

 **TAKE BACK  
THE COURT**

# The Roberts Court Would Likely Strike Down Climate Change Legislation

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# Introduction:

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The Roberts Supreme Court has been increasingly emboldened to embrace radical theories for partisan reasons.<sup>1</sup> In their challenge to the Affordable Care Act, a challenge that ultimately came within a hair's breadth of succeeding, conservatives took arguments once considered absurd and beyond the pale "from off the wall to on the wall."<sup>2</sup> If Congress enacts climate change legislation, the Supreme Court could be expected to recycle this playbook, and to rely on implausible legal arguments to evaluate and, in all likelihood, strike down the law. This memorandum catalogs "off the wall" arguments that conservative Supreme Court justices can be expected to invoke when they overturn climate change legislation.

The Court's conservative justices have an array of dubious legal interpretations at their disposal for dismantling climate change legislation, including an exceedingly narrow interpretation of statutes that empower federal agencies, an expansive reading of the Takings Clause and the Tenth Amendment, and a preferential application of the Commerce Clause.<sup>3</sup> Given the Roberts Court's track record of applying doctrine arbitrarily to suit preferred policy outcomes, it seems unlikely that climate change legislation would survive judicial review. As the planet continues to warm, the consequence of the Court's dismantling of climate change legislation would likely be a series of decisions that would not only hollow it out but also enshrine legally dubious doctrines for decades to come.

# Background:

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Environmental protection efforts are certainly not new, and they have intensified somewhat in recent years. In 2017, Representative Jared Polis (D-CO) introduced a bill reducing carbon pollution, promoting renewable energy, and providing job training and other services to those currently working in fossil fuel energy.<sup>4</sup> In January 2019, Representative Ted Lieu (D-CA) and Representative Jimmy Gomez (D-CA) introduced a bill to promote more robust renewable energy standards and lower greenhouse gas emissions.<sup>5</sup> In the same month, the New York State Senate announced hearings on the Climate & Community Protection Act, which "intends to tackle the effects of climate change by drastically cutting greenhouse gases, diverting the State's energy reliance to renewable sources, and creating green jobs in an effort to promote environmental justice across New York State."<sup>6</sup> These efforts, and countless others in recent years, point to a growing awareness of the dangers of climate change as well as the need to combat it in a way that avoids harming marginalized communities.

Major candidates for the 2020 Democratic presidential nomination have endorsed the need for climate change legislation, even if some have not yet articulated a full vision of what it would entail.<sup>7</sup> Efforts to mitigate climate change will almost certainly consist of a large-scale program composed of numerous laws and policies. This fact offers many opportunities for supporters—

but also many points of attack for opponents. Climate change legislation will almost certainly be challenged by conservative groups seeking to gut the government's ability to tackle key contemporary issues. These groups are bound to support their challenges using legally dubious rationales such as originalism, the belief that constitutional interpretation should be rooted in what the Constitution's drafters originally intended certain provisions and phrases to mean in the eighteenth century.<sup>8</sup>

Because the details of climate change legislation remain unclear and because mitigation will consist of many programs, laws, and policies, arguments against potential legislation are broad. However, even if Democrats retake the presidency and the Senate and maintain control of the House, the Supreme Court is poised to strike down key aspects of any conceivable version of climate change legislation. In the past, conservative justices and judges have sought to limit federal agency authority and expand the Takings Clause, state commandeering doctrines, and the Commerce Clause in ways that would threaten climate change legislation and policies. The current Supreme Court will likely invoke similar arguments, outlined below, to invalidate key aspects of any version of climate change legislation. Although Congress could specify some aspects of the legislation rather than delegating rule-making to agencies, and careful drafting

might address some of the concerns about delegating to agencies, climate change legislation will undoubtedly include provisions that would be vulnerable to a Roberts Court that has demonstrated a fondness for the dubious legal critiques outlined in this study.

The remainder of this study proceeds as follows. Part I discusses the longstanding practice of conservative hostility to environmental regulation. It focuses on the environmental and administrative law rulings of Justices Kavanaugh, Roberts, and Gorsuch, and it examines cases on the current Court's docket that most jeopardize environmental regulations. Climate change legislation would likely find itself in the same danger. Part II turns to specific doctrinal arguments that conservative justices can be expected to invoke to strike down provisions of climate change legislation. Those include (1) restricting agency power to interpret and implement environmental laws; (2) using the Takings Clause to strike down legislation that supposedly sweeps too broadly; (3) invoking the Commerce Clause to restrict Congress's authority to pass environmental laws; and (4) ruling that the anti-commandeering doctrine prevents Congress from requiring states to comply with certain standards. Although these arguments may be dubious at best, their implausibility will not protect climate legislation from a Roberts Court determined to strike it down.



If Congress passed climate change legislation, the Supreme Court could be expected to strike down the law.

# I. Conservative hostility toward environmental regulation

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## *Deeply Entrenched Conservative Opposition to Environmental Regulation Suggests that the Court Will Be Hostile to Climate Change Legislation*

The Court's anticipated hostility to climate change legislation reflects deeply entrenched trends, as conservative judges have been hostile to environmental regulations for decades. This Section focuses on three key Justices who pose perhaps the gravest threat to environmental law: (1) Justice Kavanaugh, because he replaced the "swing vote" Justice Kennedy; (2) Chief Justice Roberts, who has overseen the Court's ongoing drift to the far right; and (3) Justice Gorsuch, who arguably occupies Obama nominee Judge Merrick Garland's rightful Court seat. The Section ends with a discussion of current environmental and administrative law cases on the Court's docket that will have profound implications for climate change legislation.

### **JUSTICE KAVANAUGH POSES A POTENTIALLY GRAVE THREAT TO ENVIRONMENTAL LAW**

When Justice Kennedy—the Court's "swing vote"—retired in June 2018, Justice Kavanaugh filled his seat and fundamentally shifted the Court to the right. Though

Justice Kennedy was deeply conservative on a host of issues, he sided with the Court's liberal bloc in key moments to defend progressive policies. One of those pivotal votes came in the seminal case *Massachusetts v. Environmental Protection Agency*. In that case, the Court sided with the state of Massachusetts and environmental advocacy groups to rule that the Clean Air Act's definition of "air pollutant" included greenhouse gases. Justice Kennedy joined the liberal majority, but the conservative contingent comprised of Justices Roberts, Scalia, Thomas, and Alito—three of whom remain on the current Court—dissented. Were the same question to come before the Supreme Court now, the outcome would likely flip: Justice Gorsuch replaced Justice Scalia while Justice Kavanaugh took Justice Kennedy's seat, tilting the Court to the right. The entire system of regulating greenhouse gases under the Clean Air Act might be at risk, which makes the need for climate change legislation even more imperative.

Kavanaugh's record in environmental cases has prompted observers to dub him "a conservative critic of sweeping environmental regulations"<sup>9</sup> and "a disaster for the

environment,”<sup>10</sup> and to predict that he will become “a potent anti-environment Justice.”<sup>11</sup> His rulings in the realm of administrative law are particularly noteworthy. Much environmental protection is achieved not directly through congressional statute, but rather through regulations promulgated by administrative agencies. Congress delegates power to agencies, like the Environmental Protection Agency (EPA), to issue regulations that carry the force of law. Under the guise of constraining agency power, conservative judges often read congressional delegation to agencies narrowly—thus resulting in pro-industry, anti-environment rulings.

Kavanaugh’s environmental rulings while he was a judge on the D.C. Circuit Court of Appeals are no different. He consistently construed agency authority narrowly, strictly hewing to the text and often in derogation of the congressional intent of those statutes—namely, protecting the environment. For example, in *Mexichem Fluor v. Environmental Protection Agency*, he struck down a regulation that would limit the amount of hydrofluorocarbons (HFCs) that manufacturers can use.<sup>12</sup> EPA had issued the regulation because HFCs contributed to climate change, but Kavanaugh ruled that the Clean Air Act did not explicitly grant the EPA the power to regulate HFCs.<sup>13</sup> In *EME Homer City Generation, L.P. v. Environmental Protection Agency*, Kavanaugh held that an EPA rule setting forth a cooperative effort between states and the federal government to limit pollution from upwind states was in excess of the agency’s authority under the Clean Air Act.<sup>14</sup> The Supreme Court later reversed Kavanaugh’s decision in a 6-2 vote, indicating just how far outside of the mainstream his decision was.<sup>15</sup> In *Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency*,<sup>16</sup> then-Judge Kavanaugh voted to rehear (likely because he wanted to overturn) a D.C. Circuit opinion that confirmed the EPA’s ability to regulate greenhouse gases. Kavanaugh explained that the courts’

“role is not to make the policy choices or to strike the balance between economic and environmental interest.” That responsibility, instead, lay with the President and Congress.<sup>17</sup> In voting to rehear the case, Judge Kavanaugh was making his own policy choice—to substitute his judgment for that of an agency that had determined that greenhouse gases pose a threat to the environment. He can be expected to do the same on the Supreme Court.

## CHIEF JUSTICE ROBERTS CAN BE EXPECTED TO LEAD THE SUPREME COURT IN THE CHARGE AGAINST ENVIRONMENTAL REGULATION

After Justice Kennedy retired in June 2018, replaced by the more conservative Justice Kavanaugh, Chief Justice Roberts took over as the Court’s new “center,” despite his record of conservative jurisprudence. Under his leadership, the Court is predisposed to become even more hostile toward laws seeking to protect the environment. Justice Roberts’s dissent in *Massachusetts v. Environmental Protection Agency* is telling of the stance that this new Court may take. In the opening lines of his dissent, Roberts remarks that though “[g]lobal warming may be a crisis” or “even the most pressing environmental problem of our time,” the EPA lacks the statutory authority to regulate greenhouse gases.<sup>18</sup> In so doing, Roberts invokes the familiar conservative refrain of judicial restraint even though ruling *against* the EPA has consequences that arguably reach more broadly than would upholding an agency’s expert opinion.

Justice Roberts’s dissent in *Massachusetts* is indicative of his consistent opposition to environmental regulation. A report from the Constitutional Accountability Center notes that “in every major environmental law case

that divided the Supreme Court during Roberts's first eight years as Chief Justice, Roberts voted against environmental protection."<sup>19</sup> Even before that, while serving as a judge on the D.C. Circuit, then-Judge Roberts was skeptical of environmental protections. In dissenting from the D.C. Circuit's decision to not rehear a case that ended in an environment-protective outcome, he rejected the majority's application of the Endangered Species Act that protected, in his words, a "hapless toad."<sup>20</sup> His tenure on the highest court has proved little different. He has joined decisions restricting the ability of plaintiffs to sue or get relief for environmental harm,<sup>21</sup> voted to limit the scope of the Clean Water Act,<sup>22</sup> and joined an opinion authorizing the use of industry-friendly cost-benefit analyses under the Clean Water Act.<sup>23</sup> While discussing the full scope of Roberts's anti-environment jurisprudence is beyond the scope of this study, his leadership and presence on the Court would appear to put climate change legislation at real risk.

## JUSTICE GORSUCH'S HOSTILITY TO AGENCIES COULD HINDER CLIMATE CHANGE LEGISLATION

Gorsuch's record on cases directly addressing environmental protections is mixed. While on the Tenth Circuit Court of Appeals, he upheld renewable energy standards issued by Colorado, rejecting a challenge from the private sector that argued the standards to be an unconstitutional infringement on federal government prerogatives.<sup>24</sup> At the same time, however, Gorsuch has sometimes found that environmental groups do not have standing to challenge serious government violations of federal rules regarding land protection.<sup>25</sup>


Where Gorsuch is likely to do the most damage to climate change legislation is through his extremely narrow interpretation of agency authority. Although Gorsuch has not handled many environmental cases, his fierce opposition to *Chevron* deference (see below) and general skepticism of agency authority could hinder any attempt to implement climate change legislation. Gorsuch is more extreme than Scalia was in condemning *Chevron*, which held that agency interpretations of their own statutes must be given broad deference in ambiguous cases. While Scalia sometimes saw *Chevron* as "a useful constraint on activist courts," Gorsuch considers *Chevron* "a potential threat to the fundamental obligation of the judiciary to interpret federal statutes and 'say what the law is.'"<sup>26</sup> He has expressed concern about the power of executive agencies,<sup>27</sup> and he explicitly called for the reconsideration of *Chevron* in his concurrence in *Gutierrez-Brizuela v. Lynch*, decided by the Tenth Circuit in 2016.<sup>28</sup> If given the chance, Gorsuch would almost certainly contribute to the elimination of *Chevron* deference, thus subjecting regulatory agencies to intense scrutiny that would create significant obstacles for implementation. Relatedly, Gorsuch has "argued for reinvigorating the long-dormant non-delegation doctrine,"<sup>29</sup> as discussed below.

## CURRENT CASES MAY PORTEND THE COURT'S ANTI-PATHY TOWARD CLIMATE CHANGE LEGISLATION

The stakes are already high, as illustrated by cases currently before the Supreme Court. Some of these cases deal directly with environmental regulation, while others deal with administrative law more generally. Since administrative law is the key arena for modern environmental protection efforts, both types of cases will have direct consequences for future litigation.

The Court has recently considered or is currently considering several environmental cases, including *Weyerhaeuser Co. v. Fish and Wildlife Service* and *Hawai'i Wildlife Fund v. County of Maui*. First, *Weyerhaeuser* involved the Endangered Species Act (ESA), which empowers the government to designate particular areas as critical habitat for endangered species. In *Weyerhaeuser*, a group of landowners sued to limit the government's ability to make critical habitat designations. While a judge on the D.C. Circuit, Kavanaugh "handled several ESA cases...and environmentalists don't consider

his record to be favorable."<sup>30</sup> Although the Court ultimately remanded *Weyerhaeuser* for further review, Kavanaugh's antipathy to environmental regulation could bode ill for similar cases in the future—especially if *Weyerhaeuser* itself returns to the Supreme Court. Second, *Hawai'i Wildlife Fund* deals with the Clean Water Act (CWA), a crucial piece of environmental legislation. With "the current make-up of the Court, a narrow ruling which limits the reach of the CWA would not be unexpected."<sup>31</sup> Based on previous rulings by the Court's conservative justices, key environmental protections appear to be at risk of curtailment.



Kavanaugh's record in environmental cases has prompted observers to dub him 'a disaster for the environment.'

## II. Legal arguments that the Supreme Court may employ to attack climate change legislation

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**1. Federal agencies currently enjoy broad statutory authority to execute their congressionally assigned missions. Despite well-established precedent, the Supreme Court could take an overly narrow view of the statutory authorities given by Congress to federal agencies for implementing climate change legislation.**

Even if Congress passes climate change legislation, the current Supreme Court likely will interpret statutory authority narrowly for any federal agencies that are given a role in implementing the legislation. Limiting the statutory powers of federal agencies has long been a conservative priority, at least since the Supreme Court decided in the 1984 *Chevron* decision to defer to agencies' interpretation of the statutes that empower them (leading to the concept of *Chevron* deference).<sup>32</sup> Since then, the Court's conservative justices have "opened fire on *Chevron*," as one law professor put it.<sup>33</sup> More recently,

the Court has increasingly ignored *Chevron* deference without reason—even when the government asked the Court to apply it.<sup>34</sup>

As discussed above, while on the D.C. Circuit, then-Judge Kavanaugh gained a reputation for closely scrutinizing the EPA's actions and environmental regulations, in line with his general antipathy toward agency rulemaking. For example, in August 2017, Kavanaugh ruled against an EPA regulation to gradually eliminate hydrofluorocarbons, basing his decision on a limited view of the EPA's statutory authority.<sup>35</sup> In contrast to Justice Kennedy, who provided the crucial fifth vote for a pivotal case endorsing a more expansive view of the EPA's regulation authority,<sup>36</sup> now-Justice Kavanaugh will likely be hostile to attempts to increase environmental protections and regulations. Additionally, Kavanaugh is likely to restrict the longstanding doctrine of *Chevron* deference,<sup>37</sup> a doctrine that he has called "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."<sup>38</sup> Kavanaugh's attitude toward federal agencies reflects the broader conservative hostility toward the administrative state, which groups like the Federalist Society view as overly intrusive, regulatory, and



even unconstitutional.<sup>39</sup> Skeptical of agencies' authority, right-wing groups and personalities have advocated for a "deconstruction of the administrative state."<sup>40</sup>

Yet, implementation of climate change policies would rely heavily on extensive congressional delegation of authority to federal agencies. For example, in a resolution from Rep. Alexandria Ocasio-Cortez and Sen. Ed Markey, the call for "upgrading all existing buildings in the United States and building new buildings to achieve maximum energy efficiency, water efficiency, safety, affordability, comfort, and durability"<sup>41</sup> would likely be implemented by the Department of Energy. The call for "spurring massive growth in clean manufacturing in the United States and removing pollution and greenhouse gas emissions from manufacturing and industry as much as is technologically feasible, including by expanding renewable energy manufacturing and investing in existing manufacturing and industry,"<sup>42</sup> would likely be implemented by the EPA.<sup>43</sup> The U.S. Department of Agriculture would likely implement the call for "working collaboratively with farmers and ranchers in the United States to remove pollution and greenhouse gas emissions from the agricultural sector as much as is technologically feasible," and the Department of Transportation would likely implement the call for "overhauling transportation systems in the United States to remove pollution and greenhouse gas emissions from the transportation sector as much as is technologically feasible."<sup>44</sup>

Thus, the restrictive view of federal agency authority espoused by Kavanaugh and his colleagues would make agency implementation of climate change legislation all but impossible. It also would fly in the face of the clear congressional intent underlying the legislation: to delegate authority to agencies to use their discretion to prevent a climate catastrophe. Instead of honoring this intent, the Court could be expected to find a way to read statutes so as to invalidate specific attempts by agencies to implement their general congressional mandates. Of

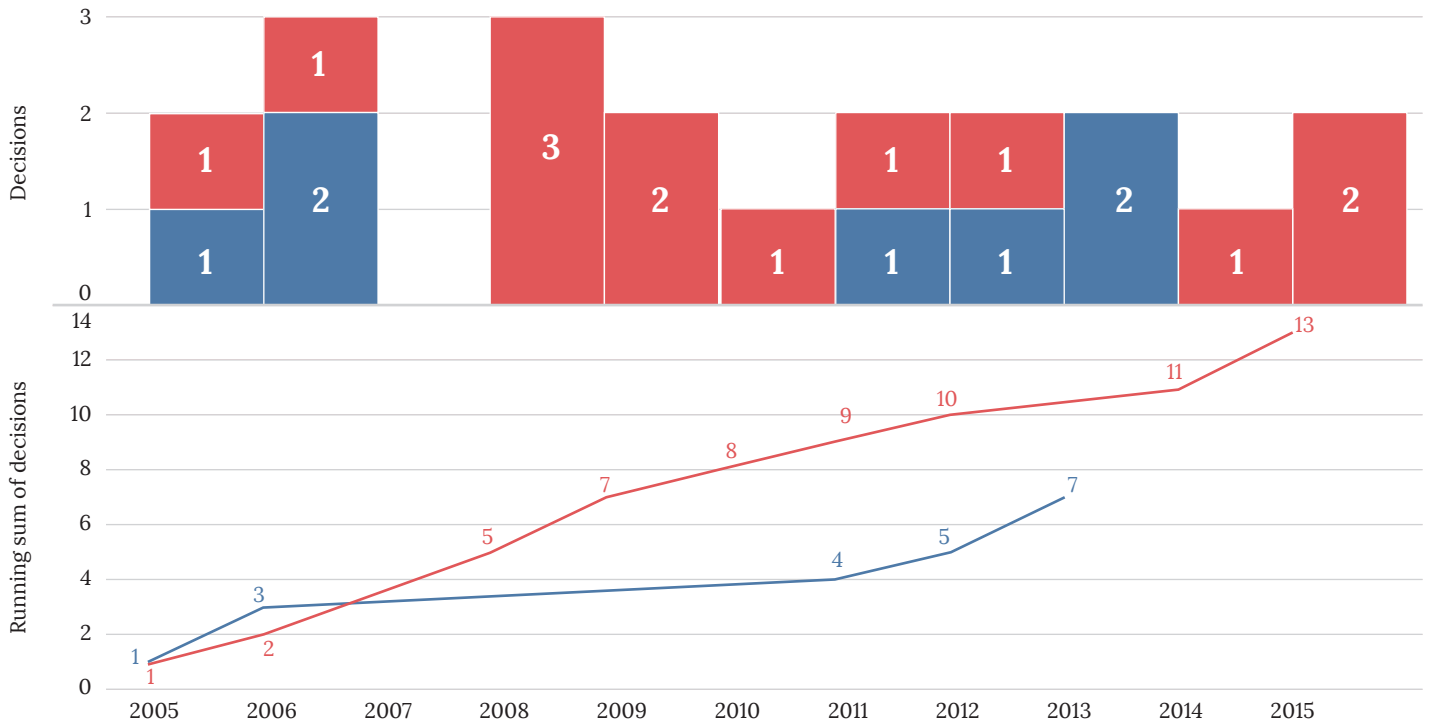
course, congressional bill drafters may attempt to draft any legislation such that their intentions to delegate authority to federal agencies are clear enough to resist judicial skepticism. However, even if congressional language and intent are clear, a determined Court can undermine attempts to realize the legislation by reading agencies' statutory authority extremely narrowly. Indeed, the Court already signaled its move in this direction before Kavanaugh was confirmed. In 2018, the Court limited the ability of the Patent and Trademark Office to exercise discretion in how it reviews challenges to patent claims. In so doing, Justice Gorsuch employed an exceedingly narrow reading of the statute at issue, arguing that "[t]here is no room in this [statutory] scheme" for agency discretion.<sup>45</sup> With Kavanaugh now on the Court, the conservative justices have an opportunity to limit agencies' statutory authority.

If the Court cannot plausibly misread the statutory language so as to pretend to uphold Congress's laws while preventing the agencies from implementing them, it will likely use one of the following arguments to invalidate the substance of the statutes themselves.

## **2. The Court may rule that regulations on land, oil, and gas are unconstitutional deprivations of property under the "Takings Clause."**

If legislation is to be effective in drastically reducing greenhouse gas emissions, then it will have to do more than regulate oil and gas drilling—it will have to affirmatively *stop* much of that drilling in its tracks. Corporations that have amassed enormous amounts of wealth extracting natural resources will lose access to future income streams. Those companies might argue that Congress has deprived them of their rightfully owned property.

## Liberal and Conservative Decision Comparison in Environmental Cases Since 2005



Graphic by Dr. Adam Feldman

### Decision Direction

- Conservative
- Liberal

The Supreme Court has entertained these kinds of claims before, and a newly emerging doctrinal area—called regulatory takings—threatens to take these lawsuits even more seriously. The doctrine stems from the Takings Clause in the Fifth Amendment of the Constitution, which provides, “[N]or shall private property be taken for public use, without just compensation.” Throughout most of the Clause’s history, jurists read it primarily as a regulation on the government’s eminent domain power. Accordingly, under the Takings Clause, the government can “take” so long as it (1) puts the property to public use—for instance, in constructing a public highway—

and (2) pays “just compensation” to the former owner. The doctrine of regulatory takings goes a step further, equating simple government regulations—like running a cable cord through an apartment building<sup>46</sup>—with the eminent domain power if a court deems those regulations sufficiently onerous.

Depending on specifics, climate change legislation could come under attack under both the traditional eminent domain question and the more recent regulatory taking question. The remainder of this Section discusses the constitutional challenges that a conservative Court would entertain.

## EMINENT DOMAIN

### *Public Use*

The Takings Clause requires any governmental taking of private property to go toward a “public use.” The Supreme Court has interpreted “public use” broadly, beginning with the 1954 case *Berman v. Parker*.<sup>47</sup> In that case, Congress created a city-wide plan to remedy “blight” in urban Washington, D.C., neighborhoods. The plan involved taking private property, restoring it, and in some cases, transferring that property to different private owners to help revitalize neighborhoods. The owners of a department store that itself was not “blighted” sued, arguing that the government was not putting the taken land to public use. The Court disagreed. Justice Douglas, writing for a unanimous Court, said, “The role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one.”

The Court took an even more deferential position in *Kelo v. City of New London*,<sup>48</sup> a controversial case that sparked a backlash. The Supreme Court upheld the City of New London’s development plan, which much like the plan in *Berman*, involved taking private property and transferring it to other private parties in the name of revitalization.

Despite facts that tugged at the heartstrings—one challenger had lived in her home since 1918—the Court upheld the development plan.<sup>49</sup>

This ruling provoked a scathing dissent from Justice O’Connor, who wrote that the decision rendered “all private property...vulnerable to being taken and transferred to another owner.”<sup>50</sup> She was joined by the Court’s other strong conservatives. Under the framework that Justice O’Connor proposed, a takings would only satisfy the “public purpose” prong of the Takings Clause if there was (1) a transfer of private land to public ownership, (2) a transfer of private land to a common carrier, like a railroad or public utility, or (3) if the taking served to remedy an “affirmative harm on society” like the blight in *Berman*.<sup>51</sup> The City of New London’s plan failed to meet that test, she argued. Were the current Court to encounter another eminent domain case of this sort, it could hold the plan unconstitutional, and could adopt a test such as the one Justice O’Connor proposed for future cases.

This could prove problematic for climate change legislation. If, for example, a law sought to take land away from oil companies and transfer that land to a company that planned to install solar panels on the property, the

“No matter how narrowly tailored the law is, the Court will likely be able to find a way to continue to undermine federal power in pursuit of a retrograde policy agenda.”

Court might rule that the taking fails to serve a public purpose. The transfer would not satisfy option one of O'Connor's test (a private to public transfer) and arguably might not satisfy number two (a transfer to a public utility). And though oil companies arguably are implicated in wreaking affirmative harm on society (per O'Connor's third criterion), the Court could go to pains to dispute the causal link between fossil fuel extraction and climate change. To be clear, if a law fails under the "public use" inquiry of the Takings Clause, that law is unconstitutional regardless of whether the government pays "just compensation." The Court could endanger laws transferring land from fossil fuel companies for an environmental purpose if it reasons that legislatively-mandated takings policies would not remedy the affirmative harm that climate change poses to society, or that climate change does not pose a sufficient harm in the first place.

### *Just Compensation*

If a court finds that a law does satisfy the public purpose prong of the Takings Clause, the government must pay just compensation for the transferred property. "[J]ust compensation normally is to be measured by the market value of the property at the time of the taking."<sup>52</sup> That calculation, though seemingly straightforward, may prove messy in the face of complex climate legislation.

For example, if a piece of legislation prohibits or sharply regulates some type of fossil fuel emissions, then land containing those fossil fuels might be worth much less immediately after the law goes into effect. If the government then sought to take the land via eminent domain, litigation over the land's value would be almost inevitable.

## **REGULATORY TAKINGS**

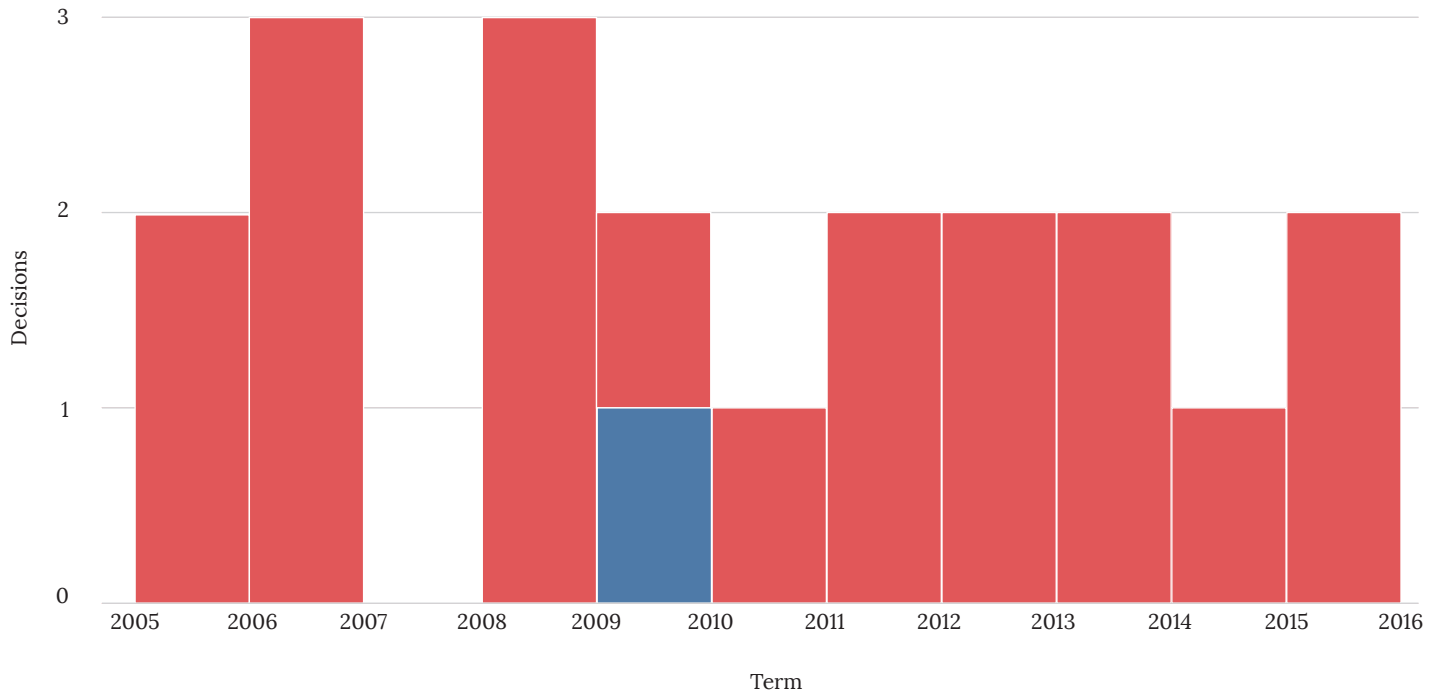
Unlike the eminent domain inquiry, which often hinges on whether a law truly serves a public purpose, regulatory takings doctrine already *assumes* a public purpose. The question in a regulatory takings case is whether the regulation constitutes a taking in the first place. If the answer is yes, then the government must pay "just compensation." Requiring the government to pay to regulate could pose problems for the fiscal feasibility of climate change legislation.

The modern regulatory takings cases began with *Pennsylvania Coal Co. v. Mahon*,<sup>53</sup> a 1922 case which involved a Pennsylvania law that prohibited the mining of certain types of coal so as to prevent land subsidence. The plaintiffs argued that the law destroyed their right

The Court's anticipated hostility to climate change legislation reflects deeply entrenched trends.



## Justice Assigning Majority Opinion in Environmental Cases since 2005



Graphic by Dr. Adam Feldman

### Opinion Assigner

- Roberts
- Stevens

to mine the coal under their home, thereby eviscerating the property right in the coal. The Court agreed. The law, which “made it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.”<sup>54</sup> “The general rule,” the Court concluded, “. . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>55</sup>

The modern Takings Clause doctrine builds on *Mahon*. The Supreme Court has delineated two categories of per se takings, or regulations that count as takings regardless of the public interest they serve. *Loretto v. Teleprompter Manhattan CATV Corp.* outlined the first category: “a permanent physical occupation authorized by government is a taking without regard to the public interests that

it may serve.”<sup>56</sup> The law in question in *Loretto* required landlords to allow cable TV companies to install a cable cord in the building.<sup>57</sup> Disputing the characterization of the cable installation as a “taking,” the dissent pointed out the diminutive nature of the imposition: “At issue are about 36 feet of cable one-half inch in diameter and two 4” x 4” x 4” metal boxes. Jointly, the cable and boxes occupy only about one-eighth of a cubic foot of space on the roof of appellant’s Manhattan apartment building.”<sup>58</sup>

*Loretto* could pose challenges to climate change legislation, depending how it is written. Say, for instance, that the legislation requires monitoring equipment on fossil fuel drilling sites to ensure that the amount of fossil fuels extracted does not exceed a certain threshold. Even if that regulation serves the public interest in a compelling

way—by helping to mitigate climate change, and by extension, preserving the future of the planet—since it is a “permanent physical occupation” the Court could consider it a taking, no matter how small the equipment is. A district court in 1997 reached a similar conclusion in *Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management Authority*.<sup>59</sup> Relying on *Loretto*, the district court concluded:

Twenty-four monitoring wells and eight piezometers remain on the property. These well and meter casings are four inches in diameter and extend two to three feet above the ground. Although the amount of space occupied by [the government agency] is arguably minimal, the *Loretto* court stated that permanent physical occupations are takings “even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner’s use of the rest of his land.”<sup>60</sup>

Following Congressional enactment of climate change legislation, the Court could reach a similar conclusion. In the regulatory takings realm, unlike in eminent domain, Congress can cure a takings claim by providing just compensation. But, as mentioned above, doing so could defeat the legislation’s economic feasibility.

To avoid this problem, Congress could respond in several ways. The first would be to affirmatively provide compensation from the outset. A second remedy would be to ensure that the occupation is not permanent. The Court in *Loretto* was careful to point out that the cable requirement was a taking because of its permanence. The Court defined permanence as “destroy[ing]” the “rights to possess, use and dispose” of property.<sup>61</sup> If, by contrast, if an imposition is temporary—say, a monthly in-person inspection requirement—it may more easily pass the *Loretto* bar.

The Court announced its second *per se* regulatory taking category in *Lucas v. South Carolina Coastal Council*.<sup>62</sup> Under *Lucas*, a regulation that “deprives land of all economically beneficial use” is an automatic taking.<sup>63</sup> In *Lucas*, the plaintiff had purchased a piece of beachfront property and planned to build two vacation homes on the parcel. After his purchase, South Carolina passed the Beachfront Management Act, which, part of a comprehensive plan to prevent erosion, barred the plaintiff from building on the property.<sup>64</sup> The plaintiff challenged the Act as a taking for which just compensation must be paid. Justice Scalia, writing for the majority, agreed. Regulatory action, he wrote, cannot “proscribe a productive use that was once previously permissible.”<sup>65</sup> The current Court could use the line of reasoning in *Lucas* to require compensation for new climate regulations that, for example, bar the drilling of fossil fuels and thus deprive land of much of its short-term economic value (notwithstanding the fact that drilling would deprive the land of much of its long-term economic value).

But despite its categorical rule, *Lucas* leaves open the question of how to measure whether a regulation deprives a parcel of land of *all* its economic value. Justice Scalia specifically emphasized the importance of the totality of the taking: “[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.” Justice Stevens, in his dissent, took issue with this “wholly arbitrary” standard.<sup>66</sup> “A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land’s full value.”<sup>67</sup>

If climate change legislation prohibits extracting fossil fuels in certain geographic areas, it may be able to avoid a *Lucas* problem if some land value remains. Fossil fuel

companies could potentially, for example, use their land for residential development, sell it to the federal government to create a national park, or install solar panels to generate clean energy. All of these options arguably prove that the land still retains value, and thus could avoid the *per se Lucas* rule upon reconsideration by the Court. The current Court, however, is unlikely to draw from Stevens’s dissent, and would probably rely on Scalia’s Takings Clause jurisprudence.

### **3. The Court may rule that Congress does not have the power to pass broad environmental regulations under the Commerce Clause.**

The Commerce Clause of the Constitution gives the federal government the power to “[r]egulate Commerce ...among the several States.”<sup>68</sup> Of the enumerated powers granted by the Constitution to the federal government, the Commerce Clause is one of the most important, and much federal legislation is passed under this power. In relation to environmental law, it has been crucial. Since 1970, every major environmental law passed by the federal government has relied on the clause for constitutionality.<sup>69</sup>

The Commerce Clause has two components that tend to work in tandem. The affirmative portion of the power comes from a plain reading of the clause and grants power to the federal government. When paired with the Tenth Amendment, the “affirmative” Commerce Clause encompasses the entirety of the power granted to the federal government in this context because anything not granted to the federal government is left to the states. But dating back to the founding of the country, courts have recognized that the clause implies a constraint on the power of the states as well. The implication, normally referred to as the “dormant” Commerce Clause, is that the states may not pass laws discriminating against interstate commerce.

Since the New Deal, the Commerce Clause has granted broad powers to the federal government. The government could pass laws under the Commerce power for any one of three reasons: to “regulate the use of the channels of interstate commerce,” to “regulate and protect the... persons or things in interstate commerce,” or to “regulate those activities having a substantial relation to interstate commerce.”<sup>70</sup>

Under Chief Justice Rehnquist, the Court began a sustained attack on federal power, constraining Congress’s ability to regulate interstate commerce in an unprecedented way. This began with the 1995 case *United States v. Lopez*, in which Chief Justice Rehnquist and his colleagues declared the Gun-Free School Zones Act of 1990 to be unconstitutional.<sup>71</sup> In *Lopez*, Rehnquist walked back the Court’s expansive reading of the Commerce Clause and reasoned that possessing a firearm in a school zone did not impact interstate commerce enough to justify federal regulation.<sup>72</sup> In 2000, the same five conservative justices in the *Lopez* majority ruled against a woman attempting to sue her rapist and declared parts of the Violence Against Women Act to be unconstitutional under the Commerce Clause.<sup>73</sup> Only in one major Commerce Clause case did the Court decline to limit federal power, allowing the federal government to criminalize the growth and use of homegrown marijuana over the objections of three of the five conservative justices. (Justice Thomas, the only conservative still on the Court, was among the dissenters).<sup>74</sup> Even when Justice Roberts chose to split from the conservatives in *Nat’l Fed. of Independent Bus. v. Sebelius*, rejecting an attack on the Affordable Care Act that many believed to be cynical, he agreed with the conservatives on the question of federal power, underscoring that the Act could not be justified under the Commerce Clause.<sup>75</sup>

While this line of cases seems to tell a cogent story of an increasingly limited Commerce Clause in the modern

era, conservative justices change their tune in cases involving the environment. Instead of proceeding with their limited reading of the Commerce Clause, they invoke the “dormant” Commerce Clause to expand their ability to strike down environmental regulations. In 2001, the conservative justices argued that federal power to pass environmental laws is constrained by “the States’ traditional and primary power over land and water use.”<sup>76</sup> In 2006, they reiterated this position, reinforcing the notion that land and water use are traditionally under state power.<sup>77</sup> This strong take on the “dormant” Commerce Clause contradicts the same justices’ weak reading of the “affirmative” Commerce Clause. Justices Thomas and Scalia have been particularly arbitrary in their Commerce Clause rulings. Although they ruled against federal power over environmental laws under the affirmative Commerce Clause, they used the dormant Commerce Clause to reject state laws regulating the environment.<sup>78</sup>

The potential for arguably inconsistent Commerce Clause jurisprudence can run even deeper, as illustrated in the late Justice Scalia’s jurisprudence. As discussed above, in *Gonzales v. Raich*, the Court considered whether Congress had the power via the Commerce Clause to criminalize marijuana despite a state law authorizing its use for medical purposes. Justice Scalia, in a concurring opinion, agreed with the majority that Congress indeed possessed that power. He reasoned that because marijuana was a “fungible commodity,” it did not matter whether the marijuana was meant for intrastate or interstate distribution and consumption.<sup>79</sup> But Scalia had signed onto entirely different reasoning a decade earlier in *United States v. Lopez*, agreeing with the majority that the Commerce Clause did not authorize Congress to prohibit the possession of firearms in school zones. Since the Gun-Free School Zones Act of 1990, the majority reasoned, “neither regulates a commercial activity nor contains a requirement that the possession be connected

in any way to interstate commerce,” Congress lacked the power via the Commerce Clause to bar the possession of guns near schools.<sup>80</sup>

In both cases, conservatives argue under the guise of reading the Commerce Clause. But it seems possible that the analyses are grounded not in a fair reading of the Constitution, but in policy preferences. Because Scalia’s desire for law and order arguably trumped his typically narrow view of congressional powers, he voted to uphold the federal government’s power to regulate marijuana. By contrast, because Scalia wanted to prevent limits on firearm ownership, he agreed with the majority that Congress lacked the power to pass the Gun-Free School Zones Act.

Scalia is no longer on the Court, but new justices seem just as predisposed to apply the Commerce Clause arbitrarily to suit pro-business, anti-regulatory ideologies. Scholars have argued that conservative judges apply originalism—the belief that interpretation of the Constitution should be grounded in what the Framers of that document originally intended—arbitrarily to match policy preferences across a broad range of doctrines. In the context of the Commerce Clause, the Court could use an originalist interpretation to construe Congress’s power to regulate commerce power narrowly—but only when it fits a particular policy agenda.<sup>81</sup> As one scholar remarked, “Originalism is anything but neutral; it is in fact a pointedly political program in the guise of a purely legal, constitutional analysis.”<sup>82</sup>

The current Supreme Court, which has demonstrated its hostility to environmental regulation as well as federal power in general, will have a strong tool in the Commerce Clause to dismantle climate policies. No matter how narrowly tailored the law is or how squarely it falls under



the Commerce Clause, the Court will likely be able to find a way to continue to undermine federal power in pursuit of a retrograde policy agenda. Mitigation will need to include federal regulations affecting natural resources in general, and land and water use specifically, which will allow the Court to strike down these policies by claiming they cross into traditional state powers, while plausibly using the “dormant” Commerce Clause to strike down state regulations.

#### **4. The Court may claim that climate policies run afoul of its anti-commandeering doctrine.**

One notable aspect of some climate change proposals is the commitment to “community-defined projects and strategies.”<sup>83</sup> This emphasis may be a selling point politically, but its implementation could become a legal Achilles’ heel when facing the Supreme Court.

The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>84</sup> For most of U.S. history, this provision had no doctrinal meaning. Indeed, in 1941, as the Court acquiesced to President Roosevelt’s New Deal, the Court described the Tenth Amendment as “but a truism.”<sup>85</sup> As conservatives expanded their influence on the Court, however, they sought to limit the power of the federal government by developing an anti-commandeering principle based in the Tenth Amendment.

Anti-commandeering means that “Congress may not simply ‘commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”<sup>86</sup> The Court established this principle in the 1992 case *New York v. United States*, wherein it struck down part of a federal statute that compelled states to regulate radioactive waste disposal or else take title to the waste. The Court reasoned that the

“The Court’s track record of hostility to environmental regulation, reliance on dubious constitutional interpretation, and arbitrary application of doctrine suggest that climate change legislation would be unlikely to survive judicial review.”

statutory provision constituted commandeering of state powers because it forced an outcome via a false choice (to regulate or else take title).<sup>87</sup> The Court then reinforced and elaborated on this principle in *Printz v. United States*, a case in which the Court found unconstitutional Congress’s implementation of the Brady Handgun Violence Prevention Act due to its “conscripting [of a] State’s officers.”<sup>88</sup>

The anti-commandeering doctrine could pose a problem for climate change legislation if the law depends on states to implement its policy goals. With respect to infrastructure, which some climate change legislation proposals anticipate “repairing and upgrading,”<sup>89</sup> states and municipalities historically make most of the investment.<sup>90</sup> There are two potential ways around this challenge, but neither seems likely to survive judicial review.

First, Congress could attempt to incentivize states’ involvement in climate policies by placing conditions on grants of funding to the states. Conditional funding has long been seen as a constitutional exercise of federal pressure on the states.<sup>91</sup> However, in its 2012 decision in *National Federation of Independent Business (NFIB) v. Sebelius*, the Supreme Court revealed its potential hostility to this mechanism. While the case is better known for upholding the individual mandate, in *NFIB* the Court also struck down the expansion of Medicaid because it held that Congress had left the states “no choice” about whether to accept the expansion.<sup>92</sup> If states did not comply, they would lose their Medicaid funding. In his opinion for the Court, Chief Justice Roberts wrote that “the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”<sup>93</sup> While clear Congressional drafting could, in theory, obviate the problem, the *NFIB* opinion appears to signal that, if climate change

legislation attempts to use conditional funding to gain the participation of states, its enforcement mechanism could come under intense scrutiny. Already, a conservative law professor has invoked the reasoning in *NFIB* to argue that parts of the Clean Air Act are unconstitutional.<sup>94</sup> This poses a catch-22, as Republican states would have greater discretion to decline to participate in climate programs if the law’s enforcement mechanisms are loosened to survive judicial review.

Second, Congress or a federal agency (like the EPA) could attempt to implement climate policies by setting a regulatory floor above which states must regulate. The federal government’s power to do this is rooted in federal preemption doctrine—the idea that federal law is the “supreme law of the land” and should take priority over conflicting state laws.<sup>95</sup> Of course, federal preemption comes with constitutional limits, and courts usually decide whether instances of preemption are legal. In the modern era, courts have increasingly relied upon federal agency interpretations of statutes when determining whether or not federal preemption is constitutional.<sup>96</sup> This reliance raises the issue discussed in Section 1, *supra*, of a Supreme Court that seems poised to limit deference that agencies receive in statutory interpretation. When the EPA proposed the Clean Power Plan during the Obama Administration, the Federalist Society responded with a panoply of arguments refuting its legality, including that the EPA lacks the authority to preempt states in this area.<sup>97</sup> With a blueprint already laid out, the Supreme Court could erode federal agencies’ preemption authority.

These questions of federalism are often raised in discussions of environmental regulation. When challenges reach the Supreme Court, conservatives could wield this brand of federalism to block climate change legislation’s implementation.

# Conclusion

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The current battle over the ACA reminds us that it takes just one district court judge to accept one off-the-wall argument to begin the process of converting a far-fetched doctrine into the law of the land. Once inside the legal system, the argument is then legitimated and must be grappled with—no matter how implausible. As this study has demonstrated, the Court’s conservative justices have an array of dubious legal interpretations at their disposal for dismantling climate change legislation, including an exceedingly narrow interpretation of statutes that empower federal agencies, an expansive reading of the Takings Clause and the Tenth Amendment, and a preferential application of the Commerce Clause.

Congress can draft climate change legislation carefully and can specify some aspects of implementation rather than delegating all rule-making to agencies. Given the sheer vastness of action that must be taken as well as its general reluctance to mandate technical implementation details, however, Congress is unlikely to dictate

everything in the legislation. As long as some aspects of rule-making are not specified in legislation, the critiques outlined in this study will be available to the Court, and the legislation will be vulnerable to judicial review.

The Court’s track record of hostility to environmental regulation, reliance on dubious constitutional interpretation, and arbitrary application of doctrine in pursuit of preferred policy outcomes suggest that climate change legislation would be unlikely to survive judicial review. Leading scientists have concluded that only twelve years remain to avoid planetary climate change catastrophe.<sup>98</sup> If the Supreme Court strikes down climate change legislation or curtails its implementation on the basis of implausible doctrine, and if humanity survives impending climate challenges, future generations may look back skeptically on Justice Roberts and his colleagues as well as political leaders who anticipated the Court’s hostility to environmental regulation yet failed to take action to reform the judiciary.

1. We are grateful to Alexa Andaya, Kayla Morin, and Ramis Wadood for research assistance, Dr. Adam Feldman, Creator of the Empirical SCOTUS Blog, for creating data-based charts, and Billie Kanfer for graphic design.
2. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, Atlantic (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> (discussing how the argument that the ACA individual mandate was unconstitutional “was, in the view of most legal professionals and academics, simply crazy”).
3. The great damage that state courts could do to climate change policies is beyond the scope of this study, but it is worth warning that conservative donors and dark money groups have recently increased their focus on state supreme court elections. See, e.g., Press Release, Brennan Center for Justice, *Dark Money Groups Poised to Spend Millions in State Supreme Court Races* (Sept. 18, 2018). Conservative scholars are also increasingly returning to state constitutional law as a site for jurisprudential change. See, e.g., Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018).
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22. *Id.* at 6 (discussing *Rapanos v. United States*, 547 U.S. 715 (2006)).
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63. *Id.* at 1027. The rule is subject to some qualifications based on the underlying land title: “Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.” *Id.* (emphasis added).

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