Supreme Court Update
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The Supreme Court decided four major cases relevant to environmental law during its October 2023 term, and they all came out at the very end of the term in June 2024. *Loper Bright Enterprises v. Raimondo*; *Corner Post, Inc. v. Board of Governors*; *SEC v. Jarkesy*; *Ohio v. EPA*. Only one of the cases (*Ohio v. EPA*) involved an environmental statute, but the other three may have important implications for environmental litigation involving the Environmental Protection Agency (EPA). Closer analysis, however, suggests that they may not prove as disruptive of environmental law as early reports in the media suggest. What can be said with some confidence is that all four cases are part of a recent tendency of the Supreme Court to arrogate power to itself and the lower courts at the expense of Congress and the Executive Branch.

Loper Bright Enterprises v. Raimondo.

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, a case that for four decades had provided the formula for judicial review of agency interpretations of their authorizing statutes.[1] Under the *Chevron* doctrine, reviewing courts employed a two-step process in reviewing agency interpretations of their statutes. At Step One, a reviewing court employed traditional tools of statutory construction to ascertain "whether Congress ha[d] directly spoken to the precise question at issue" in the agency's authorizing statute.[2] If so, and "the intent of Congress [was] clear, that [was] the end of the matter." Both the court and the agency were bound by the unambiguous language of the statute as interpreted by the court. If the statute was silent or ambiguous and Congress had not directly addressed the issue before the court, the court did not "simply impose its own construction on the statute," but instead proceeded to Step Two.[3] The court at Step Two determined whether the agency's interpretation of the statute was "permissible," which is to say "reasonable," even if the agency's interpretation was not "the reading the court would have reached if the questions initially had arisen in a judicial proceeding."[4]

Loper Bright and its companion case, *Relentless v. Dept. of Commerce*, involved challenges by companies operating offshore fishing vessels in the Atlantic to a regulation promulgated by the National Marine Fisheries Service (NMFS) requiring the companies to pay for government-certified private observers to be on their vessels "for the purpose of collecting data necessary for the conservation and management of the fishery."[5] Despite their David versus Goliath framing, both cases were underwritten by the Cause of Action Institute and the New Civil Liberties Alliance,

[1] 467 U.S. 837 (1984).
[2] 467 U.S., at 842.
[3] 467 U.S., at 843.
[4] 467 U.S., at 843.
[5] 16 U.S.C. § 1853(b)(8).

both of which had received millions of dollars in funding from the Koch network and other conservative funders.[6]

The companies argued that the Magnuson-Stevens Fishery Conservation and Management Act did not authorize NMFS to impose an assessment to support observers on their vessels. Applying the *Chevron* doctrine to the agency's interpretation of the statute, the district court held that the statute did authorize that requirement, and the D.C. Circuit affirmed.[7]

The Roberts Majority Opinion.

In an opinion written by Chief Justice Roberts and joined by the five other Republican-appointed members of the Court, the Court held that Chevron was wrongly decided. The majority opinion began with a brief historical look at the Supreme Court's pre-New Deal approach to statutory interpretation in cases involving administrative agencies, going all the way back to *Marbury v. Madison*.[8] Chief Justice Roberts concluded that the Court had historically not been especially deferential to agencies' interpretations of their authorizing statutes, but had on occasion acknowledged its "great respect" for an agency's contemporaneous interpretation of a "doubtful or ambiguous law."[9] With two rather glaring exceptions that the majority was at pains to distinguish, the Court had adhered to the same approach during the New Deal.[10]

The majority concluded that Congress codified that nondeferential approach in section 706 of the Administrative Procedure Act (APA), which provides that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[11] It goes on to require reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law."[12] The majority read these words to assign exclusively to the courts the task of interpreting statutes authorizing agency action.[13] The majority located statements in the APA's legislative history and language in contemporaneous law review articles to support that conclusion.[14] It recognized that Congress could assign the task of interpreting statutory language to agencies, but when Congress had not expressly done so, "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA."[15]

The Court rejected *Chevron*'s conclusion that statutory silence or ambiguity represents an implicit delegation of authority to the agency to determine the statute's meaning. Quoting Professor Cass

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[6] Ann E. Marimow & Justin Jouvenal, Supreme Court Curbs Federal Agency Power, Overturning Chevron Precedent, Washington Post, June 28, 2024.
[7] Loper Bright Enterprises v. Raimondo, Slip Opinion, at 5.
[8] 1 Cranch 137 (1803).
[9] Loper Bright Enterprises v. Raimondo, Slip Opinion, at 8 (quoting Edwards' Lessee v. Darby, 12 Wheat 206 (1827)).
[10] Id., at 9-12.
[11] 5 U.S.C. § 706.
[12] 5 U.S.C. § 706(2)(A).
[13] Loper Bright Enterprises v. Raimondo, June 28, 2024, Slip Opinion, at 14-15.
[14] Id., at 15-16.
[15] Id., at 18.

Sunstein, the majority observed that "[a]n ambiguity is simply not a delegation of law-interpreting power."[16]

Instead of determining whether the agency's resolution of statutory ambiguity is "permissible," it was the role of reviewing courts to come up with the "best" reading of the statute "after applying all relevant interpretive tools."[17] The majority reasoned that "agencies have no special competence in resolving statutory ambiguities," and "[c]ourts do." Indeed, "[t]he very point of the traditional tools of statutory construction – the tools courts use every day – is to resolve statutory ambiguities." And [t]hat is no less true when the ambiguity is about the scope of an agency's own power – perhaps the occasion on which abdication in favor of the agency is *least* appropriate."[18]

To the argument that agencies acquire expertise in the often highly technical subject matters addressed by their authorizing statutes, the majority concluded that "even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency." That is because "Congress expects courts to handle technical statutory questions" with the assistance of briefs from the parties and amici.[19] And the court may always consider the agency's opinion as one of the factors that goes into the court's interpretation. The hubris in this assessment of the capacities of lawyers appointed to courts is apparent in Justice Kagen's dissent: "Score one for self-confidence; maybe not so high for self-reflection or -knowledge."[20] In her considered assessment, "[t]he idea that courts have 'special competence' in deciding such questions whereas agencies have 'no[ne]' is, if I may say, malarkey."[21]

The majority also rejected the argument that interpreting ambiguous statutory language can involve a heavy dose of policymaking. Its naïve response was to draw a sharp distinction between policymaking, which was the province of the legislative and executive branches, and legal interpretation, which was to be accomplished by judges "with '[c]lear heads . . . and honest hearts' . . . free from the influence of the political branches."[22] The legal realists long ago demonstrated that statutory interpretation by judges reflects ideological and policy preferences. The number of 6-3 opinions on cases involving statutory and constitutional interpretation issued since President Donald Trump appointed three of the Court's members should disabuse everyone of any notion that ideological and policy preferences play no role in legal interpretation.

Finally, the majority rejected the argument that the principal of *stare decisis* required the Court to adhere to the *Chevron* doctrine. The majority reasoned that because the *Chevron* doctrine was both "fundamentally misguided" and "unworkable," it had "become an impediment, rather than an aid, to accomplishing the basic judicial task of 'say[ing] what the law is."[23] Instead of "safeguarding reliance interests," a primary goal of stare decisis, "*Chevron* affirmatively destroys

[16] Id., at 22.
[17] Id., at 23.
[18] Id., at 23.
[19] Id., at 24.
[20] Loper Bright Enterprises v. Raimondo, Dissenting Opinion of Justice Kagan, at 13.
[21] Id.
[22] Loper Bright Enterprises v. Raimondo, Slip Opinion, at 26 (quoting 1 Works of James Wilson 363 (J. Andrews ed. 1896).
[23] Loper Bright Enterprises v. Raimondo, Slip Opinion, at 30-32.

them."[24] The doctrine had, in the majority's view, "undermined the very 'rule of law' values that *stare decisis* exists to secure."[25] In fact, overturning *Chevron* was an exercise in "judicial humility" by way of "admitting and in certain cases correcting our own mistakes."[26]

The majority noted that if the reviewing court's interpretation does not comport with congressional intent, Congress can always amend the statute to reflect the agency's view.[27] This simplistic response, however, ignored the fact that the current Congress is not the Congress that enacted the statute, often in response to public pressure stemming from a crisis or sequence of crises that may no longer exist at the time that the court interprets the statute. It also ignored the fact that Congress is currently so polarized that corrective legislation is impossible over the opposition of one of the political parties, perhaps generated by heavy lobbying by the parties who were victorious in court. As a practical matter, the court's resolution of most issues of statutory interpretation will be effectively permanent.

The Court assured those who benefit from the protections provided by agency actions that courts had previously upheld under the *Chevron* doctrine that the "holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology." In the future, however, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.," and "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[28]

The Thomas and Gorsuch Concurrences.

Justice Thomas wrote a brief concurring opinion to underscore his conclusion that the *Chevron* doctrine was in fact unconstitutional because, in his view, it violated the doctrine of separation of powers.[29]

Justice Gorsuch wrote a much lengthier concurring opinion to say "I told you so" and to explain in more detail why overturning *Chevron* did not violate the principle of *stare decisis*.[30] Like Chief Justice Roberts, Justice Gorsuch explained, not altogether convincingly, that overturning *Chevron* represented "a form of judicial humility."[31] He maintained that *Chevron*'s "fiction" that statutory ambiguity indicated a congressional intention to delegate interpretive power to the agency "has led us to a strange place" where "authorities long thought reserved for Article III are transferred to Article II, where are the scales of justice are tilted systematically in favor of the most powerful, where legal demands can change with every election even though the laws do not, and where the people are left to guess about their legal rights and responsibilities."[32]

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[24] Id., at 33.
[25] Id., at 33.
[26] Id., at 34.
[27] Id., at 25.
[28] Id., at 35.
[29] Loper Bright Enterprises v. Raimondo, Concurring Opinion of Justice Thomas, at 2.
[30] Loper Bright Enterprises v. Raimondo, Concurring Opinion of Justice Gorsuch.
[31] Loper Bright Enterprises v. Raimondo, Concurring Opinion of Justice Gorsuch, at 8.
[32] Id., at 20.

The Kagan Dissent.

Justice Kagan wrote a scathing dissent, joined by Justices Sotomayor and Jackson, part of which she read from the bench to emphasize the magnitude of her disagreement with the majority's opinion.[33] Her dissent relied heavily on notions of institutional competence to challenge the majority's expansive view of the capacity of courts to comprehend the complex technical considerations that often permeate attempts to discern the meaning of statutory terms and to resolve intensely divisive policy questions raised in interpreting statutes while remaining above the political fray.

To Justice Kagan, the *Chevron* presumption that Congress intended to delegate to the agencies the authority to interpret ambiguous statutory language stemmed from Congress' understanding that "statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill."[34] In such cases, Congress generally prefers that the actor be the administrative agency charged with implementing the statute, not a court. She observed that "[s]ome interpretive issues arising in the regulatory context involve scientific or technical subject matter," and "[a]gencies have expertise in those areas" while "courts do not."[35] No doubt harking back to her time in the White House as the deputy director of the Domestic Policy Council, she noted some interpretive issues "demand a detailed understanding of complex and interdependent regulatory programs." Agencies "know those programs inside-out," and "courts do not."[36] Moreover, some interpretive issues "present policy choices, including trade-offs between competing goods" that are often controversial and vigorously contested in the political realm. Executive branch agencies report to a politically accountable president, but courts "have no such accountability and no proper basis for making policy."[37] For all these reasons, it made sense to presume that Congress favors *Chevron*'s deferential approach to statutory interpretation when statutory ambiguities arose.

The majority, Justice Kagan argued, replaced "a rule of judicial humility" with "a rule of judicial hubris." That was because "[i]n one fell swoop, the majority today gives itself exclusive power over every open issue – no matter how expert-driven or policy-laden – involving the meaning of regulatory law."[38] In a transparent power grab, the majority had "turn[ed] itself into the country's administrative czar."[39]

Justice Kagan provided several illuminating examples of ambiguous statutory language that called for subject matter expertise and/or appreciation of the complexity of congressionally created regulatory programs.[40] For example, FDA had to decide whether its statutory authority to regulate "biological product[s]," including "protein[s]," extended to an "alpha amino acid polymer."[41]

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[33] Alex Guillen & Josh Gerstein, Supreme Court Shifts Power Over Federal Regulations from Agencies to Judges, Politico, June 28, 2024
[34] Loper Bright Enterprises v. Raimondo, Dissenting Opinion of Justice Kagan, at 2.
[35] Id.
[36] Id.
[37] Id.
[38] Id., at 3.
[39] Id.
[40] Id., at 5-6.
[41] Id., at 5.

Similarly, the Fish and Wildlife Service must list threatened and endangered species including "distinct population segment[s]" of those species, and it must therefore determine when a population segment is "distinct" within the meaning of the statute.

The textualist justices who currently dominate the court turn to contemporaneous editions of dictionaries to interpret those words. But the authors of those dictionaries did not have the issues that the agencies faced before them when they crafted the definitions. The members of Congress who enacted the language probably did not know whether alpha amino acid polymers were "proteins" or whether a subpopulation of squirrels was "distinct." But majorities of them voted for statutes that implicitly delegated those decisions to agencies with expertise in the relevant scientific and technical areas.

In the dissenters' view, it was safe to assume that Congress prefers agency interpretations of ambiguous statutory language "because agencies often know things about a statute's subject matter that courts could not hope to," especially "when the statute is of a 'scientific or technical nature.'"[42] Justice Kagan noted that "[d]eciding when one squirrel population is 'distinct' from another (and thus warrants protection) requires knowing about species more than it does consulting a dictionary."[43] It was also safe to presume that "Congress would value the agency's experience with how a complex regulatory regime functions, and with what is needed to make it effective."[44]

In interpreting statutes like the Food, Drug and Cosmetics Act, the Endangered Species Act or the Clean Air Act, determining congressional meaning does not "demand the interpretive skills courts possess"; rather, "it demands one or more of: subject-matter expertise, long engagement with a regulatory scheme, and policy choice."[45]

Justice Kagan disputed the majority's assertion that the Court had applied an undeferential approach to statutory interpretation during the New Deal. In both Gray v. Powell[46] and NLRB v. Hearst Publications, Inc.[47] both leading cases at the time, the Court deferred to the agency's construction of its authorizing statute.[48] And she was unconvinced by Chief Justice Roberts' attempt to explain away those two important New Deal cases.[49]

To the majority's insistence that section 706 of the APA clearly delegates the job of interpretating statutes to courts, Justice Kagan responded that section 706 certainly assigned an interpretational role to courts, but it was indeterminate on the *standard* of review. It prescribed neither a deferential nor a *de novo* standard for courts to apply when they reviewed agency interpretations of authorizing statutes.[50] When a court applied a deferential "reasonableness" standard of review to an agency's interpretation of statutory language, it was deciding a "relevant question[] of law," as prescribed by section 706. Neither the text of section 706 nor the Supreme Court's

[42] Id., at 9.
[43] Id., at 9.
[44] Id., at 10.
[45] Id., at 13-14.
[46] 314 U.S. 402 (1941).
[47] 322 U.S. 111 (1944).
[48] Loper Bright Enterprises v. Raimondo, Dissenting Opinion of Justice Kagan, at 21.
[49] Id., at 22.
[50] Id., at 16.

contemporaneous practice, which the APA was supposed to reflect, supported the majority's conclusion that *Chevron* deference was inconsistent with that statute.[51]

Justice Kagan recognized that deference to an agency's interpretation is not always appropriate, and the Court "over time has fine-tuned the *Chevron* regime to deny difference in classes of cases in which Congress has no reason to prefer an agency to a court."[52] For example, the courts do not defer to interpretations of agencies that are construing a statute that they are not responsible for administering.[53]

Justice Kagan chastised the majority for failing to adhere to the principle of *stare decisis*. In addition to providing stability in the law, *stare decisis* "'contribut[ed] to the actual and perceived integrity of the judicial process,' by ensuring that [judicial] decisions are founded in the law, and not in the 'personal preferences' of judges."[54] Like the *Chevron* doctrine, *stare decisis* was therefore "a 'doctrine of judicial modesty.'"[55] Both doctrines "tell judges that they do not know everything, and would do well to attend to the views of others."[56]

Finally, Justice was not nearly as sanguine as the majority that overturning *Chevron* would not undermine the integrity of existing decisions that employed the *Chevron* analysis. She was confident that "[c]ourts motivated to overrule an old *Chevron*-based decision can always come up with something to label a 'special justification' to justify that move."[57]

In sum, Justice Kagan warned that the majority's opinion gave "courts the power to make all manner of scientific and technical judgments" and "the power to make all manner of policy calls, including about how to weigh competing goods and values." It put the courts "at the Apex of the administrative process as to every conceivable subject because there are always gaps and ambiguities in regulatory statutes, and often of great import."[58] She expected to see the courts playing "a commanding role" in "every sphere of current or future federal regulation." Although "[t]his was "not a role Congress has given to them," it was "a role this Court has now claimed for itself, as well as for other judges."[59]

My Assessment.

When *Chevron* was decided in 1984, I had been teaching environmental law and administrative law for seven years. I was and have remained agnostic about its value when it comes to the critical function of judicial review of administrative action. I have not joined in the massive outpouring of law review articles probing subtle *Chevron* nuances and exceptions, at least not until the recent advent of the far more problematic major questions doctrine. That is because, as a legal realist, I think that in most cases judges will reach the result they want to reach whether through a broad

[51] Id., at 24.
[52] Id., at 11.
[53] Id., at 11.
[54] Id., at 24 (quoting Michigan v. Bay Mills Indian Community, 572 U.S. 782, 828 (2014).
[55] Id. at 25.
[56] Id.
[57] Id., at 31.
[58] Id., at 32.
[59] Id., at 32.

application of *Chevron* Step I or a narrow view of "reasonableness" at *Chevron* Step II. Thus, overturning *Chevron* merely saves reviewing courts the effort of touching the *Chevron* bases on the way to the result that they want to reach. There are a few empirical studies to the contrary, however, that suggested that *Chevron* did constrain judicial policymaking to a limited degree.[60]

The outpouring of lamentations in the media following the Court's *Loper Bright* announcement was, in my view, largely unwarranted. By the time the Court decided *Loper Bright*, it had not invoked *Chevron* for eight years, and it had crafted the major questions doctrine in *West Virginia v. EPA* to bypass *Chevron* in important cases. Indeed, the major questions doctrine requires reviewing courts to set aside agency action if Congress has not clearly authorized that action. Thus, *Loper Bright* was not nearly the assault on newly promulgated regulations that *West Virginia v. EPA* was.

My problem with *Loper Bright* is the arrogance it displays about the capacity of judges to discern statutory meaning in complex statutory settings. The real reason for the Court's overturing *Chevron* appears to be the fact that six justices do not trust agencies to provide sound interpretations of ambiguous grants of statutory authority. The Court recognized that courts should consider the views of the agency under the long-standing *Skidmore* approach. But I fear that lower courts will take the hubris in the majority opinion as an invitation to read statutory authorizations narrowly, despite the views of the agencies, in pursuit of deregulatory agendas.

Some observers predicted that *Loper Bright* would open the floodgates to challenges to agency interpretations of their authorizing statutes.[61] I predict that the volume of challenges to new regulations will not increase dramatically because I do not believe that *Chevron* itself caused many disappointed companies and trade associations to accept defeat before the agencies. Most agency regulations of any consequence are challenged in court for one reason or another, and the agency's authority is always a contestable issue in those cases.

Corner Post, Inc. v. Board of Governors.

In *Corner Post, Inc. v. Board of Governors*, two large trade associations, the North Dakota Petroleum Marketers Association and the North Dakota Retail Association filed a facial challenge in 2021 to a regulation promulgated by the Federal Reserve Board (the Fed) in 2011 setting limits on the debit fees that banks issuing debit cards could charge for each transaction.[62] The Fed moved to dismiss the action on the ground that it was not filed within six years after its promulgation of the regulation as required by the generally applicable six-year statute of limitations for actions against the federal government, which Is found at 28 U.S.C. § 2401(a). The regulation had already been challenged by parties alleging that the agency's action was arbitrary and capricious soon after it was promulgated alleging, but the D.C. Circuit rejected the challenge and the Supreme Court denied certiorari.[63] At that point, the two trade associations amended their complaint to add Corner

[60] K. Barnett, C. Boyd & C. Walker, Administrative Law's Political Dynamics, 71 Vand. L. Rev. 1463 (2018).
[61] Eric Katz, Supreme Court Ends Judicial Deference to Federal Agency Expertise, Government Executive, June 28, 2024
[62] Corner Post, Inc. v. Board of Governors, Dissenting Opinion of Justice Jackson, at 3.
[63] Id., at 3.

Post, a truck stop in Watford City, North Dakota, as a petitioner, but the complaint otherwise remained largely unchanged.[64]

Unlike the two trade associations, which had existed for decades, Corner Post was incorporated in 2017 and opened for business in 2018.[65] It therefore could not have sought review of the regulation within the six-year statute of limitations. Corner Post therefore took the position that the statute of limitations kicked in only after Corner Post was adversely affected by the Fed's regulation, which happened at the earliest on the day it opened for business. That being the case, its 2021 facial challenge to the regulation fell easily within the six-year limitation.

The federal district for North Dakota dismissed the amended complaint, holding that it was barred by the six-year statute of limitations, and the Eighth Circuit Court of Appeals affirmed, citing five other courts of appeals that had held that the limitations period for facial challenges to government action under the APA began on the date of promulgation of the regulation.[66]

The statute of limitations at issue provided that civil actions against the United States "shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). This limitation applied to all claims against a federal entity, unless a more specific statute provided a different statute of limitations. The case turned on the meanings of the terms "right of action" and "accrues."

Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." [67] Section 704 of the APA provides that such challenges are limited to "final agency action for which there is no other adequate remedy in a court."[68]

The Barrett Majority Opinion.

The Fed argued that an APA claim "accrued" at the time that the action became final under section 704. The petitioner must suffer some injury to have standing, but that is irrelevant to the statute of limitations.[69] In an opinion joined by the other five Republican-appointed judges, Justice Barrett rejected that argument. The majority concluded that "[a]n APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured."[70] Since Corner Post could not have been injured until it was first required to comply with the Fed's debit card regulation (i.e., the day when it opened its doors and began accepting debit cards for payment), the six-year statute did not begin to run until that day. And since less than six years had passed between that day and the day the lawsuit was filed, Corner Post's challenge remained alive.

[64] Id.
[65] Corner Post, Inc. v. Board of Governors, Slip Opinion, July 1, 2024, at 1.
[66] Id., at 3.
[67] 5 U.S.C. § 702.
[68] 5 U.S.C. ¶ 704.
[69] Corner Post, Inc. v. Board of Governors, Slip Opinion, at 5-6.
[70] Id., at 6.

The majority found that the term "accrue" had a well-settled meaning in 1948 when the statute of limitations was enacted that could be ascertained from two legal dictionaries that were in existence at the time.[71] According to Black's Law Dictionary a cause of action "accrued" "when a suit may be maintained thereon."[72] And Ballentine's Law Dictionary defined "accrual of a cause of action" as the "coming or springing into existence of a right to sue," and it explained that "if an act is not legally injurious until certain consequences occur, it is not the mere doing of the act that gives rise to a cause of action, but the subsequent occurrence of damage or loss as the consequence of the act, and *in such case no cause of action accrues until the loss or damage occurs*."[73] From these definitions, the majority concluded that "when Congress used the phrase 'right of action first accrues' in § 2401(a), it was well understood that a claim does not 'accrue' as soon as the defendant acts, but only after the plaintiff suffers the injury required to press her claim in court."[74]

These dictionary definitions, however, were not context-dependent and were no doubt derived from cases involving state statutes of limitations for common-law claims, not claims against the federal government. And it is by no means clear that Congress intended to import constructions of common-law courts of the word "accrual" into a statute limiting the time during which persons could sue the government under statutes waiving sovereign immunity.

The court also relied on the hazy distinction between statutes of limitation and statutes of repose. Quoting the Black's Law Dictionary articulation of the distinction, the majority concluded that a statute of limitations creates "a time limit for suing in a civil case, based on the date when the claim accrued,"[75] whereas a statute of repose bars "any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury."[76] Statutes of limitations were "plaintiff-focused," preventing plaintiffs from resting on their rights. Statutes of repose were "defendant-focused," protecting defendants from liability after a legislatively determined period of time. In the majority's view, section 2401(a) was a statute of limitations, not a statute of repose.

The Black's Law Dictionary definitions, however, were undoubtedly drawn from cases involving state statutes of limitation addressing common law claims, not the unique statute of limitations that Congress enacted to govern claims against the federal government. And the distinction between statutes of limitation and statutes of repose was not nearly as sharp as the majority implied.[77] Statutes of limitation also shield defendants from liability after a legislatively determined period of time, and statutes of repose, which typically provide for much longer time intervals, also encourage plaintiffs not to rest on their rights. The six-year time period of § 2401(a) is more like the lengthier state statutes of repose than the typical one- or two-year state statutes of limitations for common law claims.

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[71] Id., at 7-8.
[72] Id., at 7 (quoting Black's Law Dictionary)
[73] Id., at 7 (quoting Ballentine's Law Dictionary).
[74] Id., at 7-8.
[75] Id., at 9 (quoting Black's Law Dictionary 1546 (2009)).
[76] Id., at 9 (quoting Black's Law Dictionary 1546 (2009).
[77] Corner Post, Inc. v. Board of Governors, Dissenting Opinion of Justice Jackson, at 10 (pointing out that one of the dictionaries relied on by the majority finds that "[s]tatutes of limitations *are* statutes of repose.").

The Fed conceded that the six-year period began at the time the petitioner suffered damage in the case of "as-applied" challenges to federal regulations. In such challenges, plaintiffs argue that whether or not the regulatory requirement was valid on its face, the government cannot lawfully apply that regulation to the plaintiff in the case before the court. In such challenges, it is only fair to allow the plaintiff to challenge the regulation once it became clear that the agency meant for it to apply to the facts of the case. The Fed maintained, however, that since particular damage to the specific plaintiff was not required as a precondition to bringing a facial challenge to the regulation, the statute of limitations should start running from the time that petitioners could first challenge the action – i.e., the time that the regulation was promulgated or became effective. It cited dozens of federal statutes requiring facial challenges to regulations to be filed within a prescribed period of time from the publication of the final regulation as indicative of Congress' consistent approach to statutes of limitations in administrative law.[78]

The majority had a textualist response to the Fed's contextual approach. Unlike the specific limitations in the statutes that the Fed cited, "§2401(a) does *not* refer to the date of the agency action's 'entry' or 'promulgat[ion]'; it says 'right of action first accrues,'" and "[t]hat textual difference matter[ed]" to the committed textualists in the Court's majority.[79] Among other things, it fit the majority's distinction between statutes of limitation and statutes of repose.[80] And it demonstrated that if Congress had meant to make §2401(a) a statute of repose, it clearly knew what language to employ to accomplish that result.[81]

It is also possible, however, that Congress was not thinking of facial challenges to regulations under the Administrative Procedure Act when it enacted 2401(a), which simply made the Little Tucker Act generally applicable to all claims against the federal government. The Little Tucker Act provided for federal district court jurisdiction over non-tort monetary claims not exceeding $10,000 against the federal government.[82] In extending that law's six-year limit from the time "the right accrued" to all claims against the federal government not otherwise governed by a particular statute of limitations, it is hard to imagine that Congress meant to allow multiple facial challenges to the same federal regulation as judicial personnel changed over the years.

Justice Barrett further stressed that the text of §2401(a) focused on plaintiffs, not the conduct of defendants when it employed the language: "*the* complaint is filed within six years after *the* right of action first accrues." She acknowledged that Congress did not use the words "the *plaintiff's* complaint," but she argued that the phrase did "use the definite article 'the' to link '*the* complaint' with '*the* right of action."[83] In her view, "the most natural interpretation is that its limitations period begins when *the cause of action associated with the complaint* – the plaintiff's cause of action – is complete."[84]

The Board's suggestion that §2401(a) should be interpreted differently for facial challenges to rules would give the words "right of action first accrues" "different meanings in different contexts,

[78] Corner Post, Inc. v. Board of Governors, Slip Opinion, at 10-11.
[79] Id., at 11.
[80] Id., at 11.
[81] Id., at 12.
[82] Id., at 6.
[83] Id., at 14.
[84] Id., at 14.

even though those words had a single, well-settled meaning when Congress enacted §2401(a)."[85] The majority's quick reference to definitions of "accrues" in two law dictionaries that most likely drew on an entirely different body of law did not necessarily establish that the definition was well-settled and that it was not context dependent. The Court has on other occasions concluded that a single word or phrase has different meanings in different contexts within the same statute. Environmental lawyers are familiar with the Supreme Court's holding in *Utility Air Regulatory Group v. EPA* that the term "air pollutant" meant different things in different locations in the Clean Air Act.[86]

Finally, the majority rejected the Fed's policy concerns. To the Fed's concern for the significant burden on the agencies and the courts that its interpretation of the statute of limitations would impose, the majority's simple response was that "pleas of administrative inconvenience . . . never 'justify departing from the statute's clear text.'"[87] That assumed that the words "the right of action first accrues" had a plain meaning, which, of course, was a highly debatable assumption. Justice Barratt added that agencies were always subject to as applied challenges to regulations and to petitions for rulemaking to change the language of controversial rules.[88] The first point is well-taken, though as applied challenges tend to be fairly rare. The second point, however, argues in favor of the Fed's interpretation of §2401(a), because it distinguishes APA challenges to regulations from all of the rest of the claims against the government that are subject to §2401(a)'s limitation. Instead of empowering affected parties to challenge agency regulations years after promulgation, the APA allows anyone to petition the agency to revise or repeal the regulation and seek judicial review of the agency's refusal to do so. It also argues against Justice Barrett's concern that under the government's interpretation of the rule, "only those fortunate enough to suffer an injury within six years of a rules promulgation may bring an APA suit."[89] A company not in existence at the time of promulgation may sue the agency after the agency denies its petition to amend a regulation it finds unduly burdensome.

The majority opinon also assured agencies that they will not have to expend many resources defending regulations that courts have already upheld because "courts entertaining later challenges often will be able to rely on binding Supreme Court or circuit precedent.[90] Coming from six Justices who only three days prior to uttering those words cavalierly threw out a 40-year-old precedent in *Loper Bright* and had previously discarded an even older precedent in *Roe v. Wade*, this assurance offered cold comfort to the agencies to which it was addressed.

The Kavanaugh Concurrence.

Justice Kavanaugh wrote a lengthy dissent that he devoted entirely to establishing that vacatur was one of the remedies available to a federal court when it encounters unlawful or arbitrary and

[85] Id., at 15.
[86] Utility Air Regulatory Group v. EPA, 134 S.Ct. 2427 (2014).
[87] Corner Post, Inc. v. Board of Governors, Slip Opinion, at 20 (quoting Niz-Chavez v. Garland 593 U.S. 155, 169 (2021).
[88] Id., at 20.
[89] Id., at 22.
[90] Id., at 21.

capricious agency action. Other than making a quite convincing case for that proposition, Justice Kavanaugh did not join the debate between the majority and the dissenters.

The Jackson Dissent.

Writing for herself and the two other Democrat-appointed members of the Court, Justice Jackson expressed disbelief that "[t]hree-quarters of a century after Congress enacted the APA, a majority of this court rejects the consensus view that, for facial challenges to agency rules, the statutory 6-year limitations period runs from the publication of the rule."[91] If the text of §2401(a) was so clear, she wondered why no court in its 75-year history had reached that conclusion.[92]

The dissenters insisted that Congress meant for the meaning of word "accrues" in the §2401(a) catch-all statute of limitations to be "context specific," that "in the administrative context, limitations statutes uniformly run from the moment of agency action," and that "a plaintiff's injury is utterly irrelevant to a facial APA claim."[93]

Justice Jackson argued that when a claim "accrues" must necessarily depend on the nature of the claim, not some one-size-fits-all dictionary-driven definition applicable to all varieties of claims that Congress failed to address in individual statutes.[94] The Court in *Crown Coat Front Co. v. United States* had recognized "the hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.'"[95] And the Court in *Reading Company v. Koons* had observed that the term "accrued" lacked "any definite technical meaning," much less a meaning plucked from law dictionaries based on irrelevant case law.[96] In the past, the Court's "understanding of accrual for limitations purposes ha[d] always been context specific."[97]

The Fed's reliance on the language in *Crown Coat Front Co. v. United States*[98] to the effect that the words in §2401(a) should "be interpreted in the light of the general purposes of the statute and of its other provisions" and the "practical ends" served by time limitations" was anathema to the textualists in the majority who disdain references to a statute's purpose in interpreting its words.[99] According to Justice Barrett, the Court in *Crown Coats* "did not suggest that the same words 'right of action first accrues' in a single statute should mean different things in different contexts."[100] Yet Justice Barrett in analyzing clear statement rules has stressed that context matters to textualists. It is unclear why it should not matter in interpreting §2401(a). In any event, Justice Barrett insisted that the actual holding in *Crown Coats* was that the limitations clock in §2401(a) started when the plaintiff was "legally entitled to file suit," which could not be before the plaintiff existed.[101] In her

[91] Corner Post, Inc. v. Board of Governors, Dissenting Opinion of Justice Jackson, at 5.
[92] Id., at 5.
[93] Id., at 1-2.
[94] Id., at 2.
[95] Id., at 8 (quoting Crown Coat Front Co. v. United States, 386 U.S. 503, 517 (1967)).
[96] Id., at 9 (quoting Reading Co. v. Koons, 271 U.S. 58, 61 (1926).
[97] Id., at 11.
[98] Crown Coat Front Co. v. United States, 386 U.S. 503, 517 (1967)
[99] Corner Post, Inc. v. Board of Governors, Slip Opinion, at 18.
[100] Id., at 19.
[101] Id., at 19.

view, the Court's prior precedents supported the "plaintiff-centric" approach that the majority favored.[102]

The dissenters responded that APA itself focuses on the agency's action, not on plaintiffs. Section 704 subjects "agency action[s]" to judicial review, and section 706 likewise focuses on agency action. Section 702 specifies who may challenge agency action (those suffering legal wrong or adversely affected or aggrieved by agency action) without mentioning the nature of the cause of action that such persons may bring or establishing that injury is an element of the claim.[103] Indeed, the facts of the case before the Court demonstrated the absurdity of an approach that would allow long-extant trade associations a second bite at the apple by merely digging up a recently created incorporated entity or creating one.[104]

For many kinds of claims against the government, such as tort and contract claims, "accrual is plaintiff specific because the claims themselves are plaintiff specific," but "facial administrative-law claims are not."[105] Consequently, Congress meant for the limitations period for administrative-law claims to begin "not when a plaintiff is injured, but when a rule is finalized."[106] Indeed, in the dozens of times that Congress had placed statutes of limitations in administrative statutes, it invariably insisted that the limitations period began to run "from the moment of final agency action."[107] That alone should have been enough to guide the Court to the sensible conclusion that Congress meant for the word "accrues" in §2401(a) to reference final agency action, rather than harm to the plaintiff when a court applies that statute to facial challenges to administrative action.[108]

As a policy matter, the majority's interpretation of "accrues," when applied to facial challenges to administrative regulations, would eliminate the certainty and stability that statutes of limitation are enacted to provide because opponents of a rule could always create a new entity to challenge the rule in perpetuity.[109] Litigation would never end. The majority's interpretation also ran counter to the policy of eliminating stale claims. Challenges to long-settled regulations would force the agencies to resurrect ancient administrative records, many of which might consist of paper dockets located deep in agency archives, if they existed at all.[110]

Finally, the dissenters warned that "*[a]ny* established government regulation about *any* issue … can now be attacked by *any* new regulated entity within six years of the entities formation."[111] This could be catastrophic in industries where regulatory agencies provide the "baseline rules around which businesses and individuals order their lives."[112] In the dissenters' view, it was "profoundly destabilizing – and also acutely unfair – to permit newcomers to bring legal challenges

[102] Id., Slip Opinion, at 20.
[103] Corner Post, Inc. v. Board of Governors, Dissenting Opinion of Justice Jackson, at 16.
[104] Id., at 2-3.
[105] Id., at 6.
[106] Id., at 6.
[107] Id., at 12.
[108] Id., at 14.
[109] Id., at 18.
[110] Id., at 19.
[111] Id., at 21.
[112] Id., at 21.

that can overturn settled regulations long after the rest of the competitive marketplace has adapted itself to the regulatory environment."[113]

After the Court's decision in L*oper Bright*, "[a]ny new objection to any old rule must be entertained and determined de novo by judges who can now apply their own unfettered judgment as to whether the rules should be voided."[114] The implications for the future of regulation were clear: "The tsunami lawsuits against agencies that the Court's holding in this case and *Loper Bright* have authorized has the potential to devastate the functioning of the federal government."[115]

My Assessment,

After *Corner Post*, any newly created entity with standing to challenge a federal regulation promulgated under a statute that does not have its own statute of limitations may do so if it files that lawsuit within six years after the regulation first adversely affected that entity, no matter how long ago the agency promulgated that regulation. Combined with the Court's *Loper Bright* decision overruling Chevron, this arguably opens up all regulations that agencies have successfully defended under the *Chevron* doctrine to challenge under the new de novo standard of review for statutory interpretation. Attorneys with regulated industry clients are already predicting a huge outpouring of challenges by newly created corporations to controversial regulations.

This is not necessarily a boon to all regulated companies. Companies that have spent millions of dollars complying with regulations that they may have vigorously opposed when they were being promulgated will not necessarily rejoice when their newly created competitors secure rulings that the requirements are no longer applicable.

Respect for the judiciary is certain to drop when the beneficiaries of long-standing protective regulations witness those regulations being set aside by district judges who have been carefully targeted by forum-shopping newly created litigants.

Finally, companies should be careful what they wish for. Just like new corporate entities, public interest groups can be created at the drop of a hat. The *Corner Post* interpretation of the six-year statute of limitations should apply equally to a new environmental group that wants to revisit regulations that older environmental groups unsuccessfully challenged. The victories that industries won in the past are equally up for grabs in forums selected by the newly created public interest groups. While it may be difficult for "a company that formed against a backdrop of a long-settled rule" to claim sufficient injury to establish standing,[116] a newly created environmental group may find it easier to establish standing to challenge a regulation that existed when it was created because its members would presumably have been suffering continuing harm from the regulation. For example, a new group called Citizens Against Bubbles could challenge the regulation that the Supreme Court upheld in *Chevron* in a D.C. Circuit that may soon be dominated by Democrat-appointed judges that must now subject the bubble policy to de novo review.

[113] Id., at 21.
[114] Id., at 23.
[115] Id., at 23.
[116] Id., at 4.

Justice Jackson predicted that the majority's holding will "wreak[] havoc on government agencies, businesses, and society at large."[117] In my view, the ultimate outcome may not be utter chaos, because many of the modern federal regulatory statutes have their own provisions that clearly initiate the limitations period at the time a regulation is promulgated. The Clean Air Act, for example, requires petitions for review of an EPA promulgation, approval, or other action "within sixty days from the date notice of such promulgation, approval, or action appears in the *Federal Register*."[118] And the Clean Water Act requires petitions for review to be filed within 120 days of the final agency action.[119] But for statutes like the Endangered Species Act and the National Environmental Policy Act that lack their own statutes of limitations, all bets are off. For those statutes, there is no effective federal statute of limitations, and all previously upheld regulations are up for grabs.

Justice Barrett was not concerned about the possibility that "meritless challenges will flood federal courts that are too incompetent to reject them."[120] She was confident that the judiciary would never let that happen. We'll see.

SEC v. Jarkesy.

In *Securities and Exchange Commission v. Jarkesy*, the Supreme Court held that the SEC's in-house procedures that Congress had created in 2010 for awarding civil penalties for violations of anti-fraud provisions were unconstitutional because they deprived defendants of their Seventh Amendment right to a jury trial in civil cases.[121] The substantive statutes and regulations had been in place for many years, but the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 empowered SEC to impose civil penalties of up to $750,000 through its own in-house procedures if the agency elected not to pursue civil penalties in court as it had prior to its enactment.[122] More than 200 other statutes provided for similar administrative assessments of civil penalties after an agency hearing (usually before an administrative law judge (ALJ)).

The Roberts Majority Opinion.

The Seventh Amendment provides that in "[s]uits at common law, . . . the right of trial by jury shall be preserved."[123] Chief Justice Roberts' majority opinion, joined by the five other Republican-appointed justices, opened with the proposition that the Seventh Amendment was "not limited to the 'common-law forms of action recognized'" when it was ratified. It extended to particular statutory claims that were "legal in nature" as opposed to equitable in nature.[124] Citing *Tull v. United States*,[125] a case in which the federal government sought civil penalties in federal court for

[117] Id., at 2.
[118] 42 U.S.C. §7607(b)(1).
[119] 33 U.S.C. §1369(b).
[120] Corner Post, Inc. v. Board of Governors, Slip Opinion, at 22.
[121] SEC v. Jarkesy, June 27, 2024, Slip Opinion, at 2.
[122] Id., at 4.
[123] U.S. Const., Amend. 7.
[124] SEC v. Jarkesy, Slip Opinion, at 8.
[125] 481 U.S. 412 (1987).

violations of the Clean Water Act, the majority concluded that it was immaterial for Seventh Amendment purposes whether the claim was statutory or arose at common law.[126]

According to the majority, statutory claims for civil penalties were historically viewed by courts as a "type of action in debt requiring trial by jury."[127] The key consideration was the remedy sought. If the remedy sought was "remedial" (i.e., to restore the status quo ante), the action was generally equitable in nature. If the remedy was designed to punish or deter the wrongdoer, it was generally legal in nature.[128] For the majority, that distinction was "all but dispositive" on the question whether the Seventh Amendment applied to the civil penalty proceeding. The majority's analysis of the statutory provisions under which SEC was acting demonstrated that the civil penalties SEC was seeking from Jarkesy were clearly designed to punish the defendant, rather than to restore the victim. The action was therefore legal in nature, and the Seventh Amendment was applicable.[129]

The majority's conclusion was fortified by "[t]he close relationship between the causes of action in this case and common law fraud."[130] In the majority's view, "Congress incorporated prohibitions from common law fraud into federal securities law."[131] The "close relationship between federal securities fraud and common law fraud confirms that this action is 'legal in nature.'"[132]

That conclusion, however, did not end the matter. The Court had on many occasions applied a "public rights" exception to the applicability of the Seventh Amendment to actions for civil penalties dating back to the mid-nineteenth century. Under this "public rights" exception, "Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment."[133] The majority acknowledged, however, that the Court had "not 'definitively explained' the distinction between public and private rights" for the purpose of applying the public rights exception.[134]

Without attempting its own explanation of the distinction, the majority concluded that the case was governed by the Court's decision in *Granfinanciera, S.A. v. Nordberg*.[135] In that action by a private plaintiff in a non-Article III bankruptcy court alleging that the defendant had fraudulently conveyed assets in violation of the Bankruptcy Code, the Court stated that "traditional legal claims" must be decided by courts, "whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears."[136] In applying the "public rights" exception, the Court also considered whether the actions were "closely intertwined" with the bankruptcy

[126] SEC v. Jarkesy, Slip Opinion, at 8.
[127] United States v. Tull, 481 U.S., at 418-19.
[128] SEC v. Jarkesy, Slip Opinion, at 9.
[129] Id., at 10.
[130] Id., at 11.
[131] Id.
[132] Id., at 13.
[133] Id.
[134] Id., at 17.
[135] 492 U.S. 33 (1989)
[136] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), at 52.

regime."[137] Since fraudulent conveyance was a lot like common law fraud and since such claims were not closely intertwined with the bankruptcy regime, the public rights exception did not apply, and the claim had to be brought before a jury in an Article III court.

From this, the majority concluded that "what matters is the substance of the action, not where Congress has assigned it."[138] In the case of SEC's claim against Jarkesy, the majority reiterated that that the civil penalties that the SEC sought were punitive and therefore "legal" in nature, and they "target[ed] the same basic conduct as common law fraud, employ[ed] the same terms of art, and operat[ed] pursuant to similar legal principles."[139] Like the action in *Granfinanciera*, the SEC action involved a matter of private rather than public right, and Congress could not constitutionally withdraw it from an Article III court.[140]

The majority distinguished the more recent case of *Atlas Roofing Co. v. OSHA*, a 1977 case in which the Court held that the Seventh Amendment did not apply to a civil penalty proceeding brought by the Occupational Safety and Health Administration (OSHA) in the Occupational Safety and Health Review Commission (OSHRC) against a company that had allegedly violated workplace safety standards that OSHA had promulgated.[141] The majority reasoned that unlike the statutes that SEC enforced in the case before it, the Occupational Safety and Health Act "did not borrow its cause of action from the common law."[142] It merely required employers to comply with detailed OSHA-promulgated regulations.[143] The majority found that the OSHA standards were more like detailed building codes and brought "no common law soil with them."[144] In the words of the Atlas Roofing court, the government's claims were "unknown to the common law."[145] Chief Justice Roberts concluded that "[i]n both concept and execution, the Act was self-consciously novel."[146] That assessment, however, ignored the statute's broad "general duty clause" requiring employers to provide safe places of employment for their employees, which very much resembled the common law negligence duty of employers to their employees prior to enactment of workers compensation statutes.

The majority's analysis of both the initial applicability of the Seventh Amendment to a statutory claim by either the government or a private entity for civil penalties and to the "public rights" exception thus focused primarily on whether the claim looked enough like a claim that an individual could have brought at common law in 1791 when the Seventh Amendment was added to the Constitution.

The Gorsuch Concurring Opinion.

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[137] Id., at 54.
[138] SEC v. Jarkesy, Slip Opinion, at 21.
[139] Id., at 21.
[140] Id., at 21.
[141] Atlas Roofing Co. v. OSHA, 430 U.S. 442 (1977).
[142] SEC v. Jarkesy, Slip Opinion, at 23.
[143] Id., at 23.
[144] Id., at 23.
[145] Id., at 25 (quoting Atlas Roofing Co. v. OSHA, 430 U.S. 442, 461 (1977)).
[146] Id., at 24.

A concurring opinion by Justice Gorsuch provided additional historical analysis to support that position and to rebut the dissent's analysis.

The Sotomayor Dissent.

In a lengthy dissent joined by the other two Democrat-appointed justices, Justice Sotomayor argued that the majority had fundamentally misconstrued *Atlas Roofing* and had ignored many other of its own precedents. In the dissenters' view, the majority's exclusive focus on whether the nature of the remedy sought in the administrative action resembled a common law claim was "plainly wrong" because the Court had "held, without exception, that Congress has broad latitude to create statutory obligations that entitled the government to civil penalties, and then to assign their enforcement outside the regular courts of law where there are no juries."[147]

To begin with, since the Seventh Amendment only applied to "suits at common law," it was "not applicable to administrative proceedings."[148] Indeed, the Court had held that "factfinding by a jury was 'incompatible with the whole concept of administrative adjudication,' which empowers executive officials to find the relevant facts and apply the law to those facts like juries do and a courtroom."[149] This was consistent with Article III of the Constitution because "[a]n executive official properly vested with the authority to find the facts, apply the law to those facts, and impose the consequences prescribed by law exercises executive power under Article II, not judicial power under Article III."[150] Justice Sotomayor reasoned that "[w]hen executive power is at stake, Congress does not violate Article III or the Seventh Amendment by authorizing a non-jury factfinder to adjudicate the dispute."[151] Therefore, "[t]he conclusion that Congress properly assigned a matter to an agency for adjudication . . . necessarily 'resolves [any] Seventh Amendment challenge."[152]

The dissenters noted that for more than 150 years, the Court had recognized a distinction between "private rights" and "public rights" in determining whether claims had to be resolved by Article III courts. Public right can "always be assigned outside of Article III," because "[t]hey 'do not require judicial determination,' under the Constitution, even if they 'are susceptible of it.'"[153] According to the dissenters, the majority had failed to take account of the difference between a lawsuit brought by individuals seeking civil penalties (e.g., citizen enforcement actions seeking civil penalties under the Clean Air Act) and "statutory claims for civil penalties brought by the Government in its sovereign capacity."[154] While some but not all actions in the former category came within the "public rights" exception, all claims in the latter category came within the exception.[155] Thus, "[w]hen the claim belongs to the Government as sovereign, the Constitution permits Congress to enact new statutory obligations, prescribe consequences for the breach of those obligations, and then empower federal agencies to adjudicate such violations and impose the

[147] SEC v. Jarkesy, Dissenting Opinion of Justice Sotomayor, at 2.
[148] Id., at 5 (quoting Tull v. United States, 481 U.S. 412, 418 n. 4 (1987)).
[149] Id. at 5-6 (quoting Pernell v. Southall Realty, 416 U.S. 363, 383 (1974).
[150] Id., at 6, n.2.
[151] Id., at 7.
[152] Id., at 6 (quoting Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 584 U.S. 325, 345 (2018). Id., at 7 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932).
[154] Id., at 4.
[155] Id., at 8.

appropriate penalty."[156] Any due process concerns are met by subjecting the agency's adjudicatory action to judicial review.[157]

Citing a long list of cases, the dissenters noted that the Court had "repeatedly approved Congress's assessment of public rights to agencies in diverse areas of the law, reflecting Congress's varied constitutional powers."[158] Indeed, "in every case where the Government has acted in its sovereign capacity to enforce a new statute through the administrative imposition of civil penalties or fines, this Court, without exception, has sustained the statutory scheme authorizing that enforcement outside of Article III."[159] And that is exactly what the Court did in *Atlas Roofing*.[160] The dissenters accused the majority of taking "a wrecking ball to this settled law and stable government practice."[161]

Just as in *Atlas Roofing*, Congress in *Jarkesy* had identified a problem; concluded that the existing remedies were inadequate; and enacted a new regulatory scheme as a solution."[162] Unlike common law fraud cases, the securities laws did not "require proof of actual reliance on an investor's misrepresentations or that an 'investor has actually suffered financial loss.'" As in *Atlas Roofing*, "Congress empowered the Government to institute administrative enforcement proceedings to adjudicate potential violations of federal law and impose civil penalties on a private party for those violations, all the while making the final agency decision subject to judicial review."[163] Like OSHA in *Atlas Roofing*, SEC in the instant case sought to "'remedy harm to the public at large'" for violation of the Government's rights."[164] Both cases involved "new cause[s] of action, and remedies therefor, unknown to the common law."[165]

Justice Sotomayor argued that the majority's reliance on *Granfinanciera* was misplaced, because, unlike the government's action against Mr. Jarkesy, that case did not involve "the in-house adjudication of statutory claims brought by the Government pursuant to its sovereign powers."[166] The plaintiff in that case was a private entity alleging that the defendant had fraudulently conveyed assets in violation of the Bankruptcy Code. In the *Granfinanciera* Court's own words, its analysis of the public rights issue was limited to "disputes for which the Federal Government is not a party in its sovereign capacity."[167] For cases involving the Government acting in its sovereign capacity, the *Granfinanciera* court agreed that "Congress may fashion causes of action that are closely *analogous* to common-law and [still] place them beyond the ambient of the Seventh Amendment by assigning their resolution to a [non-Article III] forum in which jury trials are unavailable."[168] In the dissenters' view, "both the majority and the concurrence miss the critical distinction drawn in the Court's precedents between the non-Article III adjudication of public-rights matters

[156] Id., at 8.
[157] Id., at 8-9, n.4.
[158] Id., at 11.
[159] Id., at 12.
[160] Id., at 12-
[161] Id., at 17.
[162] Id., at 15.
[163] Id., at 16.
[164] Id., at 16.
[165] Id., at 16 (quoting Atlas Roofing Co. v. OSHA, 430 U.S. 442, 461 (1977)).
[166] Id., at 17.
[167] Id., at 25 (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), at 55, n.10.
[168] Id. at 25 (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), at 52.

involving the liability of one individual to another and those involving claims belonging to the government in its sovereign capacity."[169]

Congress could constitutionally provide for non-Article III adjudication of disputes between private parties, as it had done in providing for resolution by EPA ALJs of disputes between pesticide registrants over compensation for the data that EPA relied on in awarding their registrations.[170] When such provisions involved adjudication of claims between private parties that closely resembled claims between private individuals at common law, an Article III court and a jury were required by the Seventh Amendment. On the other hand, Congress could provide for non-Article III adjudication of *all* disputes involving public rights between private individuals and Government acting in its sovereign capacity.[171]

In the Securities laws Congress had done just that: it had created a new right unknown to the common law that, unlike common-law fraud, belongs to the public and inheres in the Government in its sovereign capacity."[172] When the SEC enforces the securities laws, "it does so to remedy the harm to the United States," not to shift loss from a private victim to a private wrongdoer.[173] The government "seeks to protect the integrity of the securities market as a whole through the imposition of new and distinct remedies like civil penalties and orders barring violators from holding certain positions and performing certain activities in the industry."[174] When the government is acting in its sovereign capacity to enforce a statutory violation, the right at issue is a "public right" and therefore not subject to the Seventh Amendment jury trial requirement.[175]

Justice Sotomayor observed that Congress had "enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations."[176] With the issuance of the majority's opinion, "the constitutionality of hundreds of statutes may now be in peril, and dozens of agencies could be stripped of their power to enforce laws enacted by Congress."[177] In passing those statutes, Congress "had no reason to anticipate the chaos today's majority would unleash after all these years."[178] She noted that "[j]udicial aggrandizement is as pernicious to the separation of powers as any aggrandizing action from either of the political branches."[179]

Rather than acting as a "neutral umpire," the majority had once again engaged in a "power grab" by assigning the responsibility for initial adjudication to the courts and not to the agencies to which Congress had assigned that power.[180] Justice Sotomayor suggested that "[l]itigants seeking further dismantling of the 'administrative state' have reason to rejoice in their win today, but those of us who cherish the rule of law have nothing to celebrate."[181]

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[169] Id., at 21-22.
[170] Id., at 20 (citing Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985)).
[171] Id., at 22.
[172] Id., at 28.
[173] Id., at 28.
[174] Id., at 28-29.
[175] Id., at 30.
[176] Id., at 1.
[177] Id., at 35.
[178] Id., at 1.
[179] Id., at 37.
[180] Id., at 2.
[181] Id., at 36.

My Assessment.

The pressing question for environmental law is the impact that the Court's *Jarkesy* decision will have on EPA's in-house enforcement actions seeking administrative penalties.[182] After *Jarkesy*, the critical question will be how similar EPA enforcement actions under the Clean Air Act, the Clean Water Act and various other statutes are to actions at common law in 1791.

One could argue that the civil penalties that EPA assesses in its administrative enforcement actions are "legal" in nature and involve a matter of private, rather than public right. Furthermore, those actions arguably target the same basic conduct as common law public nuisance actions. The statutes simply provide new vehicles for old common law nuisance actions. The University of Texas School of Law did not hire a full-time environmental law professor until 1980, I am told, because eminent torts scholar Dean Page Keeton was convinced that all environmental law was just a statutory form of nuisance law.

On the other hand, one could argue that the environmental statutes establish a novel regulatory regime that bears very little resemblance to common law public nuisance actions. Enforcement actions tend to be focused on unpermitted discharges and emissions and on violations of permit requirements. They do not employ the same terms of art as common law public nuisance actions. And the limitations that go into permits are based on statutory technology and media quality requirements that bear little resemblance to the broad balancing of risks and benefits and other considerations that go into a court's determination of the reasonableness of a defendant's actions in a public nuisance claim. Indeed, the Supreme Court in *City of Milwaukee v. Illinois II* and *American Electric Power v. Connecticut* held that the Clean Water Act and Clean Air Act displaced the federal common law of nuisance.

My take is that EPA's non-Article III in-house civil enforcement actions are not inconsistent with the Seventh Amendment requirement for a jury trial. But I could see a legitimate claim for a jury trial in some situations, such as an attempt by EPA to enforce a provision in a state implementation plan that merely prohibits sources from creating public nuisances.

Ohio v. EPA.

The Clean Air Act empowers EPA to promulgate national primary air quality standards (NAAQS) for the so-called "criteria" pollutants that "may reasonably be anticipated to endanger" public health and result from numerous or diverse mobile or stationary sources. Having promulgated a NAAQS, EPA is obliged to determine which geographical areas of the country are "nonattainment" areas because air quality in those areas does not meet the NAAQS. States then have a prescribed period of time to write state implementation plans (SIPS) to bring those areas into attainment by the statutory deadline. In addition, the statute's "good neighbor" provision requires every state to "prohibit" emissions from sources within the state "in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State."[183] EPA must

[182] See, e.g., 33 U.S.C. § 1319 (g); 42 U.S.C. § 7413(d).
[183] 42 U.S.C. §7410(a)(2)(D)(i)(I).

disapprove a SIP that does not meet the statutory criteria, including the good neighbor requirement. EPA then has two years to promulgate a federal implementation plan (FIP) that does meet the statutory criteria, unless the state submits an adequate SIP before then.

Each time EPA revises a NAAQS, EPA and the states must go through the whole operation all over again. They have found it especially difficult to implement the good neighbor requirement in the context of the NAAQS for photochemical oxidants (ozone), which are caused when oxides of nitrogen (NOx) combine with volatile organic compounds (VOCs) in the presence of sunlight. The Supreme Court, in *EPA v. EME Homer City Generation*, upheld the good neighbor FIPs that EPA promulgated to meet the 1977 NAAQS for ozone and coarse particulate matter (PM_{10}) and the 2006 NAAQS for fine particulate matter ($PM_{2.5}$). Relying heavily on *Chevron*, the Court rejected the argument by several states and industry groups that EPA's FIPs had to allocate responsibility for reducing emissions of the relevant pollutants and precursors in "a manner proportional" to each state's contribution to each downwind state's nonattainment. The problem with that approach was that "while it is possible to determine an emission reduction percentage if there is a single downwind [receptor], most upwind states contribute to multiple downwind [receptors] (in multiple states) and would have a different reduction percentage for each one."[184]

EPA reacted to this nightmarish allocation scenario by including within its good neighbor plan all states with sources that, according to EPA's air quality modelling, contributed more than one percent of the relevant NAAQS (presumed to be a "significant" contribution to the downwind area's nonattainment) and requiring sources within those states to implement cost-effective emissions controls. The Court upheld this attempt to solve an intractable media quality problem by combining a media quality approach to determine which states had responsibilities to reduce emissions and a cost-effective technology-based approach to determine how the states would go about reducing those emissions. The Court concluded that "[e]liminating those amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem." It did leave open the possibility of "over-control" because there was a "possibility that a State might be compelled to reduce emissions beyond the point at which every affected downwind state is in attainment." But that could be addressed in as-applied challenges to the FIPs on remand.[185]

EPA followed the same methodology in responding to the SIPs prepared by states to meet the 2015 NAAQS for ozone. In response to the new NAAQS, many states submitted SIPs requiring no emissions reductions to protect downwind states. They argued that their emissions were not causing downwind-state nonattainment or that there were no additional cost-effective methods for controlling emissions.[186] EPA then proposed to disapprove SIPs for 23 states from which sources made significant contributions to downwind-state nonattainment based on its conclusion that emissions from those states did in fact significantly contribute to downwind-state nonattainment. While the comment period for the proposed disapprovals was pending, EPA further proposed a single FIP for all 23 of those states to achieve "nationwide consistency" in addressing the interstate air pollution problem.[187]

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[184] EPA v. EME Homer City Generation, 134 S.Ct. 1584 (2014)
[185] Id.
[186] Ohio v. EPA, Slip Opinion, June 27, 2020, at 3-4.
[187] Id., at 4.

EPA took the position, which the Court in *EME Homer City Generation* had upheld, that a source within an upwind state "significantly contributes" to nonattainment in a downwind state if it was responsible for emissions giving rise to ozone levels greater than one-percent of the 2015 ozone NAAQS and there were "cost-effective measures it could implement to reduce its emissions."[188] The FIP established target reductions in emissions of ozone precursors (in particular NOx) for each of the 23 states state, based on its assessment of the control measures that "maximized cost-effectiveness" (on a cost-per-ton basis) of the emissions reductions for the various industries in that state that the FIP addressed. In choosing which measures maximized cost-effectiveness for a particular industry, EPA applied its familiar "knee in the curve" test to the pollution technology cost profile of the industry based on data collected from across the nation on sources within the industry and on various emissions reduction technologies.[189] The knee in the curve test focused on the point at which the costs of obtaining more pollution reduction increased dramatically and the resulting emissions reductions (and associated improvement in air quality at downwind receptors) were very small.[190]

EPA used the cost-per-ton of NOx removed dictated by the knee in the curve test to identify the most cost-effective pollution reduction methods and technologies for various NOx-emitting industries. This produced a "uniform package of emissions-reduction tools for upwind States to adopt."[191] It then used models to predict the emissions reductions from the sources in those industries in each of the 23 states resulting from the installation of those methods and technologies. For sources other than power plants, a source was required to meet emissions limitations based on the cost-effective technologies identified for the source's industry. For power plants, EPA used the calculated emissions reductions to establish emissions budgets for states to use in cap-and-trade emissions trading programs.[192]

Once EPA finalized its disapprovals of the SIPs for the 23 states, various states and industries challenged those disapprovals in federal courts of appeals. Two courts immediately issued stays of the SIP denials for four states.[193] EPA addressed this problem in the final FIP by adopting a "severability provision" under which the FIP requirements would remain in effect for those states that were not subject to stays.[194] This precipitated more successful stay requests, so that EPA ultimately concluded that the FIP would not apply to 12 states while the stays were pending, but would kick in when the stays were lifted.[195]

The Gorsuch Majority Opinion.

Justice Gorsuch's majority opinion, joined by Chief Justice Roberts and Justices Thomas, Alito and Kavanaugh, got off to a bad start when Justice Gorsuch described how EPA's FIP addressed

[188] Ohio v. EPA, Dissenting Opinion of Justice Barrett, at 13.
[189] Ohio v. EPA, Dissenting Opinion of Justice Barrett, at 14.
[190] Ohio v. EPA, Slip Opinion, Jat 6; Environmental Protection Agency, Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard; Proposed Rule, 87 Fed. Reg. 20036 (April 6, 2022), at 20083, 20095.
[191] Ohio v. EPA, Slip Opinion, at 6 (quoting 87 Fed. Reg., at 20076.
[192] Ohio v. EPA, Dissenting Opinion of Justice Barrett, at 13.
[193] Ohio v. EPA, Slip Opinion, at 8.
[194] Id.
[195] Id., at 9.

"nitrous oxide emissions."[196] Nitrous oxide (N_2O), otherwise known as "laughing gas," is used in some dentist and doctor offices to sedate patients, but is not an ozone precursor. It is a potent greenhouse gas and stratospheric ozone depleter, but it is not one of the oxides of nitrogen (NOx) that are the subject of EPA's FIP. While the Justice's mistake may be forgiveable in that lawyers are not expected to have the technical knowledge of chemists, the error on an issue as fundamental as the identity of the relevant precursor pollutant should serve as a lesson to Justice Gorsuch and other judges in the virtues of humility. Unfortunately, Justice Gorsuch showed little humility in addressing EPA's extraordinarily complex decision-making process in the majority's application of the APA's "arbitrary and capricious" test to that process.

The majority opinion concluded that the challengers were likely to succeed on the merits of their claim that EPA was arbitrary and capricious in promulgating the FIP.[197] In particular, the FIP based the same emissions limitations for sources in various industries on the same cost-effective emissions reduction methods and technologies available in those industries, without regard to the likelihood that some states would be removed from the FIP's applicability when courts accepted challenges to EPA's disapprovals of their SIPs.[198] In the majority's words, "EPA needed to explain why it believed its rule would continue to offer cost-effective improvements in downwind air quality with only a subset of the states it originally intended to cover."[199] In the majority's view, EPA had not offered a satisfactory explanation for its severability approach to emissions from the states remaining in the FIP after EPA "severed" out states that successfully challenged EPA's disapproval of their SIPs.[200] In reality, the issue was a red herring thrown up by the challengers late in the game in an effort to create an issue that would attract the attention of the Supreme Court. The strategy worked.

EPA argued that it had in fact offered a satisfactory explanation in the justification for the severability clause, which was addressed to precisely that question. Justice Gorsuch, however, disagreed, accusing EPA of sidestepping the issue. EPA pointed to a 40-page document that it had prepared to explain its denial of a petition to reconsider its FIP that offered extensive support for its conclusion that the number of states included in the FIP would not affect the emissions limitations for individual sources, which were based on nationwide analyses of the cost and effectiveness of the various methods and technologies that EPA considered for the various industries included in the FIP. The document clarified that:

> [T}he Plan imposes obligations on sources in each individual state. Because the methodology for defining those obligations ultimately relies on a determination regarding what emissions reductions each type of regulated source can cost-effectively achieve, the obligation set for sources in each state are independent of the number of states included in the Plan. Accordingly, the fact that obligations are suspended with regard to some states does not impact the Plan's conclusions as they apply in other states.[201]

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[196] Id., at 5.
[197] Id., at 12.
[198] Id., at 12.
[199] Id., at 14, n.11.
[200] Id., at 14.
[201] The EPA's Basis for Partially Denying Petitions for Reconsideration of the Good Neighbor Plan on Grounds Related to Judicial Stays of SIP Disapproval Action as to 12 States, referenced in Environmental Protection Agency,

The agency explained that "the control technologies and cost-effectiveness figures the EPA considers . . . do not depend in any way on the number of states included." To the contrary, "the Plan regulates the large emitting sources in each included state . . . up to a uniform level of pollution control that is common across sources of that type in the states that are linked."[202] In fact, "EPA was careful to avoid creating any interdependency among the particular states included in the plan, both in the Agency's analytical methodology and in the plan's regulatory requirements."[203] That was necessary because any of the included states could have come up with a revised SIP to replace its rejected SIP while EPA was considering the FIP, a phenomenon that had occurred with some frequency in the past.[204] Finally, EPA stressed that it had an obligation to downwind states to ensure that their inhabitants received the protections that the Clean Air Act afforded them. The agency believed that "[i]t would be contrary to this statutory purpose to revise or suspend the Plan as to upwind States for which it is under a statutory requirement to act merely because the Plan's requirements were suspended for other states."[205]

No one who read the agency's response to the reconsideration motion could reasonably conclude that the emission reduction requirements for sources in one state could depend on the requirements imposed in another state. But Justice Gorsuch did not read the response. He argued that "the Clean Air Act prevents us (and courts that may in the future assess the FIP's merits) from consulting explanations and information offered after the rule's promulgation." To support this conclusion, he cited section 307(d)(6)(C) of the statute which provides that "[t]he promulgated rule may not be based (in part or whole) on any information or data which is not been placed in the docket as of the date of such promulgation).[206] The agency's explanation of how it went about setting emissions limitations for various industries, however, was arguably not "information or data" within the meaning of the statute, which was intended to ensure that EPA did not base its decisions on scientific and engineering data that was not in the rulemaking record and available for inspection and rebuttal by interested parties.

The challengers insisted that "should some states no longer participate in the plan, the agency would need to return to the drawing board and 'conduct a new assessment and modeling of contribution' to determine what emissions-control measures maximized cost-effectiveness in securing downwind ozone air-quality improvements."[207] If the statute required that extreme response whenever a state submitted an adequate replacement for an inadequate plan or a court stayed EPA's disapproval of a plan, EPA would be spending much time many resources returning to the drawing board, and air quality in the downwind states could not possibly achieve the NAAQS by the five-year statutory deadline.

The majority noted that the government's attorney acknowledged during oral argument that "it could not represent with certainty whether the cost-effectiveness analysis it performed collectively

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Partial Denial of Petitions for Reconsideration: Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 89 Fed. Reg. 23526 (April 4, 2024), at 1.

[202] Id., at 2-3

[203] Id., at 3.

[204] Id., at 3.

[205] Id., at 3.

[206] 42 U.S.C. § 7607(d)(6)(C).

[207] Ohio v. EPA, Slip Opinion, at 16.

for 23 states would yield the same results and command the same emissions-control measures if conducted for, say, just one State."[208] But certainty was not required by the APA's arbitrary and capricious test. Uncertainties pervade substantive areas of environmental law that depend on uncertain science and modeling exercises. In fact, the Justice Department attorney representing EPA at oral argument could have responded with a great deal of certainty that the FIP's cost-effectiveness-based emissions limitations did not depend on the number of states represented in the FIP. The agency made it clear in the preamble that it had followed the same methodology that it had employed in *EME Homer*, and the cost-effectiveness analysis in that case did not depend on the number of upwind states in the plan. The agency's response to the motions for reconsideration made that point pellucidly clear. The majority either did not understand the agency's methodology, or it was determined to stay the FIP no matter how clearly the agency explained its methodology.

The Barrett Dissent.

Justice Gorsuch's majority opinion was so poorly reasoned that he lost one of the three recent Trump appointees to the Court. Justice Amy Coney Barrett wrote a dissent, joined by the three Democrat-appointed members of the court, that emphasized EPA's important role in protecting the health of people in downwind states from polluters in upwind states that had a strong incentive to protect local industries and little incentive to protect citizens of other states.[209]

To begin with, Justice Barrett, a stickler for proper procedure, convincingly argued that the challengers had not raised the argument that emissions limits for individual sources depended on the number of states included in the FIP until the motions for reconsideration, which, in the majority's view, could not be included in the record on review.[210] And she accused the majority opinion of "dress[ing] up" a single comment with its own words to make it appear that the challengers had raised the issue in their comments on the proposed FIP.[211] It was a picky point, but it explained why EPA did not address that off-the-wall argument until it was raised in the motions for reconsideration.

Justice Barrett accurately observed that the majority had identified "no evidence that the FIP's emission limits would have been different for a different set of States or that EPA's consideration of state-specific input was anything but confirmatory of the limits calculated based on nationwide data."[212] In particular, the majority had not identified "any NOx limit for any industry that relied on state-specific data."[213] That was, of course, because EPA did not rely on state-specific data in setting any of the technology-based limits. Justice Barrett's dissenting opinion demonstrated how "EPA's methodology for setting emissions limits did not depend on the number of states in the plan, but on nationwide data for the relevant industries – and the FIP contains many examples of emissions limits that EPA created using nationwide inputs.[214]

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[208] Id., at 12-13. See also Id., at 18 ("even the government refused to say with certainty that EPA would have reached the same conclusions regardless of which States were included in the FIP").
[209] Ohio v. EPA, Dissenting Opinion of Justice Barrett, at 2.
[210] Id., at 6-12.
[211] Id., at 9-10.
[212] Id., at 4.
[213] Id., at 4.
[214] Id., at 4. See id., at 12-19.

EPA employed the same four-step approach to implementing the Clean Air Act's good neighbor provisions that it had applied in *EME Homer* with the Court's approval, including the technology-based approach to determining individual emissions limits based on the agency's "knee in the curve analysis." Even before EPA's definitive explanation in response to the motions for reconsideration, the preamble to the final rule "suggest[ed] that EPA calculated the cost-effectiveness threshold based on the likely cost and impact of available emissions-reduction technology given *national, industry-wide data*."[215] The dissenters concluded that "[c]ontrary to the Court's speculations, these thresholds and the FIP's resulting emissions limits appear not to depend on the number of covered states."[216] Indeed, some commentators criticized EPA's reliance on a nationwide data set in setting the emissions limits.[217]

The dissenters pointed out that the majority did not conclude that it was arbitrary and capricious to base emissions limitations for individual sources on cost-effective technology based on nationwide data. It found that EPA had not adequately explained that it had adopted that approach in the preamble to the final rule. That was, in the dissenters' view, a harmless "procedural error."[218]

In any event, Justice Barrett explained that EPA had clearly explained its position in its response to the motions to reconsider the FIP.[219] It was not obvious to the dissent that the section of the Clean Air Act defining the record for judicial review "bars consideration of later developments for purposes of the Act's stringent harmless-error rule."[220] But even if the denial of reconsideration was not part of the record before the Court in considering the stay request, the Court was at this point only judging "the likelihood of success on the merits." When the D.C. Circuit addressed the merits, "we can expect EPA to make just the sort of arguments it made in its denial: EPA likely will explain why the covered states did not matter by citing and interpreting material in the record."[221] It was therefore silly for the Court to ignore those arguments as it inserted itself into the dispute before the D.C. Circuit had an opportunity to reach the merits.

In defense of the government, Justice Barrett noted that "[g]iven that applicants' theory has evolved throughout the course of this litigation, we can hardly fault EPA for failing to raise every potentially meritorious defense in its response brief." She pointed out that "[t]he Court gave EPA less than two weeks to respond to multiple applications raising a host of general and industry-specific technical challenges, filed less than a week earlier." And the EPA had, in fact, argued that the FIP's viability and validity do not depend on the number of jurisdictions it covers."[222]

Worst of all, "the Court's injunction leaves large swaths of upwind states free to keep contributing significantly to their downwind neighbors' ozone problems for the next several years – even though the temporarily stayed SIP disapprovals may all be upheld and the FIP may yet cover all the original states."[223] The majority justified its stay "based on an alleged procedural error that likely

[215] Id., at 14.
[216] Id., at 14.
[217] Id., at 15.
[218] Id., at 20.
[219] Id., at 21.
[220] Id., at 21, n.13.
[221] Id., at 21, n.13.
[222] Id., at 22.
[223] Id., at 24.

had no impact on the plan."[224] Consequently, the majority's theory "would require EPA only to confirm what we already know: EPA would have promulgated the same plan even if fewer states were covered."[225] The dissent insisted that "[r]ather than require this years-long exercise in futility, the equities council restraint."[226]

My Assessment.

Justice Barrett's dissent convincingly demonstrated why the majority's conclusion that EPA's FIP was arbitrary and capricious was based on an unsympathetic reading of EPA's explanations and flawed assessment of the rulemaking record. The dissent was also correct in observing that Justice Gorsuch's majority opinion went "out of its way to develop a failure-to-explain theory largely absent from the applicants' briefs."[227] To this observer, the majority opinion leaves a strong impression of a court determined to come up with a rationale to justify a predetermined outcome.

If there is a weakness in EPA's position, it is in its conversion of what appears to be a media-quality-based statutory approach (upwind states must prohibit emissions that substantially contribute to downwind state nonattainment) into a technology-based approach (search for cost-effective methods and technologies) by positing that emissions in excess of the cost-effective methods and technologies substantially contribute to downwind state nonattainment. That approach, however, is dictated by the difficulty of attributing levels exceeding the NAAQS in any particular downwind state to emissions from individual sources in particular upwind states when levels in multiple downwind states depend on emissions from multiple upwind states. The Supreme Court had already approved EPA's solution to this intractable dilemma in the *EME Homer* case, and EPA rigorously followed that approach in *Ohio v. EPA*.

Rather than overruling EME Homer, the majority seized upon the red herring argument offered by the challengers that the degree of pollution reduction required to comply with the statute's good neighbor policy in any given upwind state depended upon the number of states included in the plan. As EPA clearly demonstrated in its response to motions for reconsideration, that was simply not the case. The degree of emissions reduction required by sources within an upwind state depended on EPA's technology-based industry-wide determination of the knee in the curve based on data drawn from similar sources from across the country, technology vendors, and other sources, and not from any particular downwind state. The majority refused to consider the agency's response to motions for reconsideration, but the agency's cost-effectiveness analysis was easily ascertainable from the agency's explanation in the preamble to the final rule and from the history of EPA's application of its 4-step approach in the past.

The majority's application of the APA's arbitrary and capricious test for substantive review of agency action was not really an application of the traditional "hard look" doctrine, because the majority did not look very hard for the agency's explanation of the methodology underlying EPA's application of the Clean Air Act's good neighbor requirements. Determined to ensure that companies subject to the FIP's requirements would not have to expend money on unnecessary

[224] Id.
[225] Id..
[226] Id.
[227] Id., at 21-22.

pollution control technology, the majority remained willfully ignorant of the approach that EPA took toward determining emissions limitations (and in the case of power plants, emissions budgets) for sources in upwind states, an approach that the Court had previously approved in the *EME Homer* case. The Court's approach represented a tortured application of the "reasoned explanation" aspect of arbitrary and capricious review.

The lesson for agencies whose rulemakings are subject to arbitrary and capricious review is that they must be extremely careful to explain every step of their methodologies and analyses in the preambles to their proposed and final rules, even if their explanations have already been approved by reviewing courts in the past. Congress might also consider amending the Clean Air Act to allow the content of proceedings following motions for reconsideration to be included in the record on judicial review.