Article

The Bogeyman of Environmental Regulation: Federalism, Agency Preemption, and the Roberts Court

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In a trio of environmental cases—West Virginia v. EPA*,* Sackett v. EPA*, and* Loper Bright v. Raimondo*—the Roberts Court curtailed the federal regulatory power and produced corresponding deregulatory outcomes under seemingly neutral legal principles. This Article interrogates the doctrinal coherency of the Roberts Court's jurisprudence by applying the rationales of these cases to climate change litigation. Climate change policies advanced by state and local governmental plaintiffs represent the inverse of what the Court has previously rejected. The regulatory burdens arise under state, not federal, law. In this analysis, the Article advances a previously undertheorized aspect of the trio's combined effect: These cases diminish the federal preemption power. A diminished federal preemption power, in turn, creates space for environmental regulatory action at the state and local levels to flourish. Federal preemption challenges to climate suits thereby juxtapose the deregulatory outcomes of* West Virginia*,* Sackett*, and* Loper Bright *with the separation of powers and federalism principles ostensibly advanced by the Roberts Court in those cases.*

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INTRODUCTION

> [T]he statute Congress wrote . . . . gives broad authority to EPA . . . . Another of this Court's opinions, involving a matter other than the bogeyman of environmental regulation, might have stopped there.
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> -Associate Justice Elena Kagan[1]

Justice Kagan's reference to "the bogeyman of environmental regulation" in her *West Virginia v. EPA* dissent voiced a perspective that environmental regulations are disfavored by the Roberts Court.[2] Indeed, while the administrative state has come under broad attack in recent years, it is with a trio of environmental cases that the Roberts Court most aggressively wields separation of powers and federalism principles to curtail federal regulatory power: The introduction of the major questions doctrine to diminish Environmental Protection Agency (EPA) power to set air pollution standards in *West Virginia v. EPA*,[3] the application of a clear statement rule to curtail EPA's statutory authority over wetlands in *Sackett v. EPA*,[4] and the elimination of *Chevron* deference in reference to the National Oceanic and Atmospheric Administration's (NOAA) interpretation of its statutory authority to manage fisheries in *Loper Bright Enterprises v. Raimondo*.[5] Together, these precedents' most transformative effects go to the very structure of our federal system of government. The Court-driven recalibration of the horizontal federal power structure ultimately diminishes federal authority vis-à-vis the states.[6] These cases are, therefore, really about a closely-related aspect of federalism: the federal preemption power.

This Article situates the *West Virginia-Sackett-Loper Bright* trio in both federalism[7] and preemption. It does so in two ways.

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1. West Virginia v. EPA, 142 S. Ct. 2587, 2628–30 (2022) (Kagan, J., dissenting).

2. *Id.* at 2630.

3. *Id.*

4. Sackett v. EPA, 143 S. Ct. 1322, 1327 (2023).

5. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2248 (2024).

6. *See*, *e.g.*, *Sackett*, 143 S. Ct. at 1341 (asserting that EPA's interpretation of agency power would impinge on traditional state authority in regulation of land and water use); *see also id.* at 1345–46 (Thomas, J., concurring) (opining on state and federal authority over navigable waters).

7. This Article most often uses the term "federalism" descriptively to refer to the relative distribution of power among national and state (and local) levels of government, but sometimes in context the term embodies a normative preference for decentralized power to the states. *See* Daniel C. Esty, *Revitalizing*

First, in Part I, the Article adds to the burgeoning literature articulating that the Roberts Court jurisprudence curtails not only agency power but also Congress's Article I power.[8] While the Court ostensibly directs its deregulatory ire at the administrative state, the Court undermines Congress and its legislative prerogative to dictate policy goals to the executive branch through broad statutory delegations.[9] Thus, although in the environmental context there historically has been a cyclical contraction and expansion of federal or state law as the lead on environmental regulation, we have entered a new period of federal contraction driven by the judicial branch rather than by the

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Environmental Federalism, 95 MICH. L. REV. 570, 571 n.5 (1996) (describing various applications of the term federalism); *see also* David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1802 (2008) (contrasting federalism models based on their respective commitments to selecting a particular level of government at which a problem should be regulated as opposed to multiple or overlapping approaches).

8. *See, e.g.*, Noah Rosenblum, *The Supreme Court Won't Stop Dismantling the Government's Power*, ATLANTIC (June 28, 2024), https://www.theatlantic.com/ideas/archive/2024/06/supreme-court-jarkesy-v-sec-loper-bright-chevron-deference/678842 [https://perma.cc/2LYA-4B7R] (describing recent Supreme Court decisions as an "attack on the federal government's capacity to do many of its most basic jobs"); Sanne Knudsen, *Sidestepping Substance: How Administrative Law Plays an Outsized Role in Shaping Environmental Policy and Why Recalibration is Necessary*, 76 ADMIN. L. REV. 519, 525–26 (2024) (describing the Court's decision in *West Virginia v. EPA* as "a particularly stark example of how administrative law can be used to draw power to courts and facilitate the sidestepping of federal environmental statute"); Erin Ryan, Sackett v. EPA *and the Regulatory, Property, and Human Rights-Based Strategies for Protecting American Waterways*, 74 CASE W. RSRV. L. REV. 281, 308–10 (2023) [hereinafter Ryan, *Protecting American Waterways*] (describing the Court's imposition of the clear statement rule as a realignment of the policymaking power toward the Court); Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 635 (2023) (exploring judicial power grab in the areas of election law, congressional oversight, and administrative law); Kate Shaw, Opinion, *The Imperial Supreme Court*, REGUL. REV. (Aug. 7, 2024), https://www.theregreview.org/2024/08/07/shaw-the-imperial-supreme-court/ [https://perma.cc/72XA-HXQF] (describing the Supreme Court's expansion of power)*; see also* Joshua Ulan Galperin, *Climate Change, Democracy, and the Major Questions Doctrine*, 98 SAINT JOHN'S L. REV. 585, 587 (2024) (addressing this issue from the perspective of the constitutional nondelegation doctrine).

9. *See infra* Parts I.A–I.B (discussing the ways in which the *West Virginia-Sackett-Loper Bright* trio curtails federal agency power and undermines congressional authority).

policy branches.[10] Second, in Part II, the Article offers a new perspective that the theories underlying the *West Virginia-Sackett-Loper Bright* trio transform the preemption doctrine by calling into question the very viability of implied agency preemption. Implied agency preemption—whereby federal regulatory schemes preempt state law even in the absence of clear statutory language—is inconsistent with the clear statement rules from *Sackett* and *West Virginia* and the new anti-deference of *Loper Bright*.[11] By doctrinal implication, these cases replace the longstanding rebuttable presumption against preemption with an affirmative demand that Congress articulate its intent to preempt state law expressly in the text of the operative statute implemented by agencies.[12] The result is the judicial contraction of the federal government's policymaking role.

The duality of Justice Kagan's bogeyman imagery is revealed.[13] It is an apt metaphor, but it works in more than one direction. To the Roberts Court, the overzealous federal regulatory action is the bogeyman; to Congress and federal agencies, perhaps the bogeyman is the Roberts Court itself. Like the archetypal childhood bogeyman's undefined shape, the Roberts Court's separation of powers and federalism concerns are amorphous and shapeshifting, malleable to the circumstances. Rather than punishing misbehaving children, they punish the federal government when it—to the Court's mind—has gone too far in the direction of environmental protection. But while the traditional bogeyman serves a societal benefit to warn and ultimately protect children, the benefit attending the Roberts Court's jurisprudence is less clear. The Court purportedly protects the power of states to serve as the primary deciders of environmental issues; but the question of whether environmental policies are most appropriately made at the national level or state level is a

10. *See infra* Part I (exploring the *West Virginia-Sackett-Loper Bright* trio's effect on federal regulatory power).

11. While the implications attach to the implied preemption doctrine generally, they are most apparent in the context of implied preemption via agency regulation. This Article therefore focuses on that manifestation of preemption. *See infra* Parts II.A–II.B (discussing the *West Virginia-Sackett-Loper Bright* trio's transformation of federal preemption power).

12. *Id. See generally* West Virginia v. EPA, 142 S. Ct. 2587 (2022); Sackett v. EPA, 143 S. Ct. 1322 (2023); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

13. *See West Virginia*, 142 S. Ct. at 2628–30 (Kagan, J., dissenting).

policy discussion, not a legal question. The Court nevertheless haunts its co-equal branches: Cross the line, and a court judgment will get you.

Thus, in this trio of cases, the Court reduces the regulatory burden on industry by restricting federal agency authority through seemingly neutral legal principles. Those legal principles are now on a collision course with environmental cases that involve federal preemption questions wherein state actions would increase regulatory burdens on industry. A reversal of the pattern in *West Virginia-Sackett-Loper Bright*, these state actions may reveal the Court's true preference.

Climate policy efforts led by state and local governments expose the essence of the issue.[14] State and local governments, frustrated with the slow pace of federal climate policy, turn to state tort lawsuits against energy companies to recover for harms caused by greenhouse gas emissions; industry defendants, in response, invoke implied preemption principles to shield themselves from state-law-based lawsuits.[15] When regulatory burdens arise under state, rather than federal law, is the Roberts Court really concerned about structural separation of powers and federalism issues, or reducing environmental regulatory burdens?[16]

I. THE ROBERTS COURT RECALIBRATES THE FEDERAL POWER STRUCTURE

With a cluster of three environmental law cases—*West Virginia*, *Sackett*, and *Loper Bright*—the Court wields the separation of powers and federalism as complementary strategies to recalibrate federal regulatory power. While this strategy is not new, these precedents are remarkable for their deregulatory gestalt.[17] The result is judicial aggrandizement at the expense of

14. *See infra* Parts I.C, II.C (exploring the *West Virginia-Sackett-Loper Bright* trio's effect on climate policy).

15. *Id.*

16. *See infra* Part II.C (discussing the *West Virginia-Sackett-Loper Bright* trio's diminishing effect on agency preemption).

17. Others have contributed foundational thinking about these complementary strategies, and this Article aims to analyze this phenomenon within the current jurisprudential environment. *See* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 33 (2010) ("Federalism and the separation of powers have long been considered complementary strategies for

the administrative state and Congress.[18] To adopt a turn of phrase, before, the judicial mood was at least rhetorically deferential; the mood now is explicitly imperial.[19]

And it is notable that the Court accomplished this seachange in administrative law through environmental cases: the authority of federal agencies to regulate air pollution, water pollution, and overfishing.

***West Virginia v. EPA* (2022):** The question in *West Virginia* was whether Section 111 of the Clean Air Act (CAA) authorized EPA to require power plants to engage in generation-shifting methods that would ultimately shift energy production from coal power (a source of greenhouse gas emissions) to cleaner sources of energy, such as wind or solar.[20] The Roberts Court majority held the Act's broad instruction to EPA to set "the best system of emission reduction" did not authorize EPA's action.[21] In so doing the Court formally introduced a clear statement rule—the "major questions doctrine"—to require a clear statement from Congress that it intended to confer authority to an

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diffusing national power — one vertical, one horizontal."); Erin Ryan, *The Four Horsemen of the New Separation of Powers: The Environmental Law Implications of* West Virginia*,* Sackett*,* Loper Bright*, and* Corner Post, 109 MINN. L. REV. 2839, 2847–49 (2025) (discussing overlapping themes within this trio of cases plus the statute of limitations implications of *Corner Post*); *see also* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 460–61 (2012) (discussing the relationship between federalism and the separation of powers); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 4–5 (2011) [hereinafter Ryan, *Negotiating Federalism*] (reconceptualizing and exploring the role of state-federal bargaining in areas of concurrent regulatory jurisdiction); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 503 (2007) [hereinafter Ryan, *Interjurisdictional Gray Area*] (exploring tensions that arise among the underlying values of federalism when state or federal actors regulate within the "interjurisdictional gray area" that implicates both local and national concern).

18. *See, e.g.*, Chafetz, *supra* note 8, at 635 (characterizing the "new judicial power grab" as self-aggrandizement); *see infra* Parts I.A–I.B (discussing the ways in which the *West Virginia-Sackett-Loper Bright* trio curtails federal agency power and undermines congressional authority).

19. Peter M. Shane, *The Roberts Court's* Chevron *Ruling and Darkening Clouds over the Administrative State*, WASH. MONTHLY (July 16, 2024), https://washingtonmonthly.com/2024/07/16/the-roberts-courts-chevron-ruling-and-darkening-clouds-over-the-administrative-state [https://perma.cc/PBF4-AJ62] (discussing the shift in mood post-*Loper Bright*).

20. West Virginia v. EPA, 142 S. Ct. 2587, 2603 (2022).

21. *Id.* at 2642.

agency in what the Court considers to be an "extraordinary" case.[22]

***Sackett v. EPA* (2023):** In *Sackett*, the Court rejected the then-established understanding of federal authority to protect certain wetlands adjacent to "waters of the United States" as they are defined by the Clean Water Act (CWA).[23] The Court accomplished this by applying another clear statement rule concerning water use to interpret the word "waters" narrowly, to extend only to wetlands with a "continuous surface connection to bodies that are 'waters'" such that they are "indistinguishable" from those qualifying streams, oceans, rivers, and lakes.[24] The Court demanded Congress include "exceedingly clear language" to empower the federal regulatory agencies to exercise jurisdiction over conduct, such as water use, at the "core of traditional state authority."[25] The practical effect is to narrow the scope of wetlands subject to federal protection.

***Loper Bright Enterprises v. Raimondo* (2024):** In *Loper Bright*, the Roberts Court overruled *Chevron* deference, an administrative law doctrine established forty years prior that instructed courts to give deference to agencies' reasonable interpretation of ambiguous statutes they were empowered to implement.[26] The Court did so in the context of litigation respecting whether the National Marine Fisheries Service had authority under the Magnuson-Stevens Act to require fishing vessels to cover the cost of fisheries observers statutorily tasked with collecting data necessary for the conservation and management of the Atlantic herring fishery.[27]

In this series of cases,[28] the Court issued rulings hostile to agency and congressional authority in our federal system of

22. *Id.* at 2609; *see also infra* Part I.A (discussing *West Virginia*'s application of the clear statement rule and major questions doctrine).

23. Sackett v. EPA, 143 S. Ct. 1322, 1343 (2023).

24. *Id.* at 1344. The *Sackett* majority reinforced the *Rapanos* plurality, placing the responsibility to resolve statutory ambiguity with the Court, not the agency. *See id.* at 1337–41 (citing Rapanos v. United States, 547 U.S. 715, 742, 755 (2006) (plurality opinion)).

25. *Id.* at 1341.

26. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2247–48 (2024).

27. *Id.* at 2256.

28. Even these three significant cases are just part of the picture: in October Term 2023, the Court piled on restricting agency adjudicative authority over certain civil penalties to entitle defendant a Seventh Amendment jury trial

government: To restrict what the Court characterizes as an executive branch overstepping its legislatively delegated authority along the horizontal (federal-to-federal) axis, which in turn then reduces the federal regulatory presence along the vertical (federal-to-state) axis.[29] Because these cases serve to minimize federal regulatory authority vis-à-vis the states,[30] they are really about an issue closely related to federalism—the federal preemption authority. The Article elaborates on this emergent theme to articulate how the Court's jurisprudential reaction to environmental policymaking spreads to diminish the federal preemption power.

A. THE *WEST VIRGINIA-SACKETT-LOPER BRIGHT* TRIO CURTAILS FEDERAL AGENCY POWER

The specter of federal environmental regulation drives the Roberts Court to aggressively curtail agency power in a manner that recalibrates the division of power in our federal system of government. To understand this dynamic, place these momentous rulings within the broader relationship between agencies and federalism. Over the last few decades, the Court has become "increasingly focused" on the relationship between federalism and administrative law and has "us[ed] administrative law to address federalism concerns even as it refuse[d] to curb Congress's regulatory authority on constitutional grounds."[31] This new trio of environmental cases is illustrative of this administrative-law-as-federalism framing.

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right in *Sec. & Exch. Comm'n v. Jarkesy*, 144 S. Ct. 2117, 2117 (2024), imposing an exacting arbitrary-and-capricious review standard to stay EPA's revised air-quality standards for ozone in *Ohio v. EPA*, 144 S. Ct. 2040, 2040 (2024), and relaxing the statute of limitations for facial challenges to agency rulemaking under the Administrative Procedure Act in *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2440 (2024).

29. *See infra* Part II.B (discussing federal agencies' diminished preemption powers in the wake of the *West Virginia-Sackett-Loper Bright* trio).

30. *See infra* Part II.B. This phenomenon fits in with other high-profile cases of this Roberts Court era, including the overruling of *Roe v. Wade* by *Dobbs* to return the question of abortion to the states. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022) ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."); *see also id.* at 2328 (Breyer, J., dissenting) (criticizing the majority's "idea . . . that neutrality lies in giving the abortion issue to the States").

31. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2023 (2008).

The history of environmental policymaking in the United States is characterized by a cyclical contraction and expansion of either federal or state law to operate as the leader on environmental policy. Federalism disputes have loomed large in national politics since at least the 1950s when Congress passed the precursors to current national clean air and water statutes.[32] But prior to this, the vast majority of environmental regulation was accomplished at the state or local level.[33] The earliest environmental protection mechanisms pre-date formal statute or regulation and instead took the form of nuisance and trespass suits dating back to English common law.[34] By the late 1800s, as industrialization took hold in the United States, many of the largest cities passed their own unique ordinances to address air and garbage pollution.[35] As the country grew, so did interest in a centralized approach.[36] After the post-World War II economic boom and high profile environmental incidents throughout the 1960s and 1970s, such as the Cuyahoga River fire and Love Canal chemical disaster, there was a general consensus that a patchwork of individual state laws was insufficient to meet the environmental challenges of a growing national economy.[37]

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32. *See id*. at 600–01 (outlining the origins of state environmental regulations). *See generally* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995) (discussing federalism debates in the context of federal environmental regulation).

33. Esty, *supra* note 7, at 600 (noting the rise of state regulation of environmental issues post–World War II).

34. *Id.* ("[T]he harms that accrued from air and water pollution were addressed not by environmental regulation but through . . . nuisance law."); *see* Kamaile A.N. Turčan, *"Major Questions" About Preemption*, 69 VILL. L. REV. 737, 782–83 (2024) (discussing early legal protections against environmental harms); Jonathan H. Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J.L. ECON. & POL'Y 217, 224–33 (2022) [hereinafter Adler, *Displacement and Preemption*] (summarizing the history of common law environmental protection).

35. Esty, *supra* note 7, at 600 (mentioning the adoption of "smoke abatement" ordinances by cities, like Chicago and New York); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 579 (2001) (discussing municipal pollution ordinances); Adler, *Displacement and Preemption*, *supra* note 34, at 224–33 (summarizing the history of environmental regulation).

36. *See* Esty, *supra* note 7, at 600–05 (illuminating key factors of the shift towards centralization).

37. *See id.* at 600–01 ("The state regulatory efforts of the 1950s and 1960s, however, did little to stem the flow of pollution, and by the mid-60s, the demand

Federal laws were needed to ensure a basic minimum level of protection to the citizenry and to address environmental issues that crossed state lines.[38] Congress responded by passing most of the statutes that are operative today—the CWA, the CAA, and the Endangered Species Act (ESA), to name a few.[39]

Almost as soon as these big, centralized national laws were passed, however, opponents began advocating a return to a decentralized approach for environmental problems.[40] Concerted efforts by private entities and state and local governments to push back against the centralized federal environmental infrastructure critiqued these national laws as passing the cost of implementation to the states and being on dubious Commerce Clause legal grounds.[41] The merits of decentralization were said to include the potential benefits from a diversity of approaches, greater public participation, regulatory competition, public choice, externality management, and the superiority of localized knowledge.[42] Through the years, this centralization versus

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for more centralized regulation was growing."); *see also* Adler, *Displacement and Preemption*, *supra* note 34, at 229–30 ("[T]he express purpose of many federal statutes was to supplement incomplete or insufficiently protective state and local efforts."). *See generally* Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENV'T L.J. 89 (2002) (interrogating the symbolism of the Cuyahoga River fire); *Superfund Site: Love Canal*, U.S. ENV'T PROT. AGENCY, https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0201290 [https://perma.cc/9WKL-AKEY] (providing background on the Love Canal cleanup).

38. Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism* (discussing benefits of a federal approach to environmental regulation), *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 13, 18 (William W. Buzbee ed., 2009) [hereinafter PREEMPTION CHOICE].

39. *See* Esty, *supra* note 7, 601–03 (discussing the passage of these laws as a centralization of environmental regulation).

40. *See id.* at 605 (summarizing arguments for decentralization).

41. *See* Percival, *supra* note 32, at 1166–73 (discussing Commerce Clause and funding issues related to environmental regulation); *see also* U.S. CONST. art. I, § 8, cl. 3 (the Commerce Clause).

42. *See* Esty, *supra* note 7, at 605–13 (summarizing arguments for decentralization); *see also* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 50–67 (2011) [hereinafter RYAN, TUG OF WAR] (discussing the principles of local innovation and competition and state-federal problem-solving synergy underlying American federalism); Revesz, *supra* note 35, at 557 (describing the article's aim as refuting the dominant academic view on the merits of centralized environmental regulation); Jonathan H. Adler, *Uncooperative Environmental Federalism 2.0*, 71 HASTINGS L.J. 1101, 1107–11 (2020) (describing the respective

decentralization debate has simmered. During the first Trump administration beginning in 2017, there was a marked retreat by the executive branch from environmental protection, followed by an advance toward more protection from the Biden administration.[43] This wax-and-wane of federal power over environmental issues is characteristic of the evolving politics of the role the federal government would play in environmental protection.[44]

In recognition of the complicated national and local nature of many environmental issues, the prevalent environmental federalism model is "cooperative federalism," whereby the federal government sets certain standards and then works with states to implement those requirements.[45] In the cooperative federalism context, states still play a role, but preemption principles prohibit states from working against the upper or lower boundaries set by the federal government.[46] One form of preemption is so-called ceiling preemption, which, as its name suggests, means that states are prohibited from requiring stricter environmental

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strengths and weaknesses of centralized and decentralized systems); Verchick & Mendelson, *supra* note 38, at 16–18 (describing benefits to state sovereignty and autonomy to regulate).

43. *See, e.g.*, Sarah Fox, *Localizing Environmental Federalism*, 54 UC DAVIS L. REV. 133, 140–44 (2020) (noting the rollback of policies under the first Trump Administration); *see also* Adler, *supra* note 42, at 1106 (describing the expansion and contraction of federal efforts).

44. *See, e.g.*, Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1891 (2014) (describing the federalism/nationalism divide); *see also* William L. Andreen, *Delegated Federalism Versus Devolution: Some Insights from the History of Water Pollution Control* (analyzing from the perspective of water regulation), *in* PREEMPTION CHOICE, *supra* note 38, at 257.

45. *See* Percival, *supra* note 32, at 1174–75 (describing the cooperative federalism model); *see also* Fox, *supra* note 43, at 159–60 ("'Under the classic cooperative federalism model, the federal government sets overall program mandates and goals,' which states can then assume responsibility for meeting, subject to continued federal oversight." (quoting Dave Owen, *Cooperative Subfederalism*, 9 U.C. IRVINE L. REV. 177, 179 (2018))). The federal government should also provide funding and enforcement, but there are well documented problems with both of those angles. *See* Fox, *supra* note 43, at 144 ("[A] leadership vacuum as to environmental issues has existed within the legislative and executive branches of the federal government for many years.").

46. *See* Percival, *supra* note 32, at 1174 (discussing the impact of environmental federalism on states).

compliance than required by federal law.[47] An example is the ceiling preemption of automobile emissions under the CAA, through which states are foreclosed from imposing more restrictive emission standards on vehicles (with a grandfathered exemption made for California).[48] Many environmental law scholars are critical of ceiling preemption's potential to stimy inventive environmental protections at the state level.[49] Alternatively, preemption may serve to set a floor, meaning that federal law sets the minimum level of environmental protection while leaving room for more protective state laws or common law enforcement.[50] The ESA, for example, makes room for state laws that are more protective of endangered or threatened species, but not less protective.[51] The opportunity for regulatory diversity (through either state regulations or common law) is retained, although limited, by floor preemption.[52] Floor preemption is

47. *See* William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 148 (2007) [hereinafter Buzbee, *Interaction's Promise*] (discussing recent usage of ceiling preemption). It also in practice means that the state and local governments cannot engage in lax regulations—they cannot deviate from the federal standard. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1558–59 (2007) [hereinafter Buzbee, *Asymmetrical Regulation*] (comparing regulatory floors and ceilings).

48. *See* Buzbee, *Asymmetrical Regulation*, *supra* note 47, at 1563 ("That [automobile] exception gives California . . . the option to require an even lower polluting vehicle.").

49. *See* Erin Ryan, *The Twin Environmental Law Problems of Preemption and Political Scale* ("Environmentalists should be especially on guard against the expansion of ceiling preemption, which perverts the customary use of federal preemption to ensure minimum national environmental quality standards that restrict regional efforts to do better."), *in* ENVIRONMENTAL LAW, DISRUPTED 149, 150–66 (Keith Hirokawa & Jessica Owley eds., 2021); *see also* Buzbee, *Asymmetrical Regulation, supra* note 47, at 1554–55 (characterizing regulatory ceilings as a "problematic choice"); Fox, *supra* note 43, at 175 ("[S]cholars generally agree that ceiling preemption poses more of a problem for environmental federalism . . . ."); Adelman & Engel, *supra* note 7, at 1833 ("[C]eiling preemption . . . feeds the policy preferences of the powerful business interest groups most likely to leverage their abundant political power to undercut diversity and innovation in environmental policymaking.").

50. *See* Buzbee, *Interaction's Promise*, *supra* note 47, at 147–48 (describing ceiling and floor preemption).

51. 16 U.S.C. § 1535(f).

52. *See* Buzbee, *Asymmetrical Regulation*, *supra* note 47, at 1555 ("Unitary federal choice preemption, by definition, precludes additional state and local protections and eliminates institutional diversity that is preserved (though limited) by floor preemption.").

generally lauded by environmental law scholars, on the premise that it combines the advantage of comprehensive national mandatory thresholds while allowing for elevated protections at the local level.[53] It effectively serves as a one-way ratchet toward protection.[54] State regulations and common law suits can augment or fill gaps left by federal law,[55] and through common-law lawsuits, private litigants may independently advance certain views of public welfare even in the absence of government action and also drive responsive government lawmaking.[56]

The contraction and expansion of state-federal relative authority continues; but critically, it appears we are entering a new era of federal contraction driven not by the political branches but by the judicial branch. The Roberts Court is driving this trend by directing its jurisprudential ire directly at the federal administrative branch.[57] Through this new trio of cases, the Court has expressly focused on constraining the executive branch's

53. Buzbee, *Interaction's Promise*, *supra* note 47, at 162–63 ("Federal standard-setting, at least where floors are involved, can create conditions conducive to interaction, new information and innovation, with a diversity of actors, in ways championed in experimentalist scholarship."). The premise of the federal floor is theoretically most protective, but is not without its risks; others observe that federal regulatory floors can serve as de facto ceilings if they discourage state innovation. *See* Jonathan H. Adler, *When is Two a Crowd?: The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENV'T L. REV. 67, 70 (2007) (noting that a floor can lower environmental protection if it discourages or crowds out state regulatory efforts).

54. Buzbee, *Asymmetrical Regulation*, *supra* note 47, at 1566. Others question whether federal floors are justified today, given how many states are more aggressive in pursuing protective environmental policy. *See* Adler, *supra* note 42, at 1109 (discussing the lack of evidence for the race-to-the-bottom theory and noting that some studies have shown the opposite); Tyler Runsten, *Climate Change Regulation, Preemption, and the Dormant Commerce Clause*, 72 HASTINGS L.J. 1313, 1316–17 (2021) (describing state and local government climate change efforts).

55. *See generally* Richard J. Lazarus & Andrew Slottje, *Justice Gorsuch and the Future of Environmental Law*, 43 STAN. ENV'T L.J. 1, 30 (2024) (noting the opportunity for state climate change action).

56. *See generally* Joshua Ulan Galperin, *Governing Private Governance*, 56 ARIZ. ST. L.J. 765 (2024) (discussing the role of private actors to drive environmental regulation).

57. Neutral administrative law principles and normative environmental directives can be in tension, and whether a court ruling's infringement on environmental directives is the goal or merely the result of prioritizing administrative law principles can be a conundrum. Sanne Knudsen offers a critique of courts' use of administrative law doctrines to undermine the normative aims of environmental statutes. Knudsen, *supra* note 8, at 523.

implementation of its statutory authority; although, as discussed in Part I.B, that has the result of interfering with congressional authority as well.

West Virginia and *Sackett* restrict federal agency authority by imposing so-called "clear statement rules" to constrain Congress's ability to delegate power to agencies under broad policy directives. A clear statement rule is a substantive canon of statutory construction that operates as a thumb on the scale in favor of or against a particular outcome unless the statute makes a clear statement that points in the opposing direction.[58] Clear statement rules come into play when the Court considers something *other* than the simple text of the statute; for instance, constitutional values at play.[59] In essence, clear statement rules that further abstracted constitutional goals not expressly stated in the Constitution (such as the separation of powers and federalism) "impose a clarity tax on Congress by insisting that Congress legislate exceptionally clearly when it wishes to achieve a statutory outcome that threatens to intrude upon some judicially identified constitutional value."[60]

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58. *See* WILLIAM N. ESKRIDGE, JR., ET AL., LEGISLATION AND REGULATION 648–51, 681 n.35 (6th ed. 2020) (defining a clear statement rule).

59. *Id.* at 648–51.

60. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010). On this basis Manning questions the legitimacy of clear statement rules because they simply abstract supposed constitutional values not actually identified in the Constitution to achieve certain ends. *Id.* at 449. Manning is undoubtedly correct that the rules are utilized to achieve court-identified constitutional goals that are, as this Article contends, malleable and context-specific; but this Article leaves for another day the robust dispute over whether clear statement rules as a category of substantive canon are inherently illegitimate. *Id.* at 449–50. Rather, the analysis here takes the clear statement rules as the Roberts Court animates them and then interrogates their logical extension. Insofar as there might be constitutional constraints on a clear statement rule's ability to limit implied preemption on the basis that such a rule would be inconsistent with the Supremacy Clause's overriding directive, see *infra* Part II, one might also argue in parallel that the clear statement rule is itself a violation of Congress's Article I authority to delegate to agencies via broadly worded statutes. Said differently, an illegitimate clear statement rule could not empower a court to invalidate a statute thereunder. Under either of these interpretations of the (in)viability of clear statement rules, the end result would be an entirely different scenario in which the Court is not invalidating administrative rules at all—at least under the existing theories. The latter is not, however, how the Roberts Court conceptualizes these rules, and so the Article attempts to grapple with their implication as the Roberts Court seems to treat them.

In *West Virginia*, the clear statement rule took the form of the major questions doctrine,[61] invoked by the Supreme Court to require an agency to "point to clear congressional authorization for the power it claims" when the agency acts on what the Court considers to be an "extraordinary case."[62] In *Sackett*, the Court formulated another clear statement rule that requires agencies "provide clear evidence" they were authorized to regulate conduct that lies "at the core of traditional state authority."[63] The *Sackett* clear statement rule might charitably be described as a version of the general federalism canon, curated for the environmental context.[64] In both cases, the Court majority acknowledged it was taking a different, context-specific approach from the traditional process of statutory interpretation.[65] Under Chief Justice Roberts's reasoning in *West Virginia*, while ordinarily an agency's exercise of authority need only have "a colorable textual basis" in statute,[66] once the case has ventured into what a court considers the realm of "extraordinary,"[67] the Court will then look with "skepticism" at the agency's assertion of statutory power.[68] At that point, the textual basis for the agency action must now

61. While the *West Virginia* major questions doctrine remains somewhat undefined, this Article takes the position that it is a substantive canon of construction. *See generally* Turčan, *supra* note 34 (collecting scholarship); David M. Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?*, 2024 U. ILL. L. REV. 1177 (characterizing the doctrine as a clear statement rule while criticizing its justification under the separation of powers). There are other perspectives. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (describing the major questions doctrine as a linguistic canon); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 465 (2024) (exploring its limits as a substantive canon). Others have also critiqued the doctrine's historical basis in law and theory. *See* Turčan, *supra* note 34, at 740 n.10 (comparatively examining the major questions doctrine's impact on federal preemption disputes and collecting scholarship on the doctrine as substantive canon). *See generally* Anita S. Krishnakumar, *What the New Major Questions Doctrine is Not*, 92 GEO. WASH. L. REV. 1117 (2024). While there may be some questions now about how the Court will make use of the doctrine post-*Loper Bright*, *Loper Bright* did not overrule *West Virginia*, and the doctrine has independent utility.

62. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

63. Sackett v. EPA, 143 S. Ct. 1322, 1341 (2023).

64. *See* Bond v. United States, 572 U.S. 844, 859 (2014) (implicating the federalism canon when a law alters the federal-state balance).

65. *West Virginia*, 142 S. Ct. at 2607–08; *Sackett*, 143 S. Ct. at 1341.

66. *West Virginia*, 142 S. Ct. at 2609.

67. *Id.*

68. *Id.* at 2614.

be "something more than . . . merely plausible";[69] the agency must be able to "point to 'clear congressional authorization' for the power it claims."[70] Similarly, Justice Alito wrote for the *Sackett* majority that in certain circumstances the Court will require Congress to include "exceedingly clear language" to empower the regulatory agencies to act out the challenged policy.[71]

What are the triggers of these two clear statement rules? With respect to the major questions doctrine, the outer bounds of what might constitute an "extraordinary case" remain unclear, but one trigger is the perceived external "economic and political significance" of the matter.[72] "External" to the matter in the sense that, as Judge Griffith and others have noted, with this doctrine the Court is taking a normative approach—how "major" the agency's action is perceived to be out in the world external from the statutory text.[73] And the case that triggers the *Sackett* rule is one which will "significantly alter the balance between federal and state power" (including the power over private property).[74] Thus, for an agency to exercise the power it claims over these types of consequential cases, it must be able to satisfy the

69. *Id.* at 2609.

70. *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

71. Sackett v. EPA, 143 S. Ct. 1322, 1341 (2023).

72. *West Virginia*, 142 S. Ct. at 2608–12. The triggers for the major questions doctrine are malleable and have been criticized as potentially arbitrary in their application. Turčan, *supra* note 34, at 739–40 (criticizing the doctrine and collecting similar critiques). One early study by Natasha Brunstein on how lower courts have applied the major questions doctrine suggests that the lower courts apply the doctrine inconsistently, grabbing at various factors to choose when to apply it. Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN. L. REV. 661, 663 (2023) ("There is no one major questions doctrine in the lower courts.").

73. *See* Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J.F. 693, 702 (2022) (describing how the major questions doctrine has "taken on a normative cast"); Turčan, *supra* note 34, at 755 (noting the normative nature depends on how significant the change is perceived as).

74. *Sackett*, 143 S. Ct. at 1341 (failing to immediately clarify whether the Court referenced private property as a nod to a state's authority over land use and real property or if the Court was referencing some separate private-property clear statement rule).

Court's heightened standard for clear congressional authorization.[75] Otherwise, the agency's regulations are invalid.[76]

The emergence of these clear statement rules coincided with the decline of agency deference, culminating in the Court's official overruling of the *Chevron* doctrine in *Loper Bright*.[77] Previously, under *Chevron*, federal courts would afford deference to agencies' reasonable interpretations of ambiguous statutes so that, based on their technical and policy expertise, agencies might implement their statutory directive from Congress and engage in the day-to-day minutiae of governing in accordance with the broad instruction from Congress.[78] No longer.[79] The Court complains: "*Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."[80]

Yet this is a questionable assertion at best. Two rejoinders are immediately apparent. One, from a practical standpoint, the career administrative law attorneys and agency officials that make up agencies are capable of analyzing statutes as well as judges and their law clerks.[81] Two, from a doctrinal standpoint,

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75. *See* Turčan, *supra* note 34, at 742 (quoting *West Virginia*, 142 S. Ct. at 2609).

76. *See generally id.* at 764–87 (describing the nullification of federal laws under the major questions doctrine).

77. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overturning *Chevron*); Turčan, *supra* note 34, at 741–42 (noting the infrequent application of the *Chevron* doctrine at the Supreme Court before its overruling).

78. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45, (1984), *overruled by Loper Bright*, 144 S. Ct. 2244; Turčan, *supra* note 34, at 744 (describing the former *Chevron* framework).

79. *See Loper Bright*, 144 S. Ct. at 2273 ("*Chevron* is overruled."). Exactly how *Loper Bright* will alter court review—and particularly lower court review—of agency conduct will be revealed in the coming years (including the role of *Skidmore* weight afforded to agency interpretation). But clear now is that "deference" to agencies on (most) questions of statutory authority is over.

80. *Id.* at 2251.

81. The agency interpretation afforded no deference in *Loper Bright*, for example, would have been reviewed by the NOAA Office of General Counsel, consisting of lawyers whose job description includes expertise in the statutes relevant to fisheries regulation. *See Office of General Counsel*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 27, 2025), https://www.noaa.gov/general-counsel [https://perma.cc/YGZ3-4G6B] (describing how their Attorney Honors program specializes in "administrative and federal law requirements and procedures" and "fisheries"). One might argue that agency officials setting policy are working in furtherance of their agency mission, which may suggest their legal

the deference comes in only if, at *Chevron* Step One under the normal rules of statutory construction, courts still cannot identify the one-true meaning of the statute; by Step Two, the agency's expertise in understanding an ambiguous technical or policy directive is relevant and, moreover, is precisely when the generalist judiciary has no special competence.[82] Post-*Loper Bright*, courts, not agencies, now have the definitive say over the legal scope of what an agency is empowered to do via statute, when on a particular question, that statute is silent or is open to multiple interpretations.[83] This is so even when the very question at issue bears directly on subject matter within the agency's—not a court's—area of expertise.[84]

Combined, the impact of these three cases to the federal environmental regulatory power is exponential. And the Court's federalism and separation of powers rationales will have far-reaching implications, as discussed below.

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arguments are not starting from a neutral position, but that is not the same as an assertion they have no expertise. On the contrary, agencies are custodians of their statutory regimes and take seriously a duty of care in implementing them; agencies have unique competence in applying statutes and serve an important role "balancing the need for stability and continuity with the need for adaptation and change." Anya Bernstein & Cristina Rodríguez, *Working with Statutes*, 103 TEX. L. REV. 921, 922 (2025).

82. *Loper Bright*, 144 S. Ct. at 2301 (Kagan, J., dissenting) (disputing that agencies have no special competence in statutory construction when the question extends beyond that of pure interpretation).

83. *See supra* notes 77–80 and accompanying text. The immediate post-*Loper Bright* scholarly debate on the possible long-term impact of the overturning of *Chevron* deference on substantive agency rulemaking runs the gamut from nothing much will change, to agency action will grind to a halt, to somewhere in between the two with a version of *Skidmore* deference taking hold. *See, e.g.*, Christopher J. Walker, *What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference*, YALE J. ON REGUL.: NOTICE & COMMENT (June 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/ [https://perma.cc/3MW8-5XPM] (detailing the different reactions to the *Loper Bright* ruling). In this debate, it is important to recognize that the overruling of *Chevron* deference does not itself undermine congressional delegations of agency discretion; delegations of discretion via either express statutory language or purposefully flexible statutory language survive *Loper Bright* and are an important source of authority for agencies moving forward. *See generally* Kamaile A.N. Turčan, *Rethinking Aquaculture Regulation in a Post-*Chevron *World*, 36 FORDHAM ENV'T L. REV. (forthcoming 2025).

84. *See Loper Bright*, 144 S. Ct. at 2251 (holding that the interpretation that a court would come to is the best one).

B. THE *WEST VIRGINIA*-*SACKETT*-*LOPER BRIGHT* TRIO UNDERMINES CONGRESSIONAL AUTHORITY

The Court majority's expressed concerns for the separation of powers and federalism in *West Virginia*, *Sackett*, and *Loper Bright* function in complement and ultimately undermine Congress. The cases carry an anti-administrative state imprimatur that is highly critical of what, in reality, is a long-established interplay between the legislative and executive branches to effectuate broad policy directives via detailed regulatory systems.[85] It was once a truism that "Congress simply cannot do its job absent an ability to delegate power under broad general directives,"[86] but no longer. So, while the cases are notable for their restriction on the executive's Article II authority, they also infringe on Congress's Article I authority to choose to dictate policy through broad directives to agencies.[87] *Sackett* and *West Virginia* do so by imposing clear statement rules on Congress, and *Loper Bright* does so by eliminating *Chevron* deference to agencies.[88]

85. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (discussing SORNA delegations and holding that they are a permissible allocation of power); *See* Turčan, *supra* note 34, at 751–54 (comparing the Court's approach to delegations in *Gundy* and *West Virginia* and detailing how the latter signals a hostility towards the administrative state).

86. Mistretta v. United States, 488 U.S. 361, 372 (1989); *see Gundy*, 139 S. Ct. at 2123 (quoting the same language from *Mistretta*).

87. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting) (emphasizing that Congress wrote the CAA to "broadly authorize[]" the EPA); Turčan, *supra* note 34, at 751–54 (describing how Congressional authority allows for delegation to agencies and how the judiciary has been constraining that authority).

88. *See supra* Part I.A; *see also supra* note 79 and accompanying text.

First: *Sackett* and *West Virginia*'s clear statement rules obstruct Congress's prerogative over environmental policy.[89] The Court's obstruction is explicitly justified via the preservation of separation of powers. The *West Virginia* majority, for example, demands the agency "convince" the "reluctant" Court the delegation exists with exceedingly explicit statutory text that is more than just "plausible":

> [I]n 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. To *convince* us otherwise, something *more than a merely plausible textual basis* for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.[90]

Justice Kagan's separate opinions, however, highlight that there seems to be more going on in the majority opinions than a structural separation of powers analysis can explain; in these cases, the majority conveys a general sense that the federal body is just doing too much for the Court's liking.[91] Her *Sackett* concurrence explains it.[92] Drawing parallels between *Sackett* and *West Virginia*, Justice Kagan observed that the CWA, like the CAA, was a "landmark piece of environmental legislation,"[93] designed to address a problem of "crisis proportion," and Congress wrote it to be "broad enough to achieve the codified objective of 'restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters.'"[94] The *Sackett* majority, she challenged, relied on a "judicially manufactured clear-statement

89. *See* cases cited *supra* notes 62–63 and accompanying text.

90. *West Virginia*, 142 S. Ct. at 2609 (emphasis added) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

91. *See, e.g.*, *id.* at 2628 (Kagan, J., dissenting) ("The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms."); Sackett v. EPA, 143 S. Ct. 1322, 1341 (2023) (Kagan, J., concurring) (arguing that the CWA was purposefully written with broad delegation to the EPA). Erin Ryan posits the Court's purported effort to "realign the separation of powers between the legislative and executive branch" in both *West Virginia* and *Sackett* is disingenuous under the circumstances of these cases and vests the power with the Supreme Court's majority instead. Ryan, *Protecting American Waterways*, *supra* note 8, at 308.

92. *See generally Sackett*, 143 S. Ct. at 1359–62 (Kagan, J., concurring).

93. *Id.* at 1359.

94. *Id.* at 1359–60 (alteration in original) (quoting 33 U.S.C. § 1251(a)).

rule" to upend the comprehensive legislation.[95] She challenged, too, even the majority's application of that rule, because to her read, the statute was clear enough to satisfy such a heightened requirement: The authorization to federal regulatory bodies was "as clear as clear can be—which is to say, as clear as language gets. And so a clear-statement rule must leave it alone."[96] With this understanding, there is no basis to suggest EPA is going further than Congress intended. Justice Kagan referenced her *West Virginia* dissent to observe, as she had before, that "broad" congressional language is not the same as "vague" language, and where Congress makes a conscious decision to delegate broad authority to an agency charged with implementing that statute, it is not the Court's role to interfere.[97] But once again, in *Sackett*, as it had in *West Virginia*, the Roberts Court reacted to the bogeyman of environmental regulation to restrain Congress's prerogative.[98]

Federalism is also implicated in these clear statement rules, insofar as one of the perceived evils of an agency's supposed breach of the separation of powers is that an agency overstepping its authority will intrude on the rightful role of the states. Federalism most obviously drives the opinion in *Sackett*, where the Court specifically references the regulation of water use as "at the core of traditional state authority."[99] EPA's interpretation of the CWA was, in the Court's view, "overly broad" and "would impinge on" state authority over large swaths of land and water.[100] Never mind that it was Congress's policymaking prerogative that EPA was effectuating—as both Justice Kagan and Justice Kavanaugh argued in their separate opinions, the federal government has a long history of regulating the very type of waters at issue in the case.[101] Federalism concerns permeate the *West Virginia* opinion too. After all, the petitioner States

95. *Id.* at 1360.

96. *Id.* at 1361.

97. *Id.* (referencing the fact that Justice Kagan made the same argument in her dissent in *Sackett*).

98. *See id.* at 1358 ("The Court's opinion today curbs a serious expansion of federal authority . . . .").

99. *Id.* at 1341.

100. *Id.*

101. *Id.* at 1361 (Kagan, J., concurring) (quoting *id.* at 1367 (Kavanaugh, J., concurring)) (arguing that it is not out of the ordinary for the federal government to exert this kind of control).

objected to the federal rule on the basis that it would require the states to more stringently regulate power plant emissions within their borders.[102] The conjoined separation-of-powers-federalism critique of agency overreach in *West Virginia* is voiced most explicitly by Justice Gorsuch: "When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the states."[103] The major questions doctrine and federalism canon, he explained, "often travel together,"[104] and especially so "when an agency seeks to 'intrud[e] into an area that is the particular domain of state law.'"[105] The heightened requirements of the major questions doctrine therefore protect against "intrusions on [federalism]."[106]

Second: By overruling *Chevron* deference in *Loper Bright*, the Court adds uncertainty to the fundamental question of what agencies are statutorily authorized to do in the first instance.[107] Previously under *Chevron*, Congress retained the prerogative to write statutes setting forth broad policy goals, which the agencies, operating within their areas of expertise, would then interpret and implement.[108] Not anymore. In *Loper Bright*, the Court is ostensibly concerned with agencies usurping the judicial

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102. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2606 (2022) (using states having to more strictly regulate emissions as the "injury" to establish standing in the case).

103. *Id.* at 2621 (Gorsuch, J., concurring).

104. *Id.*

105. *Id.* (alteration in original) (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).

106. *Id.* at 2620. Majority support for the relationship between the major questions doctrine and federalism is also found in the COVID-19 era *per curiam* opinion *Ala. Realtors*, 141 S. Ct. at 2485. Applying the major questions doctrine (although not by name), the Court struck down the Centers for Disease Control and Prevention's nationwide eviction moratorium for residential rental properties during the COVID-19 pandemic. *Id.* at 2490. The Court explained that it "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance'" and emphasized that the "moratorium intrude[d] into an area that is the particular domain of state law: the landlord-tenant relationship." *Id.* at 2489 (citation omitted). Court precedents, it explained, "require 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." *Id.* (citation omitted).

107. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overturning *Chevron*).

108. *See* Turčan, *supra* note 34, at 743–44 (describing *Chevron* deference).

prerogative to interpret statutes.[109] But the Court does not appear overly concerned with the possibility that it is in fact the Court that is overstepping Congress's prerogative to delegate according to broad principles that are then refined by the executive bodies with the relevant expertise—even when (like in *West Virginia* and *Sackett*) Congress had directed the agency in quite broad terms to "address a problem of crisis proportions."[110]

The bottom line is that these cases undermine broad congressional delegations of power to agencies and demand a heightened textual standard when—to the Court's view—certain circumstances call for a more precise statutory directive from Congress. *West Virginia* and *Sackett* accomplish this by introducing clear statement rules,[111] and *Loper Bright* piles on by eliminating *Chevron* deference to free courts from an obligation to defer to the reasoned judgment of the agency about its statutory authority.[112] Congress is now expected to draft statutes under this dramatically different judicial landscape. Of course, because a court's judgment that a particular matter requires a clear statement from Congress comes only *after* the statutory text has already been written and *after* legal challenge, Congress and agencies are put in the impractical position of needing to divine in advance what specific conduct will invoke the Court's

109. *Loper Bright*, 144 S. Ct. at 2251 (explaining how courts should have the controlling statutory interpretation).

110. Sackett v. EPA, 143 S. Ct. 1322, 1359 (2023) (Kagan, J., concurring) (internal quotation marks omitted). One possible alternative available to agencies is to argue their interpretations are entitled to "weight" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), based on their power to persuade. *See generally* Dena Adler & Max Sarinsky, *With or Without Chevron Deference, Agencies Have Extensive Rulemaking Authority*, YALE J. ON REGUL.: NOTICE & COMMENT (May 13, 2024), https://www.yalejreg.com/nc/with-or-without-chevron-deference-agencies-have-extensive-rulemaking-authority [https://perma.cc/GL36-XAGJ] (discussing how agencies have other avenues to adopt rules without *Chevron* deference). Another possibility, yet to be elaborated on by the Supreme Court, is the significance of the language in footnotes five and six of *Loper Bright*. It suggests that the Court left room for agency discretion in situations where Congress employed statutory language that explicitly delegates authority or utilized language leaving agencies with flexibility. *Loper Bright*, 144 S. Ct. at 2263 nn.5–6; *see* Turčan, *supra* note 83.

111. *See supra* notes 99–106 and accompanying text (describing the clear statement rule and how it was used in those two cases).

112. *Loper Bright*, 144 S. Ct. at 2273 (overruling *Chevron* deference).

heightened test.[113] Even worse, that impractical position becomes an impossible one when the Court, like with *West Virginia* and the major questions doctrine, applies this heightened standard to statutory language that was written, debated, and passed by Congress *before* the Court conjured the new standard.[114] The *West Virginia* majority makes no effort to explain, for example, how the Congress of the 1970s would have known to draft the CAA in a way to satisfy the major questions doctrine.[115] Failing extraordinary divination by both the executive and legislative branches, the judicial branch declares the environmental policy void ab initio. A bogeyman, indeed.

This is the import of the Court's approach to agency authority. While the Court may expressly direct its deregulatory wrath at agencies, it simultaneously undermines Congress. "[T]he Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the [statute] to work as Congress instructed."[116]

C. ENVIRONMENTAL LAW AT THE VANGUARD: CLIMATE POLICY

Is this trio of environmental cases simply evoking a broader federalism trend, or is there a more specific anti-environmental regulation motivation driving them? Justice Kagan's emphatic dissent in *West Virginia* suggests environmental regulations are uniquely disfavored by the current majority—the "bogeyman" of national regulation.[117] And to be sure, these environmental agency cases are notably distinct from earlier cases involving other agencies such as the Food and Drug Administration (FDA), where the Court has historically been more accepting of agency authority to regulate medical devices at the expense of state tort

113. *See* Carter H. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 ECOLOGY L.Q. 1147, 1214 (2007) ("It is not realistic to demand that Congress anticipate every future problematic or unconstitutional application of its statutes, let alone the myriad and changing state laws that legislation might affect.").

114. *See supra* note 61 and accompanying text.

115. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2600–16 (2022) (making no mention of the 1970s Congress interacting with the major questions doctrine). The author also appreciates discussions via e-mail communication with Joshua Galperin. E-mail from Joshua Galperin, Assoc. Professor of L., Elisabeth Haub Sch. of L., to author (Aug. 24, 2024) (on file with author).

116. *West Virginia*, 142 S. Ct. at 2643 (Kagan, J., dissenting).

117. *Id.* at 2630.

suits.[118] If the real motivation behind these rulings is a pro-business, anti-regulatory one rather than a pro-federalism or separation-of-powers one, then the Roberts Court may have backed itself into a corner. In all three cases, it was federal law, not state law, that imposed the burdensome environmental regulation.[119] The Court's invocation of the separation of powers and federalism concerns worked, in each case, toward *less* regulation.[120] A way to interrogate whether the anti-regulatory burden outcomes are mere coincidence or something more, therefore, is to evaluate whether the same separation of power and federalism concerns point the same direction when the environmental regulatory burden is coming from state, rather that federal, law.[121] In other words, in the scenario opposite than the one described above, when now a restrictive read of federal authority actually increases the regulatory burden on industry.

Here is where the important interlay of federalism and preemption may offer insight—when state or common law, not federal law, would impose restrictions on industry, how might the Roberts Court react to industry arguments that the burdensome state law is preempted by less onerous federal law? Questions about federalism and the administrative state are amplified through preemption litigation, where outcomes turn on the scope of federal agency authority to regulate in the first instance and whether Congress intended those regulations to preempt state law.[122]

Greenhouse gas emission tort suits are an instructive example through which to analyze the interplay of federalism and agency preemption at the Roberts Court, because they are the inverse of what the Court so far has rejected: In these cases,

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118. *See* Catherine M. Sharkey & Daniel J. Kenny, *FDA Leads, States Must Follow*, 102 WASH. U. L. REV. 155, 159 (2024) (pointing out that direct legal challenges to FDA are hardly successful); *cf.* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000) (limiting FDA's authority to regulate tobacco products).

119. *See West Virginia*, 142 S. Ct. at 2587 (centering on federal regulations); Sackett v. EPA, 143 S. Ct. 1322, 1359 (2023) (same); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (same).

120. *See* cases cited *supra* note 119.

121. Stated differently, is this an example of opportunistic federalism, where persons are more concerned with desired results than the level of government acting on their behalf? *See* RYAN, TUG OF WAR, *supra* note 42, at 36 (describing opportunistic federalism).

122. *See infra* Part II.

state and local governments are pursuing state-law-based litigation against energy companies for harm resulting from climate change, and the energy companies seek to federalize the disputes, inure themselves to the benefit of federal preemption principles, and thereby quash the state law-based climate suits.[123] To survive dismissal or removal of their actions based on federal law, state and local governments who pursue climate policies characterize their actions as based in state and common law, not federal law.[124] Government plaintiffs must strike a balance between furthering their environmental policy goals and maintaining a sufficient state-law focus to avoid federalizing their efforts.[125] The reason behind these alternative framings is what commenters have described as the historically obstructionist story that is climate change programs at the federal level compared with creativity at the state level.[126] With that history in mind, a diminished federal presence in this arena could result in more enforcement actions led by state and local government lawsuits against oil and gas corporations.[127] As of the writing of

123. *See infra* Part II.C.

124. *See infra* Part II.C.

125. *See infra* Part II.C.

126. *See, e.g.*, Lisa Heinzerling, *Climate, Preemption, and the Executive Branches*, 50 ARIZ. L. REV. 925, 925–26 (2008) (describing the increasing importance of states in climate activism as the federal government moves from inaction to obstruction); Kirsten Engel, *State and Local Climate Change Initiatives: What is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1015 (2006) (explaining that state governments take a more active role in climate change than the federal government historically has); Adler, *Displacement and Preemption*, *supra* note 34, at 217–19 (describing New York's creative approach to climate action in the face of federal inaction); David A. Dana & Michael Barsa, *The Major Questions Doctrine's Upside for Combatting Climate Change* 1 (Nw. Univ. Pritzker Sch. Of L., Pub. L. & Legal Theory Series, Working Paper No. 23-08, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4367619 [https://perma.cc/RYH6-XAJ6] (explaining how state law provides a way forward after *West Virginia v. EPA*); RYAN, TUG OF WAR, *supra* note 42, at 169–176.

127. *See* Turčan, *supra* note 34, at 786–87 (postulating how state law could lead to more effective climate protections). *See generally* Dana & Barsa, *supra* note 126, at 2 (describing how the major questions doctrine can be invoked through state suits to vindicate climate protections); Adler, *Displacement and Preemption*, *supra* note 34, at 259 ("Under existing doctrine, federal common law claims alleging climate related harms are displaced, but state law claims are not preempted."); David B. Spence, *Naive Administrative Law: Complexity,*

this Article, there are more than two dozen suits by states and municipalities against fossil fuel companies pending across the country,[128] and even more when one considers private plaintiff lawsuits.[129]

One case out of the State of Hawai'i, *City of Honolulu v. Sunoco LP*, poses the prototypical dispute.[130] In this case, the City and County of Honolulu and the Honolulu Board of Water Supply sued energy companies under state nuisance, trespass, and failure-to-warn theories for harm caused by the effects of climate change.[131] The plaintiffs' suit alleged that the defendants misled the public about the environmental impact from fossil fuels and engaged in a disinformation campaign that caused property and infrastructure damage in Hawai'i.[132] To avoid federalizing the case under the CAA, the plaintiffs argued that the state-law, deceptive marketing case fell outside the federal government's interest in interstate greenhouse gas emissions.[133] Because the CAA does not expressly preempt these types of tort claims—and, in fact, includes a savings clause preserving state common law[134]—the energy companies argue that these claims are nevertheless displaced under implied preemption principles because they intrude on "vital federal interests in the regulation

Delegation and Climate Policy, 39 YALE J. ON REGUL. 964, 987–98 (2022) (evaluating dimming prospects for national climate legislation).

128. *Common Law Claims*, SABIN CTR. FOR CLIMATE CHANGE L., https://climatecasechart.com/case-category/common-law-claims [https://perma.cc/T3D8-L8WM] (showing forty cases filed); *see* Lesley Clark, *Puerto Rico Files $1B Climate Lawsuit Against Oil Companies*, E&E NEWS (July 16, 2024), https://https://www.eenews.net/articles/puerto-rico-files-1b-climate-lawsuit-against-oil-companies/ [https://perma.cc/3B45-V3RX] (showcasing Puerto Rico's involvement in this movement).

129. Columbia University's Sabin Center maintains a helpful lawsuit database. *See U.S. Climate Change Litigation*, SABIN CTR. FOR CLIMATE CHANGE L., https://climatecasechart.com/us-climate-change-litigation [https://perma.cc/M35U-ZP7R] (providing information on different lawsuits).

130. City of Honolulu v. Sunoco LP, 537 P.3d 1173, 1180 (Haw. 2023), *cert denied*, No. 23-947, 2025 WL 76706 (U.S. Jan. 13, 2025); *see* Turčan, *supra* note 34, at 785–86 (detailing the *Sunoco* lawsuit's preemption and major questions doctrine implications).

131. *Sunoco*, 537 P.3d at 1180.

132. *Id.* at 1180–81.

133. *See id.* at 1181 (holding that there was no conflict between the state tort claim brought forward and the CAA's overarching purpose).

134. 42 U.S.C. § 7604(e).

of fossil fuels and greenhouse-gas emissions."[135] Moreover, because the case is really about an inherently federal area like transboundary emissions, the defendants argue, the so-called presumption against preemption does not apply.[136] The Supreme Court of Hawai'i agreed with the plaintiffs' framing of the case and held that the suit was not preempted.[137] Defendants filed a petition for certiorari with the U.S. Supreme Court, which ultimately denied the petition.[138] Before denying certiorari, the Court called for the views of the Solicitor General on the petition, which indicated at least some interest in the case among some on the Court.[139] The Solicitor General had counseled against granting certiorari, principally on the basis of the early procedural posture of the case.[140]

In a similar case out of a Minnesota state court, *Minnesota v. American Petroleum Institute*, the State sued energy corporations under consumer fraud, deceptive trade practices, and false statements related to climate change that harmed its residents.[141] After defendants initially removed the case to federal court and then appealed the subsequent remand back to state court, the defendants filed a petition for certiorari with the Supreme Court.[142] The Court ultimately denied certiorari, perhaps because the questions would have been presented in a

135. Reply Brief for Petitioners at 3, City of Honolulu v. Sunoco LP, 537 P.3d 1173 (Haw. 2023) (No. 23-947).

136. *Id.* at 9 (arguing that the use of state law in this way inherently conflicts with the purpose and scheme of the CAA); *see infra* Part II (discussing the presumption against preemption).

137. *Sunoco*, 537 P.3d at 1181, 1195–208 (agreeing with the plaintiffs that federal common law does not preempt their claim).

138. *See* Sunoco LP v. Honolulu, No. 23-947, 2025 WL 76706 (U.S. Jan. 13, 2025) (mem.) (denying certiorari).

139. Sunoco LP v. City of Honolulu, No. 23-947 (U.S. June 10, 2024) ("The Solicitor General is invited to file a brief in this case expressing the views of the United States.").

140. Brief for the United States as Amicus Curiae at 11, *Sunoco LP*, 537 P.3d 1173 (No. 23-947) (arguing that the jurisdictional and procedural questions would complicate the issue on appeal).

141. Complaint at 3–4, Minnesota v. Am. Petroleum Inst., 63 F.4th 703 (8th Cir. 2023) (No. 20-CV-01636).

142. *See* Minnesota v. Am. Petroleum Inst., 63 F.4th 703 (8th Cir. 2023), *cert. denied*, 144 S. Ct. 620 (2024) (No. 23-168).

complicated removal posture rather than directly on the merits.[143] Justice Kavanaugh indicated that he would have granted the petition and heard the case.[144]

Sunoco and *American Petroleum Institute* are not the only climate change cases presented to the Supreme Court, although the Court has never weighed in directly on whether federal law supersedes state common-law climate suits. In 2007, for instance, the Court ruled in *Massachusetts v. EPA* that the CAA authorizes EPA to regulate greenhouse gas emissions.[145] In 2011, the Court came the closest it has to ruling on preemption, when, in *American Electric Power Co. v. Connecticut* (*AEP*),[146] it ruled that the CAA displaced *federal* common law nuisance actions for curtailment of greenhouse gas emissions, but it did not address state law because the court below had not ruled on that question.[147] Then in 2021, the Court accepted a climate action but limited its ruling to a nuanced procedural issue involving federal officer removal.[148]

Another opportunity to explore this doctrinal interplay presents itself in new, creative concurrent state and federal regulatory efforts to address greenhouse gas emissions. For example, in March 2024, the Federal Securities and Exchange Commission (SEC) adopted a new rule requiring certain companies to disclose how their businesses are assessing, measuring, and managing climate-related risks, including disclosure of certain greenhouse gas emissions.[149] Such a federal rule is a natural

143. Minnesota v. Am. Petroleum Inst., 144 S. Ct. 620 (2024) (denying certiorari); *see* Turčan, *supra* note 34, at 784 n.310 (discussing the complications attending a merits discussion in the removal context for climate cases).

144. *Orders in Pending Cases*, SUP. CT. OF THE U.S. 15 (Jan. 8, 2024), https://www.supremecourt.gov/orders/courtorders/010824zor_cb7d.pdf [https://perma.cc/4PHA-FEJU].

145. Massachusetts v. EPA, 549 U.S. 497, 528 (2007). Chief Justice Roberts, alongside Justices Scalia, Thomas, and Alito dissented on the basis of standing. *Id.* at 535 (Roberts, C.J., dissenting). In *Utility Air Regulatory Group v. EPA*, the Court subsequently addressed stationary sources. 573 U.S. 302, 308 (2014).

146. 564 U.S. 410 (2011).

147. *Id.* at 429. None of the parties briefed preemption or the availability of a state law nuisance claim before the Court because the Second Circuit held that federal common law governed and did not reach the state law claim. *Id.*

148. BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1536–39 (2021) (discussing the removal under 28 U.S.C. § 1442).

149. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 6,

target for a clear-statement rule challenge. This type of environmental-protection rule is arguably a novel expansion of SEC's traditional role, which is "protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation."[150] Some in Congress have already referenced *West Virginia* in their concerns about the legal authority for SEC's "radical regulatory agenda."[151] Unsurprisingly, at the time of writing this Article, SEC was defending a consolidated action in the Eighth Circuit brought by several states, challenging the agency's authority under, among other things, the major questions doctrine and *Loper Bright*.[152]

Beyond threshold questions about SEC's authority to require this type of environmental disclosure, the natural next question is whether such a rule would preempt state efforts. The State of California, for instance, passed a similar law in 2023. The Climate Corporate Data Accountability Act empowered the State Air Resources Board to adopt regulations by July 1, 2025, requiring specified business entities to publicly disclose their greenhouse gas emissions.[153] The emerging consensus is that

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2024), https://www.sec.gov/newsroom/press-releases/2024-31 [https://perma.cc/N7HE-BM8L]; The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668 (Mar. 28, 2024) (denoting the final rule). The rule does not require disclosure of supply chain emissions. *See* Chloe Field & Cynthia Hanawalt, *The SEC's Final Climate Disclosure Rule: Key Requirements, and the Materiality Threshold*, CLIMATE L. (Mar. 11, 2024), https://blogs.law.columbia.edu/climatechange/2024/03/11/the-secs-final-climate-disclosure-rule-key-requirements-and-the-materiality-threshold [https://perma.cc/5JLP-3XPR] (discussing how the rule does not require disclosure of Scope 3 GHG emissions). The final rule was considerably scaled back from the goals of the proposed rule, and Commissioner Crenshaw considers this federal rule a "floor" while encouraging more stringent disclosure rules in the future. Caroline A. Crenshaw, *A Risk by Any Other Name: Statement on the Enhancement and Standardization of Climate-Related Disclosures*, U.S. SEC. & EXCH. COMM'N (Mar. 6, 2024), https://www.sec.gov/newsroom/speeches-statements/cresnshaw-statement-mandatory-climate-risk-disclosures-030624 [https://perma.cc/Z8TC-EFER].

150. *Mission*, U.S. SEC. & EXCH. COMM'N (last updated Aug. 9, 2023), https://www.sec.gov/about/mission [https://perma.cc/WVJ6-V9T7].

151. Soyoung Ho, *SEC Delays Climate Change Disclosure Rulemaking*, THOMPSON REUTERS (June 15, 2023), https://tax.thomsonreuters.com/news/sec-delays-climate-change-disclosure-rulemaking [https://perma.cc/VFA9-RPQL] (showcasing the concerns about SEC's new rule).

152. *See* Iowa v. Sec. & Exch. Comm'n, No. 24-1522 (8th Cir. Mar. 12, 2024) (showcasing the path of the litigation).

153. CAL. HEALTH & SAFETY CODE § 38532(c)(1) (Deering 2024).

California's law imposes more stringent disclosure requirements than would SEC's rule, with some concurrent (although not completely overlapping) functionality.[154] This type of scenario presents a potential implied preemption case, as Commissioner Peirce hinted while referencing California's law.[155]

The fact that environmental policy presents fertile ground for judicial engagement with federalism and preemption is not itself surprising. Environmental law is "at the epicenter of federalism controversy" because of the inherent nature of large-scale environmental problems—they arise in scenarios where both state and federal regulators simultaneously believe their claims to authority are at their strongest.[156] The differing rationales for the majority and concurring opinions in *Sackett* revolved around this very tension: while Justice Alito's majority opinion invoked the history of state and local regulatory power over water pollution as a reason to look with suspicion at EPA's claimed authority under the CWA,[157] both Justice Kagan and Justice

154. *See* Chloe Field & Cynthia Hanawalt, *The SEC's Final Climate Disclosure Rule: Interrogating Preemption and Coherence with Other Domestic Regimes*, CLIMATE L. (Mar. 29, 2024), https://blogs.law.columbia.edu/climatechange/2024/03/29/the-secs-final-climate-disclosure-rule-interrogating-preemption-and-coherence-with-other-domestic-regimes [https://perma.cc/23L5-RZ46].

155. *See* Hester M. Peirce, *Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors*, U.S. SEC. & EXCH. COMM'N (Mar. 6, 2024), https://www.sec.gov/newsroom/speeches-statements/peirce-statement-mandatory-climate-risk-disclosures-030624 [https://perma.cc/AS3A-SZRL] (referencing the potential preemption of California's law).

156. Erin Ryan, *Negotiating Environmental Federalism: Dynamic Federalism as a Strategy for Good Governance*, 2017 WIS. L. REV. 17, 19 [hereinafter Ryan, *Negotiating Environmental Federalism*]; *see also* Ryan, *Negotiating Federalism*, *supra* note 17, at 9 (discussing how jurisdictional overlap in environmental law leads to federalism disputes); RYAN, TUG OF WAR, *supra* note 42, at 34–68 (describing environmental federalism). Of course, there is room to debate whether either entity is correct in any particular scenario. But regardless of the correct answer (if there is one), the fact that both state and national governments believe themselves to be the proper regulator results in a high-stakes legal battle for jurisdiction.

157. Sackett v. EPA, 143 S. Ct. 1322, 1330–36 (2023) (discussing the history).

Kavanaugh countered that the federal government had long regulated waters and their adjacent wetlands.[158]

So, while environmental law has been aptly characterized as the canary in federalism's coal mine,[159] perhaps another descriptor is environmental law as the vanguard. Environmental law advocates will be the advance guard of federalism litigation, grappling with evolving views about the normative values of centralization or decentralization through preemption challenges.[160] Part II, therefore, explores the preemption doctrine and the environmental law disputes that will surely continue to present these powerful systemic questions.

II. THE ROBERTS COURT TRANSFORMS THE FEDERAL PREEMPTION POWER

Reacting to the specter of federal environmental regulation, the Court via the *West Virginia-Sackett-Loper Bright* trio creates rules of law that, taken to their logical extension, transform the federal preemption power. This has potentially far-reaching ramifications for all state-federal relationships, none more so than in the environmental arena. The sections below view the traditional operation of the preemption doctrine through the looking glass of the Roberts Court's deregulatory jurisprudence. The climate policy examples showcase the fundamental push and pull of the state-federal power balance, now complicated by the Roberts Court's besieging of federal regulatory power.

A. The *West Virginia-Sackett-Loper Bright* Trio Effects Federalism Through the Preemption Doctrine

To state what may be plain, preemption is significant to federalism because, while it is one thing for a court to concede that a federal agency is statutorily authorized to address some environmental issue, it is quite another for that court to agree that a

158. *Id.* at 1361 (Kagan, J., concurring) (quoting *id.* at 1367 (Kavanaugh, J., concurring)) (arguing that wetlands have historically been under the purview of federal regulation).

159. Ryan, *Negotiating Environmental Federalism*, *supra* note 156, at 32.

160. The precedent-setting nature of these three environmental cases will also be (and already is) reflected across legal arenas as diverse as abortion and healthcare protections, market regulation, net neutrality, and medication regulation, to name just a few with a strong federal regulatory presence. *See, e.g.*, Turčan, *supra* note 34, at 739 (describing the broad impact of the major questions doctrine in these areas).

federal law preempts state law operating in that same arena. When federal law preempts state law, it operates to the *exclusion* of a state law or otherwise restricts state law operating concurrently with federal law.[161] And when that federal law is restricting the operation of state law in an area traditionally considered the purview of the historic state police power—water pollution, air pollution, and land use, for instance—federalism questions concerning the relative balance of state and federal power are front and center.[162] Federalism and preemption are, therefore, self-referencing and reinforcing: Preemption is one vehicle through which federalism principles operate, and federalism is a guiding principle of preemption.[163] Through their collective impact on preemption, therefore, these three cases effect federalism.[164]

First, a description of how preemption traditionally operates. The preemption doctrine stands for the proposition that federal law will render null state laws or tort suits that would interfere with the operation of that federal law.[165] The doctrine derives from the Supremacy Clause of the U.S. Constitution, which declares the Constitution and federal laws "the supreme Law of the Land."[166] Federal preemption of state law may occur via statute or, most relevant here, agency regulation.[167] Courts recognize three doctrinal mechanisms through which a federal

161. *See* Turčan, *supra* note 34, at 739 (describing federal preemption).

162. *E.g.*, Sackett v. EPA, 143 S. Ct. 1322, 1341 (2023) ("Regulation of land and water use lies at the core of traditional state authority."); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960) (noting that the local air pollution ordinance designed to "free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of . . . the police power").

163. *See generally* Verchick & Mendelson, *supra* note 38, at 13 (explaining that federalism is a guiding principle in determining when federal law preempts state law); Trevor W. Morrison, *The State Attorney General and Preemption* (stating that there is a presumption against federal laws preempting state laws that is rooted in federalism), *in* PREEMPTION CHOICE, *supra* note 38, at 81, 90.

164. *See infra* Part II.C (explaining the impacts on preemption of the Supreme Court decisions in *West Virginia-Sackett-Loper Bright*).

165. State law can be preempted either by federal statute or by federal regulation. *E.g.*, Hillsborough County v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 713 (1985) ("[S]tate laws can be pre-empted by federal regulations as well as by federal statutes.").

166. U.S. CONST. art. VI, cl. 2.

167. *See Hillsborough County*, 471 U.S. at 713 (discussing preemption of state laws).

law may preempt state and local laws: express preemption, conflict preemption, and field preemption.[168]

Express preemption occurs when a federal law contains language that explicitly displaces state authority in a given area.[169] A common example is the Employee Retirement Income Security Act of 1974 (ERISA), which "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.[170] Another is the Lead-Based Paint Poisoning Prevention Act, which dictates that federal law supersedes "any and all" state laws that impose lead-paint standards that differ from federal law.[171]

Conflict and field preemption are types of implied (rather than express) preemption, which, as the moniker signals, occurs when federal law does not contain clear preemption language, but a court nevertheless *infers* preemption because of the interaction of the state and federal laws.[172]

Conflict preemption occurs when complying with both state and federal law "is a physical impossibility,"[173] or when state law "stands as an obstacle"[174] to the achievement of federal objectives. In an example from the pharmaceutical sphere, FDA regulation of generic drug label requirements preempts state tort law claims that would require corporations to change their drug labeling from that which was approved by FDA, which would otherwise make it impossible to comply with both state and federal law.[175] In an environmental law example, *Gade v. National Solid Wastes Management Ass'n*,[176] Illinois state laws providing for training, testing, and licensing of hazardous waste site workers were preempted because their distinct licensing requirements were an obstacle to accomplishing the purposes and

168. *See generally* Turčan, *supra* note 34, at 760 ("[Preemption] categories are generally divided into express preemption and implied preemption, with implied preemption sometimes further subdivided into conflict preemption and field preemption.").

169. Turčan, *supra* note 34, at 761.

170. 29 U.S.C. § 1144(a).

171. 42 U.S.C. § 4846.

172. *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992); Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 630–31 (2012).

173. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

174. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

175. PLIVA, Inc. v. Mensing, 564 U.S. 604, 624 (2011).

176. 505 U.S. 88 (1992).

objectives of the federal Occupational Safety and Health Act, under which the Secretary of Labor had promulgated detailed employee hazardous waste training regulations.[177] And in *International Paper Co. v. Ouellette*,[178] because the CWA's savings clause left room for operation of *source-state* law but otherwise intended federal law to dominate the field of water pollution, cross-boundary state suits that would impose liability under the *affected-state* law were conflict-preempted as interfering with the federal government's method of pollution control.[179]

Field preemption exists in situations where the federal interest in the subject is "so dominant" that even absent a federal rule on a particular matter, state law on that matter is preempted because the "federal system will be *assumed* to preclude enforcement of state laws on the same subject."[180] The theory is that, in a particular field, it is important to maintain a comprehensive and unified system.[181] Laws respecting employment of undocumented immigrants are one such field: One federal law made it illegal for *employers* to knowingly hire unauthorized workers but did not impose federal sanctions on unauthorized *workers* because "making criminals out of aliens engaged in unauthorized work . . . would be inconsistent with federal policy and objectives."[182] An Arizona state law that did make it a state crime for an unauthorized worker to apply for work was, therefore, precluded even in the absence of a federal law about the workers themselves.[183] While field preemption is descriptively distinct from conflict preemption, in practice, the boundary between the two is porous and, as evidenced by the CWA preemption case *Ouellette*, the two concepts often work

177. *Id.* at 92–93, 108.

178. 479 U.S. 481 (1987).

179. *Int'l Paper Co. v. Ouellette*, 479 U.S. at 491–96.

180. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983) (emphasis added); *see also* Catherine M. Sharkey, *Against Categorical Preemption: Vaccines and the Compensation Piece of the Preemption Puzzle*, 61 DEPAUL L. REV. 643, 643 (2012) [hereinafter Sharkey, *Against Categorical Preemption*] (discussing the various categories of preemption).

181. *See* Arizona v. United States, 567 U.S. 387, 401–02 (2012) (explaining that the basic premise of field preemption is that states cannot enter an area reserved for the federal government).

182. *Id.* at 404–05. The Court ultimately evaluated both field and conflict preemption. *Id.* at 400–06.

183. *Id.* at 404–07.

together to determine whether state law retains a regulatory role.[184]

Importantly, the Supreme Court has recognized a presumption against preemption when the federal government operates in fields of law that are traditionally occupied by the states.[185] This presumption is premised on the understanding that although federal authority is supreme, it is also limited in scope by the Tenth Amendment, which reserves to the states, or the people, all powers not delegated to the United States.[186] Accordingly, "'[t]he exercise of federal supremacy is not lightly to be presumed," and Congress "should manifest its intention [to preempt state and local laws] clearly."[187] To discern congressional intent, a court will look to the language of the statute, the structure and purpose of the statute, and the court's "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."[188] Congress's intent is, therefore, the "ultimate touchstone" of a court's preemption inquiry.[189]

The presumption operates most strongly when the federal government looks to regulate in fields of law that were

184. *See* Turčan, *supra* note 34, at 760–64; *Ouellette*, 479 U.S. at 491–96 (evaluating both conflict and field preemption principles to distinguish between affected state and source state lawsuits). *See generally* Robin Kundis Craig, *Constitutional Environmental Law, or, the Constitutional Consequences of Insisting that the Environment Is Everybody's Business*, 49 ENV'T L. 703, 714 (2019) (describing implied preemption in the environmental law field).

185. *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009) (discussing the Court's guidelines based on its "pre-emption jurisprudence").

186. U.S. CONST. amend. X. The presumption would not apply, then, when a state regulates in an area where there has been a history of significant federal presence. United States v. Locke, 529 U.S. 89, 108 (2000) (regarding maritime tanker requirements following oil spill).

187. N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (citation omitted); *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (explaining that the court begins with a presumption that the state power is not to be preempted by a federal act unless it is clearly the intent of Congress); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

188. *Lohr*, 518 U.S. at 486.

189. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001).

traditionally the purview of the states.[190] The "historic police powers" of the states are assumed protected from preemption absent "clear and manifest purpose" of Congress.[191] A presumption against preemption, the Court repeatedly asserted, promotes respect for federalism and state sovereignty.[192] The principles underlying the presumption against preemption should sound familiar—they track the clear statement rules of *West Virginia* and *Sackett*, and they focus on congressional intent as expressed in statute in the manner of *Loper Bright*.[193] The trio, therefore, impacts the preemption doctrine most directly when it is operating via agency preemption, discussed below.

B. THE *WEST VIRGINIA*-*SACKETT*-*LOPER BRIGHT* TRIO DIMINISHES AGENCY PREEMPTION

The theories underlying *West Virginia*, *Sackett*, and *Loper Bright* diminish the preemption doctrine by calling into question the very viability of implied agency preemption. The Roberts Court's precedents thereby impact any number of matters over which the federal government may seek to displace state authority via federal regulation even in the absence of explicitly preemptive statutory language.

The clear statement rules of *West Virginia* and *Sackett* both require exceedingly clear statements of intent from Congress to do precisely what preemption would do: Displace or otherwise alter the role of the states. This is because the same scenario that would trigger the presumption against preemption—fields of law that are traditionally occupied by the states—also triggers these clear statement rules.[194] Applying the rationale behind *West Virginia*'s major questions doctrine, it may be that *all* preemption cases involving fields traditionally regulated by the states are of economic and political significance and are,

190. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1946) (applying the presumption when Congress legislated in a field of law traditionally occupied by the states).

191. *Id.*

192. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part and dissenting in part) (explaining the principles of federalism and state sovereignty underlie the presumption against preemption).

193. *See infra* Part II.B.

194. *See supra* Part I.A.

therefore, major questions cases.[195] If a case presents a major question, an agency must point to an explicit delegation of "clear congressional authorization" for the authority it claims.[196] And according to the rationale behind *Sackett*'s traditional state authority rule, Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power" such as the "[r]egulation of land and water use."[197]

The anti-deference of *Loper Bright* warrants special consideration in these scenarios where the purportedly preemptive federal law comes in the form of agency action.[198] Under the former *Chevron* framework respecting judicial deference to an agency's interpretation of its statutory authority, agency efforts to preempt state law would be granted certain leeway even in the absence of clear preemption language in the statute.[199] This might have taken place in two ways. One, a court might have deferred to an agency's interpretation of the *substantive* legal meaning of its statutory authority—in other words, what the agency understood its authority to be under statute.[200] That substantive interpretation would then impact a subsequent preemption analysis. Two, and the separate question, a court might have deferred to any agency's understanding of whether its regulations had preemptive effect.[201] During the *Chevron* era, the various doctrines pointed in opposed directions, with the presumption against preemption counseling against preemption in areas of law historically regulated by the states but agency

195. *See* West Virginia v. EPA, 142 S. Ct. 2987, 2608–12 (2022) (stating that extraordinary cases provide a reason to consider whether Congress intended to grant such power to the agency); Turčan, *supra* note 34, at 748–49 (describing the potential triggers for the major questions doctrine).

196. *West Virginia*, 142 S. Ct. at 2609.

197. Sackett v. EPA, 143 S. Ct. 1322, 1341 (2023).

198. *See, e.g.*, Hillsborough County v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 713 (stating that state law can be preempted by federal regulations and statutes).

199. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

200. *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 744 (1996) (giving deference to an agency's interpretation of a statute's meaning).

201. *See id*.

deference doctrines pushing toward preemption.[202] Federal agencies would previously interpret their broad statutory authority to impliedly authorize them to preempt state law via regulation, and sometimes the courts would defer and agree.[203] Now, the anti-deference of *Loper Bright* would seem to have the upper hand and, if courts will no longer look to an agency's understanding of its own preemptive authority in the absence of express preemptive language, resolve this tension in favor of the states.[204]

Any amount of deference to an agency's interpretation of preemptive effect—in the place of Congress's expressed intent—has always been in tension with both the presumption against preemption and the Court's admonishment that preemption should turn on clear congressional intent. There has long been a disconnect in preemption jurisprudence between the strong pronouncements from *Gregory v. Ashcroft* and its ilk that "if Congress intends to alter the 'usual constitutional balance between the states and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'"[205] and the reality that for implied preemption scenarios this "unmistakably clear" intent was paradoxically inferred by courts.[206] This clear-intent-through-inference paradox may be why courts' application of the presumption has been sporadic over the years, sometimes beginning their preemption assessment by intoning the presumption's language, while others not mentioning the presumption at all.[207]

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202. *See* Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705, 1725–26 (2016) [hereinafter Sharkey, *The Administrative State*] (explaining that the presumption against preemption may indicate that areas historically regulated by states should not be preempted by federal law, while theories of agency deference indicate that a court should defer to an agency's interpretation that its regulation preempts state law).

203. *See supra* Part I.A.

204. *See supra* Part II.A.

205. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

206. *See* Sharkey, *Against Categorical Preemption*, *supra* note 180, at 643–44 (describing the tensions inherent in preemption doctrine). Or based on pronouncements from the executive branch. *Id.*

207. *See* Adelman & Engel, *supra* note 7, at 1834 (stating that assertions of federal preemption should be used sparingly); Strickland, *supra* note 113, at 1188 ("Regardless of whether we can pinpoint the exact cause, there is no question that the presumption against preemption has weakened considerably, if

In recognition of this fundamental paradox, some previously called for courts to convert the presumption itself into a clear statement rule that would essentially mandate state laws survive preemption challenges unless the statute included express preemption language.[208] Others have objected to the doctrinal difficulty that would accompany treating the presumption as a clear statement rule on the theory that these rules turn on, among other things, the subject matter at issue in the case, a standard that is potentially subjective and unworkable.[209] It may be impracticable to expect courts to identify the core or historic reach of state interests that trigger clear statement rules.[210] Regardless of the normative debate, by its very definition, implied agency preemption appears inconsistent with the Roberts Court's current approach to environmental federalism.[211]

Perhaps the *West Virginia* and *Sackett* clear statement rules are best understood as operating in lieu of the presumption. They impose a heightened obligation on Congress in certain circumstances, by which courts may sidestep the implied preemption paradox altogether without engaging with the complicated constitutional considerations posed by the Tenth Amendment versus the Supremacy Clause. The rules, as critics charge against all judicially imposed clear statement rules, serve as a

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not disappeared entirely."); *see also* Mary J. Davis, *The "New" Presumption Against Preemption*, 61 HASTINGS L.J. 1217, 1217 (2010) (observing a change in the presumption against preemption in recent court decisions); Sharkey, *Against Categorical Preemption*, *supra* note 180, at 643 (explaining that the scope of intended preemption is not always clear even when Congress expressly includes a provision for preemption in the statute).

208. *See* Adelman & Engel, *supra* note 7, at 1834 (arguing judges should follow a "clear statement" rule, only allowing federal preemption of a state law if there is an express preemption provision or direct conflict between the two). The approach may alter depending on whether the preemptive federal law creates a ceiling or a floor. *Id.* at 1835–36; Strickland, *supra* note 113, at 1191 (discussing methods for reviving the presumption). For those who believe that environmental aims are best achieved via a combination of state and federal efforts, this had appeal. Adelman & Engel, *supra* note 7, at 1834. For those who think a weakened federal regulatory state results in an anti-environmental policy "race to the bottom," less so. Buzbee, *Interaction's Promise*, *supra* note 47, at 152 n.16 (discussing debates regarding regulatory floors).

209. *See* Morrison, *supra* note 163, at 90–92 (arguing that a rule structured around substantive triggers, particularly around identifying the historic function of state governments, is unworkable).

210. *Id*.

211. *See supra* Part II.A (defining implied preemption).

"backdoor version of constitutional activism."[212] Implied preemption theories would effectively be eliminated without requiring the Court to engage in the tricky analysis of whether the presumption itself is a clear statement rule; when triggered, the *West Virginia* and *Sackett* rules accomplish the same result—no preemption.[213]

Loper Bright reinforces this heightened clear statement rule for agency preemption. True, properly promulgated agency regulations are federal law and would preempt inconsistent state law; but that assumes the regulations are valid in the first instance—an assumption that is now questionable if Congress did not expressly authorize the agency to promulgate the type of regulations that would preempt state law.[214] Nor does the agency any longer receive deference about the governing statute's

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212. Bradford R. Clark, *Process-Based Preemption* (quoting William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 3 VAND. L. REV. 45 (1992)), *in* PREEMPTION CHOICE, *supra* note 38, at 192, 193.

213. Conflict preemption appears at first glance to be on stronger footing with both the presumption against preemption and the reasoning of *West Virginia* and *Sackett* than does field preemption. Conflict preemption is a form of implied preemption, insofar as it is triggered by an actual conflict between state and federal law in practice rather than by certain language in federal statute. *See supra* Part II.A. But unlike field preemption, resolving an actual impossibility conflict in favor of the federal government is demanded by the Supremacy Clause, not a mere canon of statutory construction. This is why "since . . . *McCulloch v. Maryland* . . . it has been settled that state law that conflicts with federal law is 'without effect." Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992). *See generally* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 342–47 (1997) (discussing the nuances of conflict preemption).

But not so fast. Conflict preemption is more complex in practice than in theory, for at least two reasons. First, as demonstrated by the Court's evaluation of conflict preemption under the CWA in *Ouellette*, the distinction between field preemption and conflict preemption is porous, and court rulings often come down to a fusion of the two. *See supra* note 184 and accompanying text. In the absence of explicit congressional intent to preempt, courts are left to infer the extent of supposed conflict based on the scope of a regulatory framework (which may or may not have been explicitly instructed by Congress). *See* Sharkey, *Against Categorical Preemption*, *supra* note 180, at 643–44 (explaining that courts must often make inferences about the intended scope of preemption). Second, and reinforcing the challenge of the first, a court's conclusion about whether there is an actual conflict between state and federal law frequently comes down to a subjective framing of the matter before the Court. *See infra* Part II.C (describing the differing narratives in *Virginia Uranium*).

214. *See supra* Part I (explaining the Supreme Court decision in *Loper Bright*).

preemptive intent.[215] The earlier disagreement "over who should have primary authority to interpret the preemptive scope of agency rules or the statutes agencies are charged with implementing"[216] is now resolved to the benefit of the court.

Previously, in the absence of explicit congressional intent to preempt, courts might have looked to agencies' understanding, including to agencies' assertion of preemption power in their regulations' preamble statements.[217] The preamble preemption debate often focused on whether courts should afford *Chevron* deference, or the less-deferential *Skidmore* weight, or no deference at all to an agency's decision about the scope of its preemption authority in the absence of clear congressional guidance.[218]

The legal framework has changed. Implied preemption via agency regulation is suspect, if not outright incompatible, with the reasoning of *West Virginia*, *Sackett*, and *Loper Bright*. One, because clear statement rules require a clear expression of intent from Congress (not an agency) that an area traditionally regulated by the states is now preempted. Two, because any uncertainty regarding preemption would not weigh in favor of agency preemption under *Loper Bright*, but against. After all, the *Loper Bright* majority rejected a presumption that "statutory ambiguities are implicit delegations to agencies."[219] Under this

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215. *See supra* Part I.

216. Metzger, *supra* note 31, at 2069.

217. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f 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."), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

218. *See* Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 243 (2007) (describing controversy over how much weight to afford agency interpretation); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 698 (2008) (arguing that agencies should not receive a presumption of deference under *Chevron*, but should be given limited deference through an approach such as *Skidmore*); Metzger, *supra* note 31, at 2069 (explaining disagreement over what deference an agency interpretation of its preemptive scope should be given); William W. Buzbee, *Introduction* (describing different arguments about agency deference), *in* PREEMPTION CHOICE, *supra* note 38, at 1, 7–8. The practice had progressed to such a point that in 2009, President Obama issued an Executive Memorandum outlining his Administration's policy on when preemption by preamble would be appropriate. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693 (May 22, 2009).

219. *Loper Bright*, 144 S. Ct. at 2265.

reasoning, while federal regulations are law, insofar as a litigant would challenge an agency's authority to pass a robust regulatory scheme in the first instance, federal regulations may go no further than Congress intended. An agency is no longer permitted to interpret statutes as implicitly delegating preemptive authority to the agency.[220] And insofar as *Loper Bright* then leaves it to courts, rather than agencies, to decide questions of implied preemption, the clear statement rules of *West Virginia* and *Sackett* suggest courts should not find implicit delegation either. To do so, under the premise of these rules, would infer more from the statute than Congress wrote. In effect, what exists is a heightened double presumption: A presumption against preemption plus a presumption against *agency* preemption.[221] Whatever the terminology, previous scholarship on whether there should be a special clear statement or federalism-inspired rule in the preemption context seems overtaken by recent events.[222] The answer is already here in the combined effect of *West Virginia*, *Sackett*, and *Loper Bright*.

* * *

The changes to preemption doctrine wrought by *West Virginia*, *Sackett*, and *Loper Bright* are cumulative and reinforcing. To showcase the extent of the change, contrast the Court's 1982 summation (in the context of upholding the Federal Home Loan Bank Board's regulation of mortgage laws) of how a federal agency may preempt state law through regulatory preamble:

> Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited:
>
> "If his choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

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220. *See id.* at 2273 (overturning *Chevron*).

221. This phrasing has been employed before and carries even more meaning now. *See, e.g.*, Mendelson, *supra* note 218, at 699 (suggesting courts apply both a presumption against preemption and a presumption against agency preemption).

222. *See, e.g.*, Metzger, *supra* note 31, at 2069–72 (discussing agency preemption).

> A pre-emptive regulation's force does not depend on express congressional authorization to displace state law . . . . Thus, the Court of Appeal's narrow focus on Congress' intent to supersede state law was misdirected. Rather, the questions upon which resolution of this case rests are whether the Board meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority.[223]

Not a single sentence quoted above escapes the jurisprudential whammy that is the *West Virginia-Sackett-Loper Bright* trio.

In the first paragraph, in the post-*Loper Bright* world, the preemptive effect of federal regulations is judicially suspect if Congress passed ambiguous or broad statutory language leaving it to an agency to decide, in its discretion, whether it was authorized to pass laws that have preemptive effect. The Court is no longer so self-limiting of its ability to disturb an agency's own understanding of its statutory authority. In the second paragraph, *West Virginia*, *Sackett*, and *Loper Bright* effectively require the very same narrow focus on Congress's intent that this earlier opinion calls miscalculated. Whether an *agency* thinks it was authorized to preempt state law is now entitled to no deference, and it is certainly not the *agency's* intent upon which a preemption case rests.[224] The Court's starting point is now the inverse of what it once was.

C. WHO'S AFRAID OF THE BOGEYMAN? CLIMATE POLICY REVISITED

This Article argues that the Roberts Court's jurisprudence has wielded federalism and separation of powers principles in a way that restricts federal authority to address pressing environmental concerns and, by extension, recalibrates the relative roles of the state and federal governments through the preemption doctrine.

At this early stage, the malleable nature of these doctrines means it is premature to draw definitive conclusions about how particular preemption cases will play out. What scholars and litigants can do is make educated guesses about the relative risks associated with aggressive state or federal environmental policy

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223. Fid. Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153–54 (1982) (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)) (citations omitted).

224. *See generally* Metzger, *supra* note 31 (discussing the "relationship between federalism and administrative law" in a post-*Chevron* landscape).

and project how the Roberts Court might resolve resulting preemption disputes on a case-by-case basis. This is not to say every state and federal effort will be in conflict; some environmental efforts are based on coordination between both governments and will remain that way. Environmental federalism is not always a zero-sum game between the federal and state governments.[225] But sometimes, the federal and state governments are in opposition, and sometimes the federal government fails to act or obstructs where states would like to act. It is these federal-state conflicts that expose the true question: Is this really about the Court protecting structural separation of powers and federalism, or is this about the Court reducing environmental regulatory burdens on industry? If it is the latter, then surely that is a policy question, not a legal question for the Court to dictate.

With this new view of preemption, a national centralized approach to climate policy, as discussed in Part I.C, faces at least two problems. One, the Supreme Court now expects exceedingly specific instruction from Congress when it speaks its policy directives. This is a high bar, one that the current sclerotic Congress is unlikely to surmount.[226] And so it is doubtful that Congress will step into the climate change litigation fray in a way that obviates the numerous pending state-court cases or state regulatory proposals. Two, in the absence of such explicit language from Congress, it is equally unlikely that federal agencies themselves will feel emboldened to outright resolve the issue simply by releasing regulations with preamble language claiming to preempt those types of state-law lawsuits or greenhouse gas emission disclosure regulations.

Momentum for climate action is, therefore, toward a decentralized approach driven by state and local governments and common law litigants. For those who seek to halt climate action, implied preemption is likely their best chance—but this theory is now hampered by the clear statement rules and loss of *Chevron* deference.[227] Advocates of a centralized, preemptive federal

225. *See generally* Ryan, *Negotiating Environmental Federalism*, *supra* note 156, at 37 (offering a critique of attitudes that federalism is a "zero-sum game").

226. Interview with David L. Callies, Professor of L. Emeritus, Univ. of Haw. William S. Richardson Sch. of L., in Honolulu, Haw. (Nov. 20, 2023); *see* Ryan, *Protecting American Waterways*, *supra* note 8, at 309 (describing the Court's expectation that Congress give clear statements).

227. *See supra* Part II.B (discussing the clear statement rules of *West Virginia* and *Sackett* and the anti-deference of *Loper-Bright*).

presence will, in all likelihood, continue to include the energy corporations who, as described above, typically advance a strategy to receive the benefit of preemption principles to quash state-law-based climate suits or regulations.

To reiterate the basic conflict: The CAA does not expressly preempt state laws or tort suits concerning greenhouse gas emissions, and in fact includes a savings clause for state law.[228] Nevertheless, the regulated industry argues that greenhouse gas emission policies implicate such overriding federal concerns that state-law-based policies and tort suits are inappropriate and preempted.[229] Environmental advocates, frustrated by a perceived lack of adequate action at the federal level, push for aggressive climate change action in the state and local governments and in the state courts.[230]

Considering the high stakes for both sides and the sheer volume of cases pending around the country, it is likely that energy corporations and government regulators will continue pressing the Court to resolve these fundamental jurisdictional questions. The lawsuits would serve as a bellwether for the Court's current approach to environmental federalism and preemption issues. For instance, should the Court agree to take up a *Sunoco*-esque climate lawsuit, it would need to resolve the jurisdictional dispute about whether to frame the case as either a predominantly federal interest in transboundary pollutants or a predominantly state interest, and whether the federal agency's regulation of air emissions impliedly preempts these common law suits.[231] Likewise, should it eventually take up a challenge to SEC's (or similar agency's) authority to require greenhouse gas emissions

228. *See supra* notes 134–35 and accompanying text.

229. *See supra* note 135 and accompanying text (explaining the argument presented by the energy company in *City of Honolulu v. Sunoco LP*).

230. *See supra* Part I.C (describing the high volume of lawsuits at the state and local level against oil and gas companies).

231. *See supra* Part I.C (explaining the *Sunoco* case). There are other significant climate cases that do not directly pose the same preemption defense. For example, two cases—*Held v. Montana* and *Navahine v. Department of Transportation*—were filed by state residents under their respective state constitutions against state actors, alleging that the states failed to uphold their rights to clean and healthful environment. The Hawai'i suit settled in June 2024. *See* Joint Stipulation & Order Re: Settlement at 1, Navahine v. Dep't of Transp., No. 1CCV-22-0000631 (1st Cir. June 20, 2024). The Montana case is pending before that state's supreme court. *See generally* State of Montana's Notice of Appeal at 1, Held v. State, No. DA 23-0575 (Mont. Sept. 29, 2023).

disclosures, it would need to decide first the federal agency's substantive statutory authority to require those disclosures and then the scope of the regulation's preemptive effect on state disclosure laws like California's in the absence of clear preemption language from Congress.[232] When these conflicts inevitably are squarely presented to the Court, the trends in *West Virginia*, *Sackett*, and *Loper Bright* suggest the Court should let the state law proceed. The opposite outcome may suggest the pro-federalism, pro-separation-of-powers concerns were merely opportunistic.[233]

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232. *See supra* Part I.C (describing litigation regarding SEC's statutory authority and its preemptive effect).

233. There are many facets to the jurisprudential dynamic emerging from this trio of cases, of which preemption is a significant, yet single, part. One other potentially complicating factor is the Dormant Commerce Clause. There are, after all, three constitutional forces that define the federalism border for state law: the Tenth Amendment's protection of state sovereignty, the Supremacy Clause's displacement of state law that would interfere with federal law, and the Dormant Commerce Clause doctrine. *See generally* Lazarus & Slottje, *supra* note 55, at 29–30 (describing the Dormant Commerce Clause as one of the areas of law defining federalism's borders). That doctrine remains unsettled, with the most recent substantial ruling on its scope producing four separate writings; this doctrine could yet present a separate constitutional value which a court might use to strike state policies down. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1143 (2023). Other considerations include potentially competing judicial values with respect to industry-burdensome tort suits, judicial preferences in favor of individual liberty, and a more robust version of the constitutional nondelegation doctrine. *See* Rachel Rothschild, *Why the Supreme Court Avoided Using Traditional Interpretation in* West Virginia v. EPA, YALE J. ON 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/ [https://perma.cc/W7G7-AT7W] (discussing judicial reluctance to revive federal nuisance lawsuits); Amanda Shanor, *The Tragedy of Democratic Constitutionalism*, 68 UCLA L. REV. 1302, 1338–43 (2022) (describing the inclination of some jurists to "practically constrict the scope of the state . . . in favor of individual liberty"). *See generally* Galperin, *supra* note 8 (discussing a robust version of the nondelegation doctrine that would limit authority across the board). Should the Court invalidate state-led climate efforts under these or other theories, no doubt subsequent discussions will turn to whether the Court's environmental federalism concerns were opportunistic. *See, e.g.*, Ryan, *Negotiating Federalism*, *supra* note 17, at 36 (describing state-led climate efforts under the NPDES program). Or, perhaps, simply overtaken by countervailing constitutional interests.

There is no prior Roberts Court opinion[234] directly addressing preemption in the context of state-based greenhouse gas emission policies, but a preemption case arising out of another environmental scenario may offer some insight into how the Justices may approach this question—the 2019 case *Virginia Uranium, Inc. v. Warren*.[235] All of the Justices in the *West Virginia*, *Sackett*, and *Loper Bright* majorities, with the exception of Justice Barrett (who had not yet joined the Court), voted in *Virginia Uranium*.[236] In this case, a corporation wished to mine uranium ore, but Virginia state law prohibited uranium mining entirely.[237] The mining company challenged the Virginia law on the basis that the state law was preempted by the Atomic Energy Act (AEA) and only the federal Nuclear Regulatory Commission could regulate the field of uranium mining.[238] So, just like the climate cases discussed above, in *Virginia Uranium* it was state law imposing the regulatory burden and industry seeking to federalize the dispute to avoid state law restrictions.[239]

Justice Gorsuch wrote for the Court that Virginia's law was *not* preempted (meaning, Virginia could ban mining), but the three-three-three vote split did not yield a majority rationale for the ultimate outcome.[240] Justices Ginsburg, Sotomayor, and Kagan agreed with Justices Thomas, Gorsuch, and Kavanaugh that the Virginia law was not preempted (thus giving a majority to

234. Since *AEP*, consensus in the lower courts has been that state law plaintiffs can bring torts suits against oil and gas corporations so long as the lawsuits challenge in-state source conduct, thus avoiding the transboundary conundrum the Court addressed in the water pollution case *Ouellette*. *See* Bell v. Cheswick Generating Station, 734 F.3d 188, 196 (3d Cir. 2013) (on a motion to dismiss) (collecting cases from the Fourth and Sixth Circuits); Little v. Louisville Gas & Elec. Co., 805 F.3d 695, 698 (6th Cir. 2015) (holding the plaintiff's state common law claims are not preempted by the CAA); Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685, 695 (6th Cir. 2015) (same); *see In re* Volkswagen, 959 F.3d 1201, 1226 (9th Cir. 2020) (holding that state causes of action are not preempted just because they impose greater liability than might have been awarded under federal law).

235. 139 S. Ct. 1894 (2019).

236. *Id.* at 1900.

237. *Id.* at 1900–01 ("State law flatly prohibits uranium mining in Virginia.").

238. *Id.* at 1901.

239. *See id.* ("[Virginia Uranium] alleged that . . . the AEA preempts state uranium mining laws like Virginia's and ensconces the NRC as the lone regulator in the field.").

240. *See id.* at 1900.

the judgment) but did not join the portions of Justice Gorsuch's opinion that questioned the viability of implied preemption.[241]

Justice Gorsuch, with Justices Thomas and Kavanaugh joining, wrote critically of implied preemption as a method of discerning congressional intent: "Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law."[242] The anti-preemption aspects of his *Virginia Uranium* opinion align with the tone and tenor of the *West Virginia*, *Sackett*, and *Loper Bright* opinions Justice Gorsuch penned or joined several years later. "The preemption of state laws represents 'a serious intrusion into state sovereignty,'" he wrote in *Virginia Uranium*, and assuming preemption "would also represent a significant judicial intrusion into Congress's authority to delimit the preemptive effect of its laws."[243] This rationale is consistent with the constitutional grounding he finds for the major questions doctrine in his *West Virginia* concurrence,[244] the majority and concurring opinions preserving state authority over waterways he joined in *Sackett*,[245] and the general disdain for agency deference in the *Loper Bright* majority opinion.[246] The reasoning of Justice Gorsuch's *Virginia Uranium* opinion reflects that of a clear statement rule, without referencing one by name.[247] This plurality, therefore, declined to find conflict preemption as to *mining* when the statute

241. *Id.* at 1909 (Ginsburg, J., concurring).

242. *Id.* at 1901 (Gorsuch, J.).

243. *Id.* at 1904–05.

244. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2621 (2022) (Gorsuch, J., concurring) ("When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States.").

245. *See* Sackett v. EPA, 143 S. Ct. 1322, 1341 (2023) ("[T]his 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. Regulation of land and water use lies at the core of traditional state authority." (internal quotation marks omitted) (citations omitted)); *id.* at 1346 (Thomas, J., concurring) (noting that the federal authority over navigable waters under the Commerce Clause "does not displace States' traditional sovereignty over their waters").

246. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 ("[A]gencies have no special competence in resolving statutory ambiguities.").

247. *See Va. Uranium*, 139 S. Ct. at 1900.

specifically addressed *other* conduct, such as milling, transfer, use, and disposal of uranium, but not mining.[248]

Chief Justice Roberts, joined by Justices Breyer and Alito, dissented, principally on the basis that he would frame the question differently.[249] No one disputed that the field of uranium mining itself was not preempted under the Act, he argued, and instead the real question was whether a state can regulate an un-preempted field (mining) as an indirect means of regulating other fields that federal law does preempt (such as milling, transfer, use, and disposal of uranium).[250] In his view, because the state law had the effect of regulating preempted fields even though the state law was specifically aimed at separate un-preempted conduct, the AEA prohibited the state law too.[251] The preemption issue thus turned on whether one looked holistically at the federal law or instead parsed the statute to find the precise matter at issue. There is a tension, however, in how accommodating the Roberts opinion is of broad federal regulation in *Virginia Uranium* in comparison to his critical treatment of the broad federal regulations under the CAA and the CWA of *West Virginia* and *Sackett*. Perhaps their differing opinion outcomes reflect the *Virginia Uranium* dissent's evolution of thinking about the separation of powers and federalism in the context of administrative regulation. Or perhaps the unifying rationale in the Roberts-Alito cohort is a pro-industry outcome in all four cases. There is much wiggle room in the doctrine to accommodate disparate framing of the underlying disputes. And context-specific malleability is one of the defining characteristics of the major questions doctrine, as announced by Chief Justice Robert's majority in *West Virginia*; perhaps that scalpel-like application of doctrines to specific disputes will continue.

The three-three-three split in *Virginia Uranium* represents the uncertainty of preemption outcomes within the framework of the new regulatory reality under the Roberts Court. It is unclear, for instance, whether the center of gravity on the Court lies with Justice Gorsuch's stricter application of preemption or with Chief Justice Roberts' more flexible approach. At a practical

248. *Id.* (recognizing that the Court must respect what Congress chose not to include to regulate).

249. *Id.* at 1916–20 (Roberts, C.J., dissenting).

250. *Id.* at 1916.

251. *Id.*

level, the likely short-term result is confusion and jockeying by state and federal litigants. But perhaps the upheaval "is both a burden and an opportunity."[252] Federal regulators may strive to surmount the judicial barriers to policymaking the Roberts Court creates, with a recalibrated understanding of the legal risk those policies may face. Meanwhile, state climate advocates may avail themselves of the regulatory gap, especially if they can characterize their actions as grounded in traditional areas of state law. Advocates and policymakers operating under state or federal law, even if cooperatively, need to know where the jurisdictional lines fall; this trio of environmental cases destabilizes and blurs those lines. What *is* clear is that, at least at the federal level, neither the legislative nor the executive branch is likely to have the final say. The imperial Supreme Court now looms above them.

CONCLUSION

West Virginia, *Sackett*, and *Loper Bright* present fundamental questions of governance. By wielding the complementary strategies of separation of powers and federalism to curtail federal regulatory power, the Roberts Court has not only recalibrated rulemaking power at the federal level but diminished the federal preemption power over state law. Congress and federal agencies have been placed in an impracticable situation—in order for agency delegations to pass muster with this Court and, moreover, have preemptive effect, Congress must anticipate with heightened specificity future applications of its policies and the types of state laws that these policies might displace. The Roberts Court has transformed itself into the policy branches' own bogeyman.

In so doing, however, the Court may have backed itself into a corner. By embracing aggressive separation of powers and federalism rationales in this trio of cases, the Court created room for regulatory action at the state level to flourish. Environmental preemption cases will inevitably make their way to the Court, and thereby test the internal coherency of the Court's jurisprudence. The Court could allow state-driven environmental

252. Andrew C. Mergen & Sommer H. Engels, *The World Goes On: What's Next for the Agencies*, YALE J. ON REGUL.: NOTICE & COMMENT (July 12, 2024), https://www.yalejreg.com/nc/the-world-goes-on-whats-next-for-the-agencies-by-andrew-c-mergen-sommer-h-engles/ [https://perma.cc/W7G7-AT7W].

regulation to prevail in the face of a diminished federal agency preemption power. Or, the Court's federalism and separation of powers rationales could simply be opportunistic justifications for anti-regulatory priorities. Time will tell, and, for now, litigants will have to guess. But environmental policy is not the Court's to decide, no matter how well that policy is dressed in legal doctrine.

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