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Green Transitions in a COVID Economy

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PACE ENVIRONMENTAL LAW REVIEW

ARTICLE

Green Transitions in a Covid Economy

NICHOLAS S. BRYNER*

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INTRODUCTION

Environmental law is in a moment of transition, both in form and in substance. At the national level in the United States, the structural institutions and political posture in the legislative and judicial branches present formidable barriers for meaningful socioeconomic and environmental reform. Existing environmental legislation—the national framework built in the 1970s and 1980s—has been remarkably successful in remedying specific environmental and public health problems,¹ and the foundation of statutes like the National Environmental Policy Act, Clean Air Act, and Endangered Species Act has proven resilient during successive waves of political

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1. See, e.g., Joseph E. Aldy et al., *Looking Back at Fifty Years of the Clean Air Act* 1 (Res. for the Future, Working Paper No. 20-01, 2020), https://media.rff.org/documents/Update-Fifty_Years.pdf [<https://perma.cc/6EAJ-KCPY>] (recalling significant literature, which has documented the success of the Clean Air Act in reducing emissions of conventional pollutants over the past fifty years, while population and economic activity have continued to grow).

opposition.² However, since the 1990s, new federal legislative authority, except in a few limited areas,³ has been a political non-starter, especially with the current filibuster and cloture rules in the Senate. The form of new environmental law has instead shifted in two ways. First, the vacuum in decision-making at Congress has made State and local action, as well as private environmental action, more significant.⁴ Second, within the federal government, legislatively and judicially imposed constraints have forced a shift from regulatory social and environmental policy to policy-by-spending.⁵

Along with this shift in the form of environmental law and policymaking is an ongoing evolution in the substance of what environmental law addresses. Early, pre-statutory environmental law relied on connection to

2. See, e.g., Jim Lyons, *Under Threat: The Endangered Species Act and the Plants and Wildlife It Protects*, CTR. FOR AM. PROGRESS (Nov. 28, 2017), <https://www.americanprogress.org/article/under-threat/> [<https://perma.cc/W3A9-EE2C>] (describing the state of the Endangered Species Act at the beginning of Trump's term. During the Trump Administration, leadership of major departments and agencies, including the Department of the Interior and the EPA, pushed for both regulatory and statutory change. However, as has been the case in previous conservative administrations, no major statutory rollbacks were adopted (despite some changes to important regulatory language in implementing NEPA and the ESA)). See also H.R. 861, 115th Cong. (1st Sess. 2017) (detailing Rep. Matt Gaetz's one-line bill introduced in 2017 to abolish the EPA. These radical efforts by Members of Congress to repeal entire statutes or eliminate the EPA altogether have been introduced but have never gained significant traction. Gaetz's bill attracted only 7 co-sponsors, and despite the "message" sent by introducing such language, the bill never received any significant attention in committee work or otherwise.).

3. See, e.g., Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-82, 130 Stat. 448 (codified as amended at 15 U.S.C. § 2601) (2016) (describing the update to the Toxic Substances Control Act and serving as the only major revision to one of the core environmental statutes this century); see also Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 42 U.S.C.); Energy Independence and Security Act of 2007, Pub. L. No. 110-40, 121 Stat. 1492 (codified as amended at 42 U.S.C. § 7545) (amending, among other things, the Clean Air Act to include a mandate for including biofuels in the U.S. gasoline and diesel supply).

4. See, e.g., Derek Willis & Paul Kane, *How Congress Stopped Working*, PROPUBLICA (Nov. 5, 2018), <https://www.propublica.org/article/how-congress-stopped-working> [<https://perma.cc/TRD8-MHK7>] (showing, among other indicators of a decline in legislative activity, a sharp drop in the number of substantive committee hearings on legislation from 1990-2016).

5. See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (narrowing the scope for Commerce Clause-based legislation and further channeled federal legislative action under the Constitution's Spending Clause, opinion by Chief Justice Roberts); see also Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (codified as amended in scattered sections of 23 U.S.C.) (2021) (introducing the notion that the Biden Administration's signature legislative achievement in the 117th Congress has been a spending bill).

property and tort regimes.⁶ Statutes in the 1970s and 1980s took on a public health approach, but regulatory mandates centered primarily on individual source-by-source controls as a way of achieving overall objectives.⁷ Since the adoption of those bedrock statutes, environmental law has developed in two additional directions, through an increased interaction with the systems-wide legal approaches of energy and public utilities law, as well as a push by social movements and communities to more appropriately address environmental justice and discrimination in environmental policy.

As we move into the third decade of the 21st century, the impacts of climate change in the United States and around the world have become increasingly prevalent, with record-breaking heat waves and disastrous wildfires,⁸ floods,⁹ and tropical storms.¹⁰ These not-so-natural catastrophes exacerbate pre-existing inequalities in housing and access to resources and further highlight a need for broader reforms that address environment and social problems.

The movement for a Green New Deal—particularly as it emerged in the run-up to the midterm elections in 2018—has contributed to both environmental and social policy by framing and articulating an expanded, unified vision of justice in these two fields. The conceptual vision in the Green New Deal is powerful, as are calls for a *just transition* to reshape the distributive socioeconomic and environmental impacts of our energy systems.¹¹ The immense roadblock for the Green New Deal is that, just as this broad vision has taken shape, the political and institutional constraints have so sharply

6. Mark Latham, Victor E. Schwartz & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737, 750 (2011).

7. See, e.g., 33 U.S.C. § 1362(12) (2019) (providing a definition of “discharge of a pollutant” in the Clean Water Act, which focuses on individual “point sources” for regulatory compliance); see also 42 U.S.C. §§ 7408–10 (laying out nationwide programs based on ambient air quality while focusing on individual sources in state planning and permitting requirements).

8. See, e.g., UNEP, SPREADING LIKE WILDFIRE: THE RISING THREAT OF EXTRAORDINARY LANDSCAPE FIRES 10 fig.s2 (2022) (forecasting a likely increase in global wildfires by 2100 of 31-57% above the 2010-2020 baseline).

9. See, e.g., Oliver E.J. Wing et al., *Inequitable patterns of US flood risk in the Anthropocene*, 12 NATURE CLIMATE CHANGE 156, 157 (2022) (modeling a 26.4% increase in flood risk in the United States by 2050 under a moderate GHG emissions scenario and noting that the risk disproportionately impacts Black communities).

10. See, e.g., Kevin A. Reed, Michael F. Wehner & Colin M. Zarzycki, *Attribution of 2020 hurricane season extreme rainfall to human-induced climate change*, 13 NATURE COMM'NS 1, 2 (2022) (using a “hindcast” to model the proportion of additional rainfall from extreme weather events in 2020 due to human-caused climate change).

11. *Just Transition: A Framework for Change*, CLIMATE JUST. ALL., <https://climatejusticealliance.org/just-transition/> [<https://perma.cc/HGZ3-69UJ>].

limited the options for what change in environmental law and policy can look like. At the moment when the substance of the issues calls for holistic social and environmental policy, the opportunities for new law and the form that might take are more constrained than ever.

Discourse around a Green New Deal since 2018 has contributed to thinking about both environmental justice and labor justice.¹² An environmental justice framework highlights the degree to which fossil fuel extraction, development, and consumption disproportionately burdens minority and low-income, fenceline communities.¹³ A labor justice framework, in turn, demands transitional policy to ensure that communities reliant on energy-sector jobs are not sacrificed as investment capital moves elsewhere to decarbonize.¹⁴

As many elements of a Green New Deal languished in Congress, economic policy took dramatic turns instead to address a different crisis: the Covid-19 pandemic.¹⁵ This Essay explores the way in which legal and policy responses to Covid-19 in the United States—particularly as discourse has focused on the impacts of Covid-19 response on labor markets—may provide insight into the political economy of a Green New Deal. New federal spending toward a just transition is structurally much easier to accomplish than developing new regulatory policy through legislation or executive action and avoids judicial policing of administrative authority.

I. A GREEN NEW DEAL AS TRANSITION POLICY: CLIMATE CHANGE AFFECTS EVERYTHING, BUT NOT EVERYTHING IS ABOUT CLIMATE CHANGE

In the lead-up to the congressional midterm election in 2018, progressive activists and candidates adopted the concept of a Green New Deal as a

12. See Recognizing the Duty of the Federal Government to Create a Green New Deal, H.R. Res. 109, 116th Cong. (1st Sess. 2019) (including language about both environmental justice and social justice issues).

13. *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> [<https://perma.cc/P6ZA-CH3P>]; see generally Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

14. Ann Eisenberg, *Just Transitions*, 92 S. CAL. L. REV. 273, 291-92 (2019); see also David J. Doorey, *The Contested Boundaries of Just Transitions Law*, L. & POLITICAL ECON. PROJECT (Dec. 14, 2021), <https://lpeproject.org/blog/the-contested-boundaries-of-just-transitions-law/> [<https://perma.cc/EQW6-75G3>].

15. E.g., American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021) (providing \$1400 to each person, expanding the 2021 child tax credit, and extending unemployment insurance as a means for economic recovery during the initial height of the pandemic); see generally Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-36, 134 Stat. 281 (2020) (legislating earlier pandemic relief).

call for major socioeconomic and environmental reform. The “Green New Deal” phrase was not new; several others had used the wording in advocating for a variety of policies not necessarily associated with leftist or progressive ideologies (including, for example, New York Times columnist Thomas Friedman).¹⁶ However, groups such as the Sunrise Movement, and Representative Alexandria Ocasio-Cortez, elected in 2018, gave the Green New Deal the widespread attention and meaning with which it is now commonly associated.¹⁷

In the same year—2018—a Special Report from the Intergovernmental Panel on Climate Change (IPCC) raised major concerns about what is likely to happen to the global environment if significant cuts to worldwide emissions of greenhouse gases (GHGs) are not made.¹⁸ Representative Ocasio-Cortez and others made the IPCC warning an important part of their pitch for new legislative action, highlighting the urgent need for action within this decade.

To some extent, the climate change aspect of the Green New Deal has taken center stage. In the Green New Deal Resolution that was introduced in the House in 2019, the top-line, first-listed goal is “to achieve net-zero greenhouse gas emissions through a fair and just transition for all communities and workers.”¹⁹ Yet in that very clause is the first indication that the Green New Deal is not simply a call for decarbonization and climate mitigation.

Climate change is the most complex of all environmental policy problems. It touches everything, exacerbating many existing environmental challenges and crises. With so many simultaneous causes, addressing the sources of climate-forcing pollution is extraordinarily difficult—a truly global collective action problem. In the United States, researchers have identified three major categories of transitions that will need to occur for economy-wide “deep” decarbonization: increases in energy efficiency throughout the economy, conversion of electricity generation to renewable and zero-GHG sources, and the electrification of transportation, industry, and residential

16. Thomas L. Friedman, *A Warning from the Garden*, N.Y. TIMES (Jan. 19, 2007), <https://www.nytimes.com/2007/01/19/opinion/19friedman.html?module=inline> [https://perma.cc/5249-P3CQ].

17. *Elect Green New Deal Champions in 2022: Our Current Endorsements*, SUNRISE MOVEMENT, <https://www.sunrisemovement.org/campaign/elect-green-new-deal-champions-in-2022/> [https://perma.cc/WHT6-UH3Q].

18. Ove Hoegh-Guldberg et al., *Impacts of 1.5°C of Global Warming on Nature and Human Systems*, in IPCC, GLOBAL WARMING OF 1.5°C 175, 177–283 (Valérie Masson-Delmotte et al. eds., 2018).

19. Recognizing the Duty of the Federal Government to Create a Green New Deal, H.R. Res. 109, 116th Cong., at 5 (1st Sess. 2019).

end-use sectors.²⁰ Further measures will be necessary to address the emission of other GHGs (aside from carbon dioxide) in industry and agriculture.

Given the scale of the climate crisis, it is easy to see how climate change is, fundamentally, about everything we do as a society. Nearly all economic activity contributes to it, and the impacts from climate change will be felt everywhere in multiple ways—in ways that further drive inequality along racial, gender, and socioeconomic lines.

However, as Green New Deal activism also shows, not necessarily everything that is important in environmental and social policy is about climate change. The Green New Deal is, in its essence, a solution for “conventional” problems of environmental justice and socioeconomic inequality, with climate mitigation not as the primary end but as a critical and necessary condition for achieving justice. Therefore, the goal in the Green New Deal resolution is not only to achieve net-zero GHG emissions, but rather “to create millions of good, high-wage jobs and ensure prosperity and economic security for all people of the United States,” and “to secure . . . clean air and water; climate and community resiliency; healthy food; access to nature; and a sustainable environment” for present and future generations in the United States.²¹

To focus on the Green New Deal as climate policy or to view its prospects for success solely through a climate lens would be to miss much of the value that the Green New Deal idea brings. The pivot toward a Green New Deal within progressive circles is not a call for technocratic tailoring of neoliberal economic and environmental policies to deal with climate in the same way developed countries have approached climate negotiations since the 1990s. Instead, it is a more explicit call for a revival of industrial policy²² in the United States to reshape the economy in a more just and sustainable way—and in a way that would be consistent with ambitious action at the international scale.²³

Democrats’ return to the majority in the House of Representatives in 2018 and 2020 also coincided with a revitalization of labor movements.

20. JAMES H. WILLIAMS ET AL., ENERGY & ENV’T ECONS., INC., PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES 13–14 (2014).

21. H.R. Res. 109, at 5–6.

22. Robinson Meyer, *A Centuries-Old Idea Could Revolutionize Climate Policy*, THE ATLANTIC (Feb. 19, 2019), <https://www.theatlantic.com/science/archive/2019/02/green-new-deal-economic-principles/582943/> [<https://perma.cc/N4CB-9P3P>].

23. Fact Sheet, White House Briefing Room, President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021) (detailing a major shift in the electricity sector away from coal, toward electrified transportation and efficiency improvements in other sectors to reduce GHG emission 50-52% below 2005 levels by 2030).

With national attention on organizing at large companies like Amazon²⁴ and Starbucks,²⁵ labor unions have seen their most significant gains in decades—although overall labor’s power is still only a fraction of its previous influence in the 20th century’s progressive era. Organization of workers has been supported by grassroots movements as well as agencies in the Biden Administration.²⁶

In this context, the Green New Deal is a solution to blue/green political divides on environmental issues—a way of building a new coalition among groups that can both be considered constituencies of today’s Democratic Party. For some labor sectors, coalition-building has been successful: for example, in June 2019, the SEIU adopted a resolution strongly supporting the Green New Deal, both as a reflection of concerns about how environmental injustice affects workers and their families as well as an expression of solidarity with fossil-fuel sector workers that may be impacted by energy transitions.²⁷ That support, however, has been far from universal; as candidates in the 2020 Democratic presidential primary began floating campaign proposals and ideas for implementing a Green New Deal, labor leaders took various different positions, with some major groups opposing it.²⁸

First-generation environmental law that focused on public health (e.g., the Clean Air Act and Clean Water Act) has been successful at controlling and reducing conventional pollutants, leading to significant improvement in air quality and water quality in many parts of the United States.²⁹ But the benefits of these statutes have not been distributed equally or equitably in

24. Rachel Lerman et al., *Amazon workers vote to join a union in New York in historic move*, WASH. POST (Apr. 2, 2022), <https://www.washingtonpost.com/technology/2022/04/01/amazon-union-staten-island/> [<https://perma.cc/QMA9-Q9PH>].

25. Noam Scheiber, *A Union Blitzed Starbucks. At Amazon, It’s a Slog*, N.Y. TIMES (May 12, 2022), <https://www.nytimes.com/2022/05/12/business/economy/amazon-starbucks-union.html> [<https://perma.cc/45QK-P5FZ>] (describing trends in unionization efforts among employees of both companies).

26. Tatiana Cozzarelli & James Dennis Hoff, *Grassroots Unionism: Lessons from the Victory at Amazon*, LEFT VOICE (Apr. 10, 2022), <https://www.leftvoice.org/grassroots-unionism-lessons-from-the-victory-at-amazon/> [<https://perma.cc/98X6-3FZF>]; see also Steven Greenhouse, *‘Unions benefit all of us’: new Biden plan encourages federal workers to unionize*, THE GUARDIAN (Feb. 7, 2022), <https://www.theguardian.com/us-news/2022/feb/07/biden-union-labor-white-house-organizing> [<https://perma.cc/988X-7TZC>].

27. Service Employees International Union Res. in Support of the Green New Deal, at 1 (June 6, 2019).

28. Umair Irfan, *The Green New Deal is fracturing a critical base for Democrats: unions*, Vox (June 19, 2019), <https://www.vox.com/2019/5/22/18628299/green-new-deal-labor-union-2020-democrats> [<https://perma.cc/A5AG-KZQC>] (describing the AFL-CIO’s opposition to the Green New Deal resolution in Congress in 2019 and contrasting positions among other labor groups).

29. See Aldy et al., *supra* note 1, at 1–2.

most circumstances. Minority communities remain disproportionately likely to live near extractive activities (such as oil and gas wells) as well as near industrial facilities, power plants, and hazardous waste sites.³⁰ These differences contribute to increased rates of respiratory diseases, cancer, and other health problems, as well as a lack of access to healthy, green spaces.³¹

By the 1990s, as market-oriented policies for environmental regulation gained traction within the United States,³² the international community also encountered great difficulty in reaching consensus around any kind of direct regulatory approach to dealing with the climate change problem.³³ Even when President Obama returned the United States to the world of possible climate action after an 8-year pause under the George W. Bush Administration, the movement for federal legislation was still limited to market-based concepts.³⁴

30. Tammy Webber, *Redlining tied to more oil, gas wells in urban areas, according to study*, L.A. TIMES (Apr. 22, 2022), <https://www.latimes.com/world-nation/story/2022-04-22/redlining-tied-to-more-oil-gas-wells-in-urban-areas-according-to-study> [<https://perma.cc/U2P2-JVTY>]; Jasmine Bell, *5 Things to Know About Communities of Color and Environmental Justice*, CTR. FOR AM. PROGRESS (Apr. 25, 2016), <https://www.americanprogress.org/article/5-things-to-know-about-communities-of-color-and-environmental-justice/> [<https://perma.cc/HTU3-L3PK>]; Diane Toomey, *Coal Pollution and the Fight For Environmental Justice*, YALE ENV'T 360 (June 19, 2013), https://e360.yale.edu/features/naacp_jacqueline_patterson_coal_pollution_and_fight_for_environmental_justice [<https://perma.cc/BTJ6-HT2W>].

31. Ingrid Waldron, *How Environmental Racism Gets Under the Skin*, ECOLOGY & ACTION, Fall 2019 at 1, 4; Jennifer R. Wolch, Jason Byrne & Joshua P. Newell, *Urban Green Space, Public Health, and Environmental Justice: The Challenge of Making Cities 'just green enough'*, 125 LANDSCAPE & URB. PLAN. 234, 235 (2014).

32. See 42 U.S.C. § 7651 (establishing Title IV, an emissions trading regime for sulfur dioxide from power plants to control acid rain).

33. See generally Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 2, Dec. 11, 1997, 2303 U.N.T.S. 162 (creating an international agreement in 1997 to limit GHG emissions through regulations; however it was already clear at the time of its negotiation that the United States, while a signatory to the Protocol, was unlikely to ratify it—notwithstanding the liberalized trading regime that served as the core of the Protocol's first commitment period through 2012). S. Res. 98, 105th Cong. (1st Sess. 1997) (expressing the disapproval of the U.S. Senate on the United States' position going into the Kyoto meeting); see also *Roll Call Vote 105th Congress-1st Session*, U.S.S., https://www.senate.gov/legislative/LIS/roll_call_votes/vote1051/vote_105_1_00205.htm [<https://perma.cc/S455-DFZN>] (pronouncing the unanimous vote by the U.S. Senate to disapprove the United States from becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change).

34. See American Clean Energy and Security Act, H.R. 2454, 111th Cong. (as passed by the House, May 15, 2009) (proposing, among other things, a nationwide cap on GHG emissions with a market for tradeable allowances and credits, but it narrowly passed the House of Representatives in 2009 and never received a vote in the Senate).

The global nature of climate change encourages high-level, aggregate thinking about the scope of the problem and potential solutions. One ton of carbon dioxide, for purposes of the climate, is the same whether it is emitted at a refinery in Baton Rouge or in a wildfire in California. Cost-benefit measurements of climate policy will encourage emissions trading as a way of incentivizing action and reducing cost in the aggregate.³⁵ This can be good for *overall* social welfare, but an explicit focus on climate without an accounting for other environmental-related costs and benefits would continue to skew the distributive economics of a decarbonization transition.

Not everything, then, that is important from an environmental or social perspective is about climate change. The Green New Deal mantra is for industrial redevelopment and socioeconomic equity—with a *green* transition as a necessary organizing principle to address the environmental causes and consequences of past and present inequity. Advocating for laws and policies that will regulate or restrict pollution sources is, under the Green New Deal, part of the point. However, just as important is concrete planning and action to make whole those communities burdened by pollution *while providing for a transition* for energy-sector labor communities that does not leave them behind as an afterthought. Climate change mitigation is part of the equation, but is frequently in that equation simply as a collateral benefit of policy put in place to remedy environmental injustices of a more conventional sort.³⁶

Following on the lessons of attempts to directly regulate GHG emissions under the Clean Air Act, the Green New Deal concept is a solution that could better incorporate labor concerns—as well as environmental justice communities' concerns—into the regulatory process that currently ignores those local-level inequities. However, the structural constraints on the form and substance of environmental policy laid bare since the beginning of the Obama Administration have led to deeper frustration and to the contemporary limits of regulatory policy.

35. JANET PEACE & ROBERT N. STAVINS, PEW CTR. ON GLOB. CLIMATE CHANGE, MEANINGFUL AND COST EFFECTIVE CLIMATE POLICY: THE CASE FOR CAP AND TRADE 1, 3–4 (2010).

36. See Carbon Pollution Emission Guidelines for Existing Statutory Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661 (proposed Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (detailing the Clean Power Plan under the Obama Administration's EPA in which the proposed rule's regulatory impact analysis concluded that the health benefits from reduced exposure to particulate matter (PM) resulting from a shift away from coal-fired power plants to natural gas and renewable sources might likely exceed the climate benefits expressed as the social benefit of avoided GHG emissions. The Supreme Court stayed implementation of the Clean Power Plan in 2016, and the scope of EPA's authority to have issued the regulation in the first instance is still at issue in *West Virginia v. EPA*, argued at the Court in February 2022.).

II. IT SOUNDS BAD, BUT IT'S ACTUALLY EVEN WORSE: THE LIMITS OF REGULATORY POLICY

After the Waxman-Markey climate bill failed in 2010, the Obama Administration set about a period of “pen-and-phone” decision-making in several policy areas in the second term, including climate regulation.³⁷ The gambit, perhaps in part, was to put in place regulations with limited flexibility under the strictures of the Clean Air Act in order to force Congress’ hand in undertaking a more comprehensive approach to the issue in the future. The Supreme Court assumed as much in the *American Electric Power Co. v. Connecticut* decision in holding that the Clean Air Act displaced federal common law claims of public nuisance against electric utilities for climate damage, relying on Section 111 of the Clean Air Act as the source of EPA’s authority.³⁸

Regardless of the twists and turns of executive action, Congress, of course, has mustered no such ambition to respond in the intervening decade. The tit-for-tat of intransigence on judicial nominees eventually led Democrats in the Senate to reform filibuster rules for non-Supreme Court nominees and to Republican escalation in 2017 with the majority vote for cloture to confirm Justice Gorsuch, but no similar changes have been made for substantive legislation.³⁹

Due to victories in runoff elections in Georgia, Senate Democrats returned with the narrowest possible majority—by the Vice President’s tie-breaker—in the 117th Congress. Although there has been significant push for Green New Deal-like legislation and other major priorities, moderates have refused to further alter filibuster and cloture rules for debating bills. Instead, since the enactment of the Affordable Care Act in 2010, substantive legislative debates in the Senate have all been funneled through the budget reconciliation process—the one chance under current rules to pack in policy priorities with fewer than 60 votes.⁴⁰

37. See Jennifer Epstein, *Obama’s pen-and-phone strategy*, POLITICO (Jan. 14, 2014), <https://www.politico.com/story/2014/01/obama-state-of-the-union-2014-strategy-102151> [<https://perma.cc/QY7X-4GET>] (recounting President Obama’s famous line, “I’ve got a pen, and I’ve got a phone,” to indicate his willingness to take executive action during his second term when Congress did not adopt new legislation to address his administration’s priorities).

38. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (referring to Section 111 of the Clean Air Act as a source of authority, through which the EPA might be expected to act to regulate power plant emissions).

39. See, e.g., Susan Davis, *Senate Pulls ‘Nuclear’ Trigger to Ease Gorsuch Confirmation*, NPR (Apr. 6, 2017), <https://www.npr.org/2017/04/06/522847700/senate-pulls-nuclear-trigger-to-ease-gorsuch-confirmation> [<https://perma.cc/8YUB-4QPP>].

40. See RICHARD KOGAN & DAVID REICH, CTR. ON BUDGET & POL’Y PRIORITIES, INTRODUCTION TO BUDGET “RECONCILIATION” 1 (2022) (explaining generally the budget reconciliation process).

As of 2022, the present Senate shows no signs of breaking the logjam against further filibuster reform.⁴¹ However, it is worth considering that Senate institutionalists have long considered every past reform unimaginable until it suddenly happened—at which time the new rule quickly becomes sacrosanct and just as much of an assumed, accepted part of the process as the rest of the decision-making rules stipulated by both major parties in previous years.⁴²

The narrow partisan margin in Congress has meant that the form of environmental action is constrained, as a structural matter—limited only to matters affecting budget and revenue.⁴³ Policy-by-spending is a major limitation in form for a Green New Deal, although spending does still leave available ways in which some labor and environmental justice priorities can be advanced.

Under the policy-by-spending model, the Biden Administration's vision of what might earlier have been seen as a potential Green New Deal was cut down to the Infrastructure Bill, enacted in late 2021,⁴⁴ and the left-for-dead Build Back Better (BBB) plan, which remained at least one or two votes short of the necessary majority until the summer of 2022.⁴⁵ The realm of the possible for the Green New Deal has been reduced to spending policy.

Simultaneous with this legislative-imposed constraint on the form and substance of environmental law, the ascendant conservative wing in the

41. Li Zhou, *Democrats' failure on filibuster reform will haunt them*, Vox (Jan. 19, 2022), <https://www.vox.com/2022/1/19/22881837/senate-filibuster-vote-voting-rights-joe-manchin-kyrsten-sinema> [https://perma.cc/ZML5-4LG4] (chronicling the failed vote to change filibuster rules for voting rights legislation).

42. Ronald Brownstein, *Democrats Moved the Filibuster Overton Window*, THE ATLANTIC (Jan. 20, 2022), <https://www.theatlantic.com/politics/archive/2022/01/manchin-sinema-democrats-filibuster/621298/> [https://perma.cc/G27S-9QJ5] (noting how far other Democratic Senators moved on the issue of filibuster reform in only one year of the Biden Administration, to the point that it now seems like accepted conventional wisdom that any future Democratic candidates will support it).

43. See generally Yasmeen Abutaleb, *Biden vows to act on climate if Congress won't*, WASH. POST (July 20, 2022), <https://www.washingtonpost.com/politics/2022/07/20/biden-is-sue-new-policy-climate-vowing-act-if-congress-doesnt/> [https://perma.cc/QF4F-V2SQ] (reporting the constraint on passing environmental legislation with a 50-50 Senate split as one Democratic Senator held out approval due to concerns over inflation).

44. Editorial Board, Opinion, *The Green New Deal, in Disguise*, WALL ST. J. (Apr. 12, 2021), <https://www.wsj.com/articles/the-green-new-deal-in-disguise-11618267156> [https://perma.cc/9269-EYBY]; see generally Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

45. Jeff Stein & Tyler Pager, *How the White House lost Joe Manchin, and its plan to transform America*, WASH. POST (June 5, 2022), <https://www.washingtonpost.com/us-policy/2022/06/05/biden-manchin-white-house/> [https://perma.cc/7XKM-BWGX] (accounting the ongoing negotiations between the White House and Senator Joe Manchin).

Supreme Court with the arrival of the three Trump-appointed Justices⁴⁶ is establishing a trend that is likely to even further circumscribe regulatory authority across the executive branch.⁴⁷ This is not limited to, but certainly includes environmental and climate issues.⁴⁸ The Roberts Court's recent jurisprudence limits the authority of administrative agencies through restrictive and formalist statutory interpretation and administrative law doctrines.⁴⁹

First, the Court has shifted away from the *Chevron* doctrine⁵⁰ of deference to agency interpretation of ambiguous statutes through the application of the Major Questions Doctrine.⁵¹ Under the Major Questions Doctrine, when a statutory construction question involves an issue of "deep 'economic and political significance' that is central to [a] statutory scheme,"⁵² the Court declines to defer to agency interpretations, reasoning that Congress would not intend to leave such major issues up to the policy judgment of administrative officials without "clear congressional authorization."⁵³ One of the obvious problems with the administration of the major questions doctrine is that what is "major" or of "vast economic and political significance" is in the eye of the beholder.⁵⁴ In the vaccine-or-test mandate

46. See Aziz Huq, Opinion, *The Roberts Court is Dying. Here's What Comes Next*, POLITICO (Sept. 15, 2021), <https://www.politico.com/news/magazine/2021/09/15/the-roberts-court-is-dying-heres-what-comes-next-511784> [<https://perma.cc/HTW6-Y6J4>] (explaining the dynamics of the Supreme Court).

47. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 666 (2022) (granting an emergency stay of OSHA's vaccine-or-test mandate regarding Covid-19 in the workplace).

48. See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014) (restricting EPA's ability to tailor provisions of the Clean Air Act to specifically address climate pollutants); *Michigan v. EPA*, 576 U.S. 743 (2015) (expressing skepticism about the EPA's reliance on "co-benefits" of regulation to justify an air pollution rule).

49. See, e.g., *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (focusing in detail on the word "occupational" in construing OSHA's authority to set "occupational safety and health standards").

50. *Chevron, U.S.A., Inc., v. NRDC, Inc.*, 467 U.S. 837, 841 (1984) (granting deference to agency interpretation of ambiguous or silent statutes); see *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022) (declining to specifically overrule *Chevron*, but in a statutory interpretation opinion issued in June 2022, the Court unanimously disagreed with an agency position without citing *Chevron*, suggesting that it perhaps may no longer occupy as important a position in guiding lower courts).

51. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2599 (2022); *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665; *King v. Burwell*, 576 U.S. 473 (2015); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

52. *King*, 576 U.S. at 486.

53. *West Virginia*, 142 S. Ct. at 2609 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

54. See, e.g., Blake Emerson, Notice & Comment, *Major Questions and the Judicial Exercise of Legislative Power*, YALE J. REG. (Feb. 28, 2020), <https://www.yalejreg.com/nc/major->

case in January 2022, three concurring Justices attempted to lay out a further description of when the doctrine applies,⁵⁵ beyond the one-off situation in *King v. Burwell* where the Court had used the doctrine to deal with a word choice buried deep in the Affordable Care Act.⁵⁶ It is not yet clear exactly what the standard is, but it is evident that the application of the doctrine is anti-regulatory in nature, shifting discretion away from the executive branch and toward the judiciary.⁵⁷

Second, several current Justices, and perhaps now a majority, favor a revitalization of the non-delegation doctrine as an even stronger limitation on the scope of agency authority.⁵⁸ This doctrine—if applied as several Justices indicated in opinions such as the dissent in *Gundy v. United States*⁵⁹ and the concurrence in *NFIB v. OSHA*—is based on a formalist reading of the Constitution’s structural separation of powers, and would go beyond the major questions doctrine by placing hard limits on Congress’ ability to employ administrative agencies in addressing social problems.⁶⁰ Under the non-delegation doctrine, judicial decisions about when and in what circumstances to exclude the executive branch from the implementation of congressional will are more significant than a simple veto or a simple administrative stay: judgments limiting executive power become constitutionalized and intransigent.⁶¹

questions-and-the-judicial-exercise-of-legislative-power-by-blake-emerson/ [https://perma.cc/9KLS-VB7T] (“The formalist concern to preserve the separation of powers thus gives way to a functional analysis that involves courts in making difficult and arguably subjective policy determinations about how much executive discretion is simply too much.”).

55. *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 669–70 (Gorsuch, J., concurring).

56. *See, e.g., King*, 576 U.S. at 478.

57. *See, e.g., Util. Air Regul. Grp.*, 573 U.S. at 327 (“The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law’s administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.”).

58. *See Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting)

59. *Id.*

60. *See Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 670 (Gorsuch, J. concurring); *see Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring); *see, e.g., West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J. concurring).

61. *See Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (theorizing that there is a strong connection between the non-delegation doctrine as a constitutional limitation on Congress’ ability to legislate and the major questions doctrine, which can be taken as an interpretive method that avoids the non-delegation question); *see, e.g., Blake Emerson, Administrative Answers to Major Questions: On the Democratic Legitimacy of Statutory Interpretation*, 102 MINN. L. REV. 2019, 2044–45 (2018) (arguing that “the primary purpose” the major questions doctrine serves is to enforce the presumption that Congress does not wish for agencies to decide major questions, thereby promoting the Court’s interpretation of statutes in a way that prevents this “impermissible delegation of legislative power” to agencies).

In *West Virginia v. EPA*,⁶² decided on the last day of the Court's 2021-2022 term, the majority of the Court stopped short of overturning the holding in *Massachusetts v. EPA*,⁶³ but made it clear that it will not allow administrative agencies to use existing statutory authority under the Clean Air Act to drive a significant green transition. The case raised the issue of whether the EPA had the ability to interpret Section 111 of the Act to adopt flexible regulations that can effectively control GHG emissions from power plants or whether the agency would be constrained by formalist statutory interpretation.⁶⁴ By explicitly using the Major Questions Doctrine (for the first time in a fully-briefed merits case), the Supreme Court sent a message that it will view regulatory responses to climate change with extra skepticism unless and until Congress overcomes its own structural barriers and adopts further legislation.⁶⁵

In practical terms, any new rulemaking by the EPA or other administrative agencies to address climate change or other environmental matters will run into litigation challenges and inevitably up against the Supreme Court's searching review. Lower courts have gotten the message to crack down on regulatory authority as well, with newer district court judges making headlines in anticipation of an expanded major questions doctrine in cases involving mask wearing on public transportation⁶⁶ and the social cost of carbon.⁶⁷ Any attempt by an agency to do anything new will likely be characterized as involving a major question, and new substantive

62. *West Virginia*, 142 S. Ct. at 2599.

63. *Massachusetts v. EPA*, 549 U.S. 497, 501 (2007) (holding that EPA had a statutory obligation to determine whether greenhouse gases contributed to climate change and eventually leading to EPA authority to regulate greenhouse gas emissions). The case was decided by a 5-4 vote. *Id.* Since the retirement of Justice Breyer at the end of June 2022, none of those five majority Justices now remain on the Court.

64. *West Virginia*, 142 S. Ct. at 2607 (detailing the judicial treatment of the Obama Administration's Clean Power Plan from 2015, which established state-by-state guidelines for regulating GHG emissions existing coal- and natural gas-fired power plants. The Supreme Court stayed implementation of the rule in 2016, but found that the rule still presented a potential live issue after the DC Circuit struck down the Trump Administration's replacement.).

65. See Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, THE ATLANTIC (July 26, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/> [<https://perma.cc/D7U5-GLAG>] ("One way to break the government is to make legislators and administrations look over their shoulder every time they think they might have a creative idea . . .").

66. See *Health Freedom Def. Fund, Inc. v. Biden*, No. 8:21-cv-1693-KKM-AEP, 2022 WL 1134138, at *10 (M.D. Fla. Apr. 18, 2022).

67. See *Louisiana v. Biden*, No. 2:21-CV-01074, 2022 WL 438313, at *20 (W.D. La. Feb. 11, 2022), *stay granted*, 2022 WL 866282 (5th Cir. Mar. 16, 2022).

legislation—already implausible without filibuster reform—would still run into arguments about non-delegation.

These legal and political constraints then leave spending as the only foreseeable policy option for addressing environmental justice and climate concerns. Federal spending is insulated from these types of legal challenges and from structural Senate constraints. However, spending on a Green New Deal or other environmental priorities is still subject to public choice theory problems and other political economy challenges, including the potential for concentrated interest groups to siphon off funding or block programs that might otherwise enjoy broad public support.⁶⁸

III. THE COVID PIVOT, CLIMATE SPENDING BREAKTHROUGHS, AND RETRENCHMENT AFTER 2022

As the Covid-19 pandemic first hit the United States, Congress initially reacted quickly with a remarkable increase in emergency spending. The CARES Act was signed into law on March 27, 2020, only weeks into the first set of pandemic shutdowns, setting up relief for individuals and the Paycheck Protection Program for businesses.⁶⁹ After the new Congress took office in January 2021, the American Rescue Plan Act followed.⁷⁰ These were massive spending bills, measuring in the trillions of dollars over 10 years—social spending on a scale that would have seemed unimaginable before 2020 but that quickly became a reality as lawmakers rushed to address the massive socioeconomic upheaval that accompanied the public health crisis.

Economic recovery spending in 2021 made it seem possible that Congress could put together a package of legislation to respond to environmental and climate issues through new funding. The Infrastructure Investment and Jobs Act (IIJA) has the potential to be a major step toward climate resilience and climate mitigation. However, most of the money from the bill will be administered by state and local agencies, which will shape the infrastructure bill's outcomes according to their own priorities. In late 2021, the Georgetown Climate Center looked at provisions in the bill and concluded that, depending on implementation, the IIJA could either end up decreasing transportation GHG emissions or *actually increasing them* if funding is predominantly devoted to highway expansion.⁷¹

68. See BENJAMIN ZYCHER, AM. ENTER. INST., *Large Hidden Costs of the Green New Deal*, in THE GREEN NEW DEAL: ECONOMICS AND POLICY ANALYTICS 1, 51, 53 (2019).

69. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 §1102 (2020) (to be codified at 15 USC §§ 9001–9141 (2020)).

70. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).

71. See GEO. CLIMATE CTR., ISSUE BRIEF: ESTIMATING THE GREENHOUSE GAS IMPACT OF FEDERAL INFRASTRUCTURE INVESTMENTS IN THE IIJA (2021).

After the initial two years of federal government spending in response to Covid-19, that particular window appeared to have been closed completely by the first half of 2022, with a pile-on of coinciding constraints including public concerns about inflation⁷² and opposition to climate spending by Senator Manchin.⁷³ Further money as Covid relief has been tied to congressional negotiation about aid to Ukraine.⁷⁴

At the time of Pace Environmental Law Review's Symposium on Labor and the Environment in April 2022, I was quite ready to conclude that the future of a Green New Deal down the spending policy path did not look optimistic. And yet, in the summer, with Senator Manchin's unexpected shift, spending policy took on new life, leading to the enactment of the Inflation Reduction Act (IRA) in August 2022.⁷⁵ In comparison to initial Green New Deal proposals and even to President Biden's Build Back Better plan from 2021, the IRA is a small piece—a shell hollowed out by compromise and negotiation. Nonetheless, it is by far the United States' most significant public investment in tackling climate change, with an estimated \$369 billion in funding toward climate priorities over the next decade, spread across tax credits, rebates, research and development funding, grant programs, and other incentives.⁷⁶

The IRA now represents the biggest test of the policy-by-spending concept, and as its provisions begin to take effect, the most critical challenge will be setting up the rules and guidelines for implementation⁷⁷ to ensure that the dollars spent have a meaningful impact on technological development, adoption of clean energy and energy efficient technologies, and on

72. See, e.g., News Release, Bureau of Lab. Stat., U.S. Dep't of Labor, Consumer Price Index – May 2022 (June 10, 2022) (indicating an 8.6% annual increase in the Consumer Price Index for May 2022); Jeanna Smialek, *Fed Moves Toward Another Big Rate Increase as Inflation Lingers*, N.Y. TIMES (July 6, 2022), <https://www.nytimes.com/2022/07/06/business/economy/fed-rate-increase-inflation.html> [https://perma.cc/3MWZ-NYV8] (discussing inflation and the response by the Federal Reserve).

73. See Stein & Pager, *supra* note 45.

74. See generally Press Release, White House Briefing Room, Statement by President Joe Biden on Funding for COVID-19 and Ukraine (May 9, 2022).

75. Inflation Reduction Act of 2022, Pub. L. 117-169 (2022).

76. Senate Democrats released a one-page summary with highlights of the spending and revenue figures of the bill when the final text was released. See SENATE DEMOCRATS, SUMMARY: THE INFLATION REDUCTION ACT OF 2022 (2022), https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_one_page_summary.pdf [https://perma.cc/4KF6-VKWM].

77. For example, the IRS has its own web page tracking guidance on credits under the Inflation Reduction Act. *Inflation Reduction Act of 2022*, IRS, <https://www.irs.gov/inflation-reduction-act-of-2022> [https://perma.cc/RVP2-FCV3]. EPA and the Department of Energy will also play major roles in the development of regulations for grant programs.

remediating environmental injustice.⁷⁸ At a time when comprehensive policy action is most needed to rebuild and reshape environmental law to address historical and present injustices and to face the threat of a warming planet, the Inflation Reduction Act is a major step—but it highlights that the form and substance of possible federal action seems more constrained now than ever. Public attention to climate issues is never guaranteed, and divided government will likely put a hold on any further significant spending plans.

The future of a Green New Deal will depend on the efforts that states, local governments, and other actors—private and public—make toward changing the dynamic of the past decade. To the extent that future spending is possible, one key lesson that can be learned from the Covid-19 relief bills has to do with targeting support toward displaced workers. The first and strongest wave of economic shutdowns in the spring of 2020 displaced millions of workers across the country in several economic sectors.⁷⁹ States and local governments with the resources and political will to plan for a Green New Deal can look to this example to create policy plans for displacement of workers in transitioning energy jobs. Opportunities for major legislative action will never be plentiful, so the critical point now is that policymakers and lawmakers must be developing plans for green, just, and equitable investment, to be ready at a moment's notice. Change is inevitable, but making that transition worthwhile will not happen without dedicated and organized effort.

78. With regard to environmental justice issues, the Biden Administration launched the Justice40 Initiative—a pledge that at least 40% of funding from certain categories will go toward marginalized communities overburdened by pollution. *Justice40: A Whole-of-Government Initiative*, THE WHITE HOUSE, <https://www.whitehouse.gov/environmentaljustice/justice40/> [https://perma.cc/W54B-AAYY].

79. See News Release, Bureau of Lab. Stat., U.S. Dep't of Labor, The Employment Situation – June 2022, tbl. B (July 8, 2022).