THE REMAKING OF THE SUPREME COURT: IMPLICATIONS FOR CLIMATE CHANGE LITIGATION & REGULATION

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INTRODUCTION

With the nomination of Judge Amy Coney Barrett, the Supreme Court is a Senate vote away from a historic shakeup that will cement a conservative judicial majority for decades. While politicians, scholars, and the media have largely focused on what a Barrett nomination means

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for the Affordable Care Act[1] and *Roe v. Wade*,[2] the confirmation of Barrett would significantly impact a wide swath of environmental and climate change cases for years to come.[3] As the Supreme Court is on the brink of a generational transformation, it is increasingly clear that we have a generation—and no longer—to reduce our Greenhouse Gas (GHG) emissions and tackle the climate crisis.[4] Regardless of the winner of the 2020 presidential election, the President, Congress, administrative agencies, and litigants will need to take climate action.

Judge Barrett's record on the Seventh Circuit is not long, but her academic writing and rulings on judicial standing, the nondelegation doctrine, and agency deference will likely make it increasingly difficult both for environmental plaintiffs to establish standing and for federal agencies to regulate GHG emissions.[5] Barrett's nomination follows President Trump's successful appointment of Justices Gorsuch and Kavanaugh, both of whom have signaled a willingness to chip away at longstanding administrative law doctrines that have afforded agencies discretion in regulating GHG emissions.[6]

A transformed, 6-3 Court that replaces Justice Ginsburg with Justice Barrett has significant implications for the ability of Congress and the President to tackle climate change and other pressing environmental challenges—and for the ability of plaintiffs to address those challenges in court.

I. CLIMATE CHANGE LITIGATION: CHALLENGES TO STANDING

The Trump Administration's rollback of climate and environmental regulations has prompted a significant uptick in climate

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1 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 26 and 42 U.S.C.).

2 Roe v. Wade, 410 U.S. 113 (1973).

3 Most recently the Supreme Court granted certiorari in a climate change case from the Fourth Circuit, *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020). While the question presented in this case concerns whether this case should be heard in federal or state court, the Court can open the aperture to other matters discussed in this Essay.

4 *See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C (Valérie Masson-Delmotte et al. eds., 2019) [hereinafter IPCC 1.5 REPORT], https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf [https://perma.cc/P59B-8J5P].

5 *See* discussion *infra* Parts I, II.

6 *See* discussion *infra* Parts I, II; *see, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

litigation.[7] A diverse group of plaintiffs—states, cities, and even young children—have sued polluters, major fossil fuel corporations, and the federal government.[8] Innovative legal cases—such as *Juliana v. United States*[9]—have asserted a substantive due process right to a healthy environment.

Of course, before a litigant can have her matter addressed before any federal court, she must meet the Constitution's case or controversy requirement—including by establishing Article III standing.[10] To meet Article III's "irreducible constitutional minimum," any plaintiff must show that: (1) she has suffered or will imminently suffer an injury; (2) the injury is fairly traceable to the defendant's conduct; and (3) that a favorable federal court decision is likely to redress the injury.[11] Judicial interpretation of the standing inquiry is especially important for environmental litigants, whose injuries at times can be hard to quantify and articulate. Environmental plaintiffs often bring challenges via citizen suit provisions peppered throughout environmental statutes[12] or challenge agency actions as arbitrary and capricious under the Administrative Procedure Act.[13]

How might Judge Barrett reshape standing doctrine on the Court? It is useful to examine Justice Scalia's views on environmental standing as well as Barrett's own writings as both an academic and appellate judge. After all, Judge Barrett clerked for Justice Scalia during the 1998–1999 Supreme Court term and recently said that Justice Scalia's "judicial philosophy is mine, too."[14]

Prior to his own nomination to the Supreme Court, Justice Scalia wrote a law review article arguing that standing doctrine was a "crucial and inseparable element" of separation of powers principles—and

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7 The Sabin Center for Climate Change Law at Columbia Law School has tracked this increase. *See Climate Change Litigation Databases*, SABIN CTR. FOR CLIMATE CHANGE L., http://climatecasechart.com [https://perma.cc/8884-KZBE].

8 *See, e.g.*, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000).

9 Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016).

10 U.S. CONST. art. III, § 2; Lujan v. Defs. of Wildlife, 504 U.S. 555, 559 (1992).

11 *Lujan*, 504 U.S. at 560–61 (1992); *see also* Clapper v. Amnesty Int'l, 568 U.S. 398 (2013).

12 For example, the Clean Air Act's citizen suit provision can be found at 42 U.S.C. § 7604(a) (2018).

13 5 U.S.C. § 706(2)(A) (2018).

14 During her Supreme Court nomination in the White House Rose Garden, Barrett invoked the "incalculable influence" of her "mentor," Justice Antonin Scalia, stating "[h]is judicial philosophy is mine, too: a judge must apply the law as written." *See, e.g.*, Steve Holland, Lawrence Hurley & Andrew Chung, *Trump Picks Barrett as He Moves to Tilt U.S. Supreme Court Rightward,* REUTERS (Sept. 26, 2020, 6:05 AM), https://www.reuters.com/article/us-usa-court-trump/trump-picks-barrett-as-he-moves-to-tilt-u-s-supreme-court-rightward-idUSKBN26H0GI [https://perma.cc/2S88-SUHQ].

criticizing judges who liberally grant standing to environmental litigants as "enforcing the political prejudices of their own class."[15] This article foreshadowed Scalia's views on standing throughout much of his Supreme Court tenure, as evidenced by his writings in two environmental cases: his majority decision in *Lujan v. Defenders of Wildlife*[16] in 1992 and his vigorous dissent in 2000 in *Friends of the Earth v. Laidlaw Environmental Services*,[17] discussed below.

A. Friends of the Earth, Inc. v. Laidlaw Environmental Services

The Supreme Court narrowly granted certiorari in *Friends of the Earth v. Laidlaw* on March 1, 1999; this cert grant overlapped with Judge Barrett's Supreme Court clerkship with Justice Scalia.[18] Twenty years later, *Laidlaw* remains a key environmental standing case from which we can glean insights into how a future Justice Barrett and the newly transformed Supreme Court may approach standing in environmental and climate cases.

In *Laidlaw*, environmental groups sued Laidlaw Environmental Services, Inc., under the Clean Water Act's[19] citizen suit provision, arguing that it was illegally discharging pollutants into the North Tyger River in South Carolina.[20] The citizen suit provision gives private citizens a right of action to enforce Clean Water Act violations, and it is similar to provisions in the Clean Air Act[21] and other environmental statutes.[22] Although environmental plaintiffs have a statutory right of action, they must still meet Article III's case or controversy requirement. In a 7-2 decision, Justice Ginsburg held that the environmental groups had a justiciable claim even though Laidlaw had voluntarily ceased its discharges and come into compliance with the applicable permit.[23] In rejecting Laidlaw's argument that its cessation

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15 Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 SUFFOLK U. L. REV. 881, 881, 896 (1983).

16 Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

17 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000).

18 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 149 F.3d 303 (1998), *cert granted*, 525 U.S. 1176 (1999); *see, e.g.*, Amy Howe, *Profile of a Potential Nominee: Amy Coney Barrett,* SCOTUSBLOG (Sept. 21, 2020, 5:00 PM), https://www.scotusblog.com/2020/09/profile-of-a-potential-nominee-amy-coney-barrett [https://perma.cc/X6FZ-AL7D].

19 33 U.S.C. §§ 1251–1387 (2018).

20 *Laidlaw*, 528 U.S. at 176–77.

21 42 U.S.C. §§ 7401–7671q (2018).

22 *Id.* § 7604(a).

23 *Laidlaw*, 528 U.S. at 182–85.

mooted the plaintiffs' claims, Ginsburg highlighted the voluntary nature of these actions:

> "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." The "heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.[24]

In addition, the Court rejected the argument that the plaintiffs lacked standing because they had not demonstrated harm to the environment from Laidlaw's discharges. Justice Ginsburg's majority opinion held that the relevant showing for Article III standing is "not injury to the environment but injury to the plaintiff."[25] For Justice Ginsburg and the majority in *Laidlaw*, "[t]o insist upon the former rather than the latter . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit."[26] The plaintiffs had adequately alleged injury in fact when they provided affidavits that they used the affected area and are persons "'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."[27]

Justice Scalia, joined by Justice Thomas, wrote a scathing dissent, highlighting that the District Court found that Laidlaw's discharges caused no demonstrable harm to the environment.[28] He critiqued the Court's decision as "ha[ving] grave implications for democratic governance."[29] Scalia reiterated that a demonstration of harm to the environment is *not enough* to satisfy *Lujan's* injury-in-fact requirement, noting that "[t]ypically, an environmental plaintiff claiming injury due to discharges in violation of the Clean Water Act argues that the discharges harm the environment, and that the harm to the environment injures him."[30] Scalia acknowledged that it is "perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating and demonstrating the nature of the injury"—but found that "[o]ngoing 'concerns' about the environment are not enough . . . ."[31] For Scalia, the

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24 *Id.* at 189 (alteration in original) (citation omitted) (quoting United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968)).

25 *Id.* at 181.

26 *Id.*

27 *Id.* at 183 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

28 *Id.* at 198 (Scalia, J., dissenting).

29 *Id.* at 202.

30 *Id.* at 199.

31 *Id.*

majority had twisted the injury in fact requirement as a way to get around the lack of demonstrable harm to the environment:

> By accepting plaintiffs' vague, contradictory, and unsubstantiated allegations of "concern" about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham.[32]

Justice Scalia's more restrictive views on standing ultimately carried the day in 2009 in *Summers v. Earth Island Institute*.[33] In *Summers*, Scalia denied standing to a group of environmental organizations that challenged the United States Forest Service's implementation of regulations "in the absence of a live dispute over a concrete application of those regulations."[34]

B. Protect Our Parks, Inc. v. Chicago Park District

While on the Seventh Circuit Judge Barrett has written two majority opinions addressing Article III standing. Perhaps tellingly, in *Protect Our Parks, Inc. v. Chicago Park District*,[35] Judge Barrett raised the standing issue sua sponte.[36] In *Protect Our Parks*, an environmental group sued to halt construction of the President Obama Presidential Center in Chicago's Jackson Park.[37] Judge Barrett requested additional briefing on Article III standing and ultimately ruled against the environmental group on standing grounds, even though the defendant had not contested the issue.[38] While this is well within her discretion as an appellate judge, it nonetheless signifies Barrett's emphasis on the centrality of clearly establishing Article III standing prior to deciding the merits—not unlike her mentor, Justice Scalia.

The plaintiffs in *Protect Our Parks* asserted state law claims, including a violation of Illinois's public trust doctrine, as well as federal claims under the Takings Clause and other constitutional provisions.[39] Barrett affirmed the dismissal of the federal claims on the merits and

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32 *Id.* at 201.

33 Summers v. Earth Island Inst., 555 U.S. 488 (2009).

34 *Id.* at 490.

35 Protect Our Parks, Inc. v. Chi. Park Dist., 971 F.3d 722 (7th Cir. 2020).

36 *Id.* at 728; *see* Supplemental Brief of Plaintiffs-Appellants, Protect Our Parks v. Chi. Park Dist., 971 F.3d 722 (7th Cir. 2020) (Nos. 19-2308, 19-3333), 2020 WL 3259322 (referencing order to provide supplemental briefing on standing).

37 *Protect Our Parks*, 971 F.3d at 728.

38 *Id.* at 738; *see* Supplemental Brief of Plaintiffs-Appellants, *supra* note 36.

39 *Protect Our Parks*, 971 F.3d at 728–29.

dismissed the state law claims on standing grounds, noting that "[f]ederal courts are only permitted to adjudicate claims that have allegedly caused the plaintiff a concrete injury; a plaintiff cannot come to federal court simply to air a generalized policy grievance."[40]

Perhaps ironically given her statement that Justice Scalia's judicial philosophy is hers too, Judge Barrett actually relied upon Justice Ginsburg's opinion in *Laidlaw* when dismissing the plaintiff's state law claims for lack of standing. Quoting Ginsburg, Barrett wrote that "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."[41] But Barrett interpreted Ginsburg's language in a way that *denied standing* to the litigants.[42] Specifically, Barrett noted that the only injury the plaintiffs asserted was to Jackson Park, not themselves—writing that plaintiffs "can't repackage an injury to the park as an injury to themselves."[43]

On the other hand, Barrett suggested in a footnote that she may have ruled differently had the plaintiffs asserted an injury to their "separate concrete interest," pointing out that the plaintiffs erred when they failed to allege a concrete injury "that many plaintiffs bringing environmental challenges do."[44] In doing so, she referred to the injury alleged in both *Laidlaw* and *Sierra Club v. Morton*[45]: that the plaintiffs "use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity. That kind of injury is cognizable under Article III."[46]

How should we view Judge Barrett's views on standing and her treatment of *Laidlaw* in *Protect Our Parks*? First, it is clear that environmental groups must be careful to specifically allege a concrete injury throughout the litigation. Standing cannot be presumed, even if both litigants concede standing at the lower court level.[47] Second, her reliance on Ginsburg's majority opinion—and her suggestion that she may have ruled differently had the plaintiffs asserted an injury to themselves in addition to an injury to Jackson Park—says little about how she would approach a case akin to *Laidlaw*, where injury to the

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40 *Id.* at 728.

41 *Id.* at 732 (alteration in original) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000)).

42 *Id.*

43 *Id.*

44 *Id.* at 731 & n.1 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 (1992).

45 Sierra Club v. Morton, 405 U.S. 727 (1972).

46 *Protect Our Parks*, 971 F.3d at 731 n.1 (citation omitted) (internal quotation marks omitted).

47 *See, e.g.*, *Laidlaw*, 528 U.S. at 185 (noting that the defendant was correct to "insist that a plaintiff must demonstrate standing separately for each form of relief sought").

plaintiffs has been demonstrated but injury to the environment has not. In such a case, Barrett's own words suggest that she would likely hew to Justice Scalia's philosophy.

C. *Implications for* Massachusetts v. EPA

Judge Barrett's approach to standing may well have significant impacts on the Court's adjudication of climate change litigation, which has proliferated in recent years. To date, the Court's 5-4 opinion in *Massachusetts v. EPA*[48] is arguably its most significant climate change ruling, and the Court's most significant decision for environmental law.[49] In that case, the Court granted standing to states as "*quasi*-sovereign[s]" to sue EPA, highlighting that Massachusetts "has an interest independent of and behind the titles of its citizens."[50]

Following the failure of attempted climate legislation in the Senate in 2009, President Obama relied heavily upon executive orders and the EPA's newfound authority to regulate carbon dioxide as an air pollutant.[51] The Obama Administration issued the ambitious Clean Power Plan, new vehicle emissions standards, and new methane rules. Almost immediately upon the announcement of the Clean Power Plan, it was challenged in court.[52]

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48 Massachusetts v. EPA, 549 U.S. 497 (2007).

49 Liz Mineo, *How and Why the Supreme Court Made Climate Change History,* HARV. GAZETTE (Apr. 22, 2020), https://news.harvard.edu/gazette/story/2020/04/massachusetts-v-epa-opened-the-door-to-environmental-lawsuits [https://perma.cc/6ZML-883V] ("Massachusetts v. EPA is the most significant decision for environmental law because not only did the Supreme Court take the case and then rule in favor of the environmentalists, but also because the rule in itself had huge sweep and impact." (quoting Professor Richard Lazarus)).

50 Massachusetts v. EPA, 549 U.S. 497, 518–19 (2007) (quoting Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)). "The risk of catastrophic harm[to Massachusetts], though remote, is nevertheless real." *Id.* at 526. The Court also held that the EPA had an affirmative duty to regulate GHG emissions if EPA scientists determined that GHG emissions endangered human health. Shortly thereafter, EPA scientists made an endangerment finding and EPA began exercising its authority to regulate carbon dioxide as an air pollutant under the Clean Air Act. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,327–28 (May 7, 2010) (codified as 40 C.F.R. pts 85, 600; 49 C.F.R. pts 531, 533, 536).

51 *See Regulation Database—Executive Orders*, SABIN CTR. FOR CLIMATE CHANGE L., https://climate.law.columbia.edu/content/regulation-database-executive-orders [https://perma.cc/NVM5-XXWD] (highlighting ten executive orders on the environment and climate issued by President Obama).

52 The *New York Times* recently counted nearly one hundred environmental rules that have been rolled back under the Trump Administration. Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Is Reversing Nearly 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES (Oct. 15, 2020), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html [https://perma.cc/6RAK-4U3E].

Justice Scalia joined Chief Justice Roberts's dissenting opinion in *Massachusetts v. EPA*. Roberts's dissenting opinion focused on questions of standing in both his opinion and throughout oral argument.[53] Three of the dissenting Justices (Thomas, Alito, and Roberts) remain on the Court while just one Justice joining the majority (Breyer) remains. With the Trump Administration's rollback of environmental regulations, several states have sued both the government and private industry under a theory of standing first articulated by Justice Stevens in *Massachusetts v. EPA*.[54]

Finally, the Trump Administration is in the process of repealing the Obama-era Clean Power Plan. On October 8, 2020, the U.S. Court of Appeals for the D.C. Circuit is scheduled to hear oral arguments in the case. While standing has not been a central issue in the Clean Power Plan litigation to date, this may present the Supreme Court an opportunity to revisit *Massachusetts v. EPA*.[55] But as Professor Richard Lazarus has pointed out, the Supreme Court's recent rulings on such hot-button issues as abortion and immigration showcase that "societal and cultural change can make a difference in how [J]ustices address legal questions."[56] Indeed, advances in climate attribution science have progressed markedly in the thirteen years since *Massachusetts v. EPA* and will be difficult for the Supreme Court to completely ignore.[57] It would be increasingly difficult for the Court to rule on a major climate case in a vacuum and fully dismiss climate-exacerbated disasters such as the California wildfires. Nevertheless, Judge Barrett's views on

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53 *Massachusetts*, 549 U.S. at 535–49 (Roberts, C.J., joined by Scalia, J., dissenting). During oral argument, Justice Scalia was even more blunt. After mistaking the troposphere for the stratosphere, he exclaimed, "That's why I don't want to have to deal with global warming, to tell you the truth." *See, e.g.*, Marianne Lavelle, *Trump's Pick for the Supreme Court Could Deepen the Risk for Its Most Crucial Climate Change Ruling*, INSIDECLIMATE NEWS (Sept. 30, 2020) (quoting Justice Scalia), https://insideclimatenews.org/news/29092020/amy-coney-barrett [https://perma.cc/2V55-AY3H]. He wrote a separate dissenting opinion on jurisprudential standing grounds. *Massachusetts*, 549 U.S. at 549–60 (Scalia, J., dissenting).

54 *See, e.g.*, David Hasemyer, *Fossil Fuels on Trial: Where the Major Climate Change Lawsuits Stand Today,* INSIDECLIMATE NEWS (Jan. 17, 2020), https://insideclimatenews.org/news/04042018/climate-change-fossil-fuel-company-lawsuits-timeline-exxon-children-california-cities-attorney-general [https://perma.cc/G4AR-QHQA].

55 *See, e.g.*, Dino Grandoni, *The Energy 202: An Extra Trump Supreme Court Justice May Help Cement Environmental Rollbacks,* WASH. POST. (Sept. 21, 2020, 7:54 AM) (quoting Professor Michael Gerrard that the Clean Power Plan litigation could be a vehicle to undermine *Massachusetts v. EPA*), https://www.washingtonpost.com/politics/2020/09/21/energy-202-an-extra-trump-supreme-court-justice-may-help-cement-his-environmental-rollbacks [https://perma.cc/2L77-8GRF].

56 Lavelle, *supra* note 53.

57 *See, e.g.*, Michael Burger, Jessica Wentz & Radley Horton, *The Law and Science of Climate Change Attribution,* 45 COLUM. J. ENVTL. L. 57 (2020); Mark Patrick Nevitt, *On Environmental Law, Climate Change, & National Security Law,* 44 HARV. ENVTL. L. REV. 321, 328–34 (2020).

standing appear to roughly mirror those of Justice Scalia, who was skeptical of judges inserting political and social prejudices in their jurisprudence.[58] Further, during her confirmation hearings before the Senate Judiciary Committee, Judge Barrett was reluctant to acknowledge the consensus science on climate change in a series of questions from Senator Kamala Harris.[59]

In sum, while it remains unclear how Judge Barrett's views on standing would play out in direct challenges to *Massachusetts v. EPA*, it is unlikely that she would seek to find ways to lower the judicial bar for standing. With a Barrett nomination, questions of Article III standing in all environmental cases will be closely scrutinized, only increasing the possibility of a *Massachusetts v. EPA* reversal.[60]

II. ADMINISTRATIVE LAW CHALLENGES: THE NONDELEGATION DOCTRINE AND AGENCY DEFERENCE

In the absence of comprehensive climate legislation, a Biden Administration—or any future President seeking to take substantive climate action—will be forced to follow President Obama's strategy and rely upon the Clean Air Act and other existing environmental statutes.[61] Doing so will implicate two doctrines that a 6-3 Court could revisit in ways that significantly restrain administrative action: the nondelegation doctrine[62] and *Chevron* deference.[63] In addition, I believe that a nondelegation challenge will arise if a future Congress passes comprehensive climate legislation—such as a complex cap-and-trade system—that delegates decision-making and authority to the EPA or another administrative agency.

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58 Scalia, *supra* note 15, at 896.

59 *See* John Schwartz & Hiroko Tabuchi, *By Calling Climate Change 'Controversial,' Barrett Created Controversy,* N.Y. TIMES (Oct. 15, 2020), https://www.nytimes.com/2020/10/15/climate/amy-coney-barrett-climate-change.html [https://perma.cc/QR2M-GPPH].

60 Grandoni, *supra* note 55. While it is beyond the scope of this Article to fully examine, Judge Barrett has acknowledged that there exists a tension between originalism and stare decisis. *See* Amy Coney Barrett, *Originalism and Stare Decisis,* 92 NOTRE DAME L. REV. 1921, 1922 (2017).

61 SABIN CTR. FOR CLIMATE CHANGE L., *supra* note 51.

62 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001).

63 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

A. *Challenges to the Nondelegation Doctrine*

The nondelegation doctrine derives from Article I of the U.S. Constitution, which vests all legislative power in Congress.[64] While the term "agencies" is not mentioned in the Constitution, federal agencies have specialized rulemaking authority to promulgate regulations that carry the force of law.[65] The nondelegation doctrine provides that Congress may not delegate its legislative power to administrative agencies.[66]

There have only been two successful nondelegation doctrine challenges in U.S. history, both occurring in 1935. In *Schechter Poultry Corp. v. United States*[67] the Supreme Court struck down as unconstitutional a regulation promulgated under the National Industrial Recovery Act that prescribed labor standards for poultry businesses in New York City.[68] The Court held that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."[69] This decision—issued in the midst of President Roosevelt's New Deal, which saw a massive increase in the size of the administrative state—acknowledged that there exists a "host of details with which the national Legislature cannot deal directly."[70] But the Court held that while Congress can "leav[e] to selected instrumentalities the making of subordinate rules within prescribed limits," it cannot transfer responsibility for enacting overarching standards.[71]

Since *Schechter*, challenges to agency authority via the nondelegation doctrine have proven unsuccessful. This likely reflects a common-sense judgment by the Court that delegations to expert agencies are necessary to meet the challenges of a complex world and that the judiciary is ill equipped to draw meaningful lines.[72] While nondelegation challenges have been unsuccessful for over eighty years, the rightward shift of the Supreme Court revives the possibility that the

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64 U.S. CONST. art. I, § 1.

65 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 352–53 (6th ed. 2019).

66 *Id.* at 353.

67 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

68 *See id.*

69 *Id.* at 529.

70 *Id.* at 530; *see generally* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007) (describing the creation of "scores of new administrative agencies").

71 *Schechter Poultry*, 295 U.S. at 530.

72 *See* CHEMERINSKY, *supra* note 66, at 354.

Court will revive the doctrine. As such, agencies must be increasingly mindful that they are staying within the bounds of their delegated authority and the "intelligible principle" test set forth in prior Supreme Court holdings.[73]

Judge Barrett has yet to squarely address the nondelegation doctrine on the Seventh Circuit. But writing in the *Cornell Law Review* in 2014, she critiqued the governing "intelligible principle" test for determining whether a delegation of legislative authority to an executive agency is constitutional as "notoriously lax."[74] And as with Article III standing, Justice Scalia's views on the nondelegation doctrine provide additional insights into how Judge Barrett might rule on nondelegation challenges that come before the Court.

Justice Scalia famously dissented in *Mistretta v. United States*[75] in 1989, stating that he would strike down the United States Sentencing Guidelines as an unconstitutional delegation of legislative authority.[76] But Scalia's views on the nondelegation doctrine shifted in 2001 in *Whitman v. American Trucking Ass'ns*.[77] In *Whitman,* the Court addressed the scope of the EPA's authority under the Clean Air Act. The D.C. Circuit previously declared the EPA's air quality regulations unconstitutional pursuant to the nondelegation doctrine. Justice Scalia, writing for a unanimous Court, upheld the EPA's authority.[78] While the Constitution "permits no delegation of [legislative] powers," Congress must give "intelligible principle[s]" to guide the agency in its exercise of discretion.[79] *Whitman* may well come under closer scrutiny in the coming years if the EPA aggressively uses the Clean Air Act to regulate GHG emissions.

The Court most recently addressed the nondelegation doctrine in a 2019 decision, *Gundy v. United States*.[80] In *Gundy*, the plaintiff challenged the Sex Offender Registration and Notification Act's (SORNA) delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 20913 as an unconstitutional delegation to the Attorney General.[81] The Court rejected the nondelegation challenge, but the decision (5-3 with Justice Kavanaugh taking no part)

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73 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001).

74 Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014).

75 Mistretta v. United States, 488 U.S. 361 (1989).

76 *Id.* at 413 (Scalia, J., dissenting).

77 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

78 *Id.* at 462–86.

79 *Id.* at 472.

80 Gundy v. United States, 139 S. Ct. 2116 (2019).

81 *Id.* at 2121–22.

was much closer than either *Mistretta* or *Whitman*.[82] Justice Alito provided the critical fifth majority vote but did not join either the plurality's constitutional or statutory analysis, stating that he would join the minority in an appropriate case.[83] Chief Justice Roberts and Justice Thomas joined Justice Gorsuch's dissent.[84] Justice Gorsuch wrote that he would strike down the SORNA as an unlawful delegation of power to the Attorney General.[85] Signaling a continual openness to examine the nondelegation doctrine, Justice Gorsuch wrote:

> I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That "is delegation running riot."[86]

Finally, Justice Kavanaugh made an unusual "statement" accompanying a denial of certiorari in *Paul v. United States*[87] on November 25, 2019, another challenge brought under the nondelegation doctrine. He stated, "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."[88]

So where does the nondelegation doctrine stand as the Senate turns to Judge Barrett's nomination? Following *Gundy*, three Justices (Gorsuch, Roberts, Thomas) appear ready to wholly reinvigorate the nondelegation doctrine while two Justices (Alito, Kavanaugh) remain increasingly skeptical of the "intelligible principle" test. Given Judge Barrett's skepticism of the "intelligence principle" test in her academic writings and her embrace of Justice Scalia's judicial philosophy, we could witness the first successful nondelegation challenge since 1935, which could doom bold agency actions on a host of matters—including climate change.

As of this writing, the nondelegation doctrine functions as a true constitutional wild card. Future presidential administrations that seek bold agency action on climate must be particularly careful not to exceed existing delegated authority, and future Congresses must be mindful of

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82 *Id.* at 2116–21. Justice Kagan held that this provision "easily passes constitutional muster."

83 *Id.* at 2130–31 (Alito, J., concurring). Justice Gorsuch, in his dissenting opinion, stated that Justice Alito's refusal to join the plurality "indicat[es] . . . that he remains willing, in a future case with a full Court, to revisit these matters." *Id.*

84 *Id.* at 2131 (Gorsuch, J., dissenting).

85 *Id.* at 2148.

86 *Id.* (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring)).

87 Paul v. United States, *cert. denied*, 140 S. Ct. 342 (2019).

88 *Id.* (Kavanaugh, J., statement regarding denial of certiorari).

the doctrine when enacting comprehensive climate legislation, whether cap-and-trade, carbon tax, or some version of the Green New Deal. Placing too much authority in the hands of an administrative agency could force Congress to go back to the legislative drawing board.

B. *Deference to Agency Actions*

In addition to the nondelegation doctrine, two administrative law doctrines—*Auer* deference[89] and *Chevron* deference—are very much in jeopardy with a Barrett nomination. *Auer* deference allows agencies broad deference in interpreting their own regulations.[90] In June 2019, the Supreme Court refused to overrule *Auer* deference in *Kisor v. Wilkie*,[91] a 5-4 opinion.

Chevron deference permits reasonable agency interpretations of ambiguous statutory terms.[92] In *County of Maui v. Hawaii Wildlife Fund*,[93] Justice Thomas stated that *Chevron* is unconstitutional as it "likely conflicts with the Vesting Clauses of the Constitution."[94] Advocates for Barrett's confirmation have noted that she "has been especially attuned to overreaching by administrative agencies" while joining several opinions declining to defer to government agencies' interpretation of their own regulations.[95] For example, Judge Barrett joined a majority opinion in 2018, holding that the Army Corps of Engineers failed to provide enough evidence that thirteen acres of Illinois wetlands fell under federal jurisdiction as navigable-in-fact waters.[96] The court vacated the lower court's decision, with instructions that the Army Corps reconsider its determination.[97] Similar to the nondelegation doctrine, the status of both *Chevron* and *Auer* deference remains highly uncertain and increasingly precarious if Barrett were to be confirmed.

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89 Auer v. Robbins, 519 U.S. 452 (1997).

90 *Id.*; *see also* David B. Rivkin Jr. & Andrew Grossman, *What Kind of Judge Is Amy Coney Barrett?*, WALL ST. J. (Sept. 26, 2020, 5:04 PM), https://www.wsj.com/articles/what-kind-of-judge-is-amy-coney-barrett-11601154273 [https://perma.cc/G2M6-T3FV].

91 Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

92 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–47 (1984).

93 Cty. of Maui v. Haw. Wildlife Fund, 140 S. Ct 1462 (2020).

94 *Id.* at 1480 (Thomas, J., dissenting).

95 Rivkin & Grossman, *supra* note 90.

96 Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng'rs, 893 F.3d 1017, 1023 (7th Cir. 2018).

97 *Id* at 1027.

CONCLUSION

As the Supreme Court's membership is being transformed, the earth continues to warm. And extreme weather—further exacerbated by climate change—increases in scope, scale, and frequency every year.[98] The massive California wildfires are but one example. The world is off track to meet the Intergovernmental Panel on Climate Change (IPCC)'s emissions goals to keep global temperatures at a manageable level.[99]

Meanwhile, climate legislative efforts—such as the Green New Deal—languish in Congress.[100] And even if the Green New Deal were passed, it must carefully walk a "delegation tightrope" that provides agencies discretion and authority to implement climate legislation without delegating too much legislative function.[101] The work to reduce GHG emissions has fallen to administrative agencies who are empowered to regulate air pollutants via the Clean Air Act and other statutory authorities.[102] As the Trump Administration has rolled back nearly 100 environmental regulations and announced its intention to rescind the Obama-era Clean Power Plan, we have witnessed a significant uptick in climate change litigation.[103] A Barrett confirmation may well provide the judicial impetus to further reduce agency authority to regulate GHG emissions and raise the jurisprudential bar for climate litigants. It would also make it increasingly difficult for future presidents to take bold action on climate.

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98 *See Explaining Extreme Events of 2017 from a Climate Perspective,* 100 BULL. AM. METEOR. SOC'Y (SPECIAL SUPPLEMENT) S1 (2019), https://journals.ametsoc.org/bams/article-pdf/100/1/S1/4722470/bams-explainingextremeevents2017_1.pdf [https://perma.cc/QR73-JASC] (finding that sixteen of seventeen extreme weather events were made more likely by human caused climate change).

99 *See, e.g.*, IPCC 1.5 REPORT, *supra* note 4.

100 The last time Congress attempted to pass substantive climate change legislation occurred in 2009. For a journalistic overview of this process and why it failed, see Ryan Lizza, *As the World Burns*, NEW YORKER (Oct. 3, 2010), https://www.newyorker.com/magazine/2010/10/11/as-the-world-burns [https://perma.cc/LVB3-T3UV].

101 *See* Mark Nevitt, *Delegating Climate Solutions,* 38 YALE J. REG. (2022) (forthcoming) (on file with author).

102 *See* Massachusetts v. EPA, 549 U.S. 497 (2007). The President does possess some authority to combat climate change under the Commander in Chief Clause. For a discussion of these authorities, see Mark P. Nevitt, *The Commander in Chief's Authority to Combat Climate Change,* 37 CARDOZO L. REV. 437 (2015).

103 Popovich et al., *supra* note 52.