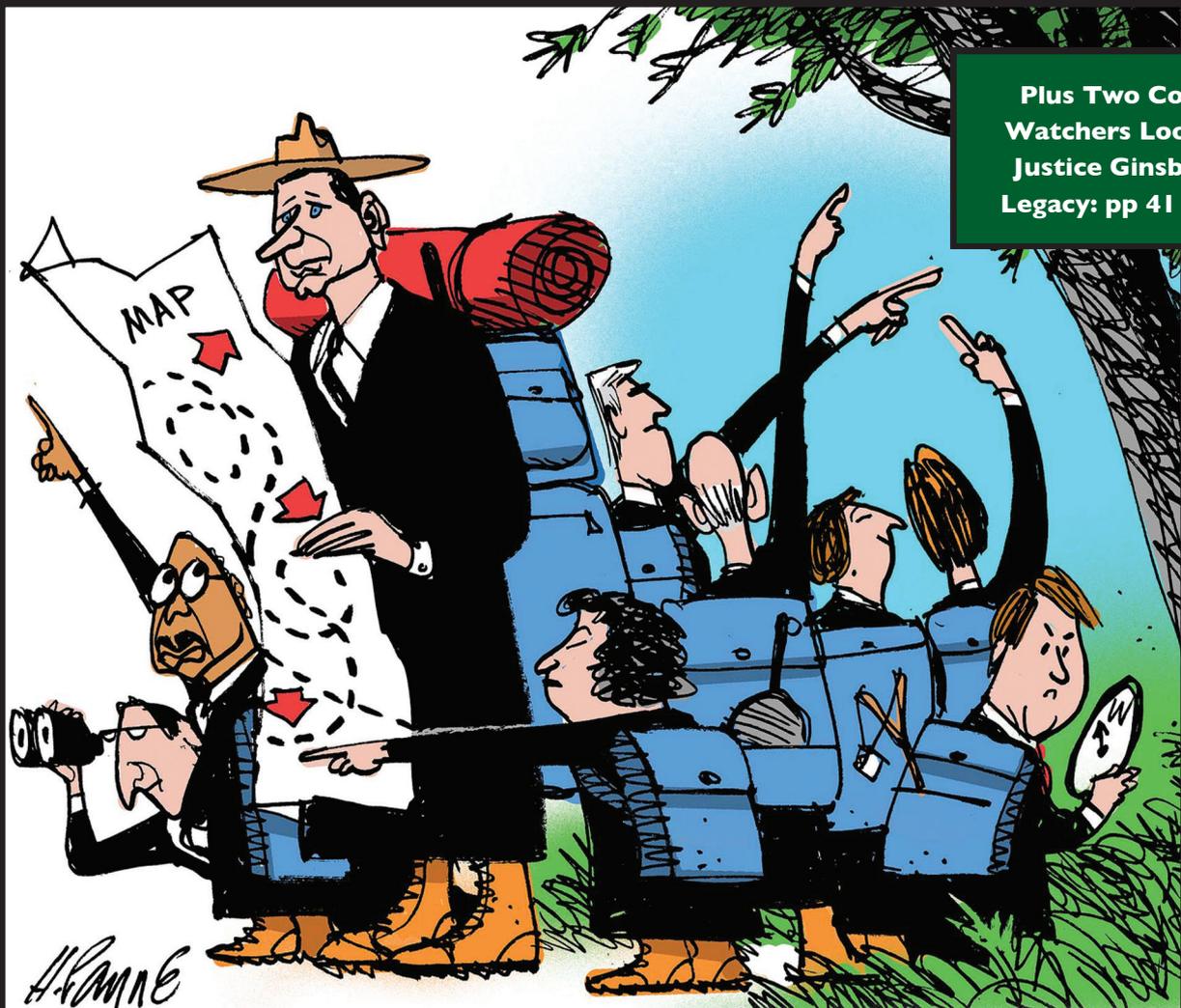


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## Which Way for the Roberts Court?

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# Which Way for the Roberts Court?

*Even before the death of Justice Ruth Bader Ginsburg, environmental law cases have not been about the environment at all, and ecological values have had little currency. Instead issues of administrative procedure, standing, and statutory interpretation drive the key decisions with environmental consequences, and that trend will continue*



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**F**ebruary 19, 2019, did not seem like a good day for environmentalists. That morning, the Supreme Court granted certiorari in *County of Maui v. Hawai'i Wildlife Federation*, to review whether the Ninth Circuit Court of Appeals had adopted an unduly broad interpretation of the Clean Water Act. The High Court's conservative orientation and pro-business reputation had environmental advocates quite worried.

The appeals court had concluded that Maui needed to obtain National Pollutant Discharge Elimination System permits for a wastewater treatment plant, because effluent discharged from underground injection wells made its way to the ocean through groundwater. That the wells only discharge pollutants "indirectly" into navigable waters did not obviate the need for a permit. The county sought certiorari to the Supreme Court, arguing the Ninth Circuit's rules could subject "millions" of local governments and business owners to the CWA's permitting requirements, and received the support of the Trump administration.

*County of Maui* seemed to present a stereotypically expansive Ninth Circuit interpretation of a federal environmental law poised for Supreme Court reversal, risking a decision that would curtail water pollution control efforts nationwide. Environmental activists were sufficiently concerned that *County of Maui* could set a bad precedent that they sought to settle the case before argument. The county council agreed to a settlement proposed by Earthjustice, according to news reports, but the mayor would not go along, so the case proceeded to argument.

The Roberts Court has a reputation for business-friendly decisions. Environmental advocates approached *County of Maui* with even more trepidation out of a fear that President Trump's two appointments had made the Supreme Court even less hospitable to environmental regulation. Environmental organizations opposed confirmation of both Neil Gorsuch and Brett Kavanaugh due to their conservative judicial philosophies and apparent skepticism of regulatory power. Kavanaugh was of particular concern because he replaced Justice Anthony Kennedy, who had long been the swing or median justice on the Court. Settling *County of Maui* was seen as a way for environmentalists to cut their losses, and now that was out of the question.

When the case was eventually decided — one day after Earth Day 2020 — environmentalists received a pleasant surprise. The Supreme Court held, 6-3, that CWA permits could be required for pollutants discharged into groundwater that mi-

grates into navigable waters. Justice Stephen Breyer wrote the opinion for the Court, explaining that when the addition of pollutants to navigable waters “through groundwater is the functional equivalent of a direct discharge” from a point source, a NPDES permit is required. While this decision did not go quite as far as the Ninth Circuit had, nor as far as HWF’s attorneys and Earthjustice had proposed, the Court roundly rejected the narrow constructions of the CWA urged by industry groups and the administration. In another surprise, Breyer’s opinion was not only joined by the Court’s other liberals — Justices

reallocation of defense spending to fund a wall along the U.S.-Mexico border.

In many respects, the 2019-20 Supreme Court term encapsulates the Roberts Court’s treatment of environmental issues. In a majority of cases, the position supported by environmental groups fails. On the other hand, positions favored by business groups or the federal government tend to succeed. Looking behind the numbers, however, reveals two equally important tendencies. First, the Court seems to lack much interest in the distinct environmental content of environmental law cases. Second, the justices do

not perceive environmental law as uniquely distinct or even important. Nonetheless, the most significant and far-reaching environmental law cases before the Court have been the ones in which environmentalist groups have been most likely to prevail. One question is whether this pattern will hold once a new justice replaces the late Ruth Bader Ginsburg on the Court.



Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan — but Roberts and Kavanaugh as well.

The *County of Maui* decision was an unexpected high point for environmentalists at the Supreme Court last term. The term’s two other environmental cases — *Atlantic Richfield v. Christian* and *U.S. Forest Service v. Cowpasture River Preservation Association* — both went the other way. In *Atlantic Richfield*, the Court rejected the claim that landowners could pursue additional remedial cleanup actions at a Superfund site without EPA approval, and in *Cowpasture* concluded the Forest Service could issue a special use permit to allow pipeline construction underneath the Appalachian Trail. In a series of orders, the Court also stayed preliminary injunctions against the use of Nationwide Permit 12 for pipeline construction and the

average of four environmental-related cases per term, accounting for over five percent of the Court’s merits docket. Most of its environmental cases concern the application, implementation, or enforcement of federal environmental laws. Others concern land-use conflicts, state regulations, and disputes between states over compacts and water rights. Taken together, these cases span the full range of environmental legal disputes that arise in federal court.

The lion’s share of the Court’s environmental docket concerns the regulation of economic activity. Individual corporations often seek certiorari when lower courts adopt aggressive interpretations of federal environmental laws. And when they do, they can usually count on support from the U.S. Chamber of Commerce and other Beltway-based trade associations that maintain

**T**hough no justice on the current Court seems to have any particular interest or expertise in environmental law matters, environmental cases represent a decent sliver of the panel’s work. Since John Roberts became chief justice in 2005, the Court has heard an

active Supreme Court practices. During the Roberts era, the Court has taken more environmental cases seeking to curtail regulation than to expand it or make pollution requirements more stringent.

The Roberts Court has a reputation as a pro-business court (a topic explored at length in my book *Business and the Roberts Court*, Oxford University Press, 2016). At least as a quantitative matter, that reputation is deserved when it comes to environmental law. During the Roberts Court, the side favored by business groups has prevailed in two-thirds of the cases in which business groups have participated as either parties or amici. The Chamber of Commerce has been particularly effective, winning almost three-quarters of the environmental cases in which it filed a brief.

The success of business groups in environmental cases is matched by that of the Department of Justice. The Office of the Solicitor General is often called the “tenth justice” because of the deference and high regard it receives from the High Court. Even when the U.S. government is not a party, the justices often ask for the opinion of the solicitor general to help them resolve a case. Thus it should be no surprise that the SG’s office also has a strong win-loss record. During the Roberts Court, the office has prevailed in approximately two-thirds of the environmental cases in which it filed.

In many cases, particularly (though not exclusively) in Republican administrations, business groups and the Department of Justice are on the same side. When this has happened, the combination appears nearly unbeatable. Business groups and the SG’s office have filed briefs on the same side in 21 environmental cases during the Roberts Court, prevailing all but three times. When business groups and the Justice Department are divided, however, they have split the cases nearly 50-50.

Environmental groups do not have nearly as positive a record. During the Roberts Court, environmentalists have prevailed in just over one-third of the cases in which they have participated as parties or amici. Thus, their win rate is little better than half that of business groups. Environmental organizations participate in fewer cases than business groups as well, due to resource constraints and to prudential judgments about what cases are important for environmental protection.

While business groups win more often than not in

environmental cases, it is not clear they win the most important cases or that their victories have done much to change the law. In this respect, the 2019-20 term was somewhat representative of the Roberts Court as a whole. While as a quantitative matter business groups fare quite well in environmental cases before the Roberts Court, as a qualitative matter, it is not so clear that business groups come out ahead.

In addition to *County of Maui*, cases in which environmental groups have prevailed over business interests include *EPA v. EME Homer City Generation*, in which the Court upheld the agency’s Cross-State Air Pollution Rule, and *Environmental Defense v. Duke Energy*, in which the Court overturned a lower court’s stingy interpretation of EPA’s authority to impose additional air pollution control equipment as part of New Source Review. And who can forget *Massachusetts v. EPA*, arguably the most important environmental law case of the past 25 years, in which the Court first allowed for standing based on harms caused by climate change, concluded greenhouse gases were pollutants subject to regulation under the Clean Air Act, and rejected the Bush administration’s attempt to explain why it could recognize the threat posed by global warming while still refusing to regulate heat-trapping emissions.

**Climate jurisprudence shows that while quantitative analyses of the Court’s decisionmaking can be revealing, they are not a substitute for looking at the substance of the individual cases**

**W**hile quantitative analyses of the Court’s decisionmaking can be revealing, they are not a substitute for looking at the substance of the individual cases. Focusing on just the Court’s climate change cases illustrates this point.

Since 2005, the Supreme Court has decided three climate change cases: *Massachusetts v. EPA*, *American Electric Power v. Connecticut*, and *Utility Air Regulatory Group v. EPA*. As a quantitative matter, environmental groups have only gone one-for-three, prevailing only in *Massachusetts*. Business groups clearly prevailed in *AEP* and perhaps earned a draw in *UARG*, getting some relief from the Court, but far less than they had asked for.

Viewed in quantitative terms, business has at least fought climate cases to a draw, and environmental groups have been on the defensive. As a substantive

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# A Poor Record, Except for One Decision

In evaluating the Roberts Court's environmental record, one must ask what the Court has done in cases concerning climate change. If the Court fails here, it fails everywhere. The answer is unsettling. The Court led by Chief Justice John Roberts has had one good moment; the rest are not so good. Without Justice Ruth Bader Ginsburg, the Court's record on climate will not improve and may get even worse.

In *Massachusetts v. EPA*, the Court held that the Clean Air Act empowers the agency to regulate greenhouse gases; that EPA may not decline to regulate based on extra-statutory policy judgments; and that the states challenging EPA's refusal to regulate have standing. The decision was a major victory for climate change policy and climate-related access to the courts. It led to the federal government's first legally consequential finding that GHGs endanger public health and welfare and ushered in the country's first regulatory programs for the gases. Justice Anthony Kennedy, who has since been replaced by Justice Brett Kavanaugh, joined the Court's more liberal justices in making this result possible.

In its next climate case, the Court used *Massachusetts* as a shield against, rather than a goad for, action on climate. In *American Electric Power v. Connecticut*, all eight participating justices concurred in a judgment rejecting a public nuisance claim against "the five largest emitters of carbon dioxide in the United States." The Court found that the statutory authority recognized in *Massachusetts*, and EPA's then-developing regulations on greenhouse gases, displaced any federal common law that might have addressed greenhouse gases. The Court made special mention of the agency's then-



*"The Court led by Chief Justice John Roberts has had one good moment; the rest are not so good. Without Justice Ruth Bader Ginsburg, the Court's record on climate will not improve and may get even worse."*

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recently commenced rulemaking to control carbon dioxide from power plants under Section 111 of the Clean Air Act.

The Court then took back some of the legal territory gained in *Massachusetts*. In *Utility Air Regulatory Group v. EPA*, the Court rejected EPA's decision to trigger the CAA's permitting program for the GHG emissions of certain stationary sources, adopting a narrowed understanding of the air pollutants subject to regulation under the act.

Equally important, the Court embraced an interpretive principle disfavoring expansion of regulatory power under long-standing laws and curled its lip at the prospect of deferring to an agency interpretation resolving an issue of major economic and political significance. The first of these interpretive approaches bodes ill for renewed climate action under the CAA. The second might threaten ambitious agency action even under a brand-new statute aimed at climate change. While sitting on this case in the D.C. Circuit, Kavanaugh wrote a dissent presaging the Court's opinion.

In its next move, the Court stayed the implementation of EPA's rule regulating GHG emissions from power plants — the very rule that had bolstered the Court's

rejection of common-law limits on GHGs. Without argument or opinion, the Court for the first time stopped a rule from taking effect before any lower court considered it. The Court's remarkable stay lasted long enough for the Trump administration to issue a replacement rule, mooted the legal challenge to the original regulation. From the briefing on the Court's stay, one might surmise that the interpretive principles announced in *UARG* proved decisive.

In *Juliana v. United States*, the Court kept "the climate trial of the century" from taking place after a district judge refused to dismiss a claim that the federal government had violated the constitutional rights of a group of children through its action and inaction on climate change. The Court first nudged the district court to revisit the justiciability of the children's claims, and when this failed to nix the trial it pressed the lower courts to reconsider interlocutory review. Joining the first of these strange orders was Kennedy's last official act as a justice.

Reflecting on these decisions, it seems clear that the Roberts Court views climate change as a special problem. But not in a good way for the climate or the rest of creation.

matter, however, the law of climate change is far more favorable for environmentalists — and worse for business — as a result of these three cases. *Massachusetts*, as already noted, opened the door to federal regulation of greenhouse gases under the Clean Air Act, and recognized that climate-based harms were sufficient for Article III standing. Neither *AEP* nor *UARG* did anything to undo these results.

In *AEP*, the Court unanimously concluded the CAA displaced suits in federal court alleging that greenhouse gas emissions contribute to a public nuisance under federal common law. Not only was this conclusion not particularly surprising, it was also extremely limited, as the Court expressly left open the possibility of state common law climate change nuisance claims, many of which continue to be litigated around the country. In *UARG* the Court trimmed back one of the Obama administration's regulations controlling greenhouse gas emissions from stationary sources, largely due to the incongruity of applying numerical thresholds written for traditional pollutants to carbon dioxide. Yet this decision left the central holdings in *Massachusetts* intact.

As a quantitative matter, the Court's climate change jurisprudence would appear to be anti-regulatory. Substantively, however, the result has been the opposite. The net result of the Court's three encounters with climate change has been a substantial increase in federal regulatory authority, even if not as great as the Obama administration had sought. *AEP* foreclosed one avenue for climate-based nuisance suits, but the Court has not (as yet) curtailed the proliferation of climate tort litigation. As this record shows, winning in a majority of cases can be less important than prevailing in the right one.

Whether or not one concludes the Roberts Court has been pro-business in its environmental law decisions, it has clearly been unsympathetic to environmental litigants, much as the Court has appeared hostile to other interest groups that seek to use the judiciary to advance social policy or drive regulatory initiatives. Under Chief Justice Roberts, the Court has been skeptical of public interest lawyering and entrepreneurial litigation and has pressed lower courts to be more stingy about granting Article III standing and offering injunctive relief. The Court has also demonstrated a strong status quo bias, overturning federal statutes and its own precedents at a lower rate than did

the Court under Chief Justices William Rehnquist, Warren Burger, or Earl Warren.

**E**ven when environmental concerns have been embraced by the Court, that has not been accompanied by environmental rhetoric. The last justice on the Court to show much concern for environmental values in his opinions was John Paul Stevens, but even he was an inconsistent voice for an environmentalist perspective. His opinion for the Court in *Massachusetts* stands out for its embrace of concerns about climate change, but it stands out precisely because such opinions have become rare.

Environmentalist victories at the Court have not been accompanied by judicial statements of environmental concern. With few exceptions, also authored by Stevens, environmentalist losses have not provoked much engagement with environmental concerns either. Justice Stevens found his environmental voice dissenting in *Rapanos v. U.S.* and *Defenders of Wildlife v. National Association of Homebuilders*, but since he retired from the Court in 2010, there has not been much of an environmental voice at One First Street.

While business interests win a majority of the cases in which they are involved, the justices do not express any particular solicitude for business in their opinions, either. As a general matter, it is rare for justices to highlight the costs of regulation or liability for environmental harms. The one exception may be cases brought by property owners against federal land-use regulations or seeking to vindicate Fifth Amendment rights, where some justices have expressed sympathy for the plight of small landowners. The Court handed property rights advocates important victories in *Koontz v. St. Johns River Management District* and *Knick v. Township of Scott*, while turning away an aggressive property rights claim in *Murr v. Wisconsin*.

The substance of the Court's environmental law decisions confirms what the language of the opinions would suggest: The Court does not really view environmental law cases as environmental cases. That is, the Court does not view environmental law as a distinct field of law, nor do the justices evince any recognition that environmental questions may require

*Justice Stevens's opinion for the Court in Massachusetts stands out for its embrace of concerns about climate change, but it stands out precisely because such opinions have become rare*

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# A Justice Who Demanded Justice for All

Justice Ruth Bader Ginsburg was a brilliant and hard-driving jurist; a feminist icon; a first-generation college and law school graduate; a leader of the Supreme Court’s liberal wing. But let’s be honest: while she loved to waterski and horseback ride, she was not a prominent judicial voice for environmental protection.

True, Justice Ginsburg authored several opinions that advanced the environmental cause. In *Friends of the Earth v. Laidlaw*, for example, she endorsed a relatively permissive approach to environmental standing: the “relevant showing . . . is not injury to the environment but injury to the plaintiff.” Later, in *EPA v. EME Homer City Generation*, Ginsburg reaffirmed the principle on which much of U.S. environmental law rests: that courts owe deference to the reasoned legal interpretations and policy judgments of expert agencies. She also supplied a reliable majority vote to confirm the breadth of bedrock environmental laws. In *Massachusetts v. EPA*, she joined four other justices in recognizing that the Clean Air Act reaches greenhouse gas emissions. Just this year, in *County of Maui v. Hawaii Wildlife Fund*, she joined five others to close a capacious potential loophole in the Clean Water Act.

But Ginsburg’s heart lay elsewhere. As movie producers and tribute writers have reminded us, her twin passions were advancing gender equality and protecting human dignity. Her Jewish heritage informed these passions. As she explained in a 2004 address at the U.S. Holocaust Museum, “The demand for justice runs through the entirety of Jewish history and Jewish tradition. . . . The command from Deuteronomy, ‘Zedek, zedek, tirdof’ [means] ‘Justice, justice shall you pursue.’ Those words are ever-



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*“In recent decades, environmental justice lawyers have exposed the deep structural inequities that lie at the heart of our environmental health protections. Justice Ginsburg, ever attuned to injustice, would have recognized those lawyers’ struggles as her own.”*

present reminders of what judges must do [to] thrive.”

In short, Justice Ginsburg’s lifework was profoundly human-centric. By contrast, until recently, the environmental movement has largely focused elsewhere.

In recent decades, however, environmental justice lawyers have exposed the deep structural inequities that lie at the heart of our pollution control system and our environmental health protections. Justice Ginsburg, ever attuned to injustice, would have recognized those lawyers’ struggles as her own.

The challenge of climate change further illuminates the interconnections between justice and environmental protection. We cannot hope to achieve human justice without mitigating the growing and increasingly disparate impacts of pollution, flooding, major storm events, multi-year droughts, and unprecedented fire seasons. We cannot mitigate those impacts without fundamentally reforming major sectors of our economy. And unless we are very careful, our efforts at reform will exacerbate rather than redress existing income, wealth, health, and resource disparities, some of which resulted from the very laws we wrote and governing structures we developed during earlier phases of

the environmental movement.

The fight for justice thus implicates environmental protection, and the fight for environmental protection implicates justice. How these battles will play out in the courts remains to be seen. Legal questions that may arise in future cases include whether our civil rights laws can be reinterpreted to reach disparate impacts of facility sitings; whether EPA can be induced to take administrative action to address such disparate impacts; whether the common law provides remedies for communities destroyed by floods or fire; and whether international conventions and domestic immigration laws can be extended to protect climate refugees.

We cannot know how future lawyers will pose these questions, nor how judges will answer them. We can, however, be certain that future Supreme Court lawyers seeking to advance environmental protection and remedy environmental injustices will deeply miss Justice Ginsburg’s insightful questions from the bench, her disciplined approach to precedent, her steady yet steely hand on the opinion-writing oar — and of course, her passion for justice.

“May her memory be for a blessing.”

viewing traditional doctrines through a green lens. The Roberts Court, like its immediate predecessors, has shown little affinity for ecological values or the idea that environmental law is a distinct area of law raising distinct concerns.

The justices tend to focus on the underlying legal questions, not the ecological concerns that may have led policymakers to adopt a given regulation or environmental groups to file suit. If the case involves how a statute should be interpreted, the justices will focus on statutory interpretation. If it centers on a question of administrative procedure, then the justice's respective doctrinal commitments on questions of administrative law will drive the decision. And so on. Ecological considerations are, at best, window dressing, and do not provide the rules of decision. The justices are more concerned about how to read a statute or limits on federal regulatory authority, writ large, than they are on the ecological dimensions of their decisions. This creates challenges to environmental advocates but it may also create opportunities.

The foremost challenge is that it may be a mistake to focus on the environmental nature of a case before the Court, particularly if it comes at the expense of developing more traditional doctrinal arguments and downplaying the potentially revolutionary nature of some environmental claims. As Harvard Law School's Richard Lazarus counsels, the best environmental lawyers to argue at One First Street are the best lawyers, not the most committed environmentalists. As Lazarus recounts in his book *Rule of Five*, the *Massachusetts* case was won because the lawyers "submerged" climate concerns and stressed straightforward statutory interpretation and administrative law norms. Convincing the justices that a case involves the straightforward application of traditional legal rules is the surest way to build a majority on the current Court, but that is sometimes easier said than done.

**W**hile it is entirely natural for environmental lawyers to focus on the Supreme Court's environmental docket, it is important not to lose sight of the broader legal context in which such cases arise. Just as the

current Court does not seem to view environmental law as a distinct area of law, some of the Court's most environmentally consequential decisions may not arise in an environmental context. Again the Court's most recent term makes the point.

*County of Maui* was an important victory for environmentalists, but it may recede in environmental importance to the Court's decisions in *Department of Homeland Security v. Regents of the University of California* and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, two highly consequential administrative law decisions in which environmental law concerns were never even raised.

In *Regents*, the Court rejected the Trump administration's attempt to rescind President Obama's Deferred Action for Childhood Arrivals immigration policy. Ending DACA was arbitrary and capricious, the Court concluded, because the administration had failed to offer a sufficient explanation for the policy change. Even if the prior policy was illegal, as the administration maintained, such a dramatic shift in the status quo could not occur absent consideration of existing program participants' reliance interests. Expect industry lawyers to cite this decision with abandon the next time a federal environmental agency seeks to limit natural resource development or rescind a permit.

*Little Sisters*, in which several states challenged the Trump administration's effort to expand religious and conscience-based exceptions to the so-called contraception mandate, flew even further under the radar, as the case seemed to center on questions of religious liberty. As decided by the Court, however, *Little Sisters* was all about administrative law. In upholding the Trump policy, the Court streamlined the Administrative Procedure Act's rulemaking requirements and made it easier to adopt interim final rules. The opinion by Justice Clarence Thomas rejected the argument federal agencies must maintain an "open mind" during consideration of post-promulgation comments after an interim final rulemaking and further cemented the *Vermont Yankee* prohibition on lower courts imposing greater procedural requirements on agencies than are expressly required in the APA. *Little Sisters* adds several arrows to the quiver for a future administration seeking to change environmental law in a hurry.

**The current Court does not seem to view environmental law as a distinct area of law, and some of the Court's most environmentally consequential decisions may not arise in an environmental context**

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# Court Loses an Environmental Champ

**T**he untimely death of Justice Ruth Bader Ginsburg is a sharp setback for environmental protection law. The Court loses the justice who had been the most sympathetic to environmental concerns during her more than 27 years on the highest court of the land. Her greatest achievement on behalf of the environment was her majority opinion in 2000 in *Friends of the Earth v. Laidlaw Environmental Services*. This decision slammed the brakes on Justice Antonin Scalia's long-time campaign to deny environmentalists standing to sue.

Standing doctrine is supposed to ensure that the federal courts hear only true "cases or controversies." Ironically, a company that had committed hundreds of violations of the Clean Water Act initially tried to collude with state regulators to preclude the citizen suit *Friends of the Earth* intended to file. The company drafted a complaint against itself and even paid the filing fee for state regulators to sue it. They then reached a token settlement with state officials and argued that it precluded the citizen suit. However, the federal trial judge hearing the case saw through this ruse and ruled that a collusive suit did not constitute the "diligent prosecution" required to bar FOE from suing. The judge ultimately imposed a \$400,000 penalty on Laidlaw in FOE's suit.

Prior to *Laidlaw*, a series of decisions authored by Justice Scalia had created increasingly demanding requirements for citizens to establish standing by requiring proof that regulatory violations caused environmental harm that directly damaged them. Relying on these decisions, the Court of Appeals for the 4th Circuit revoked the civil penalty and held that FOE lacked standing even though some of its



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*"I pray that her successor will share Justice Ginsburg's respect for the Constitution, the Court, and our environmental laws."*

members living within a half mile of the polluting facility averred that the pollution precluded them from recreating in the river. Only four Justices voted to grant FOE's cert petition, but by the time the case was decided Justice Ginsburg wrote for a 7-2 majority, faulting the lower court for "rais[ing] the standing hurdle higher than the necessary showing for success on the merits."

Justice Ginsburg approached challenges to EPA regulatory decisions by interpreting the environmental statutes in a manner consistent with their congressional purposes. In the *EME Homer City* decision in 2014 she wrote for a 6-2 majority to reverse a decision written by future Justice Brett Kavanaugh that had gutted the interstate air pollution provisions of the Clean Air Act. In dissent her good friend Justice Scalia shockingly revealed his antipathy to EPA with an embarrassingly erroneous attack on the agency that he was forced to correct after his opinion was released.

A strong believer in judicial modesty, Justice Ginsburg respected the expertise of EPA to fashion remedies for environmental problems. Writing for a unanimous Court in 2011 holding that the Clean Air Act displaced the federal

common law of interstate nuisance, she noted that EPA had much greater expertise than judges to craft remedies for climate change. But she emphasized that any EPA decision not to regulate greenhouse gas emissions would be subject to judicial review.

Justice Ginsburg's dissents spoke up for the environment. In the 2009 *Burlington Northern* decision, she was the lone justice seeking to hold an oil company liable for decades of chemical spillage that created a Superfund site. In *Coeur Alaska* she decried a decision allowing a mining company to transform a pristine Alaskan lake "into a waste disposal facility."

Her friendship with Justice Scalia inspired one of my constitutional law students, Derek Wang, to write an opera performed to the delight of both justices. As Ginsburg observed: "Toward the end of the opera *Scalia/Ginsburg*, tenor Scalia and soprano Ginsburg sing a duet: 'We are different, we are one,' different in our interpretation of written texts, one in our reverence for the Constitution and the institution we serve."

I pray that her successor will share Justice Ginsburg's respect for the Constitution, the Court, and our environmental laws.

**O**ne huge reason for environmentalist trepidation about *County of Maui* when it was argued was the changed composition of the Court. Both of President Trump's nominees to the Court, Neil Gorsuch and Brett Kavanaugh, had expressed skepticism of expansive federal regulation. Accordingly, environmental groups opposed each of their confirmations, Kavanaugh's in particular. The tragic death of Justice Ginsburg means environmental groups have lost an important ally on the bench.

Gorsuch is an avowed originalist and textualist in the mold of the late Justice Antonin Scalia, whom he replaced, but is more like Justice Thomas in his willingness to embrace sweeping arguments and reconsider long-standing precedents. Since joining the Court, Gorsuch has made no secret that he questions the constitutional foundations of the administrative state. He has called for the Court to reconsider the *Chevron* doctrine, under which federal agencies like EPA receive deference for reasonable interpretations of ambiguous regulatory statutes, and has called for reinvigorating the nondelegation doctrine, constraining Congress's ability to delegate broad regulatory authority to federal agencies.

Replacing Scalia with another conservative justice skeptical of environmental regulation might not produce much change on the Court. Replacing Kennedy, on the other hand, could be quite significant, given his central position on the Court. Replacing the "Notorious RBG" could produce a seismic change.

Although John Roberts has been the chief justice since 2005, most of the jurisprudence could be more accurately described as the Kennedy Court. This is because Kennedy has been the most consequential justice on the Court over this period. With two relatively stable blocs of four justices on his right and left, Justice Kennedy was the median or swing justice. In any closely divided case, Kennedy's preferences would almost always control the outcome. From 2005 when Roberts became chief, until Kennedy left the Court in 2018, he was in the majority more than any other justice.

He was no less pivotal in environmental cases. In fact, since joining the Court in 1988, Kennedy was in the majority for every single environmental law case, save one. For thirty years, environmental

law on the Supreme Court followed the preferences of one justice. The prospect of replacing Kennedy with a more conservative justice helps explain why the confirmation of Kavanaugh was so intense, even before allegations of sexual improprieties surfaced after his initial confirmation hearings. Environmental groups were active participants in the fight, warning of potentially dire consequences should Kavanaugh be confirmed. Earthjustice, the Sierra Club, and the League of Conservation Voters all actively campaigned against his confirmation. Democratic Senator Tom Carper of Delaware warned that a Justice Kavanaugh would be "the next Scott Pruitt." It did not help then Judge Kavanaugh's standing with environmentalists that his only D.C. Circuit opinion to be overturned by the Supreme Court was in an environmental case, *EPA v. EME Homer City Generation*, which upheld the agency's regulation of interstate air pollution. Justice Kennedy joined the majority in *EME Homer City*. Justice Ginsburg wrote the opinion.

Despite their conservative views, it would be a mistake to assume that either Justice Gorsuch or Justice Kavanaugh is an automatic vote against environmentalist positions in close cases. It would also be a mistake to assume they will always vote together. Kavanaugh is steeped in the intricacies of administrative law, having served on the District of Columbia Circuit for over a decade. Gorsuch, on the other hand, cut his appellate teeth on the Tenth Circuit.

A native Coloradan, he is the only justice currently on the Court from the West.

The same confident textualism that led Gorsuch to dissent in *County of Maui* led him to author a sweeping opinion vindicating the historic treaty rights of Native Americans in *McGirt v. Oklahoma*. In *McGirt*, Gorsuch was joined by the Court's four liberal justices, with whom he also voted in *Herrera v. Wyoming* to affirm the Crow Tribe's historic hunting rights. Kavanaugh dissented in both *McGirt* and *Herrera*, but has otherwise

joined the majority in every environmental-related case since he joined the Court.

Another case in which Kavanaugh and Gorsuch split was *Atlantic Richfield v. Christian*, in which the Court concluded, in an opinion by Roberts, that under the Comprehensive Environmental Response, Compensation, and Liability Act, landowners were required to seek EPA permission before seeking res-

**President Trump's nominees to the Court have expressed skepticism of expansive federal regulation. Environmental groups opposed each of their confirmations**

toration damages in state court to help clean up the mess decades of copper mining had made of their property. Under Montana law, homeowners are allowed to seek damages necessary to completely remediate harm to their property, even if the cost of such restoration exceeds the property's diminution in value. The same skepticism of the administrative state that leads Gorsuch to question federal regulation led him to question the broad preemptive effect of CERCLA. Nothing in the federal Superfund statute requires this result, Gorsuch argued, adding that if CERCLA were read that way, it would raise serious constitutional concerns.

The year before *Atlantic Richfield*, Gorsuch and Kavanaugh voted together in another environmental case that splintered the Court. In *Virginia Uranium v. Warren*, the Court ruled, 6-3, that the Atomic Energy Act did not preempt state regulation of uranium mining on private lands. No opinion for the Court commanded a majority. There were three opinions of three justices each. Gorsuch's opinion, joined by Kavanaugh and Thomas, expressed a profound skepticism of the sorts of broad preemption arguments often favored by business interests. Preemption, Gorsuch explained, should be based upon what the legislature did, not some broader legislative purpose. Thus, without anything in the AEA preempting a state's traditional authority to regulate private land use within its borders, Virginia's prohibition of uranium mining could not be preempted, even if Virginia legislators sought to address risks otherwise regulated by the Nuclear Regulatory Commission. Ginsburg, joined by Kagan and Sotomayor, concurred in this result, but wrote separately to take issue with Gorsuch's exclusive focus on statutory text and denigration of legislative purpose. Only the chief justice, Justice Samuel Alito, and Breyer dissented.

Environmental groups have viewed federalism arguments with some trepidation, as they are often used to constrain the reach of federal environmental regulations. As *Virginia Uranium* shows, however, federalism concerns are also a reason to take a narrower view of federal law's preemptive effect. Insofar as *Virginia Uranium* suggests several conservative justices accept this argument, their commitment to federalism could help defend state environmental laws and legal claims against industry claims

of preemption. The key is to let federalism drive the Court's decision.

**T**he environmental law cases heard by the Supreme Court will continue to be important, but so too will cases considering cross-cutting doctrines that repeatedly arise in environmental law. As this is being written, President Trump is seeking to replace Justice Ginsburg with a conservative jurist, and the Court is preparing to consider significant cases raising questions of state standing under Article III, severability of statutory provisions, and the propriety of district courts issuing nationwide injunctions. The Court has also yet to confront any of the Trump administration's efforts to remake federal environmental law.

Insofar as the past fifteen years is a guide, the Court's environmental jurisprudence will be driven by the justices' respective non-environmental doctrinal commitments. This means environmental advocates will continue to face obstacles insofar as they want the law to incorporate ecological sensibilities, but the Court should not stand in the way of important environmental victories when traditional legal arguments are on their side.

Of course, the replacement of a justice always has the potential to shift the Court, and this may be particularly so in the case of Ginsburg. Her opinion for the Court in *Friends of the Earth v. Laidlaw* remains one of Court's most important decisions on environmental standing, lowering the hurdle faced by citizen suit plaintiffs. In *FOE*, Ginsburg went toe-to-toe with Scalia to scale back the limits on standing he had erected in *Lujan v. Defenders of Wildlife*. Ginsburg was also an important voice on the procedural aspects of environmental litigation. Though not a distinct environmental voice, she was a fairly consistent vote in favor of environmental interests.

Ruth Bader Ginsburg's passing is a reminder that the Court's tendencies may be temporary, and that changes in the Court's composition inevitably change the course of the law. As there is no guarantee that the composition of the Court will stay the same, there is no guarantee the Court's approach to environmental law will remain any more static than the environment itself. **TEF**

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