THE ROBERTS COURT AND THE ENVIRONMENT

STEPHEN M. JOHNSON*

Abstract: During the October 2008 Term, the Supreme Court decided five cases that raised issues of environmental law and the environment was the loser in each case. While it may be difficult to characterize the decisions of the Roberts Court, generally, as “pro-environment” or “anti-environment,” a couple themes consistently appear in the Court’s decisions. First, in most of the environmental cases, the Court has adopted a position advocated or defended by a federal, state or local government when governmental interests are at issue. Second, in all of the cases that implicate federalism concerns, the Court has rendered decisions that favor States’ rights, regardless of whether the decisions are beneficial to, or harmful to, the environment. Finally, while the Court continues to rely primarily on textualism to interpret statutes, the Court has not relied on textualism to support its decisions in most of the cases that have been harmful to the environment.

INTRODUCTION

It is a familiar refrain. According to many academics, the Supreme Court does not treat environmental law as a unique area of law, but treats environmental cases as administrative law, statutory law, or constitutional law cases that merely arise in the context of environmental disputes.† Consequently, the Court has been viewed as “irrelevant” in developing environmental law‡ or environmental policy or, worse yet, hostile to the environment.§

* © 2010, Stephen M. Johnson, Associate Dean and Professor, Walter F. George School of Law, Mercer University. B.S., J.D., Villanova University; LL.M., George Washington University School of Law.


§ See Lazarus, supra note 1, at 705; see also Richard E. Levy & Robert L. Glicksman, Judicial Activism and Restraint in the Supreme Court’s Environmental Law Decisions, 42 Vand. L. Rev. 317.
Professor Richard Lazarus has suggested that his analysis of the voting patterns of Justices in environmental cases over thirty years, and the nature of the Court’s opinions in environmental cases, demonstrate the Court’s increasing hostility.\(^4\) Professor Albert Lin echoed Professor Lazarus’ claim that the Court is hostile to the environment, and asserted that his review of the Court’s decisions in the October 2003 term demonstrated that the Justices relied on textualism and the selective application of federalism to obscure an underlying anti-environment bias.\(^5\)

Several commentators have suggested that the unique nature of environmental law calls for a different approach from the Court. They urge the Court to consider the unique features of environmental disputes when applying general principles of law to the facts in those cases and to shape general principles of law, in part, based on lessons learned in the context of environmental disputes.\(^6\) This article examines the environmental decisions from the first four terms of the Roberts Court to make some initial observations regarding whether the Court appears hostile to the environment and whether it is treating environmental law as a unique body of law.

While the October 2008 Term was particularly harsh for the environment, the Roberts Court, over four terms, has not been overtly hostile to the environment, although the Justices seem to be more polarized in environmental cases and the Courts’ decisions, on the whole, could probably be more harmful to the environment than beneficial.\(^7\) A review of the Roberts Courts’ environmental decisions suggests that, for the most part, the Court continues to treat environmental cases as administrative, statutory, or constitutional law cases that merely arise in the context of environmental disputes.\(^8\) Surprisingly, though, some of the Court’s opinions have been peppered with pro-environment rhetoric.\(^9\)

While it may be difficult to characterize the environmental decisions of the Roberts Court as a whole as “pro-environment” or “anti-environment,” a couple themes consistently appear in the Court’s resolution of those cases. First, in most of the environmental cases that the Court has heard, it has adopted a position advocated or defended by a

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\(^3\) See supra note 1, at 706–07, 771.
\(^4\) See supra note 3, at 567–68.
\(^5\) See, e.g., supra note 1, at 740–41; Wexler, supra note 1, at 264.
\(^6\) See infra notes 90–105 and accompanying text.
\(^7\) See infra notes 112–68 and accompanying text.
\(^8\) See infra notes 198–211 and accompanying text.
federal, state, or local government when governmental interests are at issue. As the author of this article noted in a previous article, the Roberts Court appears to adopt a very deferential, “pro-government” approach in environmental cases, and other cases. Second, in all of the environmental cases that implicate federalism concerns, the Court has rendered decisions that are in favor of States’ rights, regardless of whether the decisions are pro-environment or anti-environment. If the Court were applying federalism selectively to advance anti-environment policies in the years before the Roberts Court, as Professor Lin suggested, the Roberts Court does not appear to be continuing that trend. Federalism concerns are being raised and upheld consistently in environmental cases. Finally, while the Court continues to rely primarily on textualism to interpret statutes, the Court did not rely on textualism to support its decisions in most of the anti-environment cases. On the contrary, in many of the Court’s pro-environment decisions, the Court relied on the plain meaning of the environmental laws to resolve the cases.

The following section of this Article, Part I, outlines the criticisms of the Supreme Court’s treatment of “environmental law” prior to the Roberts Term, focusing on the work of Professors Daniel Farber, Richard Lazarus, and Albert Lin. Part II of the Article explores the environmental decisions of the first four terms of the Roberts Court and draws some preliminary conclusions from them. Part III of the Article re-examines those environmental decisions in light of the criticisms raised by professors Farber and Lazarus to the Court’s environmental jurisprudence in the years prior to the Roberts Court. Finally, Part IV briefly explores whether the ascendancy of Justice Sonia Sotomayor, to replace Justice David Souter, may influence the Court’s decision-making in environmental cases.

10 See infra notes 112–27 and accompanying text.
12 See infra notes 112–24 and accompanying text.
13 See Lin, supra note 3, at 619.
14 See infra notes 112–24 and accompanying text.
15 See infra notes 172–76 and accompanying text.
16 See infra notes 172–76 and accompanying text.
I. Environmental Law: There’s No “There” There

Academics have frequently asserted that the Supreme Court has not treated environmental law as a distinct area of law in the same way that the Court has treated civil rights law and other substantive areas of law as distinct. While some have suggested that the Court’s decisions have been irrelevant in shaping environmental law and policy, others are concerned that the Court’s failure to recognize the unique nature of environmental issues has resulted in a Court that is hostile to environmental concerns.

Professor Daniel Farber is in the first camp. Based on his review of the Court’s environmental jurisprudence, Farber concluded that the Court’s decisions “have not substantially affected environmental regulation” and that the Court has been “largely irrelevant” since the late 1970s. Farber asserts that the Court has minimized its influence on the development of environmental law in several important ways: (1) by choosing to hear cases that have “little precedential value” because they involve insignificant issues or have peculiar facts; (2) by dismissing many cases on jurisdictional grounds and avoiding deciding cases on the merits; and (3) by resolving issues on narrow, technical grounds or deferring to agency decisions when the Court addresses the merits in environmental cases. Farber notes a general trend in the Court’s environmental jurisprudence towards limiting the Court’s power in fa-

17 See, e.g., Lazarus, supra note 1, at 706, 737, 766; Manaster, supra note 1, at 1965; Wexler, supra note 1, at 260–62.
18 See Farber, supra note 2, at 547–48.
19 See Lazarus, supra note 1, at 705, 706–07; see also Levy & Glicksman, supra note 3, at 346, 421; Lin, supra note 3, at 567–68.
20 See Farber, supra note 2, at 547–48. Farber recognizes that the key policy decisions for environmental law should be made by Congress or agencies, but he argues that the Court “could help provide direction in interpreting environmental statutes, improve the process by which lower courts review agency decisions, integrate innovative environmental statutes into the general body of existing law, and provide leadership in those significant policy areas that Congress has left to the judiciary rather than the EPA.” Id. at 548.
21 Id. at 569. Accordingly, Farber laments that the Court has allowed important areas of environmental law to “languish in obscurity,” and has made little contribution to several areas that “provide the bulk of litigation in environmental law,” such as officer and shareholder liability, dischargeability of future Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) claims in bankruptcy, and lender liability and contribution in CERCLA. Id. at 552–53.
22 Farber notes that the Court has frequently avoided deciding cases on the merits by restricting standing for environmental plaintiffs. Id. at 555–56 (discussing Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871 (1990) and Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).
23 Id. at 558–59 (discussing Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) and Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984)).
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24 While Farber believes that the Court has not played a significant role in the development of environmental law, he suggests that there are several directions that the Court might take in the future in environmental cases. At the extremes, he suggests that the Court might continue to be irrelevant or that “the Court might embark on a course of judicial activism, crusading for (or more likely against) environmentalism.” Alternatively, he posits that the Court might act as the “legislature’s junior partner,” resolving the questions that Congress does not answer and that agencies cannot answer, and integrating environmental legislation into the existing body of law. More pessimistically, he suggests that the Court might act as an “immune system,” subsuming environmental law within the existing legal regime and limiting changes in legal concepts as applied to environmental matters beyond changes expressly mandated by Congress.

Like Professor Farber, Professor Kenneth Manaster has concluded that the Supreme Court has not been instrumental in developing a separate field of “environmental law.” Manaster notes that the Court resolves most “environmental cases through general doctrines of administrative law and statutory interpretation,” rather than through “specific environmental principles and policies.” Reviewing Justice Stevens’s opinions in environmental cases, Manaster suggests that the Court could play a greater role in crafting “environmental law” in cases involving direct enforcement of environmental statutes or judicial review of agency action under environmental statutes.

Professors Richard Lazarus and Albert Lin are more pessimistic about the role that the Court has taken in shaping environmental law and both see the Court as increasingly hostile to environmental concerns. Based on his review of more than 240 Supreme Court decisions,
Professor Lazarus concluded that the Justices perceive environmental law as “merely an incidental factual context” and do not recognize that the nature of the environmental concerns is relevant to their resolution of the legal issues in the cases.32 Consequently, he asserts that the Court’s indifference and hostility towards environmental law frustrates environmental protection goals, “resulting in substantial losses in environmental quality and public health and welfare.”33

Professor Lazarus bases his conclusions on a review of the voting patterns of Justices in environmental cases, the identity of Justices writing opinions in environmental cases, and the nature of those opinions. First, Professor Lazarus notes that while Justice White wrote the most majority opinions in environmental cases decided by the Court,34 his dispassionate, dry, formalistic opinions do not exhibit any environmental ethic and do not suggest that the environmental dimension of the cases played any independent role in the Court’s decisionmaking or reasoning.35 The lack of an environmental voice or rhetoric is a trend that he asserts runs throughout the majority opinions in most of the environmental cases by all of the Justices.36 Absent in the rulings is any “emphasis on the nature, character, and normative weightiness of environmental protection concerns and their import for judicial construction of relevant legal rules.”37 As Professor Lazarus suggests, “the only passionate rhetorical flourishes evident in environmental cases are those penned by Justice Scalia. And they do not trumpet the importance of environmental protection; they question it.”38

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32 See Lazarus, supra note 1, at 706, 708.
33 Id. at 706–07.
34 Id. at 709. During the period reviewed by Professor Lazarus, commencing with the October Term in 1969 and concluding with the October Term in 1998, Justice White wrote thirty-six environmental opinions. Id. The next closest Justice during that time period, Justice O’Connor, only wrote twenty-two opinions. Id.
35 See id. at 710–11. Professor Lazarus wrote that Justice White’s opinions “do not reflect any deliberation regarding the special demands that environmental protection may place on law and lawmaking institutions” and “[n]or, similarly, do his opinions display any discernible effort to discern and consider how the interests of future generations in environmental protection may warrant consideration in the law’s evolution.” Id. at 711.
36 Id. at 737. In a separate article, Professor Kenneth Manaster notes that Justice William O. Douglas, who retired in 1975, wrote passionate opinions on environmental issues and that no Justice, including Justice Stevens, who replaced him, has emerged as an heir to his legacy. See Manaster, supra note 1, at 1964.
37 See Lazarus, supra note 1, at 737.
38 Id. at 739.
Professor Lazarus also notes that while Justice Kennedy voted in the majority in environmental cases more than any other Justice, and consequently influences the Court more than any other Justice on environmental matters, he has written very few opinions in those cases. Thus, as Lazarus points out, “[t]he most significant vote has had little to no direct expression in the Court’s opinion writing” and “[t]he upshot is the exacerbation of the Court’s longstanding lack of environmental voice.”

Most significantly, though, Professor Lazarus bases his conclusion that the Court is becoming increasingly hostile to the environment on his analysis of the voting patterns of the Justices. When he engages in a qualitative and anecdotal review of the Justices’ voting, Professor Lazarus concludes that the evidence suggests that most of the Justices were not influenced by the environmental context of the cases. He illustrates how several seemingly pro-environment Justices have authored or joined anti-environment decisions and vice versa. However, Professor Lazarus moves beyond a qualitative review of the Justices voting and engages in a quantitative review of the Justices, assigning each an environmental protection (EP) score based on the frequency with which they have voted in favor of the environment in their decisions in environmental cases. Based on his review of the EP scores, he concludes

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39 Id. at 714–15. Professor Lazarus indicated that, other than an original action involving an interstate water compact, Justice Kennedy dissented in only one case, Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), of the fifty-seven environmental cases in which he participated and that the Court later overruled the decision in that case. See Lazarus, supra note 1, at 714–15. Thus, he notes that Justice Kennedy voted with the majority more than ninety-six percent of the time. Id. at 713. Professor Lazarus updated his findings in a later article to include decisions of the October 1999 and 2000 terms, and Justice Kennedy only dissented one more time during those terms. See Richard J. Lazarus, Environmental Law and the Supreme Court: Three Years Later, 19 PAC. ENVTL. L. REV. 653, 656 (2002).

40 Lazarus, supra note 1, at 715. During the time period that Professor Lazarus reviewed, Justice Kennedy only wrote four majority opinions, with half of those coming during the October 1998 Term. See id. He wrote an additional two opinions during the October 1999 and 2000 terms. See Lazarus, supra note 39, at 656.

41 Lazarus, supra note 1, at 715.

42 Id. at 716.

43 See id.

44 Id. at 718–22. Professor Lazarus selected 100 of the 240 environmental Supreme Court decisions that more readily lent themselves to a designation as a pro-environmental or anti-environmental decision for scoring purposes. Id. He assigned each Justice one point for each pro-environmental outcome for which they voted and the final score (“EP score”) for each Justice was based on the percentage of pro-environmental votes that the Justice cast in the 100 cases that Professor Lazarus reviewed. Id. Professor Lazarus acknowledges that a scoring system like his could be arbitrary because many cases may not lend themselves to pro-environmental and anti-environmental labels. Id. He attempts to
that for some Justices, the environmental context of a case did influence their voting. In addition, he concludes that some Justices are becoming increasingly anti-environmental.

While Professor Lazarus recognizes that it is hard to draw fine distinctions between Justices based on their EP scores, he suggests that some conclusions can be drawn regarding Justices who have scores at the very high end or low end of the scale. Specifically, he asserts that “[a] fair case” can be made that the environmental protection dimension of cases influenced a Justice if the Justice’s score is greater than sixty-six (meaning that they supported the pro-environment position in sixty-six percent or more of the cases) or less than thirty-three (meaning that they supported the pro-environment position in thirty-three percent or less of the cases), and that “a strong case” can be made if the Justice’s score is greater than seventy-five or less than twenty-five. Reviewing the EP scores, Professor Lazarus noted that none of the sitting Justices at the time scored higher than sixty-six, while Justices Scalia (13.8), Thomas (20) and Kennedy (25.9) all scored lower than thirty-three. His analysis of the EP scores also formed the basis for his assertion that the Court, as a whole, is becoming less responsive to environmental protection. Specifically, he noted that in 1975, there were no Justices with an EP score of twenty or lower, only one Justice with a score of thirty-three or lower, and one Justice with a score over sixty-six. By 1999, though, there were two Justices with a score of twenty or lower, four Justices with a score of thirty-three or lower, and no Justices with a score over sixty-six.

Professor Lazarus is concerned about the Court’s indifference or hostility towards environmental law because the nature of the injury in account for that concern by focusing only on the 100 of 240 cases that can be characterized as pro-environmental or anti-environmental. Id. at 723.

45 Id. at 716.
46 Id. at 737.
47 Lazarus, supra note 1, at 723. Professor Lazarus admits that in many cases, whether an “outcome happened to be more or less environmentally protective had little . . . impact on an individual Justice’s decision to vote one way rather than another.” Id. at 722. Nevertheless, while Professor Lazarus recognizes that conclusions should not be drawn from small differences in scores, he suggests that “for those few Justices with scores either very high or very low, it is at least plausible to theorize that the environmental protection dimension influenced their vote one way or the other.” Id. at 723.
48 Id.
49 Id. at 724–27, 812 app. D.
50 See id. at 736–37.
51 Id. at 735.
52 Id.
environmental cases is unique, and because he believes that the Court’s analysis of the law in the cases should be informed by, and respond to, the unique character of the injury. He contends that environmental considerations should inform the development of other areas of law or, at a minimum, the Court should consider the unique issues raised by environmental disputes when applying other areas of law in the environmental context.

Professor Albert Lin also believes that the Court is becoming increasingly hostile to environmental law and bases his conclusions on an analysis of the Court’s decisions during the 2003–2004 Term, as well as prior environmental jurisprudence. The Court decided an unusually high number of cases involving the environment and natural resources during that Term and the decisions “generally resulted in the weakening of environmental law.” Reviewing the cases, Lin concludes that the decisions “continue a trend in the gradual but discernible erosion of environmental law and of governmental authority to address environmental concerns.”

Reviewing the seven cases decided by the Court during the Term, Professor Lin observed that all of the cases involved questions of statutory interpretation, none posed fundamental constitutional questions, and all of the cases had been decided in favor of the environmental interests below. Professor Lin suggested that the Court’s selection of cases implied “a skepticism . . . of lower court rulings favorable to environmentalists.” More generally, he asserted that the court eroded environmental law through the use of (1) textualism; (2) importation of common law causation analysis into statutory schemes; and (3) the selective invocation of federalism principles to inform statutory interpretation.

See Lazarus, supra note 1, at 744–48. Professor Lazarus suggests that the injuries addressed in environmental law are unique because they are often (1) irreversible, catastrophic, and continuing; (2) physically distant; (3) temporally distant; (4) enveloped by uncertainty and risk; (5) caused by multiple sources; and (6) non-economic and non-human. Id.

Id. at 756.

See id. at 740–41.

Id. at 741.

See Lin, supra note 3, at 567–69.

Id. at 567.

Id. at 568.

Id. at 568.
First, Professor Lin observed that the Court increasingly relies on textualism in interpreting statutes and that, in at least two of the cases, the Court used textualism to interpret environmental statutes in a manner that was contrary to legislative intent.\(^63\) This is particularly troubling because, as Lin notes, Justices often mask their policy choices in neutral terms when purporting to interpret a statute according to its plain meaning.\(^64\) He suggests that textualist Justices disguise anti-regulatory environmental policy choices by (1) interpreting statutes narrowly, without regard to the purposes of the statute;\(^65\) (2) deferring less frequently to agency interpretations, again thereby ignoring the policy concerns considered by the agencies;\(^66\) and (3) ignoring legislative history.\(^67\)

After examining the impact of textualism on the Court’s environmental decisions during the 2003 Term, Professor Lin argued that the Court narrowed the scope of environmental regulation in three cases in a manner that was, to some extent, inconsistent with textualism, by importing proximate cause analysis into the statute.\(^68\)

Finally, Professor Lin asserted that the Court selectively adopted or rejected federalism arguments in a manner that limited environmental protection.\(^69\) Specifically, Lin noted that three of the environmental cases decided that term involved a conflict between federal and state regulatory authority and presented opportunities for the Court to expand its federalism jurisprudence.\(^70\) Reviewing the cases, though, he asserted that “no obvious federalism theme . . . emerged. Collectively, these three decisions instead support the thesis that members of the Court voice federalism concerns inconsistently and opportunistically.”\(^71\)

While Professor Lin concludes that the Court is eroding environmental law, he does not assert that the Court is engaging in judicial ac-

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\(^{63}\) Lin, supra note 3, at 580–81.

\(^{64}\) Id. at 580. Lin also discussed Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) as an example of a decision where the Court used a textualist approach to reach a conclusion that was at odds with the purposes of a statute. Id. at 595–98.

\(^{65}\) Id. at 601–03.

\(^{66}\) Id. at 603–04.

\(^{67}\) Id. at 604–05.

\(^{68}\) Id. at 618–19.

\(^{69}\) Lin, supra note 3, at 626.

\(^{70}\) Id. at 619. Professor Lin identified Alaska Department of Environmental Conservation v. EPA, 540 U.S. 461 (2004); Engine Manufacturers Ass’n v. South Coast Air Quality Management District, 541 U.S. 246 (2004); and South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) as cases involving conflicts between state and federal regulatory authority. See id.

\(^{71}\) Id. at 626.
tivism in the environmental arena. Instead, he concludes that the Court is adopting what Professor Farber described as the “Court as an immune system” approach, utilizing other tools of legal analysis to subsume environmental regulation within the existing legal order.\textsuperscript{72} Ultimately, he asserts that the Court is subverting environmental law and that “[e]xposing the political nature and consequences of their actions is the first step in holding the Court accountable and in ultimately combating the subversion.”\textsuperscript{73}

Professor Jay Wexler does not conclude that the Court is hostile to the environment, but he agrees with Professor Lazarus, Professor Lin, and others that the Court is not recognizing the unique nature of environmental law.\textsuperscript{74} His recommendations for the direction that the Court should take in environmental cases echo the recommendations of Professor Lazarus that are outlined above. In a recent article, Professor Wexler examines seven paradigms that federal courts, including the Supreme Court, could take when deciding environmental cases.\textsuperscript{75} He ultimately concludes that because of the unique nature of environmental law, courts should not “apply generally applicable legal principles without any special concern for the environmental aspects of the case.”\textsuperscript{76} Instead, he urges that “courts should consider the distinctive features of ecological injury when applying facts to law, and . . . should draw on their knowledge of those distinctive features when fashioning rules of general application.”\textsuperscript{77}

Most of the literature that critiques the Supreme Court’s impact on the development of a unique body of “environmental law” examines

\begin{footnotes}
\footnote{72 Id. at 634.}
\footnote{73 Id. at 635.}
\footnote{74 See Wexler, supra note 1, at 260–62.}
\footnote{75 Id. at 262–63. Wexler suggests that courts might:}
\footnote{76 Id. at 263.}
\footnote{77 Id. at 264.}
\end{footnotes}
the decisions of the Court prior to the ascendancy of Chief Justice Roberts. The remainder of this Article explores whether the environmental decisions of the Roberts Court follow the trends outlined above. Although the Roberts Court has only completed four terms, at least one other academic, Professor Jonathan Adler, has already expressed some preliminary opinions regarding the Court’s decisions in environmental cases.\textsuperscript{78}

Instead of focusing on whether the Court is hostile to the environment or is creating a unique body of “environmental law,” though, Professor Adler reviewed sixteen “environmental law” decisions from the first four terms of the Roberts Court to explore whether the Court was adopting a “pro-business” approach in those cases.\textsuperscript{79} In the same way that Professor Lazarus recognized that classifying cases as “pro-environment” and “anti-environment” is often difficult, Professor Adler pointed out that business interests are often opposed in environmental disputes, so it is often difficult to classify decisions as “pro-business” or “anti-business.”\textsuperscript{80} Nevertheless, Adler determined that it was possible to identify the position that is supported by the balance of business interests, and that produces a rule that on the whole works to the benefit of business in all of the cases. He concluded that the decisions did not show a “pro-business” bias or orientation.\textsuperscript{81} Specifically, he found that the Court adopted a “pro-business” position in only eight of the sixteen cases that he reviewed.\textsuperscript{82} More importantly, he noted that most of the “pro-business” decisions occurred in narrow cases that had little effect on pre-existing law, while the decisions that harmed businesses were quite dramatic and will have profound effects on economic interests.\textsuperscript{83} He also stressed that the nature of the Court’s decisions is important in determining whether the Court is “pro-business” or “anti-business.”\textsuperscript{84} Specifically, he suggested that cases in which the Court adopts a pro-business interpretation of a statute, which can be overridden by Con-

\textsuperscript{78} See generally Jonathan H. Adler, Business, the Environment, and the Roberts Court: A Preliminary Assessment, 49 Santa Clara L. Rev. 943 (2009) (exploring whether the Roberts Court is actually “pro-business” through the lens of environmental law).

\textsuperscript{79} Id. at 952–53.

\textsuperscript{80} Id. at 952.

\textsuperscript{81} Id. at 953. More generally, though, he admitted that the Roberts Court could be “called ‘pro-business’ insofar as it is sympathetic to some basic business-oriented legal claims, it reads statutes narrowly, it resists finding implied causes of action,” and “it does not place its finger on the scales to assist non-business litigants.” Id. at 951.

\textsuperscript{82} Id. at 953.

\textsuperscript{83} Id. at 954.

\textsuperscript{84} See Adler, supra note 78, at 950.
gress, are less significant than cases in which the Court announces a substantive rule of constitutional law that benefits businesses.\textsuperscript{85}

While Adler did not find a “pro-business” bent to the Roberts Court’s environmental decisions, he suggested that the Court may have a “pro-government” bent, as the Court ruled in favor of the government in more than two-thirds of the cases in which government interests were at stake.\textsuperscript{86} Part II of this Article examines many of those same cases to assess whether the Roberts Court is hostile to the environment and to explore factors that may be influencing the Court in environmental cases.

II. THE ROBERTS COURT: THE FIRST FOUR TERMS

A. General Observations on the Environmental Law Cases

During its first four terms, the Roberts Court decided fourteen “environmental law” cases.\textsuperscript{87} While it is dangerous to reach conclusions based on such a small sample, some preliminary observations can be made about the Court’s decisions. Consistent with recent history prior to the Roberts Court, most of the “environmental law” cases decided by the Roberts Court (seventy-one percent) involved statutory interpretation, as opposed to constitutional law or other issues.\textsuperscript{88} Similarly, seventy-one percent of the Court’s decisions reversed lower court decisions, and the Court reversed all six of the cases that it reviewed from the Ninth Circuit.\textsuperscript{89} While this could be interpreted as consistent with Professor Albert Lin’s charge that the Supreme Court is often skeptical towards

\textsuperscript{85} Id.
\textsuperscript{86} Id. at 972–73. Professor Adler implies, though, that the Court might be less deferential to the government once it begins to review environmental decisions made by, or supported by, President Obama’s Administration. See id. at 975.
\textsuperscript{87} Infra app. A. While it is difficult to define the contours of what constitutes “environmental law,” for purposes of this Article, the universe was limited to cases involving disputes arising under environmental statutes, and cases that directly raised issues that are central to environmental law in the context of environmental disputes, including cases addressing the Dormant Commerce Clause, takings, and punitive damages. In addition to the cases examined in this Article, during the prior four terms, the Roberts Court decided five cases that involved environment or natural resources agencies or were otherwise tangentially related to environmental law. See generally Carcieri v. Salazar, 129 S. Ct. 1058 (2009); New Jersey v. Delaware, 552 U.S. 597 (2008); Rockwell Int’l Corp. v. United States, 549 U.S. 457 (2007); Wilkie v. Robbins, 551 U.S. 537 (2007); BP America Prod. Co. v. Burton, 549 U.S. 84 (2006). Those five cases were not included in the statistical analyses in this Article.
\textsuperscript{88} See infra app. A. Ten of the fourteen cases involved statutory interpretation.
\textsuperscript{89} See infra app. A.
lower court rulings favorable to environmentalists, the Court’s reversal rate in environmental cases is similar to its reversal rate for all cases that it decided over the prior four terms.

On balance, while the Roberts Court cannot be characterized as overtly hostile to the environment, the Court’s decisions are generally more harmful than beneficial to the environment. Quantitatively, only forty-three percent of the Court’s decisions can be characterized as “pro-environment,” and environmental groups were on the losing side in seventy-one percent of the cases in which they participated.

Looking beyond the numbers, the “anti-environment” decisions appear to be bigger losses for the environment than the “pro-environment” decisions are wins. In Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, the Court exempted discharges of mining waste and potentially many other categories of waste from technology-based pollution controls under the Clean Water Act. In Entergy Corp. v. Riverkeeper, Inc., the Court allowed the Environmental Protection Agency to consider costs in setting pollution control standards under the Clean Water Act, although the statute did not explicitly allow the agency to consider costs, perhaps foreshadowing the Court’s interpretation of other environmental statutes to allow greater use of cost benefit analysis without explicit authorization. In Winter v. NRDC, the Court weakened precedent that encouraged courts to issue injunctions to require compliance with procedural requirements of environmental laws.

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90 See Lin, supra note 3, at 570.
92 See infra app. A.
95 See 129 S. Ct. 1498, 1508–09 (2009).
Summers v. Earth Island Institute, the Court limited standing for persons bringing challenges based on harm to procedural rights. In Burlington Northern & Santa Fe Railway Co. v. United States, the Court reduced the scope of liable parties under the Superfund law and thereby reduced the funds available for Superfund cleanups in some cases. In Exxon Shipping Co. v. Baker, the Court imposed limits on the amount of punitive damages that can be awarded for pollution caused by oil spills under maritime law. In National Ass’n of Home Builders v. Defenders of Wildlife, the Court limited the scope of the duty of federal agencies to protect endangered species. Finally, contrary to predictions from several Justices in Rapanos v. United States, the Court’s decision in that case has resulted in a significant reduction in waters protected under the Clean Water Act.

On the “pro-environment” side of the ledger, Massachusetts v. EPA was clearly a positive decision for the environment, as the Court determined that EPA acted unreasonably in justifying its failure to regulate greenhouse gases as air pollutants for purposes of provisions of the Clean Air Act regarding motor vehicle emissions. However, to the extent that the Court’s decision broadened standing principles, its reach is probably limited to lawsuits by States, as the Court already limited portions of the decision that addressed standing to protect procedural rights in the Summers decision. United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority was another positive environmental decision, as the Court upheld, against a Commerce Clause challenge, a local “flow control” ordinance that required waste to be sent to government owned solid waste processing facilities. However, it is clear that the reach of the Court’s holding in that case is limited to

102 A recent report from the EPA’s Office of Inspector General noted that almost 500 enforcement cases have been affected by the decision, “such that . . . enforcement was not pursued as a result of jurisdictional uncertainty, case priority was lowered as a result of jurisdictional uncertainty, or lack of jurisdiction” was raised as a defense in the enforcement action due to the Rapanos decision. Office of Inspector Gen., Envir. Prot. Agency, Rep. No. 09-N-0149, Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation 1 (2009), available at http://www.epa.gov/oig/reports/2009/20090430-09-N-0149.pdf.
publicly owned facilities.¹⁰⁶ Most of the other “pro-environment” decisions of the Roberts Court are fairly limited, technical decisions that are unlikely to have broader impact beyond their facts.¹⁰⁷

It is also significant that the Roberts Court issued “anti-environment” decisions in sixty percent of the cases involving constitutional law or common law issues,¹⁰⁸ but issued “pro-environment” decisions in cases involving statutory interpretation as often as it issued “anti-environment” decisions.¹⁰⁹ As Professor Adler pointed out in analyzing whether the Roberts Court is “pro-business”, the Court’s rulings in cases involving constitutional or common law issues may be more significant in defining the Court as “pro-business” or “anti-environment” because, unlike the Court’s statutory interpretation decisions, those rulings cannot be overridden by Congress.¹¹⁰

While it is difficult to classify the Roberts Court as “anti-environment” or “pro-environment” based on the small sample of environmental cases decided so far, there does seem to be a clear “pro-government” trend in the Court’s environmental decisions. In more than two-thirds of the decisions, the Court ruled in favor of the position advocated by the federal government or a state or local government.¹¹¹ This

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¹⁰⁶ Id.
¹⁰⁷ In John R. Sand & Gravel Co. v. United States, the Court held that there was no implied “equitable tolling” exception to the statute of limitations for takings claims brought in the Court of Federal Claims. 552 U.S. 130, 136 (2008). In United States v. Atlantic Research Corp., the Court held that liable parties can sue other liable parties under section 107 of the Superfund law to recover costs that they have incurred in cleaning up releases of hazardous substances. 551 U.S. 128, 139 (2007). In S.D. Warren v. Maine Board of Environmental Protection, the Court concluded that discharges from a dam triggered the state review and approval procedures of section 401 of the Clean Water Act. 547 U.S. 370, 373 (2006). Finally, in Environmental Defense v. Duke Energy Corp., the Court upheld air quality standards adopted by EPA that applied to modifications of stationary sources. 549 U.S. 561, 566 (2007).
¹⁰⁸ See infra app. A.
¹⁰⁹ See infra app. A.
¹¹⁰ See Adler, supra note 78, at 950.
appears consistent with a more general trend, explored by the author of this Article in an earlier article, of the Roberts Court to accord greater deference to agencies.\footnote{See Johnson, supra note 11, at 2.} Professor Adler, in his exploration of the Roberts Court’s environmental decisions, suggested that the Court’s pro-government decision-making results from deference to other branches of government and narrow statutory interpretation.\footnote{See Adler, supra note 78, at 951.}

B. Federalism, Chevron, and Textualism

Instead of focusing on whether the Roberts Court can be characterized as “anti-environment” or “pro-government,” it may be more useful to examine three significant factors that seem to be significantly impacting the Roberts Court’s rulings in environmental law cases thus far: federalism, \textit{Chevron} deference, and textualism.

1. Federalism

In the environmental cases where federalism issues have been implicated, the Roberts Court has ruled in favor of the interests of States and local governments in every case.\footnote{See United Haulers, 550 U.S. at 334; \textit{Rapanos}, 547 U.S. at 742–45; S.D. \textit{Warren}, 547 U.S. at 386–87.} In some cases, this yielded a “pro-environment” ruling, while in others, it yielded an “anti-environment” ruling. Rather than opportunistically and unevenly applying federalism principles to achieve “anti-environment” results, as Professor Lin suggested the Rehnquist Court was doing during the 2003 term,\footnote{See Lin, supra note 3, at 569, 619.} the Roberts Court appears to be applying federalism principles vigorously and consistently, regardless of whether the application yields “pro-environment” or “anti-environment” results.

For instance, in \textit{S.D. \textit{Warren v. Maine Board of Environmental Protection}}, the Court reviewed whether operating a dam results in a “discharge” under the Clean Water Act that triggers a process where States can review and impose conditions on the discharge to meet state water...
pollution standards. While the Court found that the operation of the dam results in “discharge” under the plain meaning of the term, it also discussed the purpose of the law and stressed that:

[c]hanges in the river like these fall within a State’s legitimate legislative business, and the Clean Water Act provides for a system that respects the States’ concerns . . . . State certifications under [section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution . . . . Reading section 401 to give “discharge” its common and ordinary meaning preserves the state authority apparently intended.

Similarly, in United Haulers v. Oneida-Herkimer Solid Waste Management Authority, the Court reviewed the constitutionality of an ordinance that required persons who collected waste within Oneida and Herkimer Counties in New York State to deliver the waste to a processing facility operated by the Oneida-Herkimer Solid Waste Management Authority. In upholding the constitutionality of the scheme against a Commerce Clause challenge, a plurality of the Court distinguished the case from a prior decision where the Court had struck down a similar flow control ordinance. The plurality stressed that the case at bar was different from the precedent case because the facility to which the waste was directed was a state-created public benefit corporation. The plurality stressed that:

“[c]ompelling reasons justify treating these laws differently from laws favoring particular private businesses over their competitors. . . . States and municipalities are not private businesses—far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens. . . . These important responsibilities set state and local government apart from a typical private business. . . . Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.”

116 547 U.S. at 373.
117 Id. at 386–87.
118 550 U.S. at 334.
119 Id. at 340–41.
120 Id. at 340.
121 Id. at 342–43.
Justices Scalia and Thomas wrote separate concurring opinions to criticize the general concept of the Dormant Commerce Clause and to advocate for greater state authority.\textsuperscript{122}

While federalism concerns helped spur “pro-environment” decisions in \textit{S.D. Warren} and \textit{United Haulers}, they spurred an “anti-environment” decision in \textit{Rapanos v. United States}.\textsuperscript{123} In \textit{Rapanos}, the Court reviewed whether certain non-navigable waters and wetlands adjacent to “traditional navigable waters” were regulated under the Clean Water Act.\textsuperscript{124} In voting to limit the reach of Clean Water Act jurisdiction, the plurality first noted that the purposes of the Act include preserving the primary responsibility of States “to prevent, reduce and eliminate [water] pollution.”\textsuperscript{125} The plurality then found that the U.S. Army Corps of Engineers interpretation of the statute to regulate all non-navigable tributaries of waters of the United States and adjacent wetlands would “result in a significant impingement of the States’ traditional and primary power over land and water use.”\textsuperscript{126} In a concurring opinion, Justice Kennedy argued that the scope of jurisdiction should be tied to the “significant nexus” test created by the Court in \textit{Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers},\textsuperscript{127} a case where the Court interpreted the Clean Water Act narrowly in order to avoid interfering with traditional State power over land and water use.\textsuperscript{128}

Even in cases where federalism concerns were not directly raised, but States were advocates, the Roberts Court frequently ruled in favor of the States. In \textit{Massachusetts v. EPA}, for instance, the Court created generous standing rules for States, which it stressed are not “normal litigants,” and concluded that Massachusetts had standing to sue because its risk of injury would be reduced “to some extent” by the relief it sought.\textsuperscript{129} Similarly, the State of Alaska was a petitioner in \textit{Coeur Alaska v. Southeast Alaska Conservation Council}, and the Court ruled in its favor, finding that the disposal of mining waste in Lower Slate Lake did not need to comply with pollution standards under section 402 of the

\textsuperscript{122} See id. at 348 (Scalia, J., concurring); id. at 349 (Thomas, J., concurring).


\textsuperscript{124} 547 U.S. at 729–30.

\textsuperscript{125} Id. at 737.

\textsuperscript{126} Id. at 737–38 (citations omitted).

\textsuperscript{127} 531 U.S. 159, 167 (2001).

\textsuperscript{128} Rapanos, 547 U.S. at 766–67 (Kennedy, J., concurring).

\textsuperscript{129} 549 U.S. 497, 518, 526 (2007).
Clean Water Act. However, in *Entergy Corporation v. Riverkeeper*, the Court rejected a challenge brought by States to EPA’s regulations that imposed pollution limits for cooling water intake structures based on cost considerations.

2. *Chevron*

Just as federalism has been an important factor that has influenced the Court’s decisionmaking in environmental law cases, *Chevron* deference has also been an important factor in many of the cases involving statutory interpretation, but *Chevron* deference has contributed to generally “anti-environment” decisions. In a sample of recent environmental law cases where *Chevron* applied, the Roberts Court upheld the agencies’ interpretation of the statute in sixty percent of the cases. In all of the cases where the Court upheld the agencies’ interpretation of the statute, the Court’s decision was harmful, rather than beneficial, to the environment.

One thing that is interesting about the Roberts Court’s application of *Chevron* to these environmental law cases is that the Court has gener-

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130 129 S. Ct. 2458, 2474 (2009).
131 129 S. Ct. 1498, 1510 (2009).
132 *Chevron U.S.A. Inc. v. NRDC* established a two-part test for courts to use when reviewing legislative rules and other agency actions. 467 U.S. 837, 842–43 (1984). At step one, if Congress has directly spoken to the precise question at issue, courts should give effect to Congress’s intent. *Id.* At step two, though, if the statute is silent or ambiguous regarding the question at issue, courts should defer to reasonable agency interpretations of the statute. *Id.*
133 Five cases—*Coeur Alaska v. Southeast Alaska Conservation Council*, 129 S. Ct. at 2469; *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. at 1515; *National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665–66 (2007); *Massachusetts v. EPA*, 549 U.S. at 527; and *Rapanos*, 547 U.S. at 739—involving *Chevron* deference. The Court deferred to the agency’s interpretation in three of the five cases—*Coeur Alaska*, 129 S. Ct. at 2474, *Entergy*, 129 S. Ct. at 1515, and *National Ass’n of Home Builders*, 551 U.S. at 665–66—all of which were “anti-environment” decisions. The Court did not defer to the agency’s interpretation in the other two cases, *Massachusetts v. EPA*, 549 U.S. at 529 (pro-environment) and *Rapanos* 547 U.S. at 739 (anti-environment). While the plurality in *Rapanos* did not apply *Chevron*, the dissenters and Justice Kennedy, in his concurring opinion, applied *Chevron*. 547 U.S. at 766 (Kennedy, J., concurring); *id.* at 788 (Stevens, J., dissenting). While the Court used a method of analysis that appears to be the *Chevron* analysis in the *Duke Energy* case, the Court did not cite *Chevron* in that case or discuss the two steps of the analysis in the case. See 549 U.S. 561, 578–82 (2007).
134 *See Coeur Alaska*, 129 S. Ct. at 2474 (exempting discharges of mining waste from technology based standards that would apply to permits issued under section 402 of the Clean Water Act); *Entergy*, 129 S. Ct. at 1510 (authorizing the consideration of cost benefit analysis in setting standards for cooling water intake structures); *Nat’l Ass’n of Home Builders*, 551 U.S. at 665–67 (holding that EPA need not comply with section 7(a)(2) of the Endangered Species Act when delegating authority to the State of Alaska to issue water pollution permits).
ally resolved the statutory interpretation question at step two of *Chevron*, rather than at step one. All of the Court’s “anti-environment” *Chevron* decisions have been resolved at step two, rather than step one.\(^{135}\) For instance, in *Coeur Alaska*, the majority determined that Congress did not directly speak to the precise question of whether EPA’s pollution standards under section 306 of the Clean Water Act applied to fill material, so the Court deferred to the agency’s determination that the standards did not apply.\(^{136}\) Similarly, in the *Entergy* decision, the majority inverted the *Chevron* analysis and did not directly address whether the statute was ambiguous, but concluded that EPA acted reasonably in interpreting the Clean Water Act to authorize the consideration of costs in setting technology-based pollution control standards for cooling water intake structures.\(^{137}\) Finally, in the *National Ass’n of Home Builders* case, the majority determined that the conflict between the provisions of the Endangered Species Act and the Clean Water Act rendered the provision in the Clean Water Act regarding delegation of federal water pollution permitting authority to States ambiguous.\(^{138}\)

Moving to step two, the Court upheld EPA’s decision that it was not necessary to consider the requirements of section 7(a)(2) of the Endangered Species Act when deciding whether to approve delegation of the permitting program as reasonable.\(^{139}\) While this is admittedly a very small sample, it is interesting to note that the Roberts Court’s approach in those cases runs counter to a trend suggested by academics in the mid-1990’s, when many commentators were convinced that judges were less likely to find statutes ambiguous at step one because judges were increasingly adopting a textualist approach to statutory interpretation.\(^{140}\) Under *Chevron*, if a statute is not ambiguous, there is no need to defer to the agency’s interpretation of

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\(^{135}\) See *Coeur Alaska*, 129 S. Ct. at 2474; *Entergy*, 129 S. Ct. at 1510; *Nat’l Ass’n of Home Builders*, 551 U.S. at 665–66. The final “anti-environment” *Chevron* case was also decided at step two, by all of the Justices who applied *Chevron*. The dissenting Justices and Justice Kennedy, in his concurring opinion, all found the Clean Water Act ambiguous, but the dissenting Justices would have deferred to the agency, while Justice Kennedy did not; the plurality in *Rapanos* did not apply *Chevron*. 547 U.S. at 739, 766, 788.

\(^{136}\) 129 S. Ct. at 2469–74.

\(^{137}\) 129 S. Ct. at 1505–10.

\(^{138}\) 551 U.S. at 666–68.

\(^{139}\) Id.

the statute.\textsuperscript{141} Thus, in \textit{Massachusetts v. EPA}, for example, the Court owed no deference to the agency’s interpretation of the statute.\textsuperscript{142}

While the Court did not defer to EPA in \textit{Massachusetts v. EPA}, the Roberts Court’s \textit{Chevron} decisions generally accord broad deference to agencies. In \textit{Entergy}, for instance, the majority of the Court indicated that it was appropriate to defer to EPA’s regulatory interpretation of the Clean Water Act to authorize the consideration of costs in setting technology-based pollution standards because the agency had consistently provided guidance over several decades suggesting that costs could be considered in setting pollution control standards for cooling water intake structures on a case-by-case basis.\textsuperscript{143} However, as Justice Breyer noted in dissent, it appeared that the agency considered costs in its regulation in a manner that was different from the approach it had traditionally used. Therefore, the Court should not have deferred to the “traditional” interpretation of the statute—at least without some explanation for the change in interpretation—since the traditional interpretation may have been a different interpretation than the one advanced by the agency in its regulation.\textsuperscript{144}

\textit{Coeur Alaska} is another case where the Court accorded the EPA exceedingly broad discretion.\textsuperscript{145} When the majority discussed whether the pollution standards under section 306 of the Clean Water Act applied to the discharge of fill material, the Court recognized that not only was the statute ambiguous, but the agency’s regulation was also ambiguous.\textsuperscript{146} Accordingly, pursuant to \textit{Auer v. Robbins}, which holds that an agency’s interpretation of its own regulations is entitled to deference unless it is plainly erroneous or inconsistent with the regulations,\textsuperscript{147} the Court in \textit{Coeur Alaska} deferred to a memorandum that was sent from EPA’s headquarters to its regional office indicating that the pollution standards should not be applied to the discharge of fill material into Lower Slate Lake.\textsuperscript{148} Justice Scalia wrote a separate concurrence to stress that while he agreed that the Court should defer to the agency’s interpretation, the Court was applying \textit{Auer} in a situation where the case should not apply.\textsuperscript{149} Scalia wrote that “it becomes obvious . . . that

\begin{itemize}
  \item \textsuperscript{141} \textit{Chevron U.S.A. Inc. v. NRDC}, 467 U.S. 837, 842–43 (1984).
  \item \textsuperscript{142} 549 U.S. 497, 528–32 (2007).
  \item \textsuperscript{143} 129 S. Ct. 1498, 1509–10 (2009).
  \item \textsuperscript{144} \textit{Id.} at 1515–16 (Breyer, J., dissenting).
  \item \textsuperscript{145} 129 S. Ct. 2458, 2471–72 (2009).
  \item \textsuperscript{146} \textit{Id.}
  \item \textsuperscript{147} 519 U.S. 452, 461 (1997).
  \item \textsuperscript{148} 129 S. Ct. at 2476.
  \item \textsuperscript{149} \textit{Id.} at 2479 (Scalia, J., concurring).
\end{itemize}
the referenced ‘regulatory scheme,’ and ‘regulatory regime’ for which the Court accepts the agency interpretation includes not just the agencies’ own regulations but also (and indeed primarily) the conformity of those regulations with the ambiguous governing statute, which is the primary dispute here.”150 He argued that the Court was according Chevron deference or its equivalent to informal agency guidance, which is not owed Chevron deference pursuant to the Supreme Court’s decision in United States v. Mead.151

The Court’s reasoning in Coeur Alaska also seems to be at odds with the reasoning adopted by the Court in 2006 in Gonzales v. Oregon.152 The Gonzales Court created an exception to Auer, holding that the Court does not accord such deference to an agency interpretation when the agency is interpreting a regulation that merely restates or paraphrases the statutory language.153 The Court stressed that “the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”154 As Justice Scalia’s concurring opinion stressed, the Coeur Alaska majority appeared to be giving deference to the agency’s interpretation of the statute, rather than the regulation.155

To the extent that Coeur Alaska broadens the deference owed to agencies under Auer v. Robbins, it continues a trend begun by the Roberts Court in the 2006 term in Home Builders and a case that did not involve environmental law, Long Island Care at Home, Ltd. v. Coke.156 In both of those cases, the Court accorded Auer deference to agency interpretations of regulations when the interpretations had changed over time,157 while the Court’s precedent in Gonzales v. Oregon implied that Auer deference should not be accorded to agency interpretations that change over time.158

150 Id.
151 Id. (citing United States v. Mead Corp., 533 U.S. 218 (2001)). Justice Scalia wrote that while he would prefer to overrule Mead, he was “pleased to join an opinion that effectively ignores it.” Id. at 2480.
153 Id.
154 Id.
155 Coeur Alaska, 129 S. Ct. at 2479 (Scalia, J., concurring).
Although the Roberts Court has accorded significant deference to agencies in the environmental law cases involving *Chevron* thus far, it is unclear whether the Court will accord the same level of deference to decisions made by agencies under a new presidential administration. Professors Thomas Miles and Cass Sunstein, among others, have suggested that the decisionmaking of Supreme Court Justices and lower federal court judges can be motivated by political ideology.\(^{159}\) Professors Miles and Sunstein reviewed the decisionmaking of Supreme Court Justices and federal appellate court judges in *Chevron* cases (prior to the ascension of Chief Justice Roberts to the Supreme Court) to determine whether application of the test reduced judicial policymaking.\(^{160}\) In theory, the two-step analysis should eliminate systematic differences in decisionmaking among judges along political lines, so that the rate at which judges validate agency actions should be fairly uniform and not correlated to the ideology of the judges.\(^{161}\) However, in reviewing the decisionmaking of Supreme Court Justices, Professors Miles and Sunstein found that the validation rates for Justices varied by almost thirty percentage points across the Justices.\(^{162}\) Justice Breyer validated agency decisions in 81.8% of the *Chevron* cases in the study, while Justice Thomas validated agency decisions in only 52.2% of the cases.\(^{163}\) The divergence identified in Professor Miles and Sunstein’s study is also apparent in the limited sample of *Chevron* cases decided by the Roberts Court, where Justices Ginsburg, Souter, and Stevens only voted to uphold the agencies’ decisions in one of five cases, while Justices Alito, Scalia, Roberts and Thomas voted to uphold the agencies’ decisions in four of five cases.\(^{164}\)

More importantly, at the Supreme Court level, Miles and Sunstein found that political ideology played an important role in decisionmaking.\(^{165}\) Significantly, they concluded that (1) “liberal” Justices\(^{166}\) voted to

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\(^{160}\) Miles & Sunstein, supra note 159, at 825.

\(^{161}\) See *id.* at 827–28.

\(^{162}\) *Id.* at 831.

\(^{163}\) *Id.*

\(^{164}\) Justices Ginsburg, Souter, and Stevens only voted to uphold an agency’s decision in the *Rapanos* case. Justices Alito, Roberts, Scalia, and Thomas voted to uphold the agency’s decision in *Coeur Alaska*, *Entergy*, *National Ass’n of Home Builders*, and *Massachusetts v. EPA*.

\(^{165}\) See Miles & Sunstein, supra note 159, at 825–26.

\(^{166}\) *Id.* at 832–33 (identifying Justices Stevens, Souter, Breyer, and Ginsburg as “liberal” Justices in their study, and identifying Justices Scalia and Thomas as “conservative” Justices;
validate agency decisions more often than “conservative” Justices in general;\(^\text{167}\) (2) the rate at which the Justices validated agency decisions seemed to be significantly influenced by whether the agency interpretation was “liberal” or “conservative;”\(^\text{168}\) and (3) the rate at which the Justices validated agency decisions seemed to be significantly influenced by the political party of the administration whose decisions were being reviewed.\(^\text{169}\) Miles and Sunstein concluded that “the most conservative members of the Supreme Court show significantly increased validation of agency interpretations after President Bush succeeded President Clinton . . . .”\(^\text{170}\) Time will tell whether a change in administration results in a change in deference.

3. Textualism

While the application of *Chevron* and deference to agencies has been contributing to “anti-environment” decisions in the Roberts Court thus far, the same cannot be said for textualism. In contrast to Professor Lin’s observations that the Rehnquist Court, during the 2003 term, appeared to be relying on textualism to interpret environmental statutes against their purposes,\(^\text{171}\) textualism has not played a central role in the “anti-environment” decisions of the Roberts Court.\(^\text{172}\)

As noted in the preceding section, in most of the “anti-environment” *Chevron* cases, the Roberts Court has relied on *Chevron* step two

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\(^{167}\) Id. at 823, 826, 832.

\(^{168}\) Id. at 823. Miles and Sunstein labeled decisions as “liberal” or “conservative” for purposes of the study by reference to the identity of the party challenging the decision. *Id.* at 830. For instance, if an agency decision were challenged by an industry group, Miles and Sunstein labeled the decision as “liberal.” *Id.*

\(^{169}\) Id. at 823, 827. In analyzing data for this portion of the study, Miles and Sunstein focused on the political party that was in power at the time of the Court’s decision. *Id.* at 830. While they recognized that the decisions that were being reviewed could have been made, in some cases, by a prior administration, they noted that it was appropriate to identify those cases with the administration in power at the time of the decisions because the new administration could change the agency’s position or change the litigation position after the administration came to power. *Id.*

\(^{170}\) Id. at 823. While they also noted that “liberal” Justices voted to validate agency decisions less frequently when they reviewed decisions of a republican administration than a democratic administration, the change in the validation rates was much less dramatic than the change in validation rates for the most “conservative” Justices. *Id.* at 826. Miles and Sunstein noted that “the validation rates of the conservative Justices appear more sensitive to the presidential administration.” *Id.* at 833.

\(^{171}\) Lin, *supra* note 3, at 568.

\(^{172}\) See *supra* Part II.B.2; *infra* Part III.
rather than an interpretation of the statute according to its plain meaning at step one.\textsuperscript{173} In fact, in only one of the ten cases involving statutory interpretation did the Court adopt a plain meaning interpretation of the statute that was detrimental to the environment.\textsuperscript{174}

It is significant that most of the “anti-environment” decisions have not been based on textualism, because the Supreme Court has limited the discretion of agencies to change their interpretations of statutes after the Court has concluded that the statute is unambiguous.\textsuperscript{175} Thus, if the agencies want to reverse the positions that they have taken in the “anti-environment” cases under a new administration, they would have discretion to do that, so long as the explanation for the change is reasonable.\textsuperscript{176}

While most of the “anti-environment” decisions have not been based on textualism, the Roberts Court has reached many of its “pro environment” decisions through the plain meaning approach. The Court’s textualist approach in \textit{Massachusetts v. EPA} was described in the preceding section.\textsuperscript{177} In addition, in \textit{S.D. Warren v. Maine Board of Environmental Protection}, the majority determined that the ordinary meaning of “discharge,” under the \textit{Webster’s New International Dictionary}, includes releases of water from a dam, so that the operation of the dam triggers the state review and certification procedures of the Clean Water Act.\textsuperscript{178} Similarly, in \textit{United States v. Atlantic Research}, the Court concluded that the plain meaning of section 107 of the Superfund law authorized liable parties to sue other liable parties to recover money that they had spent to clean up hazardous substance spills.\textsuperscript{179}

\section*{III. Revisiting the Critiques of Professors Farber and Lazarus}

Throughout this article, reference has been made to the “environmental law” cases of the Roberts Court. It seems appropriate at this

\begin{footnotesize}
\begin{enumerate}
\item See supra Part II.B.2.
\item See supra notes 129–31, 141–42 and accompanying text.
\item 547 U.S. 370, 375–78 (2005).
\end{enumerate}
\end{footnotesize}
time, therefore, to revisit the observations that were made by Professors Farber and Lazarus and inquire whether “environmental law” is becoming a unique area of law in the Roberts Court.

A. Revisiting Professor Farber

In his review of the Supreme Court’s environmental jurisprudence a decade ago, Professor Farber asserted that the Supreme Court had minimized its influence on the development of environmental law in several important ways: (1) by choosing to hear cases that have little precedential value because they involve insignificant issues or have peculiar facts; (2) by dismissing many cases on jurisdictional grounds and avoiding deciding cases on the merits; and (3) by resolving issues on narrow, technical grounds or deferring to agency decisions when the Court addresses the merits in environmental cases. A review of the environmental cases decided during the Roberts era suggests that some change has occurred, but not much.

As in the past, many of the Court’s environmental cases involved peculiar facts or could have limited precedential value. For instance, the Winter Court focused heavily on the importance of military readiness in its opinion, so the decision might be limited to disputes arising in similar contexts in the future. Similarly, the limitation on punitive damages in Exxon Shipping v. Baker could be limited to cases arising under maritime law. At the same time, though, the Court’s decision in Massachusetts v. EPA does not qualify as a case involving peculiar facts with limited precedential value. Likewise, in Burlington Northern and Sante Fe Railway v. United States, the Court addressed some aspects of the CERCLA contribution puzzle, which Farber chastised the Court generally for ignoring.

Regarding the Court’s preference for dismissing cases on jurisdictional grounds, the Court adopted that approach in Summers v. Earth Island Institute, finding that the plaintiffs lacked standing, and in John R. Sand & Gravel v. United States, finding that the statute of limitations barred the plaintiffs’ suit. However, the Court declined an opportu-
nity to dismiss the *Massachusetts v. EPA* case on standing grounds, and most of the environmental cases that were heard by the Roberts Court were decided on the merits.

Regarding the Court’s preference to defer to agencies and to decide cases on narrow, technical grounds, the trend noted by Professor Farber continues in the Roberts Court. As described in the prior section of this Article, the Court has frequently deferred to agencies in environmental cases under *Chevron*. Furthermore, several of the Court’s decisions have been based on narrow, technical grounds. In addition to *Winter* and *Exxon*, which are mentioned above, the Court issued a narrow decision in *United Haulers v. Oneida-Herkimer Solid Waste Management Authority*, likely limiting its reach to cases involving state-created public benefits corporations. Even in *Massachusetts v. EPA*, the Court left open the possibility that EPA could re-examine its decision and determine that it was not appropriate to regulate automobile emissions of carbon dioxide under the Clean Air Act.

**B. Revisiting Professor Lazarus**

As noted above, Professor Lazarus bases his conclusion that the Court has been indifferent, or even hostile, towards environmental law, on a review of the voting patterns of Justices in environmental cases, the identity of Justices writing opinions in environmental cases, and the nature of those opinions. As some evidence of environmental law’s standing with the Court, he noted that the Justice who wrote the greatest number of opinions in environmental cases did not write with an environmental voice or passion and that the Justice who most frequently voted in the majority in environmental cases rarely wrote majority opinions. Similar patterns exist in the Roberts Court. Justice David Souter wrote the most majority opinions in environmental cases during the Roberts term, but his opinions were quite dry and technical, with no environmental rhetoric and little discussion about the purposes or goals of the environmental laws. As in the past, Justice Kennedy continues

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188 See 549 U.S. at 526.
189 See supra notes 132–34.
191 See 549 U.S. at 534–35.
192 See supra notes 32–39 and accompanying text.
193 Justice Souter wrote the majority opinion in three cases: *Exxon Shipping Co. v. Baker*, *Environmental Defense v. Duke Energy Corp.*; and *S.D. Warren v. Maine Board of Environmental Protection*. Two of those cases, *Duke Energy* and *S.D. Warren*, were 9–0 rulings. In the third, *Exxon*, the Court ruled 8–0 that punitive damages were available, but split 5–3 on the limits
to vote in the majority in the greatest number of environmental cases, but he has written only one majority opinion out of the fourteen cases. The Justice who voted in favor of the “pro-environment” position most often, Justice Ginsburg, did not author any majority opinions.

While most of the majority opinions in environmental cases continue to lack strong environmental rhetoric or focus on the goals and purposes of environmental law, the Court’s decision in *Massachusetts v. EPA* was an exception and pro- and anti-environmental rhetoric is increasing in several dissenting and concurring opinions. In expanding standing principles for States in *Massachusetts v. EPA*, the majority spoke passionately about the harms that would be caused by emissions of greenhouse gases, including the retreat of glaciers and global sea level rise, the need to regulate motor vehicle emissions of carbon dioxide, and the real risk of “catastrophic harm” that will be caused by such emissions. Counterbalancing the majority opinion, Justice Scalia wrote a strong dissent expressing skepticism about the “asserted” harms caused by greenhouse gases and chiding the majority for adopting a definition of air pollutant broad enough to include “everything airborne, from Frisbees to flatulence.”

Justice Scalia also expressed strong “anti-environment” sentiments in his plurality opinion in *Rapanos v. United States*, describing the U.S. Army Corps of Engineers as “an enlightened despot” and criticizing the Corps for interpreting the Clean Water Act in a manner that Scalia argued authorized regulating “entire cities and immense arid wastelands” as waters of the United States, stretching the term “beyond parody.”

To the extent that an environmental voice emerged in other cases during the Roberts Term, though, it generally appeared in the “anti-environment” cases in dissent. In his dissenting opinion in *National Ass’n of Home Builders v. Defenders of Wildlife*, Justice Stevens spoke about...
the goal of the Endangered Species Act to make species protection the “highest of priorities” without exception and he lamented that the majority’s opinion “whittles away at Congress’ comprehensive effort to protect endangered species from the risk of extinction and fails to give the Act its intended effect.” Towards the end of the opinion, Justice Stevens wrote:

Mindful that judges must always remain faithful to the intent of the legislature, Chief Justice Burger closed his opinion in the “snail darter” case with a reminder that “[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.” Hill, 437 U. S., at 194. This Court offered a definitive interpretation of the Endangered Species Act nearly 30 years ago in that very case. Today the Court turns its back on our decision in Hill and places a great number of endangered species in jeopardy, including the cactus ferruginous pygmy-owl and Pima pineapple cactus at issue here. At the risk of plagiarizing Chief Justice Burger’s fine opinion, I think it is appropriate to end my opinion just as he did—with a quotation attributed to Sir Thomas More that has as much relevance today as it did three decades ago. This quotation illustrates not only the fundamental character of the rule of law embodied in § 7 of the ESA but also the pernicious consequences of official disobedience of such a rule. Repetition of that literary allusion is especially appropriate today:

“The law, Roper, the law. I know what’s legal, not what’s right. And I’ll stick to what’s legal. . . . I’m not God. The currents and eddies of right and wrong, which you find such plain-sailing, I can’t navigate, I’m no voyager. But in the thickets of the law, oh there I’m a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country’s planted thick with laws from coast to coast—Man’s laws, not God’s—and if you cut them down . . . d’you really think you could stand upright in the winds that would blow then? . . . Yes, I’d give the Devil benefit of law, for my own safety’s sake.” R. Bolt, A Man for All Seasons, Act I,
Justice Ginsburg’s dissenting opinions in *Winter v. NRDC* and *Coeur Alaska v. Southeast Alaska Conservation Council* also demonstrate a strong environmental voice. In *Coeur Alaska*, she wrote at length about the purposes and goals of the Clean Water Act, citing legislative history that suggests that the use of the waters as a waste treatment system is unacceptable, and she chastised the majority for reading the statute to allow polluters to transform waters of the United States into waste disposal facilities. She argued that “[p]roviding an escape hatch for polluters whose discharges contain solid matter . . . is particularly perverse” and criticized EPA for failing to exercise its authority to veto a permit for the fill in the case, which would cause “[d]estruction of nearly all aquatic life in a pristine lake.” In *Winter*, she wrote about NEPA’s “sweeping commitment to environmental integrity” and the need to integrate environmental concerns “into the very process of agency decisionmaking” and “into the fabric of agency planning.” In light of the goals of NEPA to afford the public and other agencies with information and an opportunity to comment, she wrote about the need to prepare an EIS at the “earliest possible time” to advance the information and participatory goals of NEPA. She described the harms that would be caused by the Navy’s use of sonar in great detail and argued that the risks “cannot be lightly dismissed, even in the face of an alleged risk to the effectiveness of the Navy’s 14 training exercises.”

Neither Justice Ginsburg’s dissent in *Burlington Northern v. United States* nor Justice Stevens’s dissent in *Entergy Corp. v. Riverkeeper* contain passionate rhetoric, but both focus on the goals and purposes of the environmental laws at issue in the case. Other than Justices Ginsburg, Stevens, and Scalia, though, none of the Justices make strong statements in favor of, or opposed to, protection of the environment in their opinions. Justice Breyer repeatedly writes concurring and dissent-

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202 *Id.* at 694–95.
205 *Id.* at 2480–83.
206 *Id.* at 2483 & n.5.
208 *Id.* (citing *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979)).
209 *Id.* at 390.
210 *Id.* at 393.
ing opinions to clarify administrative law issues, suggesting that he probably views environmental law simply as administrative law that arises in disputes involving the environment.\textsuperscript{211}

In addition to reviewing the nature of the opinions written by Supreme Court Justices, Professor Lazarus examined the voting records of the Justices in an attempt to determine whether any of the Justices appeared to be influenced, in their decisionmaking, by the environmental nature of a case.\textsuperscript{212} A review of the voting patterns of Justices in the Roberts Court in the environmental cases suggests that several Justices may be influenced by the environmental nature of the cases and that the Court may be becoming even more polarized on those issues than in the past.\textsuperscript{213}

First, it is interesting to note that Justice Stevens and Ginsburg vote in the majority on environmental cases far less frequently than they vote in the majority in other cases decided during the Roberts era.\textsuperscript{214} While Justice Ginsburg has voted in the majority between sixty-nine and seventy-five percent of the time in all cases, she has voted in the majority only forty-three percent of the time in environmental cases.\textsuperscript{215} Similarly, while Justice Stevens has voted in the majority between sixty-four and seventy-five percent of the time in all cases, he has also voted in the majority only forty-three percent of the time in environmental cases.\textsuperscript{216} At the other end of the scale, Justices Thomas and Scalia voted in the majority in environmental cases decided during the Roberts era more frequently than they vote in the majority in other cases.\textsuperscript{217}

Following up on the system created by Professor Lazarus,\textsuperscript{218} if the Justices are assigned EP scores for their voting records on environmental cases decided during the Roberts era, it appears that many of

\textsuperscript{211} See, e.g., Coeur Alaska, 129 S. Ct. at 2477 (Breyer, J., concurring) (stressing that courts should defer to an agency’s reasonable interpretation of a statute even though it may not represent the best overall environmental result); Entergy Corp. v. Riverkeeper, 129 S. Ct. 1498, 1515 (2009) (Breyer, J., concurring and dissenting) (noting that if the EPA changed its longstanding policy regarding consideration of costs in setting technology-based standards for cooling water intake structures, it must adequately explain the basis for the change); Nat’l Ass’n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644, 698 (2007) (Breyer, J., dissenting) (writing separately to note that grants of discretionary authority to agencies come with implied limits, but also to note that section 7(a)(2) of the Endangered Species Act might not apply to some unrelated agencies’ actions).

\textsuperscript{212} See supra notes 42–46 and accompanying text.

\textsuperscript{213} See supra notes 47–52 and accompanying text; see also infra app. B.

\textsuperscript{214} See infra app. D.

\textsuperscript{215} See infra app. D.

\textsuperscript{216} See infra app. D.

\textsuperscript{217} See infra app. D.

\textsuperscript{218} See supra notes 42–46 and accompanying text.
the Justices are influenced by the environmental nature of cases, as most
of the Justices have scores that are higher than sixty-six percent or lower
than thirty-three percent, the numbers at which Professor Lazarus
suggested a fair case could be made that the environmental dimension
of the case influenced their decision. On the pro-environment side,
four Justices, Ginsburg (93%), Souter (86%), Breyer (71%) and Stevens
(71%) have pro-environment scores that are higher than 66%. The
other five Justices, Alito (31%), Kennedy (36%), Roberts (36%), Scalia
(36%), and Thomas (36%) all have scores close to thirty-three per-
cent. The scores also suggest that the Court may be becoming more
polarized on environmental issues during the Roberts era. While there
were no Justices with a score over sixty-six percent in Lazarus’ study
through the 1999 Term of the Supreme Court, four Justices have
scores over sixty-six percent during the Roberts era. While there were
four Justices with scores of thirty-three percent or lower in Lazarus’
study, the remaining five Justices all have scores below or near thirty-
three percent.

On the whole, therefore, most of the criticisms that Professor Laza-
rus leveled at the Supreme Court prior to the appointment of Chief Jus-
tice Roberts can be raised with similar force to the environmental deci-
sionmaking of the Roberts Court. The final section of this article briefly
explores whether a recent change in the composition of the Court is
likely to have any impact on the Court’s treatment of environmental law.

IV. REPLACING JUSTICE SOUTER

While the composition of the Court had not changed since the
appointment of Justice Alito during the first term of the Roberts Court,
Justice David Souter retired at the conclusion of the October 2008

219 See infra app. B.
220 See Lazarus, supra note 1, at 723.
221 Infra app. B.
222 Infra app. B.
223 Lazarus, supra note 1, at 735.
224 Infra app. B.
225 Lazarus, supra note 1, at 735.
226 See infra app. B. On a positive note for the environment, the scores for several of
the Justices at the bottom of the scale are higher during the Roberts era than they were
during the period covered by Professor Lazarus’s study. Justices Kennedy, Scalia, and
Thomas’s scores have increased. Compare infra app. B. with Lazarus, supra note 1, at 727,
729, 733, Justice Kennedy’s score in Professor Lazarus’s study was twenty-five percent, while
Justice Scalia’s score was thirteen percent and Justice Thomas’s score was twenty percent.
See Lazarus, supra note 1, at 727, 729, 733.
Term. On May 26, 2009, President Obama nominated Judge Sonia Sotomayor, a judge on the United States Court of Appeals for the Second Circuit, to replace Justice Souter on the Court. Judge Sotomayor has received the support of environmental groups, but her appointment will probably not significantly change the Roberts Court’s approach toward environmental cases.

Even if she ultimately votes in favor of “pro-environment” positions in environmental cases, she will merely be replacing another Justice who voted consistently in favor of “pro-environment” positions. Justice Souter’s EP scores in Professor Lazarus’ study and during the terms of the Roberts’ Court are among the highest on the Court and he wrote the most majority opinions in environmental cases during the Roberts Court’s first four terms. He was also a frequent dissenter in the Court’s “anti-environment” decisions.

Although Judge Sotomayor’s appointment may not significantly change the nature of the Roberts Court’s treatment of environmental law, the limited data that is available suggest that she may be a strong environmental voice on the Court. While she has written very few opinions in environmental cases on the Second Circuit, she authored that court’s opinion in the Riverkeeper, Inc. v. EPA case that was reversed by the Supreme Court. Applying Chevron, her opinion concluded, at step one, that the Clean Water Act did not authorize EPA to consider cost-benefit analysis in setting pollution standards for cooling water intake structures. Significantly, the analysis focused on the purposes of the statute and legislative history to clarify the language of the statute and did not adopt a textualist approach. Ultimately, though, the

230 Lazarus, supra note 1, at 812 app. D.
231 See infra app. B.
232 See infra app. C.
234 475 F.3d 83 (2nd Cir. 2007), rev’d sub nom. Entergy Corp. 129 S. Ct. at 1498.
235 Id. at 98–99.
236 Id. at 97–101.
court concluded, at *Chevron* step two, that it was not possible to determine whether EPA had used cost-benefit analysis in setting the standards, so the court remanded to the agency to explain the manner in which it considered cost in setting the standards.  

She also joined in another decision in the Second Circuit where the court focused on legislative history and statutory purposes, rather than textualism, to interpret a statute to protect the environment. In *NRDC v. Abraham*, the court overturned the Department of Energy’s efforts to weaken energy efficiency standards for air conditioning units. Applying *Chevron*, the court concluded at step one that it was clear, based on the legislative history and purpose of the Energy Policy and Conservation Act, that the agency did not have the authority under the statute to revoke energy efficiency standards that had been published as final standards, even though the attempted revocation preceded the “effective date” of the standards.

On the “anti-environment” side of the ledger, Judge Sotomayor was part of a panel that rejected an environmental group’s challenge to EPA’s approval of New York’s plan for meeting the agency’s air quality standard for ozone in *Environmental Defense v. EPA*. Even in that case, though, the court examined the legislative history and purpose of the Clean Air Act to determine whether the agency’s decision complied with the statute. The court determined, at *Chevron* step one, that the statute was ambiguous regarding whether the scientific modeling used by New York was appropriate, and the Court concluded at step two that the agency’s interpretation of the statute to authorize the modeling used by New York was reasonable. The court stressed that in “examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.” Federalism considerations also seem to have motivated the court in this case, as the court emphasized that “the primary responsibility for meeting these [air quality] standards rests with the states” and that “states have considerable leeway in selecting the particular meth-

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237 *Id.* at 102–05.
238 355 F.3d 179, 206 (2nd Cir. 2004).
239 *Id.* at 195–97.
240 369 F.3d 193, 210–12 (2nd Cir. 2004).
241 *Id.* at 196–98.
242 *Id.* at 203–05.
243 *Id.* at 204 (quoting Baltimore Gas & Elec. Co., v. NRDC, 462 U.S. 87, 103 (1983)).
ods and programs they will use to achieve compliance with the national standards.”

Just as federalism considerations may have influenced the Second Circuit in the *Environmental Defense* case, federalism considerations influenced that court in another decision that Judge Sotomayor joined that rejected challenges brought by environmental plaintiffs. In *Burnette v. Carothers*, the court upheld the dismissal of citizen suits brought against Connecticut State officials under the Clean Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response Compensation and Liability Act, on the grounds that the claims were barred by the Eleventh Amendment immunity for States.

Thus, Judge Sotomayor’s record in environmental cases seems generally positive and her votes against environmental groups have frequently been motivated by federalism considerations. While the opinions she has written or joined lack environmental rhetoric, they focus on legislative history and statutory purposes, rather than textualism, and are generally pro-environment, suggesting that her voting pattern on the Supreme Court may more closely follow Justices Ginsburg and Stevens than Justices Scalia and Thomas.

**Conclusion**

While environmental law issues were a major focus of the Supreme Court during the October 2008 Term, very few environmental cases are on the Court’s docket for the current term. Accordingly, it may take time to assess Justice Sotomayor’s influence on the development of “environmental law” and on the outcome of environmental cases. Nevertheless, even if she were to become a strong environmental voice on the Court, it will likely have little effect on the treatment of environmental law by the Roberts Court. Although it is difficult to draw firm conclusions based on the small number of environmental law cases decided by the Roberts Court thus far, the Court’s decisions, on the whole, have generally been more harmful than beneficial to the envi-

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244 *Id.* at 197.
245 192 F.3d 52, 55 (2nd Cir. 1999).
246 The only case added to the Court’s docket for the October 2009 Term, at this time, is *Stop the Beach Renourishment, Inc. v. Florida. Department of Environmental Protection*, a case that involves littoral rights and takings. The Oyez Project, Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection, http://oyez.org/cases/2000-2009/2009/2009_08_1151 (last visited May 14, 2010).
While the Roberts Court has not been overtly hostile to the environment, it appears that a majority of the Justices are negatively motivated by the environmental nature of those cases, and that balance has not shifted with Justice Sotomayor’s replacement of Justice Souter. Like its predecessors, the Roberts Court has not generally treated “environmental law” as a separate area of law. Based on the current composition of the Court, though, that could be a good thing for the environment.

247 See supra notes 92–113 and accompanying text.  
248 See infra app. B.
### APPENDICES†

#### APPENDIX A: ENVIRONMENTAL CASES DECIDED DURING THE OCTOBER 2005–2008 TERMS

<table>
<thead>
<tr>
<th>Case</th>
<th>Major Issue</th>
<th>Affirm/Reverse</th>
<th>Pro-Environment</th>
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<tr>
<th>Case</th>
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<tbody>
<tr>
<td>United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007).</td>
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<tr>
<th>Issue</th>
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<tr>
<td>Punitive Damages</td>
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<td>Statutory Interpretation</td>
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<td>Commerce Clause</td>
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<td>Standing / Statutory Interpretation</td>
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<thead>
<tr>
<th>Circuit</th>
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<tbody>
<tr>
<td>Reversed 9th Circuit</td>
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<tr>
<td>Affirmed Federal Circuit</td>
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<tr>
<td>Reversed 9th Circuit</td>
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<tr>
<td>Affirmed 8th Circuit</td>
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<tr>
<td>Affirmed 2d Circuit</td>
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<tr>
<td>Reversed 4th Circuit</td>
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<tr>
<td>Reversed D.C. Circuit</td>
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<tr>
<td>Reversed 6th Circuit (vacated and remanded).</td>
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<tr>
<td>Affirmed Maine Supreme Court</td>
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<td>No</td>
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<td>Yes</td>
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<tr>
<td><strong>Justices’ Pro-Environment and Pro-Government Votes and Scores</strong></td>
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<td>------------------------------------------------------------------</td>
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<tr>
<td><strong>Justice</strong></td>
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</tr>
<tr>
<td>Alito</td>
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<tr>
<td>Breyer</td>
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<td>Ginsburg</td>
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<tr>
<td>62%</td>
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<tr>
<td>Justice</td>
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<tr>
<td>Roberts</td>
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<td>Scalia</td>
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<td>Souter</td>
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<td>Stevens</td>
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<tr>
<td>Thomas</td>
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## Appendix C: Environmental Opinions by Justice

<table>
<thead>
<tr>
<th>Justice</th>
<th>Majority Opinions</th>
<th>Concurring Opinions</th>
<th>Dissenting Opinions</th>
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<tbody>
<tr>
<td>Alito</td>
<td>National Assoc. of Home Builders v. Defenders of Wildlife</td>
<td>None</td>
<td>United Haulers v. Oneida Herkimer Solid Waste Authority</td>
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<td>Kennedy</td>
<td>Coeur Alaska v. Southeast Alaska Conservation Council</td>
<td>(1) Summers v. Earth Island Institute; (2) Rapanos v. United States</td>
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<tr>
<td>Roberts</td>
<td>(1) Winter v. NRDC; (2) United Haulers v. Oneida Herkimer Solid Waste Authority</td>
<td>Rapanos v. United States</td>
<td>Massachusetts v. EPA</td>
</tr>
<tr>
<td>Scalia</td>
<td>(1) Summers v. Earth Island Institute; (2) Entergy Corporation v. Riverkeeper Also authored plurality opinion in Rapanos v. United States</td>
<td>(1) Coeur Alaska v. Southeast Alaska Conservation Council; (2) Exxon Shipping Co. v. Baker; (3) United Haulers v. Oneida Herkimer Solid Waste Authority</td>
<td>Massachusetts v. EPA</td>
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<td>Souter</td>
<td>(1) Exxon Shipping Co. v. Baker; (2) Environmental Defense v. Duke Energy; (3) S.D. Warren v. Maine Board of Environmental Protection</td>
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## Appendix C: Environmental Opinions by Justice (Continued)

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<th>Concurring Opinions</th>
<th>Dissenting Opinions</th>
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</thead>
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<tr>
<td>Thomas</td>
<td>United States v. Atlantic Research</td>
<td>(1) Exxon Shipping Co. v. Baker; (2) Environmental Defense v. Duke Energy Corp.; (3) United Haulers v. Oneida Herkimer Solid Waste Authority</td>
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## Appendix D: Justices’ Frequency in the Majority in Environmental Cases as Compared to All Types of Cases for the October 2005–2008 Terms

<table>
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<tr>
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<tbody>
<tr>
<td>Alito</td>
<td>85%</td>
<td>81.0%</td>
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<tr>
<td>Breyer</td>
<td>68%</td>
<td>74.7%</td>
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<td>Ginsburg</td>
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<td>Kennedy</td>
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<td>86%</td>
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<tr>
<td>Roberts</td>
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<td>90%</td>
<td>89%</td>
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<tr>
<td>Scalia</td>
<td>93%</td>
<td>83.5%</td>
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<td>88.4%</td>
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<td>Souter</td>
<td>61%</td>
<td>68.4%</td>
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<tr>
<td>Stevens</td>
<td>43%</td>
<td>64.6%</td>
<td>75%</td>
<td>64%</td>
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<tr>
<td>Thomas</td>
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<td>75%</td>
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<td>79.4%</td>
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