

Justice Breyer's Friendly Legacy for Environmental Law

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Environmentalists did not cheer President Bill Clinton's decision in May 1994 to nominate then-First Circuit Judge Stephen Breyer to fill Justice Harry Blackmun's seat on the Supreme Court. Just the opposite. Many instead expressed serious concerns about Breyer's impact on environmental law were he to be confirmed, and openly questioned whether a Justice Breyer might be "hazardous to our health." This article considers whether, in light of Breyer's actual record over the past twenty-seven years on the Court, environmentalist concerns about Breyer at the time of his nomination were realized. The article concludes they were not. Breyer was instead friendly to environmental protection concerns even if he fell shy of being an unqualified friend on the bench. In almost all of the most important environmental cases of the past twenty-seven years, he was a reliable vote joining the majority in the big cases environmentalists won — often providing the critical fifth vote. And although Justice Breyer on a handful of occasions was less a reliable vote in dissent with liberal justices sounding the alarm in the big cases environmentalists lost, in none of those cases was his vote dispositive of the outcome. For this reason, although environmentalist concerns at the time of Breyer's nomination were reasonable, and had the potential to cause the very problems environmentalists identified, they proved largely insignificant in actual application. Finally, Justice Breyer's actual record on the Court suggests the wisdom of rethinking what it means to be a "dream" justice for environmental law. Most simply put, the best Justice for environmental law may not be a Justice who always votes in favor of the outcome favored by environmentalists in individual cases.