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Fears, Faith, and Facts in Environmental Law

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FEARS, FAITH, AND FACTS IN ENVIRONMENTAL LAW

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I. INTRODUCTION

Environmental law has long been shaped by both the particular nature of environmental harms and by the actors and institutions that cause such harms or can address them. This

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nation's environmental statutes remain far from perfect, and a comprehensive law tailored to the challenges of climate change is still elusive. Nonetheless, America's environmental laws provide lofty, express protective purposes and findings about reasons for their enactment. They also clearly state health and environmental goals, provide tailored criteria for action, and utilize procedures and diverse regulatory tools that reflect nuanced choices.

But the news is far from good. Despite the ambitious nature of the nation's environmental laws, the environment and environmental law in the United States today face many pressing challenges, among them climate change, political vacillations, and a currently antiregulatory Supreme Court that uses unpredictable linguistic games and fact-free exaggerations to reject protective actions.[1] This six-justice antiregulatory majority on the Supreme Court has, in 2022 and 2023, begun to embrace its newfound power and act to further its preferred views of the world, politics, and environmental policy. As discussed below, these antiregulatory justices don't like agencies, don't like deference, don't trust Congress, and find statutes wanting. These justices seem confident in their analytical rigor and integrity, yet often paint skewed views of regulatory actions, trod sloppily over what statutes actually say and do—especially in their neglect of laws' protective designs and choices—and instead focus almost exclusively on resultant costs claimed by those opposed to the laws' protective goals.

This article, based on a 2023 Distinguished Lecture at Florida State University College of Law, focuses on the role and possible corrective power of facts, science, and other sorts of "effects claims" in environmental law policymaking. After briefly identifying the fact and science-linked problems motivating this article, I turn to several predictable sorts of *fears* that both shape our environmental laws and motivate resistance norms that threaten environmental progress. I next turn to the double-edged sword of *faith*—not in the religious sense, but in the sense of trust or confidence in people and institutions that affect environmental outcomes. Different sorts of faith are displayed by, and motivate, both environmental interests and those seeking to shelve or weaken environmental laws.

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1. I review administrative agency policy shifts and how administrative law doctrine, especially attention to shifting effects claims, constrains such policy shifts in William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 BOSTON U. L. REV. 1357, 1358 (2018). In related work, I further explore an unusual strategy of the Trump administrative deregulation efforts, namely new claims that an agency completely lacked power previously asserted. *See* William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509 (2019).

This article argues that more rigorous documentation and testing of facts, science, and other effects observations, assertions, and predictions—which this article labels as "effects claims"— and overt challenges to conjecture, dissembling, and exaggerations, could force all to engage with evidence and empirical judgments made salient by legally binding choices reflected in this nation's environmental statutes. The focus should be on *facts, science, and tested effects claims linked to each statute's particular express goals and action criteria.* This increased reliance on and documentation of facts should include development of scientific evidence, assessments of technological and business practice capacities, and on-the-ground observations about environmental ills and effects claims about such risks, harm-creating actions, and regulatory responses. More factually-tethered regulatory actions, built on such documented and tested effects claims, could reduce wild oscillations, check judicial overreach, and even build trust and lock in progress. Law—especially environmental law—as mostly a word-based power game must be de-emphasized.

In suggesting that more rigorous attention to facts, science, and other effects claims could offer a path away from policy vacillations and judicial defeats for environmental interests, I am not arguing that statutes' particular language and procedural choices do not matter. Far from it. Each statute's particular choices must shape all that follows. Law undoubtedly translates political choices into power through words, but environmental policies are built on much more than just language. Environmental regulatory actions under this nation's environmental laws must build on observable reality and expert, or stakeholder, reasoned predictions, all tailored to what each law sets forth. If, under our Constitution, Congress through legislation remains the nation's chief policymaker—and this is clearly the law, at least as stated—then consideration of science, facts and other effects claims by all legal actors should always be tailored to and delimited by statutory criteria.

In contrast, an emphasis on language-based justifications for change or new regulation, perhaps attributable in part to some laziness invited by *Chevron* deference, has empowered a regressive Court.[2] An overreaching Supreme Court might always find ways to reach out and scuttle regulatory actions. Environmental regulators, however, have only weak claims to greater expertise

2. As now discussed in hundreds of regulatory actions, judicial opinions, and articles, in *Chevron*, the Supreme Court articulated a two-step approach to, and rationale for, judicial deference to agency statutory interpretations. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 838 (1984)

than courts if they, tacitly or expressly, take actions justified with a focus on the semantic meaning of words and argument for shifts in readings of those words.

In contrast, more fact-bound regulatory actions would make politicized courts' work more difficult, more transparently illegitimate, and subject to criticism. In addition, better regulatory choices are likely to be made, and fears or faith conflicts addressed or checked, when environmental regulatory actions are rooted rigorously in documented science and fact realities that, in turn, are faithful to statutory criteria. Viewed on a broader worldwide canvas, the United States' environmental progress, especially regarding climate change, needs to be documented so that firms and competitor nations know what is actually being done in the United States. Polluting firms and nations need to be confident that they can trust that their own efforts are not futile because they will be undercut by regulatory shirking.[3] Thus, this article argues, tested and documented science and fact claims, confined to what statutes prioritize, can serve to constrain all and thereby reassure global actors about environmental progress.

This more rigorous and law-bound attitude toward effects claims could help forge a path forward through the jurisprudential and policy thicket that now pervades environmental law. Maybe environmental law's fate is all politics, even when before the judiciary. If law still makes a difference, however, then this article offers analysis and prescriptions that might help.

To explore environmental policy and the roles of fears, faith, and facts, I build here on scholarship on climate change, administrative law, statutory interpretation, and regulatory federalism, but also seek both to meld and critique insights of scholarship of Elinor Ostrom, Carol Rose, Thomas McGarity, Wendy Wagner, and the more recent work of Charles (Chuck) Sabel. Relatedly, I, Erin Ryan, and numerous others have shown how federalism's space for a diversity of actors and regulatory tailoring and experimentation, not easy preemption or rejection of federal roles, likewise helps establish facts about what has been and can be done.

The conditions and methods identified by these scholars as effective to overcome distrust and make environmental progress

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3. In earlier work, I explore how "federalism hedging" that allows both federal and state regulation, especially of climate-linked pollution, can spark progress that assists national credibility even during periods when federal actors are inactive or failing to act effectively. *See* William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WISC. L. REV. 1037, 1042-46 (summarizing benefits to businesses and other jurisdictions of entrenching regulatory progress even through suboptimal state and local-level climate regulation).

have their dissimilarities. I argue, however, that the conditions and methods are commonly grounded in the sound insight that progress and protection of the environment depend fundamentally on mutual awareness of the stakes, building of trust, and public identification of effective and best-known means to protect the environment. Such forms of trust depend on facts, science, and other types of effects claims that are reliable, tested, and documented. Such tested and documented effects claims tied to each statutes' texts can serve to constrain subsequent actors who might seek to backslide, rely on exaggeration or conjecture, or claim that law is merely about words and power. Mutual awareness of documented risks, progress, and effective or "best" regulatory strategies can be a powerful force for the environment, nudge policy in sound directions, and disempower overreaching courts.

II. THE PROBLEM: FACT AND SCIENCE CHALLENGES TO ENVIRONMENTAL LAW PROGRESS

I start here with brief examples of my article's (and earlier lecture's) problem under analysis, namely how legal actors' and stakeholders' disregard of environmental effects and other facts made salient by statutory criteria results in threats to environmental law progress. As a shorthand, I'll allude to this focus as environmental law's "law-fact problem". This part also introduces recent work by Charles Sabel and describes how his model of regulatory decisionmaking for climate change offers great promise in terms of eliciting facts and spurring progress, but also demands a lot—perhaps too much—from environmental regulators.

A. Supreme Court Fact Conjecture and Imbalance: West Virginia, Sackett, and Major Questions Triggers

First, I briefly introduce the Supreme Court problem. Although the Roberts Supreme Court in 2022 and 2023 has been actively changing the law in many areas, much of which will have environmental law implications, I focus here on the Court's approach to effects claims. The Roberts Court's "antiregulatory six" has, in several high stakes cases, approached or relied on effects claims in ways crucial to outcomes, yet with little attention to underlying statutory choices of policy, criteria for actions, or documented evidence. I focus primarily on *West Virginia v. EPA*,

but also discuss *Sackett v. EPA* and briefly address several of the other recent "major questions doctrine" cases.

1. *West Virginia* and the Emergence of the "Major Questions Doctrine"

In the 2022 *West Virginia v. EPA* case, the majority embraced and refashioned the "major questions doctrine."[4] Both the triggering of this doctrine and the linked judicial rejection of the Obama administration's Clean Power Plan (the CPP) were rooted in statutory interpretation blunders and disregard of usual administrative law core tenets.[5]

In particular, the majority in *West Virginia* was inattentive to actual facts or the regulatory record. It made key empirical claims about burdens and disruptions, but with no citations to supportive evidence. In fact, the grounds upon which the major questions doctrine was invoked in this case—the claim that an agency was claiming "sweeping and consequential authority", "'extravagant statutory power over the national economy'" of "highly consequential power" that empowered it to "substantially restructure the American energy market" that would "forc[e] a shift throughout the power grid"—were contradicted by the record.[6] Grid transitions surpassing CPP goals had already come and gone, yet the CPP had never come into effect. Close analysis shows that many claims of abuse and excessive power did not reflect what the agency *had done*, but what it perhaps *could have done* under the hypothetical overreach imagined by the Court. Facts and goals made salient by the Clean Air Act's express text were shunted to the side. Language that the Court saw as evidence of disruption, including political setting statements of executive officials, were presented as crucial support.[7] I below provide a deeper analysis of *West Virginia*.

2. Waters Wars

Likewise, hostility to protection of "waters of the United States" has long been founded on several scenarios of regulatory overreach. And, over several cases, including the 2023 *Sackett v.*

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4. *See* West Viriginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022).

5. The Clean Power Plan was a promulgated notice-and-comment regulation. 80 Fed. Reg. 64,662 (Oct. 23, 2015).

6. *West Virginia*, 142 S. Ct. at 2607-11. Note that the Court majority shifts in its framing from claims about the action's effects, to power implications, to language-based parsing, yet with little attention to their differences.

7. *Id*. at 2610-12 (selecting quotes from an array of settings about the nature of the CPP).

EPA decision, challengers', and sometimes justices' and courts', claims of hardship and discussion of effects are neither documented nor tailored to mesh with congressional policy choices.

In the 2023 *Sackett* opinion, the Court majority jettisoned several of its own past majority holdings, rejected consensus views of both Republican and Democratic administrations over the preceding forty-five years, and narrowed the reach of the Clean Water Act's key jurisdictional term, "the waters of the United States" (WOTUS). The case resulted in a law that no longer protects nearly half of the nation's previously federally protected wetlands. On what grounds? Central to these conclusions and legal revisions were an array of claimed consequences and regulatory effects.[8] The Court, however, does not document them and does not tie them to what the Clean Water Act says and does. In fact, the Court expressly disclaims power to consider ecological consequences despite the statute's express antipollution, ecological, and water quality focus.[9] On the other hand, the *Sackett* majority does view some consequences as of huge importance. The majority opinion, penned by Justice Samuel Alito, includes pages of discussion of claimed untoward consequences of the Act and the alleged regulatory burdens it imposes on private property owners.[10] The Court, however, provides no discussion of how such consequences and alleged burdens relate to congressional choices of goals, criteria, and procedures reflected in the Act's text.[11] As with *West Virginia,* the consequences analysis focuses almost entirely on the views of Act opponents.

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8. Sackett v. EPA, 598 U.S. 651, 659-69, 679-81 (2023) (in extensive discussion of Clean Water Act's reach, focusing on "crushing" and "staggering" burdens and potential liabilities, costs and delay of permitting process, emphasizing burdens of "case-by-case" assessments and calling science-based judgments "freewheeling"). None of this analysis discusses the water quality rationales and benefits of waters protection, or science about wetlands function.

9. *Id.* at 683-84 (calling government arguments about rationales for maintaining the CWA's protective reach "policy arguments" centered on "ecological consequences" and declining to consider such consequences as relevant to its own ruling, stating "we cannot redraw the Act's allocation of authority").

10. *Id.* at 660-69 (discussing burdens and liabilities); *id.* at 679 (stating need to construe CWA and reach of protected waters so as not to "significantly alter the balance between federal and state power and the power of the Government over private property") (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 40 S. Ct. 1837, 1849-1850 (2020).

11. Much of the *Sackett* majority's criticisms about "Waters" protection and wetlands permitting is focused on delay and cost associated with the congressional choice to use a permit-based system for considering proposed discharges of dredge and fill materials into putative waters. *See Sackett*, at 659-71, 679-80 (highlighting permit process costs, liabilities if a water is filled illegally, costs of scientific consultants, and remaining indeterminacy prior to conclusion of advisory process about jurisdiction, expert advice, or a permit proceeding).

3. Deference Lost and Action Framing

Relatedly, with growing judicial hostility to the administrative state, members of the Court and others are calling for abandonment of *Chevron* deference, rejuvenation of the nondelegation doctrine, and empowerment of judges—whom Justice Neil Gorsuch refers to as independent and neutral arbiters.[12] Under this new anti-deference tilt, judges would more vigorously second-guess administrative agencies who still must implement and enforce laws handed to them by Congress. Although these major developments in administrative law are beyond the scope of this article, the emerging antideference turn of the Supreme Court does relate in important ways to effects claims.[13]

4. Language or Expert Empirical Judgments?

In all of these rejections of deference, the focus is mainly on regulatory legality as turning on statutory language, and interpretation as turning on gleaning a meaning, or best meaning, from the statute.[14] Antideference advocacy tends to downplay the importance of expertise, science, and facts. Downplaying these factors necessarily weakens agencies' roles and empowers courts; under virtually all environmental and other regulatory laws, agencies must make policy choices that satisfy statutory criteria, that fit into preexisting webs of regulation and linked business adjustments, and that are based on statute-linked agency effects observations and predictions about the world.[15] With this framing

12. *See, e.g.*, Kisor v. Willkie, 139 S. Ct. 2400, 2425-48, especially at 2425-26, 2434 (Gorsuch, J., concurring in the judgment) (extensively criticizing judicial deference to agency regulatory and statutory interpretation, alluding to need for judicial check of "systematic judicial bias" that favors the federal government (citation omitted), need for "best independent" judicial "judgment of the law's meaning" and risk that government will change legal interpretations "without advance warning and in pretty much whatever form it chooses").

13. *See, e.g.*, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023); Brief for the Respondents in Opposition, *Loper*, 143 S. Ct. (Feb. 16, 2023) (No. 22-451); Reply Brief for Petitioners, *Loper*, 143 S. Ct. (Mar. 8, 2023) (No. 22-451).

14. Justice Gorsuch's call for independent judicial law interpretation is rooted in his view that judicial review of agency action is mostly about the law's meaning, not the reasonableness of fact-informed judgments of agencies. *See Kisor*, 139 S. Ct. at 2425-26. *See also* Gundy v. U.S., 139 S. Ct. 2116, 2131, 2136 (Gorsuch, J., dissenting) (arguing for a revived delegation doctrine and appearing to limit agency roles mainly to "fill[ing] up the details" and finding facts in implementing laws).

15. For exploration of the nature of agency expertise, *see* Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and Consequences*, 50 WAKE FOREST L. REV. 1097 (2015).

shift by deference opponents to a language focus, judges are newly empowered to define the law. Less room is left for congressional and agency environmental problem-solving based on experience. Regulators stand in a comparatively more expert position if they instead emphasize close analysis of facts, science, business practices, and technological capacity, as made relevant by each statute. More science and fact-based regulatory actions would also create beneficial resistance to executive branch vacillations under long-established administrative law tenets surrounding agency policy change and consistency doctrine.[16]

Sometimes, judicial denials of agency expertise are doozies. In *West Virginia*, the Supreme Court stated that the EPA lacks relevant expertise in regulating power plant pollution.[17] Only by making this bizarre claim with linking of the particular provision at issue and particular regulatory strategy, with emphasis on energy laws' overlapping strictures, could this claim pass the laugh test. In reality, the EPA has long regulated power plant pollution in all of its forms. Power plant regulation of any kind undoubtedly is subject to the same environmental law and energy law intersection claim. Power plants have been regulated for water pollution, toxic air pollution, for their emissions of "criteria" air pollutants, for their hazardous waste, and also via several permit programs that further tailor obligations to each plant depending on a mix of statutory factors.[18] Power plant regulation by the EPA was hence nothing new; the EPA acted with substantial expert knowledge of the sector.

B. Effects Assessment Optimism and Charles Sabel's Regulatory Experimentalism

Let me turn now to a different sort of law-fact problem related to climate change and the challenge of finding effective mitigation strategies, focusing mainly on Charles (Chuck) Sabel's model for climate action. It both holds great promise and raises questions.

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16. *See* Buzbee, *The Tethered President*, *supra* note 1, at 1390-1416 (reviewing the importance of "contingent facts" made relevant by statutes as legal constraints on agencies when trying to shift policy).

17. West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2612-13 (2022) (quoting an EPA fiscal year report to support assertion that the EPA lacked comparatively greater expertise than courts when regulating polluters in the power sector).

18. See Brief for the Federal Respondents at 37-49, *West Virginia*, 142 S. Ct. 2587 (2022) (filed Jan. 22, 2022) (reviewing CPP choices, distinguishing effects of any power plant regulation from claim of rigid and disruptive regulation, and highlighting past regulation of power plant mercury emissions and flexibility of implementation choices left under CPP for emitters and states).

Chuck Sabel recently published a co-authored book, *Fixing the Climate*, with David Victor.[19] This book is a tour de force, laden with insights and case studies mined for their lessons for climate regulation. This book and its touted problem-solving methodology are both a problem and perhaps also illuminates means to improve environmental policies and outcomes. As Sabel and Victor correctly note, the ubiquity of climate effects and contributors to greenhouse gas emissions, plus rapid changes in the clean energy and transportation engineering sphere, create risks of intractable problem overbreadth and interactive uncertainty in a dynamic setting.[20] And, pervasively, both businesses and governments fear mandates and linked investment in mitigation efforts when others may blithely change nothing, shirk, or outright cheat.[21] Powerful incumbent firms have the means and motivation to resist change and new competition, especially competition that might trigger a need for new investments to comply with more stringent regulation.[22] Opposition, skepticism, and distrust run rampant. What is possible, what is needed, what is actually being done, and what is prudent are all exceedingly hard to know.[23]

Sabel argues for applying his form of adaptive problem solving to climate change and most other forms of regulatory challenge. He now calls his approach "experimentalist" regulation or governance but has, in past work, called it "learning by monitoring."[24] Under his model, regulators and regulatory stakeholders, especially business firms, should organize by sectors, assess the best that can be done, benchmark that "best" and reward it as the new norm or requirement.[25] Then, they should start all over again.[26] Dynamic,

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19. CHARLES F. SABEL & DAVID G. VICTOR, FIXING THE CLIMATE: STRATEGIES FOR AN UNCERTAIN WORLD (2022).

20. *Id*. at 2-3, 7.

21. *See* Buzbee, *Federalism Hedging, supra* note 3, at 1045 (discussing need to address firm worries about regulatory reversals and ineffective regulation and role "federalism hedging" to reduce such concerns); SABEL & VICTOR, *supra* note 19, at 70 (discussing problem of "incorrigible actors" and ways to get polluters to improve or embrace stricter regulation).

22. SABEL & VICTOR, *supra* note 19, at 66-69 (discussing tendency to prefer the status quo and how "penalty defaults," moral outrage, and deliberative venues can prompt engagement and improvement).

23. *Id*. at 68-72 (observing that even leading firms often do not know best means to address a regulatory challenge and will need investigation, pooling of resources of similar firms, and continuous consultation to identify and adjust to new best practices).

24. CHARLES F. SABEL, LEARNING BY MONITORING: THE INSTITUTIONS OF ECONOMIC DEVELOPMENT (1993); *see* also Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 78-80 (2011) (explaining experimentalism and tracing it to work of John Dewey).

25. SABEL & VICTOR, *supra* note 19, at 8-10, 15-16, 48-51, 60.

26. Sabel & Simon, *supra* note 24 at 78-79 (distilling these key elements of experimentalist regulation).

ongoing assessment and rolling rules changes will, he posits, be the best way to deal with climate's scale and "wicked" nature. Incremental improvements can catalyze more progress, without the need for a complete solution before best paths forward are known. Actual knowledge of innovations by regulated firms in discerning the "best" also reduces risk of imprudent regulation or false claims of progress due to "accounting tricks."[27] This regulatory model of problem-solving and progress expects a lot, perhaps too much, from regulators. Sabel and Victor acknowledge that their approach, with its heavy reliance on peer-based deliberation, can sometimes seem like magical thinking.[28] But a lot can be gained from understanding this model. Below, I further distill Sabel's work, offer some questions, but then also try to build on it.[29]

C. The Inflation Reduction Act and Catalyzing and Documenting Progress.

The 2022 Inflation Reduction Act (the Act) contains, from the law-fact problem perspective, both challenges and promise for addressing climate change.[30] The Act directs billions of dollars to agencies which, in turn, can reward businesses, organizations, and state and local governments for climate policy, science, and business innovations. The Act is designed to catalyze such environmental and clean energy progress, but through regulatory tools quite different from the other major environmental laws. It does not rely on regulatory mandates. Instead, it uses the regulatory "carrots" of tax benefits and conditional federal spending, often through competitive grant opportunities.[31] Enhanced regulatory capacity at all levels of government, plus new engineering and research and development by governments and firms, and comparative assessments of best paths forward, will be essential to turn dollars into progress. How do science, engineering, and fact demands of Act-induced progress and future revelations and plans interact with other environmental and energy goals? And, especially, how can catalyzed progress be confirmed and shared for others' use? Progress without sharing and learning about successful innovations would diminish the Act's value.

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27. SABEL & VICTOR, *supra* note 19, at 43.
28. *Id.* at 61.
29. *See infra* Section IV(C) ("Regulatory Experimentalism and Ongoing Factual Reassessments").
30. *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat 1818.
31. *Id.*

I now turn to discussion of environmental fears and faith. This sets the stage for analysis of the benefits of a greater regulatory focus on the facts and science behind environmental legal policymaking, always linked to each statute's textual choices.

III. ENVIRONMENTAL (AND REGULATORY) FEARS

Fears underpin both the shape of our environmental laws and the array of resistance norms and moves that often undercut environmental goals. How environmental facts and science are shunned or engaged links to these fears and perhaps offers ways to overcome such fears. In very brief form, here are the key countervailing fears.

First, and most obviously, environmental law's presence is built on a fear that, without legal constraints, environmental resources will be degraded. Why? Under the tragedy of the commons, resources shared in common are at risk of overuse, as Garrett Hardin and others have explored.[32] Elinor Ostrom and Carol Rose have documented and analyzed settings where this does not hold true, but from fisheries, to timbering, to climate change, the commons nature of a resource often leads to harms.[33] Failure of all to see and feel the harms effects of their incremental contributions to resource degradation leads to yet more degradation.

Still, with shared norms, reciprocal relations or trust, mutual monitoring, and tangible feedback about success or failure—all of which fundamentally depend on shared access to environmental facts—commons resources are not actually always destined for destruction. This is perhaps the key and optimistic insight of Ostrom and the linked work of Rose. Environmental challenges may be difficult to overcome, but failure is not inevitable, especially if communities engage in shared norms and mutual monitoring.

Second, environmental harms are rooted in several pervasive market imperfections. Polluters rarely pay for harms they cause,

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32. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243-48 (1968). For an earlier, similar exploration, see Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954).

33. ELINOR OSTROM, ROY GARDNER & JAMES WALKER, RULES, GAMES AND COMMON POOL RESOURCES (1994); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Carol Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1 (reviewing commons problems and strategies that overcome commons destruction); *see also* ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (studying how neighbors in ranching country often resolve disputes without regard to law).

with externalized (or spillover) harms meaning more cash in the pocket. Markets for innovative low-polluting products and services are disadvantaged by externalized harms. Harms are often hard to perceive or slow to emerge. Regulation, to be effective, must assess and then address the reality of such externalized, often latent, and costly pollution harms. These elements of environmental harms further create challenges due to cognitive shortcomings now well-documented in behavioral economics literature.[34]

Further, and third, there are numerous polluters, regulators, and forms of corrective law in the U.S., at times confounding efforts to attribute harm and spark regulatory correction. Pollution and other forms of environmental harms must be checked by laws, but actually matching laws and institutional arrangements to the dynamics and scope of environment harms is difficult. As I wrote about long ago, "regulatory commons" pervade environmental law with the frequent, if not ubiquitous, problem that often no regulator is situated to match the economic, political, and harm dynamics and scale of environmental challenges. If a regulatory commons exists, the result is often inaction or partial and ineffective regulation, even where the underlying environmental risk is well-known to all.[35]

Nonetheless, our environmental laws are, as many have noted, often quite protective and a sort of political economic miracle.[36] And many of the same structural arrangements that can confound can also, at times, create room for progress and innovation.[37] For example, federalism-based divisions of turf can complicate effective tailoring of regulatory measures to an environmental risk. But federalism can also leave room for policy testing and progress, even during periods of federal backsliding or torpor, or when some states are ineffective or oppose action.[38] A few states' actions can provide nationwide benefits by highlighting the possible and good, or by illuminating the ineffective and bad. Information gleaned from regulatory failures can be of great value. Successes and failures, tested on smaller state or local scales, can educate firms,

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34. This substantial body of scholarship is reviewed in brief form in ROBERT GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 4-13 (Aspen 2022).

35. William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003).

36. Daniel Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59 (1992); Christopher Schroeder, *Rational Choice versus Republican Moment—Explanations for Environmental Law*, 1969-1973, 9 DUKE ENV'T L. & POL'Y F. 29 (1998).

37. See Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balancing in the Interjurisdictional Gray Area*, 66 WM. & MARY L. REV. 503 (2011) (exploring federalism structures and dynamics and the challenges, opportunities, and benefits provided by federalism).

38. Buzbee, *Federalism Hedging, supra* note 3.

regulators, and other jurisdictions about how to make better choices in the future.[39]

Environmentalists have fears of an opposite sort. Old-fashioned capture fears abound, with regulators often too sympathetic to those they regulate. Even if not captured, agencies may be behind, slow, or lacking in zeal. Or, agencies may reverse course in response to political pressures. Temptations to backslide always exist.[40] Environmentalists also worry that attention to cost-benefit analysis, as long required by Executive Order 12,866, results in regulatory outcomes that are skewed in antienvironmental, illegal, and immoral directions.[41]

Those concerned about the over-use of environmental laws are plagued by different fears. Consistent with critiques of United States regulation in general, environmental laws are pilloried as too crude, rigid, or stringent. Firms that would otherwise be nimble are constrained, disadvantaged in world markets while firms in less regulated jurisdictions flourish. Or the forms of regulation are criticized. Crude technology-based regulations, critics claim, are pursued with inattention to wiser regulatory tailoring or to regulation offering flexibility or using markets.[42]

In addition, regulators are often painted as the problem. (Put to the side inconsistencies in these antiregulatory critiques—there are many). One critique shared with environmentalists is that agencies just don't do a good job. They do just enough, are hampered by lack of good information, and are risk averse. They prefer the quiet life or, to quote the musician Elvis Costello, the "promise of an early bed."[43] Perhaps they are well-intentioned, but they cannot possibly do all that is needed with too few resources

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39. I explore these issues in Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, cited *id.* For other related works, *see* Anne Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281 (2003); Kirsten Engel, *Who's Afraid of Overlapping Federal and State Jurisdiction?: Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Robert Glicksman & Richard Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U.L. REV. 579 (2008); Douglas Kysar & Bernadette Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621 (2008).

40. Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENV'T L. REV. 297 (1999) (reviewing reasons environmental and other regulatory goals often are not fully achieved).

41. For the views of strong critics, see FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004). *See also* Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993).

42. *See* Wendy Wagner, *The Triumph of Technology-Based Standards*, 2000 U. ILL. L. REV. 83 (2000) (presenting and then criticizing assumptions that technology-based regulation is dysfunctional).

43. ELVIS COSTELLO, RADIO, RADIO, on This Year's Model (Radar Records; Columbia Records 1978).

and too much work. Or they act, and then never revisit their work. Recent research, however, finds that ongoing regulatory fixes and corrections are more common than often claimed.[44]

In a contrary antiregulatory critique, regulators are painted not as inactive, but instead as rapaciously seeking power and discretion.[45] Or, they are blinded by their mission, in their single-minded zeal ignoring larger tradeoffs and better policy options. While these "empire building" claims have been repeatedly debunked as illogical, as well as contrary to case study analysis, claims and images of the overreaching and overbearing regulator remain pervasive in advocacy and court opinions.[46] The current Supreme Court "antiregulatory six" justices often assert or parrot this claim, frequently paired with idealized views of judicial capacity and virtue.[47]

Note the pervasive role of fact claims, and need for facts, in this litany of environmental policy fears.

IV. ENVIRONMENTAL REGULATION'S COMPETING FAITHS

Contrary but also competing faiths are inherent in my discussion of environmental law fears and how more intensive law-fact scrutiny could help advance environmental goals.

The central faith underlying our environmental laws is faith in democratic possibility. If Congress has acted to require environmental protection, we should respect that political economic miracle. Legislative supremacy means all should respect

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44. *See* Wendy Wagner et al., *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183 (2017) (presenting research finding agencies updated and corrected regulations more frequently than usually claimed).

45. For a review of anti-agency power themes in academic literature and case law, see Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 33-38 (2017) (presenting and analyzing "anti-administrativism's core themes," among them themes of agency aggrandizement and abuse of power).

46. For exploration and questioning of the "empire-building" agencies theme, and discussing prevalent "quiet life" proclivities among many regulators, *see* Darryl Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932-34 (2004-05). I explore and question claims and assumptions of overregulation and agency zeal in Buzbee, *The Regulatory Commons*, *supra* note 35.

47. Justice Gorsuch, in particular, views agencies as likely to abuse their powers. *See, e.g.,* Axon Enter., Inc. v. Fed. Trade Comm'n., 143 S.Ct. 890, 917-18 (2023) (Gorsuch, J., concurring) (stating that "[a]gencies like the SEC and FTC combine the functions of investigator, prosecutor, and judge under one roof. They employ relaxed rules of procedure and evidence—rules they make for themselves. The numbers reveal just how tilted this game is."); Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, OSHA, 142 S. Ct. 661, 669-70 (2022) (Gorsuch, J., concurring) (arguing for revival of the nondelegation doctrine and emphasizing risks of abuse by regulators and congressional shirking); Kisor v. Wilkie, 139 S. Ct 2400, 2446-68 (2019) (Gorsuch, J., concurring) (arguing against deference and highlighting problems he has with agency power and judicial deference regimes).

those statutory choices.[48] Congress has created and assigned environmental tasks to administrative agencies.[49] Perhaps the most famous judicial statement of such need for judicial respect for congressionally enacted policy was in the Supreme Court majority opinion by Chief Justice Warren Burger in *Tennessee Valley Authority v. Hill* (*TVA*).[50] In *TVA*, the Court declined to limit the reach of the Endangered Species Act when applied to protect the snail darter and halt a partly-built dam. The Court rejected calls for it to read the statute "reasonably" or to adjust outcomes in light of the Court's view of "'common sense and the public weal.'"[51] The Court said that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of" protecting endangered species.[52] The Court rejected arguments that it had the power to engage in "individual appraisal of the wisdom or unwisdom of a particular course."[53] The policy selected by Congress cannot "be put aside in the process of interpreting a statute."[54] Courts, the Supreme Court was saying, must respect the policymaking primacy of the political branches, as manifested in statutes. This article is calling for similar renewed respect for the policy choices manifested in statutes, with all prioritizing the effects observations and claims that are made salient by each statute.

Congress, in these environmental laws, has also usually left room for states to take over delegated program work and to go even further than federally required. Regulatory federalism structures, especially delegated program structures and the use of regulatory floors rather than ceilings, leave room for state-level tailoring, innovations, and greater protections, while precluding races to the bottom.[55]

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48. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) (discussing the need for judicial respect for congressional policy primacy and declining to trim the reach of endangered species law). For further related discussion, *see supra* at notes 50-54 and accompanying text.

49. For a recent review and defense of why Congress will delegate important authority to agencies, see *Biden v. Nebraska*, 143 S. Ct. 2355, 2384-91 (2023) (Kagan, J. dissenting) (discussing, in dissent from the Court's rejection of Biden administration student loan forgiveness, reasons for congressional delegations to agencies and criticizing the Court majority for overreaching in its reviewing role).

50. Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

51. *See id*. at 194 (quoting *id.* at 196 (Powell, J., dissenting, joined by Blackmun).

52. *Id*. at 194.

53. *Id.*

54. *Id.*

55. For general review of environmental federalism designs and linked law, see GLICKSMAN ET AL., *supra* note 34, at Chapter 2; William W. Buzbee*, Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007).

Likewise, much of environmental law is based in faith about facts elicited through "best available technology" (BAT) sorts of regulation or permitting. Such "best" analyses look at capabilities with varying degrees of aggressiveness, then set a performance standard level that caps pollution emissions but does not dictate how regulated parties must meet those standards.[56] This use of such performance standards pegged to the "best" has been remarkably effective. They may not be tailored to every setting or fully meshed with use of flexible or market-based forms of regulation, but "best" performance benchmarking is nonetheless a brilliant innovation that has generated huge progress.

Despite critiques of regulators and regulation, close study of our environmental laws and subsequent regulatory policy reveals remarkable foresight, policy innovation, incremental improvement, and structures allowing for implementation tailoring, adjustments, and negotiation.

Legislative supremacy rules! Hope lives . . .

Well, maybe not.

All of these forms of pro-law faith are met with opponents' greater faith in markets, and in firms and judges too.

With most of the Supreme Court and much of the judiciary today sympathetic to antiregulatory views, those judges and their fellow travelers instead have faith that judges should be the main law interpreters and should have the final say on regulatory policy. These anti-environmental judges and justices are now increasingly quick to impute to past Congresses a reluctance to regulate effectively or aggressively.[57] Such imputations, however, are rarely rooted in any statutory materials, history, supportive facts or science, or citations of any kind. [58]

V. STATUTE-LINKED EFFECTS CLAIMS TESTING AND DOCUMENTATION AS A PATH TOWARDS DEMOCRATIC LEGITIMACY AND ENVIRONMENTAL PROGRESS

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56. For review of the diverse strategies reflected in U.S. environmental laws, see GLICKSMAN ET AL., *supra* note 34, at 76-82. For exploration of the benefits of technology-based regulation, see Wagner, *Triumph of Technology-based Standards*, *supra* note 42.

57. Major questions doctrine cases often include a claim that Congress could not have intended to regulate as did the agency in the action under review. *See supra* note 6 and accompanying text; *infra* note 72 and accompanying text.

58. I earlier mentioned the work of Chuck Sabel and will return to it shortly. His work is rooted both in scorching criticism of the normal ways of regulation, but also faith in his experimental regulatory modes that learn by monitoring and then benchmark regulation to the "best". I remain intrigued by his work but also question possibly heroic assumptions in his work. For another Sabel work exploring his ideas, but more generally looking at the "administrative state" and contrasting "command and control regulation" with his experimentalist model, see Sabel & Simon, *supra* note 24.

I now turn to a more in-depth discussion of cases and theories illustrating the law-fact problem, then turn to my diagnosis and prescriptions for restoring environmental law progress despite current headwinds.

A. Statute-bound Effects Claim Analysis

Facts and science are the neglected children of environmental law. But their power, long present in our environmental laws' language and design, is now more important than ever. If facts and science realities (or engineering documentation, or business best practices, among other types of effects claims) are emphasized, tested, and documented with greater rigor, we might improve the odds of making environmental progress consistent with the optimistic faith manifested in our laws. Documenting and testing effects claims with more rigor could reduce permissible levels of polluting activity and check administrative agency failures and abuse, thereby addressing the fears sketched above. Importantly, more rigorous effects analysis could check a regressive Supreme Court's newfound tendency to make key effects claims without documentation and without balanced attention to what environmental statutes, under their express texts, say and are designed to do.

However, the sort of fact and science-intensive work I suggest is not free-floating analysis or an unbounded technocratic movement towards environmental improvement. Instead, I am arguing for a far more legally-bounded and constrained form of analysis. I suggest close attention by agencies, courts, and, of course, other stakeholders to:

1. Balanced, thorough, empirical assessment of fact, science and other effects claims and documented or predicted consequences to understand baseline conditions and capabilities and likely regulatory effects, and to regulate based on the best assessments and predictive judgments possible,

2. As made relevant by, and limited to, what underlying statutes set as national policy through express goal statements and criteria for action.

What do I mean by this focus on facts and science? And what would be changed or omitted under such an approach?

Most environmental statutes state goals or identify and require "best" sort of benchmarks to dictate choices. And even where laws

do not aim for the "best," environmental laws provide criteria that agencies must assess and weigh in some manner when regulating or engaging in adjudicatory actions such as setting permit limitations or devising cleanup plans. Careful deliberative investigation and assessment of statutorily relevant contingent facts and science could check governmental and private regulatory lying, ungrounded assertions, and empty exaggerations. Such documentation of facts and science could also help reassure all that agencies are not adrift from governing law. More careful documentation of effects claims and accurate evidence could also help check politically induced policy vacillations and judicial overreach.

A greater emphasis on science and facts as sources of regulatory constraint and means to deter regulatory overreach or imprudence also could serve as an antidote to the new push to revive the nondelegation doctrine. If revived, the nondelegation doctrine could empower courts to declare that Congress conferred unconstitutionally excessive power on agencies.[59] Statutory criteria and linked science and facts could, or should, be seen as a way to address concerns about untethered agency power, at least if the usual rules of administrative law hold true. Words may be broad, especially if viewed in isolation from their context; words alone often have many possible meanings. Viewed in their grammatical and statutory operational contexts, however, words usually lead to more delimited agency power. Furthermore, if agencies must meld language-based mandates or criteria for action with underlying empirical assessments of facts and science, agencies' freedom is even more constrained.[60]

To do these more intensive fact-laden and record-establishing tasks, agencies will face difficult work. Judgment calls and room for politics-influenced adjustments will remain. But working more with science, facts, and other effects analysis and less with mere linguistic possibilities could reduce space for power grabs and destructive actions. Good reasons still exist for concerns and pessimism. Courts that close to their eyes to actual evidence, records, and the specifics of the cases and actions before them—and the Roberts Supreme Court's "antiregulatory six" seem comfortable with such intentional law and fact disregard—may proceed regardless of what effects claims and evidence show.

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59. The Supreme Court rejected the most recent effort to revive the delegation doctrine in Gundy v. United States, 139 S. Ct. 2116 (2019).

60. For exploration of the legal constraints imposed on agencies pursuing policy shifts due to such fact, science, and other effects claims and observations, see Buzbee, *The Tethered President*, *supra* note 1.

I now return to this article's three main case studies of the challenges and promise of more fact-dominant environmental policymaking. The first is the Supreme Court's 2022 ruling in *West Virginia v. EPA*, with its substantial reliance on effects claims, yet with virtually no legal rigor in how such effects were considered, established, or linked to the Clean Air Act's provisions. Second is *Sackett v. EPA*'s shrinkage of federal wetlands protection. It too is laden with effects claims, but the Court majority shuns attention to the statute's express goals and criteria and fails to wed its own effects claims to the case record or other agency record materials. The third case study is analysis of the fact-intensive work called for by Chuck Sabel's problem-solving model, both highlighting key insights and raising some questions about its real-world potential.

B. West Virginia's and Sackett's Consequentialist Conjecture and Myths

I now turn to a discouraging case involving mythical major consequences, undocumented costs, and benefits ignored. The focus here is on the problems of the *West Virginia v. EPA* case, its new "major questions doctrine" formulation and application, and how intensive law-fact documentation might help check the Supreme Court's lawless and factless overreach. This case and its new embrace and articulation of the "major questions doctrine" has already spawned a raft of commentary and scholarship, so I will not here engage in a full critique.[61] I will, however, focus on a neglected element of the decision that ties into this article's focus on fears, faith, and facts.

As oddly cued up by the Supreme Court and the case petitioners, the Court was reviewing the Obama administration's Clean Power Plan (the CPP).[62] The CPP sought to regulate existing power plants' greenhouse gas emissions under the Clean Air Act Section 111(d). The EPA's regulatory caps had to be set based on what the best power plants were doing, or were able to do, to meet

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61. *See, e.g.*, Daniel T. Deacon and Leah H. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023) (analyzing the new MQD cases); Thomas O. McGarity, *The Major Questions Wrecking Ball*, 41 VA. ENV'T L. REV. 1 (2023); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?* 97 S. CAL. L. REV. (forthcoming 2024) (also analyzing the new MQD but in particular focusing on and testing the "common sense" element).

62. Clean Power Plan (hereinafter the CPP), 80 Fed. Reg. 64661-65120 (Oct. 23, 2015) (codified at 40 C.F.R. § 60.5000 (2015)). Review was unusual because judicial stays meant it had never come into effect, it had been replaced by the Trump administration, its pollution reduction goals had already been exceeded, and the new Biden administration had no plans to revive it.

environmental and energy law and market demands. The regulatory caps were set based on the definition of "standards of performance" for power plants, which required the EPA to base pollution caps on the "best system of emissions reduction" that was "adequately demonstrated."[63]

The caps the EPA ultimately set were not demanding, but were based on how power plants met regulatory demands in flexible, low cost ways via harnessing flexibility of interconnected electricity grids.[64] The EPA did not set the caps at the most stringent level it saw as defensible, but did take into account the interconnected grid and how its "system" linkages facilitated power plant emissions reductions.[65]

Despite an abundance of political noise and heated rhetoric in court filings by challengers, they did not document anything close to impossibility, risks to energy markets, or even hardship as designed. In fact, the challenge before the Supreme Court was ultimately exclusively word-based. Claims that the regulation was impossible, or reckless, or lacking a factual, empirical basis, were made, but not based on regulatory record materials as usually done under "arbitrary and capricious" reviewing frameworks, the Clean Air Act's judicial review provisions, and under "whole record" review expressly required under section 706 of the Administrative Procedure Act.[66] Instead, the challengers and the Court majority mostly based their arguments on rhetorical gambits of extreme disruption. The Court filings neither included, nor had record citations to, hard data to back up such claims.

Instead, the heart of the challengers' argument was that the EPA could not base regulatory caps on regulatory compliance by power plants linked to actions "outside the fenceline," meaning outside the physical site or property boundaries of each power plant. Notably, the challengers were not power plant operators. In fact, power plant operators supported the EPA's regulation before the Supreme Court. The power plant operators, which were the actual targets of the regulation, saw the regulation as linked to

63. *See* Clean Air Act § 111(d) and cross-referenced § 111(a)(1), 42 U.S.C. § § 7411(a), (d).

64. Key discussion can be found in the CPP, 80 Fed. Reg. at 64725-28.

65. *Id.*

66. The Clean Air Act's judicial review provisions partly track the APA, but actually set forth numerous additional demands for agency and stakeholder specificity about evidence, data, and facts both before the agency and later in requests for judicial review. *See* 42 U.S.C. § 7607(b)-(d).

business as usual, found it reasonable, and feared shelving of a workable regulatory regime.[67]

Why, then, was regulation in the CPP's form opposed when it was viable, flexible, low cost, and not disruptive? The regulatory reality explaining the challenge was not about power plant operators' concerns, but coal interests and coal-heavy states, perhaps also linked to party politics. If power plant polluters could keep complying with energy and environmental regulations via system-based, low cost, and flexible trading of pollution, energy, or permit obligations facilitated by the interconnected electricity grid—and this they were doing and would have done even more—coal interests would lose. If regulation was built on and allowed shifting of the fuel for energy, or efficiency measures, or trading pollution-reduction obligations, all such modes of compliance would result in shifts away from coal. Coal results in high emissions of greenhouse gas; easy low-cost emissions reductions are possible when power plants utilizing coal adjust their fuel mix, change their source of energy, or devise strategies with other energy suppliers on the always-balancing electricity grid.

That the CPP was actually not disruptive or difficult in its goals was arguably clear at its inception. But the CPP's lack of stringency and ease of accomplishment was incontrovertible and known by the time of the Supreme Court argument. On this point, supportive industry, states, environmentalists, the Biden administration, and even the Trump administration agreed.[68] When the Trump administration had sought to roll back the CPP and then replace it with a facility-specific form of regulation, it admitted that shelving the CPP would have no deleterious climate effects. Why? Shifts to natural gas and clean energy changes had already led CPP goals to be exceeded despite the CPP never coming into effect.[69] Despite these documented realities and

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67. *See generally* Brief of Power Company Respondents, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (No. 20-1530) (supporting EPA's regulation, highlighting how the CPP was built on actions and regulatory obligations already tested and in effect, and emphasizing that CPP's goals had already been exceeded without hardship or disruption and without the CPP ever coming into effect due to judicial stays and subsequent executive branch policy shifts).

68. *See* Brief of Non-Governmental Organization and Trade Association Respondents at 42-46, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530) (reviewing in concise form business, engineering, and regulatory developments that collectively meant the CPP's goals had been exceeded without ever coming into effect).

69. For the most extended explanation of business developments surpassing the CPP without it ever coming into effect and repeated refutation of claims of hardship or disruption, see Brief for the Power Company Respondents at 22, 26-27, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530) (contrasting challengers "implausible imagin[ed]" claimed impacts with Trump rule's concession that CPP's emissions reductions levels had already been achieved and surpassed without coming into effect).

litigant alignments that supported the reasonableness of the EPA's CPP design, the case was rife with unfounded rhetorical claims of massive regulatory impacts from litigants and the Court alike.[70]

I now turn to this linkage of effects claims and the major questions doctrine's skeptical and difficult "clear statement" hurdles. Several sorts of disruptive effects claims triggered the Court's full embrace and new articulation of the major questions doctrine in the case. The Court's discussion of "majorness" was focused almost exclusively on hardship rhetoric of opponents of the regulation, was often linked to hypothetical future agency actions and slippery slope concerns, was imbalanced due to the Court's focus on costs alone, and was not wedded to express goals and criteria in the Clean Air Act.

Such threshold empirical assertions of huge consequences, political dispute, and regulatory disruption are central to the Court's opinion, perhaps constituting the key trigger for the Court's application of its newly embraced and strengthened "major questions doctrine."[71] Here, distilled to its key elements, is the major questions doctrine trigger and effects, as described in *West Virginia v. EPA*: If the Court finds that something about an agency action is extraordinary, transformative, novel, and with major political and economic consequences, or massively and newly increasing an agency's powers, yet without adequately "clear congressional authorization," then the agency claim of power, or the particular strategy viewed as overreach, is rejected.[72]

The Court's reformulation and embrace of the major questions doctrine by its nature empowers judges and skews against protective new national regulation to address emergent challenges, especially if achieved through new regulatory tools. After all, all newly issued national regulations will, by definition, do something new, thus checking the novelty box. They likewise will have national impacts, as is true of all federal regulation. And most national regulations engender contestation by someone. This is especially true during times of partisan gridlock; state attorneys general now regularly challenge national regulation shifts

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70. The Power Company Respondents argued, but without success, for the Court to follow usual administrative law tenets and not base its review on "abstract speculation" of what "agencies might do in the future" or "farfetched…hypothetical concerns" about "way[s] an agency might try to misuse" its statutory authority. *Id.* at 20-23.

71. *See infra* Section IV(A) ("Statute-bound Effects Claim Analysis") (quoting key rhetoric from the majority's opinion about major consequences and disruption).

72. *West Virginia*, 142 S. Ct. at 2610-2614 (discussing the elements of the new embrace of the "major questions doctrine" and then further explaining it in applying it to reject the EPA strategy utilized in the CPP).

whenever the White House is controlled by a different political party.

In *West Virginia,* as in the two earlier COVID regulation Supreme Court decisions (*COVID cases*), the Court assumed massive costs, alluding to major political and economic consequences and business sector disruption.[73] Instead of basing such claims on regulatory record citations, the Court's main claimed support in *West Virginia* was based on semantic parsing of the term "generation shifting" used by the EPA in the CPP and on statements by regulatory and executive branch officials in political settings outside of the agency's regulatory preamble explanation or record.[74] Judicial focus on contemporaneous political disputes in connection with the challenged action was also a substantial portion of the Court's analysis, yet by its nature such regulatory contestation arises after enactment of the relevant statute. Post-enactment conflicts often reveal nothing about the limits or choices in the actual statute. Such opposition may be based on dislike of the regulation or regulator, or may be rooted in political rhetoric and partisan game playing rather than record-documented evidence.

Furthermore, in *West Virginia* and the *COVID cases*, the Supreme Court notably focused almost exclusively on the cost side of the ledger, only glancingly looking at countervailing benefits. This is unusual in its lack of respect for both the text of the statutes and the regulatory records. In none of these cases did the Supreme Court shape its analysis of costs or benefits with close attention to what statutes in their texts prioritize as criteria and policy goals. The Court provided its usual rollout of the basic underlying statutory setting en route to a focus on the key terms, but then left behind attention to each statute's protective goals and designs.

Furthermore, in each of the 2021-2022 cases which fully embrace the major questions doctrine, and in even more recent 2023 opinions, the Court imputes to Congress a reluctance to regulate to the extent claimed.[75] The Court, however, provides no

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73. Those cases were Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, OSHA, 142 S. Ct 661 (2022) (per curiam) (rejecting the vaccine or mask OSHA workplace rule imposed during the peak of the COVID pandemic); Ala. Ass'n of Realtors v. Dept. of Health & Hum. Serv., 141 S. Ct 2485 (2021) (per curiam) (rejecting the Centers for Disease Control and Prevention renter eviction moratorium imposed during the peak of the COVID pandemic).

74. *West Virginia*, 142 S. Ct. at 2610-14.

75. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2372-76 (2023) (applying and expounding on major questions doctrine in rejecting Biden administration authority to provide student loan forgiveness); *id.* at 2376-2384 (Barrett, J., concurring) (in concurring opinion, providing

citations to any statutory text or history in support of this claim of congressional reluctance. In fact, this imputation of congressional reluctance has been inattentive to statutory language, to any legislative history, or to any other context that might confirm or refute such a claim.

The Court even rooted its decisions in part on congressional failures to enact laws that would have provided the agencies with broader regulatory powers.[76] This interpretative move has long been derided by Court textualists and legislation scholars since statutory nonenactment can, in most instances, drive opposite, contradictory inferences.[77] Congress can fail to convert a bill into a statute because it is opposed, or because its aims are already addressed by other laws. Or, quite frequently, failures to enact laws may just reflect the presence of other, more pressing, matters on the legislative agenda. Statutory nonenactment hence can be wholly unrelated to congressional support or opposition on the merits of the unenacted policy. And, more importantly, the failure to enact a law allowing an action is fundamentally different from the enactment of a law prohibiting that action; only actual legal enactments surmount the legislative process for enacting laws mandated by the Constitution.[78]

In *West Virginia* and other major questions cases in which the Court relies on nonenactment inferences, the Court sometimes engages in cherry-picking of which unenacted laws are relevant. In the eviction moratorium case, *Alabama Association of Realtors v. Department of Health and Human Services*, the Court did not grapple with opposite inferences that might be drawn from Congress expressly supporting COVID-linked actions with approval, especially in the form of statutorily provided monetary support for landlords shouldering eviction moratorium costs.[79] The amount of that landlord relief, although it substantially reduced landlords' economic hardship, was cited not as a factor supporting the agency's authority under the argument that hardship was alleviated and that these congressional enactments indicated

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her expanded rationale and defense of the major questions doctrine, with imputations of congressional reluctance among her rationales).

76. *West Virginia,* 142 S. Ct. at 2614 (reviewing congressional failures to enact cap and trade legislation to regulate greenhouse gas emissions)

77. For a leading casebook's presentation of criticisms of drawing inferences from failures to enact legislation and other legislative activities not resulting in statutes, see JOHN MANNING & MATTHEW STEPHENSON, LEGISLATION AND REGULATION 1193-96 (Foundation Press, 4th ed. 2021).

78. *See* U.S. CONST. art. I, § 7.

79. Ala. Ass'n of Realtors v. Dept. of Health & Hum. Serv., 141 S. Ct 2485, 2489 (2021).

congressional support. Instead, the Court somehow converted these enactments into evidence of high stakes at issue that Congress would not (or did not) support. The Court cited to interference with the landlord-tenant relationship and then to a series of hypothetical excesses that had no basis in the record or action taken, but which the Court could imagine.[80] Apart from a glancing early mention of lives at stake, the Court did not give priority to the protective valence of CDC's mission and law, nor did the Court engage with assessments of disease-spread risks with and without the evictions moratorium.

Likewise, in *West Virginia*, the Court did not acknowledge numerous failed efforts to pass laws that would have taken away the EPA's climate powers, including some expressly about the Clean Power Plan.[81] The Court instead focused on one word, "system," derided it as "an empty vessel" and part of a "backwater" provision, and said that, due to the major consequences the Court listed, the provision should be read as though it said "technology."[82]

In a similar thematic vein, in the major 2006 Clean Water Act "waters of the United States" case, *Rapanos v. United States*, Justice Scalia (in a plurality opinion) alleged that the EPA and the Army Corps of Engineers protected waters with such excessive zeal that it supplanted state and local land use authority.[83] *Rapanos's* empirical claim about federal overreach drove the Scalia opinion to call for a clear statement authorizing the federal government's claimed power. Justice Scalia's analysis, however, cited only to court challenges, with no attention to overall benefits and costs, agency records, or the Clean Water Act's criteria guiding agency actions and overall focus on water quality and "integrity" goals.[84] Following his own claims of overreach, Justice Scalia jumped to dictionaries and newly declared that only waters that are "relatively permanent" in their flow and connected to larger waters could possibly be subject to federal jurisdiction. Justice Scalia did not carry the day, but that view then became the

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80. *Id.*

81. *See* Jean Chemnick, *'Just Say No' Strategy Appears to be Crumbling*, E&E NEWS (Oct. 28, 2015), https://www.eenews.net/articles/just-say-no-strategy-appears-to-be-crumbling/ (reviewing strategies to halt the CPP's implementation, including bills to preclude its implementation under the Congressional Review Act). Research indicates at least thirteen amendments, bills, or resolutions were introduced that sought to limit the EPA's climate power or preclude the CPP, but none were passed into law. The Court cited none of them.

82. West Virginia v. United States, 142 S. Ct. 2587, 2613-16 (2022).

83. Rapanos v. United States, 547 U.S. 715, 719-57 (2006) (Scalia, J., writing for a plurality); *id.* at 721-22, 730-39 (arguing that the agency was overreaching).

84. *Id.* at 722-29.

preferred policy of the Trump administration. This jurisdiction-shrinking test then became the heart of the challengers' case and the preferred test for "waters of the United States" jurisdiction in *Sackett v. EPA*.

The Supreme Court in *Sackett* largely embraced this test, but again got there through statutorily selective cherry-picking and effects claims that were neither documented nor balanced.[85] The *Sackett* Court's major consequences arguments were of several sorts, all of which were in tension with usual statutory interpretation and administrative law tenets. First, the Court emphasized the physical scale of national jurisdiction over wetlands and other waters. This was and is true but, apart from citing one of the Act's savings clauses, the Court never cites any evidence that Congress did not intend this national pollution control legislation to have a major, national effect.[86] Second, the Court's analysis heavily weighted the costs and delays of permitting for discharges of dredge or fill materials, the process incontrovertibly expressly set forth in the Clean Water Act.[87] Debate exists over exaggerations of costs and delays, plus other ways decisionmaking can be streamlined; there is a kernel of truth in claims about wetlands permitting delays and costs. But Congress chose to make this a permit-based regulatory regime with strongly environmentally-protective criteria that were science-based; delay and difficulty are mostly the result of that express congressional choice. Although Congress is usually viewed as being in the driver's seat in setting policy and choosing the procedural means to further that policy, here the majority skewed its interpretation against federal power despite these express statutory procedural and substantive choices.

Moreover, despite the Act expressly setting forth science-based criteria for wetlands regulations and permitting choices, the Court dismissed the relevance of science and environmental effects analysis; the Court called such factors "open-ended" and "freewheeling."[88]

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85. I critique this decision in William W. Buzbee, *The Lawlessness of Sackett v. EPA,* CASE WESTERN L. REV. (forthcoming 2024).

86. Sackett v. EPA, 598 U.S. 651, 674 (2023).

87. *Id.* at 674-76.

88. *Id.* at 681. This language is partly commenting on Kennedy's opinion in *Rapanos* which created the "significant nexus" test that was embraced by four dissenters. That test was heavily built on the Act's decisional criteria and agency science about the important functions of waters, including wetlands. *Sackett*, 598 U.S. at 675-76. See *Rapanos v. United States*, 547 U.S. 715, 759-87 (2006) (Kennedy, J., concurring). The dissenters' embrace of that portion of Kennedy's opinion created a numerical majority supporting that test, but the dissenters would have gone further and also deferred to the underlying regulatory judgment. *Id.* at 788 (Stevens, J., dissenting, joined by three other justices) (noting the

The Court also chose words of burden—requirements, uncertainties, and potential liabilities are called "crushing" and "staggering"—but with no record citations whatsoever to forty-five years' worth of rulemakings and actions to back them up. And, in the Sacketts' instance, the evidence was not supportive. They disliked the advice they were given by their own consultant and by regulators, and disliked regulatory strictures. They could not, however, claim they were left wondering or were dealing with unresponsive experts and regulators. That did not matter; the Court set forth a tale of burdensome, unknowable regulatory burdens.

Lastly, what about the Act's focus on protecting waters' integrity and water quality, and disfavoring of pollution and any filling of waters?[89] The *Sackett* Court does not consider these express countervailing protective goals and protective criteria, focusing instead on the words "navigable" and "waters" and dictionaries' lessons. The Court actually goes even further in its impacts skewing, closing its argument by shifting gears and claiming no power to consider "ecological consequences" or "policy" impacts in deriving its new and substantially narrowed "waters" definition.[90]

Thus, these major questions cases, plus *Sackett*, have a crucial shared and troubling attribute. None of the splenetic claims of abuse and disastrous outcomes in these cases are documented with facts. No record citations. No cites to stakeholder submissions and reports. No grappling with lengthy regulatory impact analyses that since the 1980s have assessed both costs and benefits of regulatory choices and alternatives. No balanced consideration of costs and benefits in ways tailored to each statute's choices and design. And, similarly, the Court does not limit its consequences analysis to the actual action and documented effects. Other hypothetical, imaginable abuses are more prominent. This effects claim disregard is most notable in *West Virginia*, where claims of massive consequences and disruption were contradicted by the record and by subsequent, already-known events. As the Power Company Respondents aptly characterized challengers' arguments and risks, the case was built on "imagined" impacts and

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numerical majority support for Kennedy's "significant nexus" test, also protecting waters that would be protected under the Scalia plurality opinion, but joining with Kennedy in rejecting the substantial limitations on waters protection sought by Justice Scalia).

89. Section 404(b) of the Clean Water Act expressly cross-references and hence incorporates by reference the protective criteria provided for protection of coastal waters in Section 403(c), mandating for Section 404 regulatory actions use of "criteria" that are "comparable" to those set forth in Section 403(c). *See* 33 U.S.C. §§ 1343-44 (2021).

90. *Sackett*, 598 U.S. at 684.

hypothetical legal abuses by the agency, rather than on the record before the Court.[91]

So, in these settings, neglect of science, facts, and statutory priorities is the problem.

C. Regulatory Experimentalism and Ongoing Factual Reassessments

This article now turns to a different sort of law-fact problem, but also possible promise. Here, the problem is not factual disregard, but questions about possibly excessive faith in the fact-laden regulatory process and rigor called for by Chuck Sabel's "learning by monitoring" and by experimental regulation and governance.

As briefly introduced above, here is Sabel's basic model. A government or private actor faces a problem: car quality, an agency or legislature plagued by inertia, or an emergent or many-layered problem like climate change. The problem's nature, and prudent ameliorative or profitable measures, are not fully knowable, nor are best means to address the problem known. A big statutory deal remains elusive.[92]

Sabel's approach calls for monitoring of the state of the world, usually on a sectoral basis, then identification of the "best" practices and what they can achieve. Once this "best" practice or action is benchmarked, then a broader shift to the "best" measures or levels of improvement is either mandated or somehow incentivized. And then the process continues, with new monitoring, assessment, and identification of a new "best", and adjustment of regulatory expectations.[93]

Under this model of problem solving, those regulated are not surprised, although moving "best" targets do create risks, if not near certainty, of periodic regulatory and business destabilization. Importantly for Sabel, regulators cannot rest on their laurels. They must critique on-the-ground effects and accomplishments and the effectiveness of their own past actions. Information is continuously updated. Furthermore, each step toward a goal will change the status quo and, often, provide new information about solutions and actions to avoid.[94]

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91. *See supra* note 67 and accompanying text (discussing Power Company Respondents' arguments).

92. SABEL & VICTOR, *supra* note 19, at 1-2 (introducing such regulatory challenges, with a focus on climate change).

93. *Id.* at 47-73 (providing a chapter of explication of the "theory of experimentalist governance").

94. *Id.*

This model and its optimism are encouraging. Sabel, with his coauthor, has identified settings where variants of his proposed modes were used and progress made.

If cost-benefit analysis is often about facts without law, and the major questions doctrine in operation is mostly a judicial power play asserted with inattention to actual established facts that legally govern (or should govern), regulatory experimentalism involving learning by monitoring is the near opposite. It tests facts on the ground with rolling rules. Expectations are updated with each new identification of the "best," all to achieve a clearly defined end goal. It involves unusually rigorous and ongoing effects claims, observations, contestation, and updating.

This would be a great way to get governments and firms to make progress on a problem like climate change. Elements of Sabel's approach mesh well with the prescriptions discussed later in this article. But first, a critique.

If the world were all Chuck Sabels and Elena Kagans, and they could be hired and retained by the government, the Sabel regulatory practices could probably work. A hunger for new knowledge, improvement, and love of work, if found all around the regulatory table, could avoid misguided zeal and ensure regulatory actions would both advance the regulatory cause and elicit good information. The question is whether Sabel's touted method may, at times, demand more than is likely or possible. Relatedly, theoretically and empirically-grounded defenses of "best performance" technology-based standard setting show how theoretically suboptimal modes of regulation may nonetheless drive tremendous progress.[95]

Sabel also starts with an assumption about law that exposes his argument to legal vulnerability. Some defined, shared end goal, ideally with unpalatable penalty alternatives or clear tangible benefits, is probably a necessity to get to "go" in the sense of law that would be constitutionally permissible. Without it, we probably lack law that would ever pass the nondelegation doctrine, let alone pass as a piece of legislation, for which compromise is usually essential. In some sense, Sabel just steps by an initial challenge of enactment of clear statutory goals. How goals are determined and how stakeholders are brought to the legislative table remain unclear under Sabel's approach.

Nonetheless, we can assume for analytical purposes here that a law with clear goals is set and that benefits of regulatory success are large, or the penalty default daunting. We then must consider the demands of ongoing, rolling assessments of past actions,

95. Wagner, *Triumph of Technology-based Standards*, *supra* note 42.

unsettling of past choices, and embrace of new and better measures.

Which people or institutions would embrace such work where environmental improvement or pollution reduction is the targeted end? More optimistically, what are the conditions that might be conducive to the work demands of Sabelian experimentalism involving learning by monitoring? Pessimistically, why might this ideal approach either fail or be less ideal than envisioned?

One question about Sabel's work is whether it is driven by a selection bias, picking successes utilizing forms of learning by monitoring and experimental regulation, with too little comparative analysis of other case studies, including failures.

Here are other challenges and questions. First and foremost, the work demanded of regulators is extraordinary. As many of us have long documented, agencies tend not to be rapacious, zealous, and eager, but are more often overworked, behind, underpaid, and risk averse. Loss of the best regulators, especially lawyers and engineers, to the private sector is a pervasive problem. Hiring highly qualified personnel in a timely way is a challenge, especially where needs and opportunities are great. Furthermore, even with current, sometimes clunky methods of regulatory policymaking, agency standard-setting tends to be slow, divisive, and subject to periodic political reversals. It is therefore difficult to imagine settings where regulators will eagerly unsettle their own work, have the resources to do so, criticize their own past determinations, change rules for businesses, and continuously update requirements.

Suppose, nonetheless, that regulators are willing to engage in this sort of rolling rule reassessment. Businesses will have adjusted to the previous rules and often will resist any unsettling of business expectations. The stability of rules targeting business spillover harms is often more important for business planning and competitive success than the particular content of the chosen rule. A genuine question is whether businesses will embrace this regulatory mode. Incumbents tend to dominate regulatory settings in Congress and agencies. Incumbents resist weakening of their favored position. Any investment in a past regulatory requirement will result in some resistance to change, even if the shift would be to a newer, societally better, and more stringent form of regulation.

Concededly, this is part of the goal and design of regulatory experimentalism. Good regulation under this model will unsettle things and create room for new entrants to devise new, better modes of production. But how will new entrants ready to gain

market share by demonstrating a better regulatory mousetrap get a seat at the table and have the resources to keep playing? Regulators and businesses both will have reasons to resist, and critically important new entrants may find it hard to provide input, let alone shape a new regulatory answer.

It is also hard to see how this model can work without the presence of not only highly expert and motivated regulators (or consultants to such regulators), but also firms that benefit from the regulated market. As I've written about in prior works, the dynamics and space left for innovation and difference in settings of federalism and concurrent areas of regulation can, for reasons linked to regulatory and political tailoring at different scales, lead to innovations and improvement akin to what Sabel envisions.[96] What will similarly catalyze and motivate highly expert regulators outside of federalism dynamics?

What about groups lacking business incentives on the beneficiary side of the regulatory ledger? Will environmental groups or citizen advocates, or other public interest actors, be able to play in a continuously reassessing regulatory world? High stakes, high impact, but intermittent regulatory and political interventions have generally been favored in settings where the goal is to promote the public interest. Suppose each category of risk (say a pollutant) and each source of risk (say a polluter category like car manufacturers or a chemicals refineries) were subject to agency regulation that could affect many citizens and natural resource like rivers, airsheds, or wild species. If each agency action affecting many citizens or the environment were undergoing regular reassessments of the old, the "best", and what should be the new standard, the demands on small and lightly funded public interest groups would be difficult if not insurmountable. Yet participation of beneficiary groups would likely be crucial to keep regulators on task and not unduly swayed by industry entreaties.

The track record and critiques of negotiated rulemaking seem relevant here.[97] Negotiating around the table might seem better than top-down regulatory efforts where those with key information, namely those to be regulated, have incentives to stall and withhold information. But someone must bring everyone to

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96. William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145 (2007) (discussing dynamism sparked by federalism and comparing it to Sabel's earlier work on modes of regulatory experimentalism).

97. See William Funk, *When Smoke Gets In Your Eyes: Regulatory Negotiation and the Public Interest EPA's Woodstove Standards*, 18 ENV'T L. 55 (1987) (analyzing challenges to effective and legal action under negotiated rulemaking structures, including need for meaningful regulator rule).

the table, and regulatory expertise and energy will always be essential to assess and question others' contentions. Finding means to invite, support, and fund affected communities and interests—so called regulatory beneficiaries—is probably essential.

Even if regulators were interested, would this combination of legal, engineering, and data-testing expertise exist within agencies frequently enough for expertise to accumulate such that it endures over time? The problem of loss of the best regulators is a genuine one.

I agree that regulatory updating and improvement as Sabel advocates would be wonderful. Some case studies show that this can happen. Sabel and Ann Carlson document the California Air Resources Board's work with clean vehicles and its unusual expertise and regulatory capacity.[98] This is perhaps his best case study, confirmed in Carlson's earlier work.[99]

Much of California's expertise has been rooted in the CAA's setting of strong penalties for terrible air, and California's own need to face air challenges, especially in the "southern basin" of Los Angeles and its environs. California is specially empowered by federal law to address air ills, especially with cars, and can limit access to California markets. The Supreme Court's 2023 case *National Pork Producers v. Ross*, like earlier appellate cases about California greenhouse gas regulation, preserves such broad room for states to experiment and even lead.[100] Business firms' desire for access to the California market, combined with pollution harms, are together huge motivators.

Other examples Sabel draws on—sulfur dioxide (SO_2) and ozone (O_3) regulation in particular—also involve combinations of regulatory need, looming penalties, and private desire for market access via innovation, providing near perfect settings for Sabel's approach. What about the rest of the nation and other sectors?

D. Improving Effects Claims Analysis

How could more law-bound intensive documenting of science and empirical facts on the ground work, and how could it help surmount challenges arising out of environmental policies' law-fact problems?

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98. SABEL & VICTOR, *supra* note 19, at 74-87 (reviewing CARB's innovations and success and highlighting methods similar to that advocated by authors Sabel and Victor).

99. Ann Carlson, *Regulatory Capacity and State Environmental Leadership: California's Climate Policy*, 24 FORDHAM ENV'T L. REV. 63 (2013).

100. Nat'l Pork Producers v. Ross, 598 U.S. 356 (2023); Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013) (upholding California transportation fuel standard designed to combat climate change despite claimed out-of-state impacts), *reh'g en banc denied*, 740 F.3d 507 (9th Cir. 2014), *cert. denied*, 573 U.S. 946 (2014).

Better use of facts, especially law-fact (including science) applications that pervade all regulatory work, offers a means to check, or try to check, stakeholder hyperbole and dissembling. Better use of facts could also check, or at least provide resistance to, judicial derailing of environmental progress. Documentation of reality and reasonable future possibilities could also reshape environmental successes and battles in the political branches.

Agency assessment of science, business practices, and risks of environmental harms are at the heart of agency tasks as set forth in our environmental laws. Such on-the-ground effects analysis is at the heart of agency expertise and is far less susceptible to judicial power grabs and regulatory stakeholder falsehoods than to broad word-based claims of power and discretion.

Now, in closing, I turn to best practices to establish facts and science linked to choices in environmental laws. Despite my concerns about Sabel's model and the regulatory work it requires, it provides a gold mine of ideas for environmental progress and also for countering specious effects claims in a world of hostile judges, resistant firms, small public interest entities, and tired and understaffed agencies. The best of Sabel's ideas, plus other recommendations below, are suggested as means to counter regressive effects and atextual and fact-free claims as most problematically exemplified in the 2022 *West Virginia* decision and other recent major questions doctrine cases.

First, rigorous holistic statutory work must be melded to effects analysis. This is an essential element of my prescription. A key move in antiregulatory advocacy is microtextual analysis of a few words, disregard of express statutory aims, and general disregard of statutory criteria that each law provides. Instead, advocates and agencies should take environmental statutes' texts seriously. Their language and criteria are protective and powerful. The Supreme Court has repeatedly talked about statutory interpretation as requiring attention to text, context, and structure. This should be a constant, not an episodic, practice. In the major questions doctrine cases, unfortunately, the Court's statutory interpretation methodology has been illogical, selective, and inattentive to each statute's overall logic, goals, and criteria.

I cannot here go into depth about what this sounder form of statutory analysis would look like, but it would be more like we see in *Whitman v. American Trucking Associations*, in which Justice Scalia, speaking for the Court, rejected an atextual effort to add new criteria to a statute.[101] The Court instead looked at the words, structure, operative logic, and also need for respect for

101. Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001).

congressional design and choices. *King v. Burwell*, likewise, paid close attention to how the statute worked and was meant to work. *King* insisted on giving the statute a "fair reading" rooted in such holistic textual analysis.[102] The recent *American Hospitals v. Becerra* opinion was brief but unanimous, and carefully built on attention to how the statute and regulatory tasks worked.[103]

FDA v. Brown and Williamson Tobacco Corp. is laden with methodological moves usually shunned by textualists and is rightly criticized for many of these moves.[104] It did, however, look at how a single industry—the tobacco industry—had been repeatedly regulated by Congress in six laws and what an array of officials had said about FDA power to regulate tobacco. Its conclusion—that Congress did not grant the FDA power in 1934 to regulate tobacco marketing—was a reasonable conclusion rooted in close legal analysis and attention to political and regulatory context. It did not veer into hypothetical abuse claims.

A brief I led in the *Sackett* case for 167 members of Congress, with Sara Colangelo and Jack Whiteley of Georgetown's Environmental Law and Justice Clinic, sought to apply this more rigorous and full text form of textualism to focus the Court on what the Clean Water Act (CWA) says, criteria for action, and how a textualist approach clearly precluded the Sacketts' call for a severe narrowing of the CWA.[105] The brief did not carry the day, but the methodology wielded is nonetheless rooted in a larger body of consensus statutory methodology that remains potentially powerful.

Countering of microtextual analysis with attention to more of each statute's actual choices can highlight statutes' protective express provisions. More comprehensive statutory work also can rule out atextual additions used by opponents of environmental protection, agencies seeking to roll back protections, and sloppy or hostile judges.[106]

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102. King v. Burwell, 576 U.S. 473 (2015). It also used "major questions" cases and logic but did so focused mostly on how the statute worked and allocated power.

103. AHA v. Becerra, 142 S. Ct. 1896 (2022).

104. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

105. Brief of *Amicus Curiae*, 167 U.S. Members of Congress in Support of Respondents (filed June 17, 2013), Sackett v. EPA, 598 U.S. 651, 674 (2023) (No. 21-454) (extensively analyzing numerous mutually confirming Clean Water Act provisions that supported longstanding statutory protections and scope and conflicted with Petitioners' arguments for severely curtailing Act protections).

106. For lengthy exploration of need for avoidance of "textual gerrymandering" in statutory interpretation and ways more inclusive and contextual reading can reduce conjectural reading, see William E. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718 (2021).

Second, agencies must try procedural modes that use targeted inquiries, seek documentation for stakeholder effects claims, and possibly even choose formal procedures with on-the-record information-gathering and testing. Agencies have tremendous latitude to enrich and focus their regulatory inquiries and to choose procedural modes. They can do more to highlight lies and exaggerations and to make these clear in the record. Regulatory high-stakes battles are now, as Tom McGarity has analyzed, a blood sport with exaggerations, attacks, and public relations campaigns part of the game.[107] Agencies must adjust.

The *FCC v. Prometheus* case has been a bit of a sleeper, and a problematic decision if it allows agencies to do poor work due to stakeholder inattention.[108] On the other hand, it does take special note of the FCC's seeking information from regulatory stakeholders that might support the stakeholders' claims of illegal impact.[109] The Court's upholding of the agency's action was partly based on the complainants' and their allies' failures to supply the welcomed information. The case could provide a roadmap for agencies seeking to test hyperbolic claims of disaster by stakeholder groups.

Third, agencies can do more to generate their own facts and science and memorialize their findings, with opportunities for challenge and improvement welcomed. A notice and comment process prioritizing science, facts, and other effects claims is possible and can be effective. A prime example of this is EPA's and the Army Corp's work on the so-called "Connectivity Report" in the wake of *Rapanos.*[110] The agencies publicly declared their intent to collect and distill the best peer reviewed science about types of waters and their functions. They published it, welcomed criticism, and later relied on it in both adjudicatory settings and in subsequent regulatory efforts. To this author's knowledge, no one

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107. Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L. J. 1671, 1762 (2012).

108. FCC v. Prometheus Radio Project, 141 S. Ct. 1150 (2021) (upholding agency action despite claims of illegal effects where stakeholders had not responded to agency seeking of information showing discriminatory ownership effects).

109. *Id.* at 1159 (in explaining affirmance of the agency action, stating that "despite repeatedly asking for data on the issue, the Commission received no other data on minority ownership and no data at all on female ownership levels"). The Court concluded: "Despite those requests, no commenter produced such evidence indicating that changing the rules was likely to harm minority and female ownership. In the absence of additional data from commenters, the FCC made a reasonable predictive judgment based on the evidence it had" and the Court concluded that administrative law required no more. *Id.* at 1160.

110. ENV'T PROT. AGENCY, CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE EVIDENCE (2015), https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NCEA&dirEntryId=296414.

has challenged, let alone questioned, the validity and substance of the waters science synthesized in this report.

Similarly, but more episodically, when EPA engages in major stationary source permitting under the Clean Air Act, it and stakeholders need to determine the "best" being done and the "best" that is possible for the category under consideration. Whether "lowest achievable emissions rate" (LAER) permitting in nonattainment settings or "best available control technology" (BACT) emissions control potential in "Prevention of Significant Deterioration" (PSD) settings, stakeholders and the agency will assess, document, and act on what current information reveals.[111] It is further expected to keep a "clearinghouse" of information about such determinations.[112]

Similarly, but perhaps a bit unexpectedly, cost-benefit analyses can and should become a standard go-to to compare effects over time and in light of new possible policies. Regulatory impact analyses provided important comparative effects claim information in combatting the Trump administration's lawless and fact-poor deregulatory efforts.[113]

Fourth, regulatory lessons and innovations developed due to regulatory federalism should be retained and more regularly documented. Federal floors remain important, but ceilings precluding different and more protective state actions are rare and should remain rare. State tailoring and latitude for difference should remain prevalent. Due to environmental regulatory federalism, climate progress and policy testing occurred at the state level for decades while federal inaction reigned. Despite calls by some prominent academics for a federal-only climate law answer, such an idea has been and must be resisted. Federal-only climate law would be unworkable, given the ubiquitous nature of actions with climate effects. Furthermore, federal error and policy reversals remain prevalent risks. I discuss this in a 2017 article on *Federalism Hedging*, but also in earlier works on regulatory federalism.[114]

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111. *See* 42 U.S.C. §§ 7470-7492 (containing Prevention of Significant Deterioration sections); 42 U.S.C. §§ 7501-7515 (containing "plan requirements for nonattainment areas").

112. 42 U.S.C. § 7408 (setting forth provisions for EPA creation of criteria documents about criteria pollutant harms and means to address such pollution, including a mandate that the EPA create a database of public information about such control techniques called the RACT/BACT/LAER clearinghouse).

113. *See* Carolyn Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593 (2019) (discussing this benefit of comparing cost-benefit analyses over time in assessing and constraining policy changes).

114. Buzbee, *Federalism Hedging, supra* note 3; *see also* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007);PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S

Regulatory federalism, as it actually works, creates some of the dynamism, room for innovation, and space for business and policy testing and entrepreneurship that Sabel champions.

Fifth, agencies should downplay policy choosing as a matter of linguistic possibility. Instead, agencies should ground actions more overtly as shaped by law-fact analysis. For example, the CPP was soundly constructed overall, but relied heavily on language-based parsing. Data and qualitative explanation of the "best systems of emissions reduction" that were "adequately demonstrated" was buried and splintered.[115] A few clear touchstone case studies would have been a huge help. It would have been important politically, and might have changed advocacy. Maybe the Supreme Court was reachable, but maybe not. By the time *West Virginia* came before the Supreme Court, electric utilities had come forward and supported the CPP's design as sound and accurate.[116] A more fact-justified CPP with extensive record citations would have made the Court's work harder. Even the "generation shifting" label, while accurate as a descriptor, seemed to imply something disruptive even though the actual CPP was built on already observed best practices.

Notably, the 2023 Biden Administration's proposed new power sector Section 111(d) rule is built much more specifically on breaking down categories of plants and adjusting their obligations, and then quite explicitly naming the facilities demonstrating what levels of pollution control could be achieved.[117] It is not about labels and words, but provides agency fact observations about producers and pollution control capabilities.[118]

Sixth, greater use of regulatory vetting via the Georgetown Climate Center's "convenings" model could help vet effects claims and reveal good, bad, and better ideas. Georgetown University Law Center's Climate Center regularly gathers diverse groups of stakeholders, including academics, consultants, legislative staff, federal and state regulators, and businesses, to discuss climate

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CORE QUESTION (2009) (William W. Buzbee, ed. and contributor) (book with numerous authors and chapters analyzing the prevalent statutory choice to retain space for federal and state regulatory overlap, versus far rarer preemptive regimes).

115. *See* Clean Air Act § 111(d) and cross-referenced § 111(a)(1), 42 U.S.C. § § 7411(a), (d).

116. *See supra* note 67 and accompanying text (discussing the power companies' experience and brief).

117. New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33240 (Proposed May 23, 2023) (to be codified at 40 C.F.R § 60).

118. *Id*. at 33252-66 (reviewing developments by sectors, particular jurisdictions, and named facilities in explaining basis for its proposal).

regulatory experiences and ideas. These meetings bind no one and generally operate under "Chatham house rules." This arrangement allows subsequent description of matters discussed, but with no named attribution. On an array of legislative and federal and state regulatory matters implicating climate change goals, Climate Center convenings have quickly worked much as Sabel advocates, with discussions in roundtable formats quickly revealing areas of consensus and disagreement, while allowing mutual education. Even without attribution, and although these gatherings are purely informational and informal in nature, such meetings do help sort out the wheat from the chaff of ideas and complaints. As with the many other informal settings of regulatory give-and-take long allowed under the law (with *Sierra Club v. Costle* the most important embrace of the political nature of regulation), key claims, evidence, and arguments must still be made part of the agency's action record.[119] But the range of disagreements and identification of best ways to act can be illuminated by such convening-based discussions. Quick conversational exchanges among experienced and expert stakeholders can elicit and correct regulatory understandings.

Lastly, a closing word about some perhaps underappreciated elements of the 2022 Inflation Reduction Act. As mentioned earlier, the 2022 Act uses tax and spending inducements to spark climate progress. It should, however, have benefits linked to my call for documentation of facts, science and progress. It both funds personnel to do climate-linked work but also offers to fund state, local and other entity planning to devise greenhouse gas-reducing strategies, yet without dictating what measures might be embraced or invented.

This combination of planning, tailoring, and documenting should both spark progress and, importantly, provide information that will generate horizontal and vertical learning. The Inflation Reduction Act should also, on many fronts, illuminate, if not create, new "best" performance information under environmental laws. But to capitalize on this new Act-incentivized creativity and best results, EPA and those receiving funding or tax benefits will need to distill, document, monitor, and share information about actual performances and sound plans if the Act is to provide broad regulatory learning benefits. The information and effort to be catalyzed by Inflation Reduction Act dollars is far from Sabel's rolling rule experimental regulation, but monetary inducements

119. Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (rejecting arguments that informal communications about a regulation invalidated it and affirming benefits of both record submissions and informal and political give and take).

should spark similar innovation and change. And, as Sabel argues, and regulatory federalism scholars have long documented, policy testing, progress, and innovation can break down resistance to broader solutions.

VI. CONCLUSION

Respecting our environmental laws' choices and criteria, and establishing facts and science as made salient in our laws, could help surmount environmental challenges in several ways. Greater law-fact testing and documentation could check hostile courts and perhaps help check lawless and ungrounded lies and exaggerations that undercut environmental goals and statutory requirements.

Such analysis could also document progress achieved without disastrous ripple effects. Such documentation could even facilitate win-win regulation where regulatory innovation both protects the environment and results in excellent performance by the best regulated firms. Each new success could also open up new political possibilities of better, more encompassing environmental regulatory solutions. Lawless fact conjecture, dissembling, and hypothetical horribles, however, are at the present time an important and troubling part of regulatory contestation and Supreme Court practice. Efforts to counter baseless effects claims untethered to statutes' actual textual choices are essential to protect the environment and to retain legislative supremacy as a core constitutional value.