

THE JURISPRUDENCE OF JUSTICE GORSUCH AND FUTURE EFFORTS TO ADDRESS CLIMATE CHANGE

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INTRODUCTION

Following the Trump administration's significant reshaping of the federal judiciary¹ and a number of blockbuster Supreme Court cases during the October 2021² and October 2022 Terms,³ environmental law is shifting rapidly toward a more restrictive vision of federal regulation. Justice Gorsuch has been clamoring for such a revolution throughout his time on the bench. Since joining the Supreme Court, he has not only provided a crucial vote for limiting the Environmental Protection Agency (EPA)'s regulatory authority, but also advanced a radical vision of the separation of powers that would drastically alter our modern system of administrative governance. In several of his opinions, Justice Gorsuch has opposed federal regulations on quite expansive grounds, criticizing deference to agency expertise and questioning the constitutionality of delegation to administrative agencies.⁴ He has also praised the slow trickle of congressional legislation, arguing that it is consistent with the Founders' vision of a limited federal government.⁵

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1. Matt Stevens, *Trump Has Reshaped the Judiciary. Here's How the 2020 Democrats Would Address That*, N.Y. TIMES (Feb. 8, 2020), <https://www.nytimes.com/2020/02/08/us/politics/democrats-courts-trump.html> [perma.cc/6P4Y-4NLC].

2. See generally ERWIN CHEMERINSKY, A MOMENTOUS YEAR IN THE SUPREME COURT: OCTOBER TERM 2021 (2022).

3. Robert L. Glicksman, *Supreme Court Delivers Another Massive Blow to Federal Environmental Law*, CTR. FOR PROGRESSIVE REFORM (May 30, 2023), <https://progressivereform.org/cpr-blog/supreme-court-delivers-another-massive-blow-to-federal-environmental-law> [perma.cc/8QME-98KD].

4. See Heather Elliot, *Gorsuch v. The Administrative State*, 70 ALA. L. REV. 703, 707 (2019) ("Judge Gorsuch even gestured toward a belief that administrative agencies are themselves unconstitutional."); see also *Gundy v. United States*, 139 S. Ct. 2116, 2137–43 (2019) (Gorsuch, J., concurring); *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring).

5. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016); *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

Although Justice Gorsuch's views on the administrative state are more extreme than those of most other Supreme Court Justices, his perspective appears to have influenced the Court's shift to a "more formalist and less pro-agency direction."⁶ This does not bode well for the federal government's ability to undertake significant, swift regulatory actions to avoid serious environmental effects from climate change. The current Court's hostility to federal regulations is particularly dire given congressional deadlock on climate legislation to create a carbon tax or cap-and-trade program.⁷ While the Inflation Reduction Act and the EPA's recent slate of greenhouse gas regulations will lead to less reliance on fossil fuels, the U.S. will need additional measures to meet its stated target of reducing greenhouse gas emissions to 50 percent below 2005 levels by 2030.⁸

If Congress is unlikely to pass another climate bill, and the EPA is doing all it can under the Clean Air Act, are we out of other options? This essay will argue that Justice Gorsuch's jurisprudence suggests that *state* actions, whether through legislation or the common law, may be a viable pathway to address the climate crisis. His potential support of these state efforts against constitutional challenges as well as claims of federal preemption runs counter to the typical lineup of Republican and Democratic appointees on the court in administrative law cases, which has proven to be a serious obstacle to federal environmental regulations.⁹ En-

6. Kristin E. Hickman, Response, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 78 (2022), <https://harvardlawreview.org/forum/vol-136/roberts-courts-structural-incrementalism> [perma.cc/PGX2-M6VL]; see also *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting). In *Gundy*, Chief Justice Roberts and Justice Thomas signed onto Justice Gorsuch's dissent, which argued that the major questions doctrine had taken the place of the discredited nondelegation doctrine since "[w]hen one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines." *Id.* Compare *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (Roberts, C.J.) (stating that "both separation of powers principles and a practical understanding of legislative intent" provide grounds for invoking the major questions doctrine), with *id.* at 2617 (Gorsuch, J., concurring) (stating that the major questions doctrine operates "to protect the Constitution's separation of powers").

7. See Emma Ricketts & Grant Schwab, *Amid Rising Emissions, Could Congressional Republicans Help the US Reach Its Climate Targets?*, INSIDE CLIMATE NEWS (Jan. 25, 2023), <https://insideclimatenews.org/news/25012023/amid-rising-emissions-could-congressional-republicans-help-the-us-reach-its-climate-targets> [perma.cc/LKG3-96ES].

8. *Id.*

9. See Lisa Heinzerling, *How Government Ends*, BOSTON REV. (Sep. 28, 2022), <https://www.bostonreview.net/articles/how-government-ends> [perma.cc/4BJX-DQ65] (noting that the Trump administration sought to nominate justices to the Supreme Court "who would shrink the size and power of the administrative state"). It would be a mistake, however, to suggest complete uniformity among the conservative justices on environmental law cases. See, e.g., *Sackett v. EPA*, 143 S. Ct. 1322, 1362 (2023) (Kavanaugh, J., concurring). On divisions between the three Trump-appointed justices more generally, see

vironmentalists should therefore give greater attention to novel state climate initiatives, such as state legislation to fund adaptation and mitigation projects,¹⁰ as well as state common law remedies.¹¹

Part I of this Essay describes Justice Gorsuch's views on federal regulatory authority, particularly his writings on delegation and deference to agencies, and assesses their implications for federal climate action. It argues that Justice Gorsuch is deeply skeptical of government intervention on matters that require collective action as well as scientific and technical expertise, which is likely to pose serious problems for efforts to address environmental threats like climate change if his fellow conservative justices adopt them. Part II then turns to Justice Gorsuch's opinions on state authority to address environmental and public health issues, such as hazardous waste and animal welfare. It argues that the justice's record on these cases suggests that he may provide a crucial vote in support of state authority to protect the public and natural resources from climate harms.

I. THE IMPLICATIONS OF JUSTICE GORSUCH'S JURISPRUDENCE FOR FEDERAL CLIMATE ACTION

Justice Gorsuch has made no secret of his antipathy for the administrative state during his time on the bench.¹² But while Justice Gorsuch's disdain for agency deference and "the explosive growth of the administrative state"¹³ are obvious from even a superficial acquaintance with his jurisprudence, it's less clear whether he has a consistent, logical rationale for his approach to administrative law. For instance, some of his opinions appear to ground his opposition to agency deference on issues of statutory interpretation in separation of powers concerns.¹⁴ In a Tenth Circuit

Jonathan H. Adler, *Kavanaugh v. Gorsuch—The Return*, REASON: THE VOLOKH CONSPIRACY (Apr. 19, 2023, 11:02 AM), <https://reason.com/volokh/2023/04/19/kavanaugh-v-gorsuch-the-return> [perma.cc/2MTZ-LV9Y].

10. See, e.g., Anna Kasradze, *How a Climate Superfund Act in New York Would Work*, MEDIUM: POL'Y INTEGRITY INSIGHTS (Feb. 21, 2023), <https://medium.com/policy-integrity-blog/how-a-climate-superfund-act-in-new-york-would-work-25ec479ffe01> [perma.cc/B28K-RHX6] (describing the effort to draft state legislation to create a state climate superfund in New York).

11. See Benjamin Franta, *Climate Litigation Rising: Hot Spots to Watch*, A.B.A.: TRENDS (Dec. 22, 2021), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2021-2022/january-february-2022/climate-litigation-rising [perma.cc/Z42K-NT2M].

12. See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 (2019) ("[T]he explosive growth of the administrative state over the last half-century has exacerbated *Auer's* potential for mischief."); *West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022) ("With the explosive growth of the administrative state since 1970, the major questions doctrine soon took on special importance."). See generally Kristin E. Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and Chevron Deference*, 70 ALA. L. REV. 733 (2019).

13. *West Virginia*, 142 S. Ct. at 2619 (2022) (Gorsuch, J., concurring).

14. See, e.g., *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015).

case involving a provision of the Immigration and Nationality Act, Justice Gorsuch suggested that *Chevron* deference “muddles the separation of powers by delegating to the Executive the power to legislate generally applicable rules of private conduct.”¹⁵ He has made similar arguments for abolishing agency deference doctrines since joining the Supreme Court,¹⁶ particularly in *West Virginia v. EPA*,¹⁷ where his separation of powers points were also picked up in Chief Justice Roberts’s majority opinion announcing the newly named “major questions doctrine.”¹⁸ Various descriptions of the doctrine as a “clear statement rule,”¹⁹ “super-charged rule of interpretation,”²⁰ and “revived nondelegation doctrine,”²¹ the major questions doctrine instructs courts to apply a heightened level of scrutiny to statutory authorization for “major” agency actions.²² Chief Justice Roberts’s *West Virginia v. EPA* opinion was not a model of clarity about what, exactly, triggers application of the doctrine beyond a regulation’s “economic and political significance.”²³ Justice Gorsuch, however, suggested several other factors that should trigger application of the

15. *Id.* at 1171.

16. *See, e.g.*, *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908–09 (2019) (Gorsuch, J., dissenting) (arguing that it is the court’s role to “say[] what the law is” and praising the majority’s decision not to rely on the *Chevron* doctrine when deciding the case). In *Kisor*, Justice Gorsuch also suggested that the *Chevron* doctrine is inconsistent with the Administrative Procedure Act, relying on several recent scholarly articles making this claim. *Kisor*, 139 S. Ct. at 2432–37 (Gorsuch, J., concurring) (“A court that, in deference to an agency, adopts something other than the best reading of a regulation isn’t ‘decid[ing]’ the relevant question of law or ‘determin[ing]’ the meaning’ of the regulation. Instead, it’s allowing the agency to dictate the answer to that question. In doing so, the court is abdicating the duty Congress assigned to it in the APA.”).

17. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (“The major questions doctrine works in much the same way to protect the Constitution’s separation of powers.”).

18. *See id.* at 2609 (Roberts, C.J., majority opinion) (stating that, “in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there”).

19. *See, e.g.*, Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1011–12, 1024–26 (2023); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. (forthcoming 2024) (manuscript at 2) (on file with the *Michigan Law Review*).

20. *See* Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 467–68 (2023).

21. *See* Alison Gocke, *Chevron’s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 994–97 (2021).

22. *West Virginia*, 142 S. Ct. at 2595 (“Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to ‘clear congressional authorization’ for the authority it claims.”).

23. *See* Jonathan H. Adler, *West Virginia v. EPA: Some Answers about Major Questions*, 2021 CATO SUP. CT. REV. 37, 38–39 (2022) (arguing that “*West Virginia v. EPA* provides little clarity on how the invigorated major questions doctrine should inform statutory interpretation”).

doctrine in his concurrence. These include (1) the failure to adopt congressional legislation on the matter, (2) the importance or vastness of the regulated industry, and (3) the regulation's effects on state authority.²⁴ Through application of the major questions doctrine in such circumstances, he argued, courts can “protect the Constitution's separation of powers” and avoid “a regime administered by a ruling class of largely unaccountable ‘ministers.’”²⁵

Yet in other decisions, Justice Gorsuch's concerns about the administrative state seem less about the relationship between Congress, the courts, and the executive branch, and more about the potential for agencies to infringe on the individual liberty of citizens. He has argued that the modern administrative state can “destroy [] livelihoods and intrude on [] liberty”²⁶ and has been especially averse to employing *Chevron* deference when agencies are seeking to impose criminal penalties.²⁷ Whereas the Supreme Court originally rationalized *Chevron* deference as appropriately reflecting the changing political preferences of the electorate,²⁸ Justice Gorsuch has questioned the implications of this approach for ordinary citizens who must conform their conduct to the law in the face of changing agency statutory interpretations.²⁹ He voiced concerns about the potential for agencies to “punish politically disfavored groups or individuals”³⁰ and abuse their power through centralizing the authority to make, enforce, and interpret the law.³¹ By rejecting *Chevron* deference, Justice Gorsuch seems to believe that courts

24. *West Virginia*, 142 S. Ct. at 2620–21.

25. *See id.* at 2617.

26. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016).

27. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J.) (objecting to the Supreme Court's decision not to grant certiorari and writing that *Chevron* “has no role to play when liberty is at stake”).

28. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

29. *See Guedes*, 140 S. Ct. at 790–91 (“[T]hese days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations . . . why should courts, charged with the independent and neutral interpretation of the laws Congress has enacted, defer to such bureaucratic pirouetting?”).

30. *Gutierrez-Brizuela*, 834 F.3d at 1146.

31. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2442 (2019) (Gorsuch, J., concurring) (arguing that the public should not be governed “by the shifting whims of politicians and bureaucrats”).

can ensure those who challenge agency actions will be granted an “impartial judgment that the Constitution guarantees them.”³²

These aspects of Justice Gorsuch’s jurisprudence are problematic for implementation of our environmental statutes, particularly to address climate change. Pollution regulations have often imposed larger quantifiable economic costs than have other types of government rules.³³ More and more Americans view climate change as politically significant while partisan gaps have deepened.³⁴ Congress has updated just one major environmental law in nearly three decades,³⁵ and many environmental rules implicate state authority and private property rights, at least in part.³⁶ Environmental regulations to address climate change thus seem likely to constitute “major” questions, at least as Justice Gorsuch has defined the term. Nevertheless, most of the justices in *West Virginia v. EPA* seemed wary of eliminating the EPA’s ability to regulate greenhouse gas emissions from power plants, let alone overturning *Massachusetts v. EPA*, which established that the Clean Air Act’s definition of “air pollutants” unambiguously includes greenhouse gases.³⁷ It thus seems possible for the EPA to use a number of well-tested legal authorities to reduce greenhouse gas emissions even with the newly invigorated

32. See *id.* at 2430–40 (further noting that the court “mislead[s] those whom we serve by placing a judicial *imprimatur* on what is, in fact, no more than an exercise of raw political executive power”).

33. It is important to note, however, that economic analyses have shown that the total benefits from these regulations outweighed the economic costs. See OFF. OF MGMT. & BUDGET, 2016 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 12 (2016), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf [perma.cc/BVB5-P6PU].

34. See, e.g., Nadja Popovich, *Climate Change Rises as a Public Priority. But It’s More Partisan Than Ever*, N.Y. TIMES (Feb. 20, 2020), <https://www.nytimes.com/interactive/2020/02/20/climate/climate-change-polls.html> [perma.cc/H6GS-4PJH]; Jeffrey M. Jones, *Record Party Gap on Environment-Economic Growth Tradeoff*, GALLUP (Apr. 13, 2023), <https://news.gallup.com/poll/474218/record-party-gap-environment-economic-growth-tradeoff.aspx> [perma.cc/RH35-VBKD].

35. Rachel Rothschild, *Unreasonable Risk: The Failure to Ban Asbestos and the Future of Toxic Substances Regulation*, 47 HARV. ENV’T L. REV. 529, 535 (2023).

36. The private property rights at stake in federal water pollution permit requirements became a key aspect of the recent Supreme Court decision in *Sackett v. EPA*. See *Sackett v. EPA*, 143 S. Ct. 1322, 1341 (2023) (“This Court ‘require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.’”).

37. See Rachel Rothschild, *Why the Supreme Court Avoided Using Traditional Tools of Statutory Interpretation in West Virginia v. EPA*, YALE J. REGUL.: NOTICE & COMMENT (Jan. 12, 2023), <https://www.yalejreg.com/nc/why-the-supreme-court-avoided-using-traditional-tools-of-statutory-interpretation-in-west-virginia-v-epa-by-rachel-rothschild> [perma.cc/3VAZ-GJ7J] (arguing that the Supreme Court may not have sought to overrule *Massachusetts v. EPA* or further reduce EPA authority under 111(d) in *West Virginia v. EPA* given the impact on federal common law nuisance suits over climate change).

major questions doctrine and little deference to agencies on questions of statutory interpretation.³⁸

However, Justice Gorsuch's opinions suggest more radical reasons for reducing deference to agencies as well as skepticism of fast-moving congressional efforts to address major policy issues. These ideas seem to reflect an aversion to government intervention on matters that require collective action as well as scientific and technical expertise, and they could pose more serious problems for efforts to address environmental threats like climate change if his fellow conservative justices adopt them. For example, Justice Gorsuch has insinuated that the administrative state may be unconstitutional, writing that "the framers anticipated an Executive charged with enforcing the decisions of the other branches—not with exercising delegated legislative authority."³⁹ It is difficult to envision how Congress would design a climate change law that did not afford agencies like EPA significant "legislative" authority to assist with implementation, just as it did when enacting programs like the Clean Air Act's acid rain cap-and-trade scheme.⁴⁰

In a similar vein, Justice Gorsuch has questioned the legality of congressional delegations involving agency fact-finding and detail resolution even with an "intelligible principle" because of the possibility that agency invocations of expertise might serve as a cover for "legislative" decisionmaking in violation of the nondelegation doctrine. While on the Tenth Circuit, he approvingly cited several "thoughtful judges and scholars" who had suggested that the "intelligible principle" standard may serve as a license for "the delegation of legislative authority" rather than protection against it.⁴¹ Justice Gorsuch has also urged judges to play a larger role in determining which experts are correct in disputes over the scientific justifications for agency regulations, arguing that courts should weigh an agency's expert judgment against the views of "competing experts" and other evidence supplied in court.⁴² Given longstanding

38. See Daniel Cronin, *The Impact of West Virginia v. EPA*, CARBON TRACKER: BLOGS (July 12, 2022), <https://carbontracker.org/the-impact-of-west-virginia-v-epa> [perma.cc/3UHH-LQK8] (noting that the transportation sector represents the largest source of greenhouse gas emissions); see also Dena Adler, *West Virginia v. EPA Will Shape, but Not Stop, Power Plant Regulation*, POWER MAG. (Oct. 3, 2022), <https://www.powermag.com/west-virginia-v-epa-will-shape-but-not-stop-power-plant-regulation> [perma.cc/35FN-T2V9].

39. *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 (10th Cir. 2015).

40. See RACHEL EMMA ROTHSCCHILD, *POISONOUS SKIES* 182 (2019) (explaining that the acid rain program involved forty different formulas to determine how many pollution allowances would be allotted to power plants and required the EPA to promulgate regulations specifying the rules for allowances, monitoring, and penalties).

41. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154–55 (10th Cir. 2016)

42. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2443 (2019) (arguing that while courts should "afford respectful consideration to the expert agency's views, they must remain open to competing expert and other evidence supplied in an adversarial setting").

issues with corporate-sponsored science denial,⁴³ including on climate change,⁴⁴ this approach to weighing agency expertise could be disastrous for environmental policies.

Nor does Justice Gorsuch seem especially enthusiastic about the potential for Congress to assume a more robust role in enacting legislation. While in *West Virginia v. EPA* he claimed that Congress is the appropriate body to address new environmental problems like climate change,⁴⁵ Justice Gorsuch seems entirely untroubled by our current state of congressional dysfunction. In more than one opinion, he has praised the “purposefully painful process of bicameralism and presentment” created by the Constitution, viewing it as consistent with the Framers’ desires to shield individuals from capricious laws and “tyranny.”⁴⁶ Yet the inability to pass climate legislation appears to represent a tyranny of select corporate entities⁴⁷ and a problem that is growing worse compared to earlier historical periods.⁴⁸ Justice Gorsuch has also failed to grasp how a focus on unsuccessful legislative efforts in major questions cases⁴⁹ could stifle “open and vigorous legislative debate” in Congress, which he has elsewhere found to be “vital to testing ideas and improving laws.”⁵⁰ In the

43. See, e.g., ROTHSCCHILD, *supra* note 40, at 78 (describing the role of the coal industry in producing scientific research that claimed acid rain was not harming freshwater and forest ecosystems).

44. See NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT* 197–215 (2019).

45. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2623 (2022) (Gorsuch, J., concurring) (arguing that courts should examine “the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address” when deciding whether it violates the major questions doctrine).

46. *Gutierrez-Brizuela*, 834 F.3d at 1151; see also *West Virginia*, 142 S. Ct. at 2618 (“Admittedly, lawmaking under our Constitution can be difficult. But that is nothing particular to our time nor any accident. The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty.”).

47. See Samantha Gross, *Republicans in Congress Are Out of Step with the American Public on Climate*, PLANET POL’Y (May 10, 2021), <https://www.brookings.edu/blog/planet-policy/2021/05/10/republicans-in-congress-are-out-of-step-with-the-american-public-on-climate> [perma.cc/LG86-96XD].

48. See Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 93 (2015) (demonstrating that congressional gridlock, especially for “salient” political issues, has grown markedly worse since World War II; the analysis only covers through the 112th Congress, suggesting an even more significant break with the past in recent years).

49. *West Virginia*, 142 S. Ct. at 2620–21 (“[T]his Court has found it telling when Congress has ‘considered and rejected’ bills authorizing something akin to the agency’s proposed course of action. . . . That too may be a sign that an agency is attempting to ‘work [a]round’ the legislative process to resolve for itself a question of great political significance.”).

50. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1906 (2019) (rejecting a searching inquiry into state legislative intentions when enacting a new law for fear that it would “stifle deliberation in state legislatures and encourage resort to secrecy and subterfuge. That would inhibit the sort of open and vigorous legislative debate that our Constitution recognizes as vital to testing ideas and improving laws”).

wake of *West Virginia v. EPA*, Congress may now hesitate to debate any climate legislation for fear of further hamstringing the EPA's ability to address greenhouse gas emissions.

These aspects of Justice Gorsuch's opinions offer reasons to be wary about his approach to federal environmental laws. His jurisprudence does not appear to value agency expertise even on matters of fact-finding, nor appreciate the need for Congress to fully engage in heated debates over issues like climate change without fear that their discussions will be used against administrative agencies in future litigation over rule-makings. As we face a rapidly closing window to avoid the worst outcomes from rising greenhouse gas emissions, Justice Gorsuch's ideas point to a path of more, rather than less, federal government dysfunction and inaction.

II. A POSSIBLE AVENUE FOR STATE CLIMATE ACTION

While Justice Gorsuch's views on administrative agencies and Congress are ominous for those who believe we need to strengthen, not weaken, federal climate initiatives, there are aspects of his jurisprudence that suggest he may be open to such efforts at the state and local level. In two cases after he joined the Supreme Court, Justice Gorsuch has endorsed a "cooperative federalist" approach to environmental protection that could provide a way for states and localities to pursue climate change policies. The first case, *Virginia Uranium, Inc. v. Warren*, addressed the question of whether the federal Atomic Energy Act preempted a Virginia state law that banned uranium mining.⁵¹ Justice Gorsuch wrote the lead opinion,⁵² arguing that a "clear statement" from Congress would be necessary to take away state powers to regulate mining. He expressed skepticism about finding preemption through what is known as implied preemption, noting that "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law."⁵³ Under the traditional approach to finding implied preemption, the Court would have sought to determine whether 1) the federal regulatory apparatus is so pervasive that Congress intended to "occupy the field" in that area; or 2) there is a conflict between state and federal laws.⁵⁴ Justice Gorsuch, however, suggested that litigants should have to meet a higher bar, identifying a specific constitutional text or a federal statute that preempts state law.⁵⁵ To do otherwise

51. *Id.* at 1897.

52. *Id.* Justices Thomas and Kavanaugh joined Justice Gorsuch's opinion; Justices Ginsburg, Sotomayor, and Kagan concurred only in the judgment.

53. *Id.* at 1901.

54. These categories are not "rigidly distinct." See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000); see also Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1366 n.40 (2006).

55. See *Va. Uranium, Inc.*, 139 S. Ct. at 1901.

would be a potentially serious infringement of state sovereignty,⁵⁶ and create a situation where there might be no protection against the hazards of uranium mining on certain properties.⁵⁷

Justice Gorsuch further elaborated his views on federal preemption in *Atlantic Richfield Co. v. Christian*, which the Supreme Court decided two years after *Virginia Uranium*.⁵⁸ The case concerned whether the federal law governing hazardous waste cleanups—the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—prevented landowners from pursuing state law remedies for toxic chemical pollution on their properties.⁵⁹ While a majority of the court held that landowners could not clean up hazardous waste on their properties without EPA approval, Justice Gorsuch disagreed, arguing that CERCLA did not preempt state common law remedies and should not prevent the landowners from pursuing further remediation.⁶⁰ While much of his dissenting opinion focused on a textual interpretation of CERCLA’s statutory terms as well as whether EPA had given proper notice to the landowners,⁶¹ at several points he discussed the larger issue of preserving state authority to regulate environmental hazards. Justice Gorsuch argued that “[e]verything in CERCLA suggests that it seeks to supplement, not supplant, traditional state law remedies and promote, not prohibit, efforts to restore contaminated land,” citing multiple savings clauses in the Act.⁶² The cooperative federalist scheme, he said, also served to promote both “good government” and “environmental protection.”⁶³

Whether Justice Gorsuch’s support for state and local actions to protect the environment will extend to climate change is uncertain, but there have been a few signs that he may support at least some role for state law in addressing the problem. For example, Justice Gorsuch may have provided a crucial vote in the Supreme Court’s recent decision not to grant a

56. *See id.* at 1904–05 (“The preemption of state laws represents ‘a serious intrusion into state sovereignty.’ . . . And to order preemption based not on the strength of a clear congressional command, or even on the strength of a judicial gloss requiring that much of us, but based only on a doubtful *extension* of a questionable judicial gloss would represent not only a significant federal intrusion into state sovereignty. It would also represent a significant judicial intrusion into Congress’s authority to delimit the preemptive effect of its laws.”).

57. *See id.* at 1898 (“[T]he company’s reading would prohibit not only the States from regulating uranium mining to protect against radiation hazards but the federal government as well, since the AEA affords it no authority to regulate uranium mining on private land.”).

58. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020).

59. *See id.* at 1352.

60. *See id.* at 1367 (Gorsuch, J., dissenting).

61. *See id.* at 1363–64.

62. *Id.* at 1363.

63. *Id.* at 1366.

petition for certiorari in *Suncor Energy, Inc. v. Board of County Commissioners of Boulder County*.⁶⁴ The case involved a state tort suit against major fossil fuel companies seeking financial compensation to fund climate adaptation and mitigation efforts.⁶⁵ The Tenth Circuit, like nearly all courts of appeals that have heard similar cases, had held that the lawsuit should proceed in state, not federal, court.⁶⁶ The Supreme Court's denial of certiorari will allow these cases to proceed to the merits, which represents a huge win for city and state plaintiffs seeking to hold fossil fuel companies accountable for their contributions to climate change.⁶⁷

There are striking parallels between *Suncor Energy* and the *Atlantic Richfield* and *Virginia Uranium* cases. Like CERCLA, the Clean Air Act contains several savings clauses preserving both state common law remedies and legislation to control air pollution.⁶⁸ And climate change initiatives are arguably "better served if state law remedies proceeded alongside

64. A minimum of four Justices must vote to grant a certiorari petition. At least two of the six Republican-appointed justices refused to hear the case, as Justice Alito recused himself from the decision. Justice Kavanaugh publicly dissented from the decision not to grant certiorari. See *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, No. 21-1550, 2023 U.S. LEXIS 1671 (Apr. 24, 2023). For the petition, see *Petition for a Writ of Certiorari, Suncor Energy v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, https://climate-casechart.com/wp-content/uploads/case-documents/2022/20220608_docket-21-1550_petition-for-writ-of-certiorari-1.pdf [perma.cc/3YL9-BGC9].

65. *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022).

66. See *id.* at 1246. On the decisions by other courts of appeals, see Jonathan Adler, *Third Circuit Rejects Oil Company Efforts to Remove Climate Claims to Federal Court*, REASON (Aug. 17, 2022, 4:05 PM), <https://reason.com/volokh/2022/08/17/third-circuit-rejects-oil-company-efforts-to-remove-climate-claims-to-federal-court> [perma.cc/55F9-JZVV]. On the Second Circuit decision that differed from these other Courts of Appeals, see Jonathan H. Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J.L. ECON. & POL'Y 217, 221 (2022) [hereinafter Adler, *Displacement and Preemption*].

67. See Sean Lyness, *Oil Giants Inch Closer to Discovery in State Climate Cases*, BLOOMBERG L. (Apr. 26, 2023), <https://news.bloomberglaw.com/us-law-week/oil-giants-inch-closer-to-discovery-in-state-climate-cases> [perma.cc/MG9E-QXB2].

68. See 42 U.S.C. § 7416 (2022) ("Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution."); 42 U.S.C. § 7604(e) (2022) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."). For arguments that the Clean Air Act does not preempt state climate tort suits, see Rachel Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L.J. 412, 435 (2019), arguing that the Clean Air Act's savings clause will make it difficult to find the law preempts state climate suits; and Adler, *Displacement and Preemption*, supra note 66, at 221, criticizing the Second Circuit for holding in *City of N.Y. v. Chevron Corp.* "that state law claims against fossil fuel companies are preempted, despite the lack of any preemptive legislative action, implicit or otherwise. . . . Whether state law nuisance actions are to be preempted is a choice for Congress to make, and is a choice Congress has not yet made."

federal efforts,” as Justice Gorsuch emphasized in *Atlantic Richfield*.⁶⁹ Furthermore, a finding that the Clean Air Act completely preempts state common law tort suits would recast “the statute’s presumption in favor of cooperative federalism into a presumption of federal absolutism,” stripping common law rights.⁷⁰ In *Virginia Uranium*, Justice Gorsuch was very careful to note that banning uranium mining was not the same thing as regulations that would eliminate construction of nuclear power plants, the focus of regulation under the Atomic Energy Act.⁷¹ Similarly, the state climate lawsuits at issue in *Suncor Energy* are not seeking regulation of greenhouse gas emissions, and Justice Gorsuch might therefore be skeptical of arguments that seem to stretch the plaintiff’s complaint.⁷² His rejection of reading implicit preemption into the Atomic Energy Act further signals that Justice Gorsuch may be wary of treating vague gestures towards the need to regulate greenhouse gases through the Clean Air Act as sufficient grounds for preemption of these common law suits.⁷³

The Supreme Court’s recent decision in *National Pork Producers Council v. Ross* further underscores Justice Gorsuch’s views on the importance of protecting state authority to legislate on environmental and public health matters.⁷⁴ The case concerned a California law that banned the sale of pork products within the state unless out-of-state farmers complied with certain space requirements for the animals.⁷⁵ Farmers and pork companies sued California, arguing that the law violated the dormant commerce clause because of its impact on the national economy and regulation of out-of-state parties.⁷⁶

Writing for the majority, Justice Gorsuch rejected arguments that the California law violated the dormant commerce clause simply because of

69. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1366 (2020) (Gorsuch, J., dissenting). On the Clean Air Act’s savings clause and the potential benefits from state involvement in climate change efforts, see Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act’s Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 817 (2008).

70. *Atl. Richfield*, 140 S. Ct. at 1367 (noting that this reading of CERCLA would transform it “from a law that supplements state environmental restoration efforts into one that prohibits them” and arguing that this is “not what the law was written to do; that is what it was written to prevent”).

71. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019).

72. The Second Circuit did just that in finding that the lawsuits were really seeking to regulate greenhouse gas emissions. *See City of N.Y. v. Chevron Corp.*, 993 F.3d 81, 93 (2d Cir. 2021) (claiming that “though the City’s lawsuit would regulate cross-border emissions in an indirect and roundabout manner, it would regulate them nonetheless” and thus pose a conflict with the Clean Air Act).

73. *See Va. Uranium*, 139 S. Ct. at 1900 (“In this, as in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn’t write.”).

74. *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023).

75. *See id.* at 1144.

76. *See id.* at 1149.

its extraterritorial effects.⁷⁷ He also rejected the assertion that the highly interconnected nature of the pork industry meant the law infringed on the dormant commerce clause.⁷⁸ Justice Gorsuch further cautioned that courts are ill-suited to weigh the “costs and benefits” of state legislation that may impose a financial burden on out-of-state companies’ money but produce “moral and health” benefits to state residents,⁷⁹ and he argued that Congress was the proper body to “identify and assess all the pertinent economic and political interests at play across the country.”⁸⁰

Scholars and advocates have hailed the decision as a win for state environmental legislation in a wide range of areas,⁸¹ and it could prove especially influential in disputes over state climate legislation. Justice Gorsuch’s exceedingly high bar for finding a substantial effect on interstate commerce—which received support from three other justices—indicates that dormant commerce clause challenges to state climate laws face a difficult, uphill battle. This will be especially so if the state laws are rooted in ethical and moral concerns about protecting the environment for future generations.⁸²

* * *

The U.S. is running out of time to significantly reduce its greenhouse gas emissions and begin the process of adapting our infrastructure to a warming world. Justice Gorsuch’s jurisprudence has been enormously problematic for seeking climate solutions at the federal level, particularly

77. *See id.* at 1154.

78. *Id.* at 1156 (“Consider, too, the strange places petitioners’ alternative interpretation could lead. In our interconnected national marketplace, many (maybe most) state laws have the ‘practical effect of controlling’ extraterritorial behavior.”).

79. *Id.* at 1160.

80. *Id.* at 1161.

81. *See* Dan Farber, *Has the Supreme Court Declared Open Season on Interstate Commerce?*, LEGAL PLANET (May 24, 2023), <https://legal-planet.org/2023/05/24/has-the-supreme-court-declared-open-season-on-interstate-commerce> [perma.cc/5UUZ-6RYV]; Pamela King, *Supreme Court Pork Ruling Boosts States’ Rights*, E&E NEWS (May 11, 2023, 10:31 AM), <https://www.eenews.net/articles/supreme-court-pork-ruling-boosts-states-rights> [perma.cc/42U7-G5G9].

82. In her concurrence, Justice Barrett did not agree with the high bar Justice Gorsuch placed on finding a substantial effect on interstate commerce, but agreed that there was no dormant commerce clause violation in the case because

the benefits and burdens of Proposition 12 are incommensurable. California’s interest in eliminating allegedly inhumane products from its markets cannot be weighed on a scale opposite dollars and cents—at least not without second-guessing the moral judgments of California voters or making the kind of policy decisions reserved for politicians.

See Nat’l Pork Producers Council, 143 S. Ct. at 1167 (Barrett, J., concurring). Justice Gorsuch echoed these concerns in his majority opinion. *See id.* at 1160 (majority opinion) (finding that “[t]he competing goods are incommensurable”).

given his attacks on the administrative state. The serious and dangerous consequences for federal environmental law should other justices adopt his more radical views cannot be understated. Nevertheless, his reluctance to find federal preemption of state environmental laws and his emphasis on allowing states broad leeway to regulate both indicate that Justice Gorsuch does not necessarily oppose environmental laws per se. Instead, his opinions suggest that he sees states as important loci of environmental regulation, even on matters that may have interstate effects. Justice Gorsuch's writings therefore indicate that state climate initiatives may be able to serve as a crucial supplement to federal efforts given the current makeup of the Supreme Court. With dim prospects for new congressional legislation or court reform, states must take on a more active role in passing laws to address the climate crisis and should design them with Justice Gorsuch's perspectives on state authority in mind.