Commission for Racial Justice and EPA's Office of

99. *See* U.S. EPA, *The Origins of EPA*, https://www.epa.gov/history/origins-epa (last updated May 31, 2024).

100. *See* U.S. EPA, *What Is the National Environmental Policy Act?*, https://www.epa.gov/nepa/what-national-environmental-policy-act (last updated Sept. 4, 2024); 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.

101. *See* CEQ, Environmental Justice: Guidance Under the National Environmental Policy Act (1997), https://www.epa.gov/sites/default/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf. This guidance document directs federal agencies to analyze the environmental effects, including human health, economic, and social effects, of their proposed actions on minority and/or low-income communities when required by NEPA.

102. *See* Office of Federal Activities, U.S. EPA, Consideration of Cumulative Impacts in EPA Review of NEPA Documents §2 (1999) (EPA 315-R-99-002), https://www.epa.gov/sites/default/files/2014-08/documents/cumulative.pdf:

> Cumulative impacts result when the effects of an action are added to or interact with other effects in a particular place and within a particular time. It is the combination of these effects, and any resulting environmental degradation, that should be the focus of cumulative impact analysis. While impacts can be differentiated by direct, indirect, and cumulative, the concept of cumulative impacts takes into account all disturbances since cumulative impacts result in the compounding of the effects of all actions over time. Thus[,] the cumulative impacts of an action can be viewed as the total effects on a resource, ecosystem, or human community of that action and all other activities affecting that resource no matter what entity (federal, non-federal, or private) is taking the actions.

103. Adrienne L. Hollis, *An Environmental Impact Statement on NEPA*, Env't F., Nov./Dec. 2019, at 37.

104. *See* New York University School of Law Institute for Policy Integrity, *TRAINING: Understanding Environmental Justice Laws and Policies*, https://policyintegrity.org/news/event/training-understanding-environmental-justice-laws-and-policies (last visited Sept. 16, 2024). This training took place on August 22, 2024.

> Environmental Justice to create a video to help communities learn about and use environmental laws effectively.[105]

B. State Governments

In the wake of *Loper Bright*, state laws may become increasingly important. First, disproportionately impacted communities have also used state environmental laws to address their concerns. For example, in another article,[106] I discussed the case *Friends of Buckingham v. State Air Pollution Control Board*[107]:

> In January, the Fourth Circuit Court of Appeals in Richmond sent a permit for an Atlantic Coast Pipeline's [(ACP's)] compressor station back to Virginia's state regulators over environmental justice concerns. The compressor station, which would burn gas 24 hours a day, 365 days a year, is one of three planned to support the transmission of natural gas through the 600-mile ACP, which is projected to stretch from West Virginia to South Carolina.
>
> The plaintiffs, Friends of Buckingham and the Chesapeake Bay Foundation, challenged the compressor station permit issued by the State Air Pollution Control Board, arguing that the project would have a disproportionately adverse impact on the health of residents of the predominately African American Union Hill neighborhood in Virginia's Buckingham County. In fact, according to the appellate court, Union Hill consists of 84 percent nonwhite residents, some of whom are the descendants of its Civil War-era founders. The court recognized a study which revealed that the residents, including many elderly, already suffer chronic ailments including asthma, chronic obstructive pulmonary disease, chronic bronchitis and pneumonia, heart disease, and other conditions that would make the residents particularly susceptible to pollution from the compressor station.
>
> The court of appeals vacated and sent the permit back to the board for reconsideration, citing, among other things, the panel's inadequate assessment of the health risks of the site to the community. "It is clear to us that the board's [environmental justice] review was insufficient, which undermines the board's statutory duties and renders the board's permit decision arbitrary and capricious, and unsupported by substantial evidence," the court concluded. "The board rejected the idea of disproportionate impact on the basis that air quality standards were met," the three-judge panel found, "but environmental justice is not merely a box to be checked, and the board's failure to consider the disproportionate impact on those closest to the compressor station resulted in a flawed analysis."[108]

Second, disproportionately impacted communities can have their concerns addressed even when the state does not have environmental justice legislation. In that same article, I wrote:

> Nonetheless, achieving environmental justice can arguably be an agency duty under state law. Indeed, the statute provides that the Air Pollution Control Board in approving permits "shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it." There are four major grounds for review of permits under Virginia law. Number 1 references "the character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused." Number 3 references "the suitability of the activity to the area in which it is located." The appellate court determined that the board violated this state law by failing to assess the compressor station's disproportionate health impacts on the predominately African American community, in violation of the first enumerated ground for concern, and failed to assess the suitability of the site in violation of the third.[109]

Among other things, as a direct result of the *Friends of Buckingham* case, in 2020, Virginia enacted its Environmental Justice Act (Senate Bill 406) into law,[110] and the Department of Environmental Quality (DEQ) has issued draft environmental justice regulations.[111]

Third, disproportionately impacted communities can have their concerns addressed when the state has environmental justice legislation. For example, New York Gov. Kathy Hochul signed the "Cumulative Impacts Bill"[112] into law on December 31, 2022.[113] Under the Cumulative

105. Barry E. Hill, *Using Law to Rectify Environmental Injustices*, Env't F., Nov./Dec. 2019, at 7. *See also* ELI, *Community Education and Training Program*, https://www.eli.org/community-environmental-health-and-justice/community-education-and-training-program (last visited Sept. 16, 2024) ("[P]rovides citizens and grassroots groups with information on environmental law and policy that can help them participate effectively in the decisions that impact public health and the environment in their communities."); ELI, *Community Environmental Health and Justice Program*, https://www.eli.org/environmental-health/community-environmental-health-and-justice-program (last visited Sept. 16, 2024) ("[W]orks with grassroots, community based organizations and advocates to address challenges to their environment and health. Working in partnership with those who live the policies made by government, the program seeks to increase the capacity of community organizations and advocates to protect their health and environment.").

106. Barry E. Hill, *Bending the Arc Toward Justice*, Env't F., July/Aug. 2020, at 50-55.

107. 947 F.3d 68, 50 ELR 20018 (4th Cir. 2020).

108. Hill, *supra* note 105, at 51-52.

109. *Id.* at 52.

110. Virginia Environmental Justice Act §2.2-234 (Definitions), §2.2-235 (Policy regarding environmental justice), Va. Code art. 12 (2020).

111. DEQ issued draft guidance, "Environmental Justice in the Permitting Process," for public comment, which ended on May 1, 2023. DEQ continues to conduct its internal review of the public comments.

112. S.B. 8830, 2021-2022 Leg. Sess. (N.Y. 2022), https://legislation.nysenate.gov/pdf/bills/2021/S8830.

113. *See* Press Release, WE ACT for Environmental Justice, Governor Hochul Signs Landmark Environmental Justice Legislation Reducing the Cumulative Impacts of Pollution on Disadvantaged Communities (Dec. 31, 2022), https://www.weact.org/2022/12/governor-hochul-signs-landmark-environmental-justice-legislation-reducing-the-cumulative-impacts-of-pollution-on-disadvantaged-communities/.

Impacts Bill, which went into effect in June 2023, agencies must consider a proposed action's environmental justice consequences from the outset, starting with determining whether an environmental impact statement (EIS) is necessary under the State Environmental Quality Review Act, New York's version of NEPA.[114]

In determining whether an EIS is required,[115] agencies must consider the action's potential to "cause or increase disproportionate or inequitable or both disproportionate and inequitable burden on a disadvantaged community that is directly or significantly indirectly affected by such action." Where an EIS is required, state agencies must assess the effects of any proposed action on disadvantaged communities, including whether the action may "cause or increase a disproportionate or inequitable pollution burden on a disadvantaged community." Agencies are prohibited from approving actions that "may cause or contribute to, either directly or indirectly, a disproportionate or inequitable or both disproportionate and inequitable pollution burden on a disadvantaged community."[116]

A growing number of other states have enacted, with the ardent support of disadvantaged communities, environmental justice laws involving cumulative impacts, including New Jersey,[117] California,[118] Washington,[119] Minnesota,[120] Massachusetts,[121] Connecticut,[122] and Vermont.[123]

In conclusion, considering the above, it appears that the demise of *Chevron* would not adversely affect the efforts of disproportionately impacted communities to have their cumulative impact concerns addressed by federal, state, and local government agencies because "the toothpaste is out of the tube." As stakeholders, it is irreversible for the residents of those sacrifice zones because there is no going back. Moreover, failing to include and address environmental injustice concerns in the planning process will cause permit delays or denials, such as what occurred in the *Friends of Buckingham* case discussed above. More importantly, applicants for operating permits must also demonstrate how the project will benefit the disproportionately impacted community in accordance with environmental laws and their implementing regulations.[124] Most assuredly, the secret is out!

114. *See* J. Michael Showalter & Bradley S. Rochlen, *Environmental Justice Update: New York Becomes Second State to Require EJ-Focused Cumulative Impact Analysis*, ArentFoxSchiff (Jan. 3, 2023), https://www.afslaw.com/perspectives/environmental-law-advisor/environmental-justice-update-new-york-becomes-second-state.

115. *See* New York State Department of Environmental Conservation, DEP 24-1/Permitting and Disadvantaged Communities (May 8, 2024), https://dec.ny.gov/sites/default/files/2024-05/prgrmpolicy24dash1.pdf:

> This policy is written to provide guidance for DEC staff when reviewing permit applications associated with sources and activities, in or likely to affect a disadvantaged community, that result in greenhouse gas (GHG), or co-pollutant emissions regulated pursuant to Article 75 of the Environmental Conservation Law (ECL). This policy does not apply to permit applications that are not located in or likely to affect a disadvantaged community.

116. N.Y. Env't Conserv. Law §70-0118.

117. New Jersey Gov. Phil Murphy signed the state's environmental justice legislation (Senate Bill 232) into law on September 18, 2020, which requires the New Jersey Department of Environmental Protection to identify the state's "overburdened communities," and only grant or renew permits for certain facilities after determining that there are no disproportionate, cumulative environmental impacts on those communities. The law imposes new requirements for obtaining permits for "facilities" located in overburdened communities, including facilities that are major sources of air pollution (as defined under the CAA); resource recovery facilities or incinerators; sludge processing facilities, combustors, or incinerators; large sewage treatment plants; transfer stations, large recycling facilities, and landfills; and other industrial facilities.

118. California Gov. Jerry Brown signed Assembly Bill 617 into law on July 24, 2017, to develop a new community-focused program to more effectively reduce exposure to air pollution and to preserve public health. The program requires local air districts and the state Air Resources Board to reduce air pollution in environmental justice communities.

119. The Healthy Environment for All (HEAL) Act became law in May 2021. The law empowers the Department of Ecology, among other state agencies, to conduct environmental justice assessments when planning significant actions. An environmental justice assessment provides an opportunity to better understand a wide range of environmental justice impacts that an action may have in the early developmental stages of the department's work. They will help state agencies make informed decisions to reduce environmental harms, and to address environmental and health disparities in overburdened communities. This was an historic step toward eliminating environmental and health disparities among communities of color and low-income communities. It was the first time a statewide law created a coordinated state agency approach to addressing instances of environmental injustice in Washington.

120. In July 2023, Minnesota's Legislature passed the cumulative impacts law. The law requires that when issuing operating permits, the Minnesota Pollution Control Agency must consider more than the pollution directly emitted by a factory, power plant, or other facility. If the facility is in what is called an "environmental justice area," the agency must also consider how the community has been affected by pollution over time. An "environmental justice area" as defined in the statute is 40% or more of the population is nonwhite; 35% or more of the households have an income at or below 200% of poverty ($60,000 for a family of four); 40% or more of the population over the age of five has limited English proficiency; and located within Indian Country. The Minnesota Pollution Control Agency is working on the implementing regulations, which will take effect no later than May 18, 2026.

121. On March 26, 2021, Gov. Charlie Baker signed into law "An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy" to create a net-zero greenhouse gas emissions limit in Massachusetts by 2050, and it outlines and defines certain precepts of environmental justice principles for the state.

122. Public Act 20-6, "An Act Concerning Enhancements to State's Environmental Justice Law," was effective November 1, 2020. It was signed into law by Gov. Ned Lamont in October 2020. The law requires applicants seeking a permit for a new or expanded "affecting facility" that is proposed to be located in an "environmental justice community" to file an environmental justice public participation plan with and receive approval from the Department of Energy and Environmental Protection prior to filing any application for such permit.

123. Vermont's Environmental Justice Law (Act 154 of 2022) was signed into law by Gov. Phil Scott on May 31, 2022. The law requires that the covered state agencies (1) create and adopt community engagement plans; (2) develop a statewide environmental justice mapping tool and use the tool to ensure environmental burdens are fairly distributed; (3) publish annual spending reports showing which communities had access to what environmental benefits; and (4) report on and address any civil rights or environmental justice complaints filed against the agency.

124. *See* Will Bohlender, *Data-Driven Environmental Justice: A Guide Toward Improved Community Benefits*, Ramboll (May 1, 2024), https://www.ramboll.com/en-us/insights/resilient-societies-and-liveability/data-driven-environmental-justice-a-guide-toward-improved-community-benefits.