JUSTICE BREYER'S FRIENDLY LEGACY FOR ENVIRONMENTAL LAW

RICHARD J. LAZARUS*

ABSTRACT

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 Justice Breyer's actual record over the past twenty-seven years on the Court, environmentalist concerns about him at the time of his nomination were realized. The Article concludes they were not. Justice 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 Justice Breyer's nomination were reasonable, and had the potential to cause the very problems environmentalists identified,

* Howard J. & Katherine W. Professor of Law, Harvard Law School. I would like to thank Professors Hope Babcock, Jonathan Cannon, Bill Funk, Steph Tai, and Susannah Weaver for their terrific comments on a preliminary draft of this Article. Kathryn C. Reed, Harvard Law School Class of 2022, provided outstanding research and editorial assistance. Although it has no bearing on my analysis, for the sake of disclosure I served as counsel for either one of the parties or an amicus in the following Supreme Court cases that fall within this Article's scope of review: Dolan v. City of Tigard, 512 U.S. 374 (1994); Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302 (2002); Norfolk & Western Ry. v. Ayers, 538 U.S. 135 (2003); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95 (2004); S.D. Warren Co. v. Me. Bd. of Env't Prot., 547 U.S. 370 (2006); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009); Monsanto Co. v. Geertson Seed Farm, 561 U.S. 139 (2010); and Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

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.

TABLE OF CONTENTS

INTRODUCTION

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. While Justice Breyer had his defenders, environmentalists mostly expressed serious concerns about Justice Breyer's impact on environmental law were he to be confirmed. And some denounced him on that ground, worrying that he might be "hazardous to our health"[1]—a concern strikingly similar to that which had

1. *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 491 (1994) (statement of Ralph

been expressed a year earlier by attorneys advising President Clinton when the President had first considered Justice Breyer for a vacancy on the Court.[2] Yet, ironically, although those concerns had abruptly derailed Justice Breyer's nomination only hours before its expected announcement in 1993, they became a major reason *why* the President chose Justice Breyer over the President's first choice for the nomination in 1994. Senate Republican leaders threatened to wage an all-out campaign against the President's first choice, Secretary of the Interior Bruce Babbitt, because of his reputation as an unabashed environmentalist.[3] And that same Republican leadership promised smooth sailing if Justice Breyer were instead the nominee because Justice Breyer had expressed concern about unduly costly environmental protection requirements and therefore was perceived, unlike Babbitt, as pro-business.[4]

Justice Breyer's recent retirement from the Court after twenty-eight years[5] provides an opportune moment to reflect on his legacy for environmental law based on his actual record—as reflected in the votes he has cast and the opinions he has written. More specifically, this Article considers whether Justice Breyer's record on the Court confirms or contradicts the expectations of his supporters and detractors more than a quarter century ago.

To that end, the Article is divided into three Parts. Part I reviews the events surrounding Justice Breyer's nomination and the role that environmental law then played in securing both his nomination and confirmation. Part I includes discussion of previously undisclosed information long buried in the official archival papers of President Clinton related to the decision not to nominate Justice Breyer in 1993. Part II reviews Justice Breyer's record in environmental cases before the Court, with special emphasis on opinions he wrote in those cases, whether majority, concurring, or dissenting.

Part III considers whether, in light of Justice Breyer's actual record on the Court, environmentalist concerns—shared by some advising the White House—about Justice Breyer were realized. Although those concerns were understandable and pertained to the very problems that White House advisors and environmentalists identified in 1993 and 1994, they have

Nader) (citing the attachment Thomas O. McGarity, *Could Justice Breyer Be Hazardous to Our Health?*) [hereinafter *Breyer Confirmation Hearings*].

2. *See infra* notes 14–25 and accompanying text.

3. *See infra* notes 31–36 and accompanying text.

4. *See infra* notes 19–26 and accompanying text.

5. Letter from Justice Stephen Breyer to the President (Jan. 27, 2022), https://www.supremecourt.gov/publicinfo/press/Letter_to_President_January-27-2022.pdf [https://perma.cc/C7CF-Q7EL].

proven largely insignificant in actual application. In the vast majority of environmental law cases heard by the Court during Justice Breyer's tenure to date, Justice Breyer has both displayed heightened sensitivity to environmental protection concerns and voted in a manner sympathetic to environmentalists, without expressing any concern about environmental protection requirements being too demanding. And, in those relatively few cases in which his concern with unduly stringent environmental law was relevant to a legal issue's resolution, Justice Breyer's views made no difference to the outcome of the case, nor has he written an opinion of the Court in any of those cases, instead at most writing a separate concurring opinion of no legal effect. In only one relatively unimportant case that defied application of liberal or conservative ideology did he ever supply the decisive fifth vote against environmentalists,[6] likely because the Court has been consistently dominated by at least five more conservative Justices ever since he joined the bench.

I. WHITE HOUSE ADVISOR CONCERNS AND ENVIRONMENTALIST OPPOSITION TO JUSTICE BREYER'S NOMINATION

President Clinton's decision to nominate then–First Circuit Judge Breyer to fill Justice Harry Blackmun's seat in May 1994 was remarkable because only one year earlier, the President had decided at the last minute *not* to nominate Judge Breyer to fill Justice Byron White's seat on the Court. In June 1993, Judge Breyer had been the expected nominee, bolstered by the strong support of Massachusetts Senator Ted Kennedy.[7] But in what was dubbed by the *New York Times* as "A Surprise Choice," Clinton instead tapped D.C. Circuit Judge Ruth Bader Ginsburg to fill the opening.[8]

According to press accounts at that time, Judge Breyer's nomination stumbled in the final day and hours because of reports that he had failed to pay Social Security taxes on the wages of a part-time housekeeper.[9] Judge Breyer's problem was an especially sensitive one for the White House because the President had recently suffered repeated embarrassment when his two successive choices to serve as the first female Attorney General were abandoned because of problems with their domestic household employees: the first had reportedly failed to pay taxes for a childcare provider and the

6. *See infra* note 108.

7. Richard L. Berke, *Judge in Boston Is Called Likely for High Court,* N.Y. TIMES, June 11, 1993, at A1.

8. Richard L. Berke, *A Surprise Choice—President Hails Judge as Force for Consensus and Rights Pioneer*, N.Y. TIMES, June 15, 1993, at A1.

9. Richard L. Berke, *Favorite for High Court Failed to Pay Maid's Taxes*, N.Y. TIMES, June 13, 1993, at 1.

other had failed to inform the White House that she had once hired an illegal alien as a household employee (although, in her defense, that hiring was not itself unlawful when it occurred).[10] And, as much as the Clinton White House sought to distinguish Judge Breyer's circumstances, the specter of excusing conduct from a man that resembled conduct that had only recently derailed two female cabinet picks apparently cratered Judge Breyer's nomination.[11] Judge Breyer also reportedly interviewed poorly with the President not long before Ginsburg was announced—which Judge Breyer's supporters blamed on painkillers he was taking while recovering from a serious bicycle accident for which he had recently been hospitalized.[12]

But what was not reported at the time is that White House concerns about Judge Breyer were also substantive in nature.[13] In early June 1993, White House Counsel Bernie Nussbaum asked Joel Klein, a highly skilled and trusted D.C. private sector attorney, to conduct a confidential review of both Judges Ginsburg and Breyer to assist the President's decision. Over the course of just a few days, Klein orchestrated detailed reviews of the record of both judges by forty lawyers at six law firms. And Klein provided Nussbaum a comparative analysis of the two judges in memos dated June 10 and June 11[14]—precisely the time period when President Clinton pivoted away from Judge Breyer in favor of Judge Ginsburg, whose Senate confirmation Klein then championed in his new role as Deputy White House Counsel.[15]

The reviews were devastating to Judge Breyer's prospects. As summarized by Klein to Nussbaum, "Judge Ginsburg more closely meets the President's articulated standards for the Supreme Court than does Judge

10. *Id.*; Richard L. Berke, *Judge's Friends Try to Save Candidacy for High Court*, N.Y. TIMES, June 14, 1993, at A11.

11. Berke, *supra* note 9.

12. Berke, *supra* note 10; Richard L. Berke, *President Has First Meeting with High Court Candidate*, N.Y. TIMES, June 12, 1993, at 10; Berke, *supra* note 8.

13. In 2014, the Clinton Presidential Library released several hundred pages of previously undisclosed documents regarding the nominations of Ruth Bader Ginsburg and Stephen Breyer to the Supreme Court. *See* Robert Barnes, *Clinton Library Release of Papers on Ginsburg, Breyer Nominations Offer Insight, Some Fun*, WASH. POST (June 8, 2014), https://www.washingtonpost.com/politics/clinton-library-release-of-papers-on-ginsburg-breyer-nominations-offer-insight-some-fun/2014/06/08/3aac9276-ed8d-11e3-9b2d-114aded544be_story.html [https://perma.cc/NXH6-G952].

14. Draft Memorandum from Joel Klein to Bernard Nussbaum, Counsel to the President on Judge Breyer's Opinions and Legal Scholarship (June 10, 1993), https://clinton.presidentiallibraries.us/items/show/14693 [https://perma.cc/95AQ-66Y7] [hereinafter Klein-Nussbaum Draft Breyer Memo]; Memorandum from Joel Klein to Bernard Nussbaum, Counsel to the President on Judge Ginsburg's Opinions and Legal Scholarship (June 11, 1993), https://clinton.presidentiallibraries.us/items/show/14693 [https://perma.cc/5LDG-VGHD] [hereinafter Klein-Nussbaum Ginsburg Memo].

15. Ronald J. Ostrow, *Joel Klein,* L.A. TIMES (Apr. 12, 1998), https://www.latimes.com/archives/la-xpm-1998-apr-12-op-38666-story.html [https://perma.cc/9S4L-4AWP].

Breyer."[16] Her "work has more of the humanity that the President highly values and fewer of the negative aspects that will cause concern among some constituencies."[17] "She has written more, and consistently, about the human condition and the plight of the disadvantaged, and she has done so with obvious conviction and commitment."[18] In a draft memo to Nussbaum on Judge Breyer, while describing Judge Breyer as "a brilliant jurist" with "the potential to rank with the most distinguished judges in our past,"[19] Klein also described the "dispassionate" nature of his writing and how "he does not wear his heart on his sleeve."[20] Klein added that Judge Breyer's views on government regulation such as environmental risk regulation were "conservative" and in a recent book he authored on risk regulation, he had proposed "a government-wide cost/benefit approach" akin to what Republicans then favored and to those regulatory reforms supported by the prior presidential administration.[21]

Those attorneys who reviewed Judge Breyer's writings for Klein stressed Breyer's apparent lack of sensitivity to the human stakes of economic regulation and environmental protection requirements. In one memo dated June 8, and sent to Klein on June 9, two reviewers described the "bloodlessness" evidenced by Judge Breyer's penchant for "analyz[ing] every problem he is considering within a framework [so] bounded by economic theory or rules of logic that the result seems devoid of emotion and even . . . humanity."[22] The reviewers harshly contrasted Breyer's writings with those of Bruce Babbitt—the candidate favored by environmentalists who was then serving as Secretary of the Interior—which were described as "lucid, exuberant and wide-ranging."[23] A second memo, prepared on June 7, similarly described Judge Breyer as a "cold fish," "bring[ing] no passion or insight" and as so "lack[ing] of vigor in his jurisprudence that one suspects he does not have (or refuses to utilize) any innate sense of justice."[24] The memo concluded that Judge Breyer was "certainly a judicial conservative" and "[c]onservatives will be thrilled if

16. Klein-Nussbaum Ginsburg Memo, *supra* note 14, at 4.
17. *Id.* at 5.
18. *Id.* at 1.
19. Klein-Nussbaum Draft Breyer Memo, *supra* note 14, at 1.
20. *Id.*
21. *Id.* at 6.
22. Memorandum from Jim Hamilton to Joel Klein 1, 3 (June 8, 1993), https://clinton.presidentiallibraries.us/items/show/14693 [https://perma.cc/QC5W-J84V] [hereinafter Hamilton-Klein Breyer Memo].
23. *Id.* at 3.
24. Memorandum from Tom Perrelli and Ian Gershengorn to Joel Klein, Judge Breyer's Civil Rights, Privacy and National Security Opinions, 1–2, 8 (June 7, 1993), https://clinton.presidentiallibraries.us/items/show/14693 [https://perma.cc/QC5W-J84V] [hereinafter Perrelli-Gershengorn-Klein Breyer Memo].

Judge Breyer is appointed. . . . Nothing in Judge Breyer's opinions suggests that he would be a great Supreme Court Justice."[25] "In no way is he a 'man of the people,' as some other candidates have been."[26]

These concerns had a clear impact. Then-Associate White House Counsel Ron Klain made an explicit reference to the concern in his June 11, 1993, memorandum to White House Counsel that listed the questions that the President could ask Judge Breyer in their interview.[27] One question asked Judge Breyer to respond to the claim that his "writings suggest an over-emphasis on economics: putting a cost on lives, for example."[28] Another question more pointedly asked him to "respond to the criticism that his opinions are 'bloodless.' "[29] President Clinton's interview with Judge Breyer that same day did not go well,[30] and a few hours later, Klein called Judge Ginsburg to let her know she should be available for a meeting with President Clinton. She met with the President two days later, Sunday, June 13, and the President called her later that same night to offer her the job.[31]

What resurrected Judge Breyer's prospects a year later and secured President Clinton's nomination was the President's desire to avoid a Senate confirmation battle. Clinton's apparent first choice in 1994, as it had first been in 1993, was Bruce Babbitt.[32] Liberals in the Democratic Party strongly endorsed Babbitt, as did environmentalists, in 1994 because of his progressive views and his championing of environmental protection causes both as Governor of Arizona and Interior Secretary.[33] Indeed, environmentalists had a year earlier been so enthusiastic about Babbitt that some had actually opposed his nomination to the Court to replace Justice White because they did not want to lose his leadership at Interior—in

25. *Id.* at 9.

26. *Id.* at 2. When this memo was released for the first time in June 2014, its two co-authors, Tom Perrelli and Ian Gershengorn, quickly and easily acknowledged they had been completely mistaken. They were second- and first-year law firm associates at the time, and Perrelli commented, "That shows why you shouldn't have second-year associates evaluating Supreme Court nominees." Gershengorn noted that Breyer has been "a terrific justice" and, quoting the baseball manager Earl Weaver, "It is what you learn after you know it all that counts." Both Perrelli and Gershengorn served in high-ranking positions in the Justice Department during the Obama administration—Gershengorn as Solicitor General. Barnes, *supra* note 13.

27. Memorandum from Ron Klain to Berrnie Nussbaum on Areas of Discussion for the President (June 11, 1993), https://clinton.presidentiallibraries.us/items/show/14734 [https://perma.cc/WHG9-UXDY].

28. *Id.* at 1.

29. *Id.*

30. Neil Lewis, *As Political Terrain Shifts, Breyer Lands on His Feet*, N.Y TIMES, May 15, 1994, at 1.

31. RUTH BADER GINSBURG, MY OWN WORDS 177–82 (2016).

32. Thomas L. Friedman, *Latest Version of Supreme Court List: Babbitt in Lead, 2 Judges Close Behind*, N.Y. TIMES, June 8, 1993, at A20.

33. Ron Fournier, *Babbitt One of Three Court Favorites*, ARIZ. DAILY SUN, May 11, 1994, at 2.

retrospect a decision they may well regret.[34]

But it was that same environmentalist enthusiasm for Babbitt that ended up sinking his possible nomination to replace Justice Blackmun in 1994. When the White House let leak to the news media that the President had settled on Babbitt and would announce his nomination shortly,[35] Republican Senate leadership preemptively announced that they would vigorously oppose Babbitt—because of his reputation as an ardent environmentalist.[36] Simultaneously, the Republican Senate minority leader, Senator Bob Dole, predicted "smooth sailing" were President Clinton to nominate Judge Breyer instead.[37] The President blinked, and Judge Breyer became the nominee. Judge Breyer also overcame Clinton's earlier doubts, upon meeting him a summer before, that he lacked energy, by literally taking a run with the President along the Capital Mall to establish his physical stamina for the job.[38] The White House's concerns of a year earlier, regarding his lack of humanity and affinity for regulatory reform, apparently disappeared—these qualities had been transformed from a political liability into a political virtue.

Most liberal Democrats in Congress muted their displeasure with the Judge Breyer choice, presumably to avoid breaking publicly with their own President, following twelve years of Republican administrations. But some of the more progressive Democrats and hardcore environmentalists did not shy away from sharply criticizing the nominee, revealing their obvious frustration that the President had let pass a potentially historic opportunity to

34. *See* Berke, *supra* note 8; Friedman, *supra* note 32; Thomas L. Friedman, *The 11th-Hour Scramble—After Hoping for a "Home Run" in Choosing a Justice, Clinton May Be Just Home Free*, N.Y. TIMES, June 15, 1993, at A1.

35. Gwen Ifill, *President Is Said to Pick Babbitt for Court Despite Senate Concern*, N.Y. TIMES, May 11, 1994, at A1.

36. *Id.*

37. Gwen Ifill, *Pragmatic Jurist—Bipartisan Support Seen as Clinton Sidesteps Risky Senate Fight*, N.Y. TIMES, May 14, 1994, at 1.

38. Lewis, *supra* note 30. Judge Richard Arnold of the United States Court of Appeals for the Eighth Circuit had also been an early favorite to receive the nomination in 1994, but his nomination faltered after President Clinton learned from the judge that he had recently been treated for a cancer diagnosis. The President's interest in Judge Arnold had been so keen that he even contacted the judge's own doctors to learn more about the judge's prognosis, preferring to appoint a Justice who could serve on the Court for many years. *Id.*; Neil A. Lewis, *Richard S. Arnold, 68, Judge Once Eyed for Supreme Court, Dies*, N.Y. TIMES, Sept. 25, 2004, at B9. Some environmental law professors at the time wrote a letter in support of Judge Arnold, rooted in the judge's writings and National Environmental Policy Act litigation he performed in the early 1970s for the then-new public interest organization the Environmental Defense Fund. *See* William Funk, *Justice Breyer and Environmental Law*, 8 ADMIN. L.J. AM. U. 735, 735 & n.2 (1995) (citing to a letter in support of Judge Arnold from thirty-three law professors to President Bill Clinton); *Summary & Comments Article in This Issue: "Substantive Rights Under NEPA," by Richard S. Arnold*, 3 ENV'T L. REP. 10069, 10079 (1973) (describing Richard Arnold "[a]s an attorney who has brought several NEPA suits for the Environmental Defense Fund"). Arnold also published an article in the Environmental Law Reporter on the substantive right to environmental quality under the National Environmental Policy Act. *See* Richard S. Arnold, *The Substantive Right to Environmental Quality Under the National Environmental Policy Act,* 3 ENV'T L. REP. 50028 (1973).

have an acclaimed environmentalist join the High Court.[39]

The focus of their criticism was a common theme evident in Judge Breyer's scholarship, work experience, and judicial opinions in favor of reform of excessively burdensome regulations. These were the same concerns that advisors to the White House had stressed in 1993. As counsel to the Senate Judiciary Committee, on leave from Harvard Law School in the late 1970s, Breyer had worked effectively in a bipartisan fashion with both Democrats and Republicans in support of legislation that deregulated the airline industry. He favored such deregulation on the ground that regulation imposed unnecessary costs on industry and impeded the operation of free market forces that could on their own lead to better products and services for lower prices than burdensome government regulation might achieve.[40]

Indeed, Breyer had so impressed Senate Republicans with his support of regulatory reform that they endorsed President Carter's nomination of Breyer to serve on the First Circuit even though that nomination occurred on November 13, 1980—a time when a nomination for a life-tenured position should have been dead on arrival in Congress. After all, the date of the nomination was only nine days after Carter had lost the Presidency to Ronald Reagan and the Democrats had lost the Senate to the Republicans. Confirming Breyer to the First Circuit during a congressional lame duck session would accordingly mean the elimination of an important federal appellate court vacancy that would otherwise have been available for a Republican President and Republican Senate to fill a couple months later. Yet, because of Senator Kennedy's clout and significant Republican leadership support for Breyer, rooted in his work on regulatory reform as a Senate staffer, Breyer was confirmed as a federal appellate judge less than a month later in December 1980.[41]

As an appellate judge, moreover, Judge Breyer continued to be a proponent of regulatory reform, including for environmental protection rules. In both his judicial rulings and his extra-judicial writings, Judge Breyer expressed concern about the possible harm caused by irrational environmental regulations with compliance costs that far exceeded their

39. Neil A. Lewis, *In a Sea of Praise, Discouraging Words*, N.Y. TIMES, May 16, 1994, at A10.

40. Joan Biskupic, *Breyer: Pragmatic Lawyer and Judge*, WASH. POST (June 27, 1994), https://www.washingtonpost.com/archive/politics/1994/06/27/breyer-pragmatic-lawyer-and-judge/90acd981-f9b6-452b-8c57-ef013b2b5549 [https://perma.cc/8LQS-ADFD].

41. David Rogers, *New England in Washington: The Politics Behind N.E. Judgeship*, BOS. GLOBE, Nov. 30, 1980; Richard H. Stewart, *Profile in the News: They Call Him a Natural for Federal Bench*, BOS. GLOBE, Dec. 10, 1980; Martin Tolchin, *Bill to Strengthen Fair Housing Act Killed as Senate Cloture Vote Fails*, N.Y. TIMES, Dec. 10, 1980, at B8 (reporting on Judge Breyer's confirmation to First Circuit following vote of eighty to ten to defeat an attempted filibuster).

benefits.

One of Judge Breyer's most prominent opinions for the First Circuit was *United States v. Ottati & Goss*, in which the court upheld a trial court ruling that had rejected the proposed remedy by the Environmental Protection Agency ("EPA") to clean up a hazardous waste site on the ground that the public health benefits did not warrant the high cleanup costs.[42] The ruling was remarkable at the time because it was so unusual for a court not to defer to EPA's judgment about the extent of cleanup needed to reduce risks from hazardous wastes. Although the force of Judge Breyer's opinion for the First Circuit was a bit muted because the appellate court was simply affirming the trial court's ruling against EPA—concluding that "[w]e cannot say that the district court was 'clearly erroneous' or unreasonable"[43]—his opinion seemed to join the lower court in ridiculing EPA's decision to base its cleanup remedy on the proposition that a child would eat contaminated soil over a sustained period of time.[44] And, while declining to impose sanctions on EPA, Judge Breyer's opinion gratuitously took the occasion to "wonder about the government's priorities in the face of other, apparently more serious, environmental demands for 'cleanup' time and effort."[45]

Judge Breyer, moreover, did far more than just author the opinion. Outside of his judicial role, he trumpeted its policy themes regarding how environmental risks should be regulated. He used the *Ottati & Goss* case as the basis for his 1992 Oliver Wendell Holmes Lectures at Harvard Law School, which he then published as a book entitled *Breaking the Vicious Circle: Toward Effective Risk Regulation* the following year.[46] In that book, Judge Breyer identified why and how government regulation of risks, including environmental risks, had a tendency to require excessive expenditures to reduce the "last ten percent" of risks,[47] here too referring to the facts of the *Ottati & Goss* case as an illustrative example.[48] Judge Breyer more broadly proffered the question whether determining the acceptable level of environmental risk was best answered by a political process vulnerable to accommodating the public's tendency to overreact to environmental risks. And, answering his own question, Judge Breyer concluded that such public policy questions were better answered by expert, technical agencies removed from the pressure of politics and popular

42. United States v. Ottati & Goss, 900 F.2d 429, 444–45 (1st Cir. 1990).
43. *Id.* at 442.
44. *Id.*
45. *Id.* at 445.
46. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993).
47. *Id.* at 11.
48. *Id.* at 11, 40.

opinion.[49]

What simultaneously made Judge Breyer's book so popular with the Republican Party and regulated business and so unpopular with Democratic Party progressives and environmentalists was its embrace of the rhetoric of regulatory reform. Regulatory reform had in fact been an express and significant part of the agenda of the administration of President Jimmy Carter and EPA when Judge Breyer first endorsed it in his work at the Senate in 1980.[50] Regulatory reform then was a more benign political issue, and it enjoyed support on both sides of the political aisle. In March 1978, President Carter issued an executive order, developed in part by EPA leadership, that sought to "reform" the process for developing "significant regulations" in order to eliminate regulations that "impose unnecessary burdens on the economy."[51] Political appointees at EPA during the Carter administration favored opportunities to employ economic analysis to ensure that the Agency was directing its limited resources to the most serious environmental issues and taking advantage of market incentives to reduce pollution in general.[52] The Reagan administration announced from the outset that it would similarly champion a regulatory reform agenda that took more account of the costs of environmental protection.[53]

But by 1993, the term "regulatory reform" had become a highly partisan term, tainted by efforts during three Republican administrations to cut back on environmental protections under the guise of cost-benefit analysis and economic efficiency. Reagan administration officials at the Office of Management and Budget and EPA used the rhetoric of regulatory reform and cost-benefit analysis but in a wholly skewed fashion to justify deregulation based on exaggerated estimates of regulatory costs coupled with underassessments of the benefits of environmental protection.[54] Environmentalists vehemently opposed those efforts.[55] Even prominent supporters of President Reagan openly commented at the time that his environmental appointees had so bungled the regulatory reform effort that they had undermined it. The President's own chair of the Council of

49. *Id.* at 59–81.

50. U.S. EPA, OPA-114/8, 1978 REPORT: BETTER HEALTH & REGULATORY REFORM (1979) [hereinafter EPA 1978 REPORT].

51. Exec. Order No. 12,044, 43 Fed. Reg. 12,661, §§ 1–2, (Mar. 24, 1978); *see also* EPA 1978 REPORT, *supra* note 50, at 10.

52. RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 103–04 (2004).

53. Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 MD. L. REV. 253, 261 (1986); LAZARUS, *supra* note 52, at 99–101.

54. McGarity, *supra* note 53, at 260–68; LAZARUS, *supra* note 52, at 101–06.

55. McGarity, *supra* note 53, at 268–73; LAZARUS, *supra* note 52, at 101–06.

Economic Advisors, a stalwart champion of regulatory reform, publicly declared: "We will be lucky if by January 1985, we are back where we were 1981 in terms of the public's attitude toward" regulatory reform.[56]

That is why Judge Breyer's promotion of regulatory reform rhetoric in his 1993 book set off alarm bells throughout the environmental community, and to those reviewing his writings for the White House Counsel in 1993, to a degree that would not have happened in the late 1970s during the Carter administration. But, in light of how much the political debate had shifted since 1980 when Breyer was working on deregulation on the Senate Judiciary Committee, his 1993 publication was either politically tone-deaf or deliberately designed to position Judge Breyer for promotion as a justice with bipartisan support. With Judge Breyer, the former is a distinct possibility. However, whatever the actual motivation, the publication of Judge Breyer's book coincided with the openings of two seats on the Supreme Court in successive years and played a central role in whether he would be nominated and confirmed.

Republicans and the business community became his cheerleaders while environmentalists expressed serious concerns. The latter's criticism could be scathing. "[I]t is clear that [Judge Breyer] is no fan of health and environmental regulation."[57] If he "had been a member of Congress, he would not have supported many of the current health and environmental statutes."[58] They accused him of blithely accepting the economic analysis of right-wing think tanks to belittle the risks addressed by government regulation,[59] minimizing "the risks posed by toxic chemicals in the environment,"[60] "reject[ing] a policy of erring on the side of safety . . . because it leads society to spend too many dollars chasing after what he believes to be trivial risks,"[61] failing to recognize the limits of cost-benefit analysis,[62] and of "even accept[ing] the highly dubious 'richer is safer' argument against stringent regulation of activities that pose health and safety regulations."[63]

Consumer advocate Ralph Nader pulled no punches in testifying against Judge Breyer's confirmation. Nader described Judge Breyer as an

56. LAZARUS, *supra* note 52, at 100–05.

57. *Breyer Confirmation Hearings*, *supra* note 1, at 495 (statement of Ralph Nader) (citing the attachment Thomas O. McGarity, *Could Justice Breyer Be Hazardous to Our Health?*).

58. *Id.* at 502.

59. *Id.* at 496.

60. *Id.*

61. *Id.* at 499.

62. *See id.* at 500–01.

63. *Id.* at 501.

"extremist."[64] According to Nader, Judge Breyer was "ridden with fantasy" and "insensitive on the ground to the health and safety needs of the American people."[65] Judge Breyer, Nader concluded, "appears to seriously question many health and safety laws that he will be expected to interpret impartially as a Justice of the Supreme Court."[66]

There were, of course, supporters too. The renowned scholar Professor Cass Sunstein, a close professional colleague of Judge Breyer, casebook co-author, and the leading legal scholar in support of the central role of cost-benefit analysis for rational regulation, testified in favor of Judge Breyer's nomination.[67] More moderate legal academics contended that Judge Breyer would be a "friend" to environmental law and that, even though "in sheer numbers, his rulings against environmental groups probably exceed his rulings in their favor"—only because they lose most of their cases—the judge "ha[d] shown a sensitivity and appreciation for environmental issues."[68]

Only one environmental public interest organization affirmatively supported Judge Breyer's nomination—the Conservation Law Foundation, headquartered in Massachusetts—perhaps because of his favorable ruling in a case they had brought to clean up Boston Harbor, because of geographic allegiance to Judge Breyer, or perhaps even more likely, because of institutional loyalty to his principal political sponsor, Massachusetts Senator Ted Kennedy.[69] But even that organization's letter was noticeably understated. It was only two paragraphs long and addressed merely "To Whom It May Concern."[70] The most the organization's director could muster in his opening sentence was that "Stephen Breyer has fashioned a remarkable record on environmental matters that have come before the First Circuit Court of Appeals."[71] The word "remarkable," is, of course, itself remarkable for what it does not say in a letter that purports to be an endorsement.

During his own Senate testimony, Judge Breyer plainly sought to

64. *Id.* at 470 (statement of Ralph Nader).
65. *Id.*
66. *Id*. at 477 (statement of Ralph Nader).
67. *Id.* at 577–78 (statement of Cass R. Sunstein).
68. Funk, *supra* note 38, at 736, 745.
69. *Breyer Confirmation Hearings*, *supra* note 1, at 130 (statement of Sen. Edward M. Kennedy) (citing the attachment Letter from Douglas I. Foy, Executive Director, Conservation Law Foundation, Boston, Mass. (June 30, 1994)) (supporting Judge Breyer's nomination to the Supreme Court); *United States v. Metro. Dist. Comm'n*, 930 F.2d 132 (1st Cir. 1991) (upholding a district court order that the Commonwealth of Massachusetts, to remedy violations of the Clean Water Act that had polluted Boston Harbor, was barred from hooking up new sewer lines emptying into the harbor until the state provided its Water Resource Authority the power to acquire a suitable landfill site to avoid such continuing pollution).
70. *Breyer Confirmation Hearings*, *supra* note 1, at 130 (Letter from Douglas I. Foy).
71. *Id.*

assuage concerns by walking back from the deregulatory import of some of his writings. While conservative Republican Senator Strom Thurmond stressed how he "was pleased to learn of [Judge Breyer's] concerns with excessive regulation,"[72] Judge Breyer asserted that the "role of economics" was necessarily "much more limited" in application to "health, safety, and the environment . . . because, there, no one would think that economics is going to tell you how [much] you ought to spend helping the life of another person."[73] He also characterized the book as "a plea . . . not to cut back by 1 penny this Nation's commitment to health, safety, and the environment" but only to "reorganize[e] that commitment" to ensure that money was spent on saving real lives rather than "on the statistical life that might not exist."[74]

The Senate voted overwhelmingly in favor of Judge Breyer's confirmation to join the Court.[75] Eighty-seven senators voted in favor, only nine were opposed, and four did not vote.[76] And the only votes opposed were a smattering of conservative Senate Republicans.[77] No liberal Democrat opposition challenged their own President's nominee notwithstanding any misgivings they might have harbored.[78]

II. JUSTICE BREYER'S RECORD IN ENVIRONMENTAL LAW CASES BEFORE THE COURT

Justice Breyer's environmental law record consists of his votes in individual cases and his written opinions in a subset of those cases. During the past twenty-eight years on the Supreme Court, Justice Breyer has written more than five hundred opinions: (1) about two hundred opinions for the Court; (2) approximately one hundred concurring opinions; (3) just shy of two hundred dissenting opinions; and (4) approximately thirty opinions dissenting and concurring in part.[79]

The Justice has written relatively few opinions in environmental cases, mostly for the straightforward reason that the Court does not decide that many environmental cases. Environmental law is, at least numerically, a

72. *Id.* at 140.
73. *Id.* at 128.
74. *Id.* at 308.
75. Helen Dewar, *Breyer Wins Senate Confirmation to Top Court, 87 to 9*, WASH. POST (July 30, 1994), https://www.washingtonpost.com/archive/politics/1994/07/30/breyer-wins-senate-confirmation-to-top-court-87-to-9/762b763f-f95f-46de-8f8a-fd6dc567b54a [https://perma.cc/W9AE-W8P6].
76. *Roll Call Vote 103rd Congress—2nd Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1032/vote_103_2_00242.htm [https://perma.cc/TS5W-Y8EH].
77. *See id.*
78. *Id.*
79. *See Writings by Justice Breyer*, LEGAL INFO. INST., https://www.law.cornell.edu/supct/justices/breyer.dec.html [https://perma.cc/D98H-6V3T].

relatively small part of the Court's docket so long as one defines "environmental law" more narrowly as I am doing for the purposes of this inquiry.

My narrower approach considers only those cases that arise in a fact pattern in which environmental protection concerns are at stake and those stakes are not wholly incidental to the legal issue raised. That definition sweeps in both cases involving the construction and application of classic environmental laws like the National Environmental Policy Act[80] as well as those cases involving general cross-cutting legal issues such as the scope of congressional commerce authority in a case where environmental protection is at stake. A broader, and perfectly fair contrary approach would be to consider all cases that raise legal issues that, although not arising in an environmental protection setting in the case then before the Court, are likely to have significant implications in future cases that do.[81] Consistent, however, with the author's belief that there is a discernible "environmental" dimension to environmental law that is important for judges (and Justices) to consider,[82] this Article relies on the narrower definition instead.

Based on that narrower definition, I have identified sixty-three "environmental law cases" decided by the Court during Justice Breyer's tenure to date, in which he participated in sixty-one due to his recusal in two cases in which his brother, also a federal judge, participated in the case in the lower courts. This subset of cases fulfilled two conditions: (1) each case raised legal issues in the environmental protection context; and (2) that context was not wholly incidental to the legal issue being considered by the Court.[83] For instance, I excluded from my sample a case like *Alaska v. United*

80. 42 U.S.C. §§ 4321–4347.

81. A clear example is a case like *United States v. Lopez*, 514 U.S. 549 (1995), a Court ruling involving the scope of congressional Commerce Clause authority. The *Lopez* case itself raised the question whether a federal firearms law exceeded Congress's authority under the Commerce Clause, *id.* at 552, but the Court's decision has clear implications for the reach of other federal laws such as the Endangered Species Act and the Clean Water Act. The same is true for the Court's decisions on a host of other wide-ranging legal issues that cut across many fact patterns, including those implicating environmental protection. A Supreme Court decision on standards of judicial review in interpreting statutes or regulations, the rules of civil procedure, limits on corporate liability, Article III standing, among myriad others, are naturally not confined to the fact patterns in which they arise. Nor, in the vast majority of circumstances, could they be or should they be for those Court rulings to be coherent.

82. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 U.C.L.A. L. REV. 703, 744–63 (2000); LAZARUS, *supra* note 52, at 16–42. *But see* Jay Wexler, *The (Non)Uniqueness of Environmental Law*, 74 GEO. WASH. L. REV. 260 (2006).

83. *See infra* Appendix A. My database does not include original action equitable apportionment cases involving the allocation of water rights between states. A very strong argument could be made for inclusion of those cases. The only reason I did not do so was, correctly or incorrectly, I did not include them in my original 2000 database, and I decided it was best to be consistent for comparative purposes over time. In all events, those cases amount to a very small percentage of the cases and are unlikely to have any significant impact on the resulting statistics or the accompanying analysis.

States,[84] a 2005 original action case in which the State of Alaska and the United States were disputing ownership over certain submerged lands in Glacier Bay. I also excluded the Court's recent decision in *BP P.L.C. v. Mayor of Baltimore*,[85] concerning the scope of judicial review of a district court ruling not to allow removal of a state court case to federal court. In neither of those cases, or those like them, do the environmental stakes play any non-incidental role in the Court's resolution of the legal issue to be decided.[86] But I included cases like Article III standing and regulatory takings cases because, as I have elaborated in previous scholarship,[87] the environmental dimension of those cases should bear on the application of the relevant legal standards even if, as described below, individual Justices and sometimes a majority of the Justices too often fail to grasp its relevance.

A. JUSTICE BREYER'S VOTES

In 2000, I published an article that tried to develop a rough quantitative basis for comparing how individual Justices voted in environmental law cases and for assessing whether certain Justices and the Court as a whole were more or less responsive to the need for environmental protection. The article argued more broadly in support of the thesis that there was a uniquely "environmental" dimension to environmental law relevant to judicial decision making—for instance, how such concerns might provide a proper basis for rethinking what constitutes a "concrete injury" for Article III standing purposes, a "property right" in natural resources for regulatory takings purposes, an "intelligible principle" for nondelegation doctrine purposes, an "economic activity" in Commerce Clause analysis, or the degree of judicial deference owed a federal agency in both technical assessments and statutory interpretations.[88] While concluding that the Court overall had displayed "apparent apathy or even antipathy towards environmental law,"[89] I concluded that some individual Justices had shown more sensitivity than others to how environmental protection concerns could be relevant to how the legal issues before the Court should best be decided.[90]

My 2000 analysis relied on a scoring system somewhat analogous to that employed by the League of Conservation Voters in scoring members of

84. Alaska v. United States, 545 U.S. 75 (2005).

85. BP P.L.C. v. Mayor of Baltimore,141 S. Ct. 1532 (2021).

86. Unsurprisingly, whether the legal issue is "incidental" to the environmental protection concerns is a judgment call, and there are close cases. As a general matter, if it was close, my tendency was to include the case.

87. Lazarus, *supra* note 82, at 749–52.

88. *Id.* at 744–63.

89. *Id.* at 703.

90. *Id.* at 721–34.

Congress on environmental matters,[91] but now applied to each Justice. A Justice was awarded one point for each outcome that I classified as "pro-environmental protection," resulting in each Justice receiving an "EP score," based on the percentage of pro-environmental votes the Justice cast out of those in the sample of environmental cases in which that Justice participated. Although nominally quantitative in its ultimate yield, I freely admitted at the time the "inevitabl[e] arbitrariness and sometimes downright foolishness in attempting any such 'pro' or 'anti' policy assignments to Supreme Court rulings, especially assignments that purport to be binary in nature."[92]

The problems are obvious. First, I defined as "pro-environmental" the legal position favored by environmentalists in each case. An environmental advocate, however, trying to win a particular case may in fact be making an argument that leads to a win in that case but to losses in other future environmental cases. For instance, the advocate may be arguing against deferring to an expert agency's judgment because, in the case before the Justices, an argument against such deference may be needed to secure a win. But if the advocate prevails in that case, the precedent established may cause environmentalists in the future to lose far more than they win if it turns out that judicial deference to agency expertise is more advantageous to environmental protection concerns over the longer term.

Second, the legal position favored by environmentalists in a particular case may be very weak on the merits and warrant rejection. There is no necessary correlation between a legal argument favoring environmental protection and its being a meritorious argument. Not every argument in favor of environmental protection is necessarily a strong legal argument that a judge or Justice should accept.

Indeed, there is good reason to worry that the Justices tend to hear cases in which the legal arguments favoring environmental protection are disproportionately weaker. As I have detailed elsewhere,[93] the Court's decision-making at the jurisdictional stage for most of the past fifty years that define the modern environmental law era has been skewed against environmentalists. The vast majority of the cases in which the Court has granted review are cases in which the position favored by environmentalists

91. *See generally, e.g.*, LEAGUE OF CONSERVATION VOTERS, NATIONAL ENVIRONMENTAL SCORECARD (1998), https://scorecard.lcv.org/sites/scorecard.lcv.org/files/2021_LCV_Scorecard.pdf [https://perma.cc/8BJ9-KSSK].

92. *Id.* at 722.

93. Richard Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1524–26 (2008); Richard J. Lazarus, *Docket Capture at the High Court,* 119 YALE L.J. ONLINE 89, 95 (2009); Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1532–34 (2012).

prevailed in the courts below. The Court has taken relatively few cases in which the environmentalists lost and then sought the Court's review, especially those in which the federal government was the prevailing party.[94] The Court has, in effect, cherry-picked the cases in which environmentalists may have won based on potentially weak arguments while not being similarly ready to review cases in which business interests have won on weak grounds.[95]

I accordingly warned in 2000 against drawing any conclusions based on EP scores apart from those at the two extremes—either very high or very low. Because of the obvious limits to such scoring, only such extreme discrepancies in scores might offer a fair basis for positing that the Justice in question was more or less "likely to rule in favor of or against an environmentally protective outcome *because* of that outcome's environmental dimension."[96] Those same limits are also a reason not to be surprised when even the highest EP score is not that high—the potential result of a skewed merits docket.

In 2000, Justice Breyer had served on the Court for only six years, and his EP score back then of 66.6 after six years of service was in fact one of

94. For instance, when the Court granted the petition for a writ of certiorari in *Massachusetts v. EPA*, 548 U.S. 903 (2006), in June 2006, it was the first time since 1970 that the Justices had granted a petition supported by environmentalist parties over the federal government's opposition and ruled on the merits. *See* Sierra Club v. Morton, 401 U.S. 907 (1971).

95. The most troubling explanation for this persistent decades-long trend is that the Justices have been far more ready to conclude at the class certification stage that a lower court ruling in favor of environmentalists is wrong and important enough to warrant granting review than if the environmentalists had instead lost. To be sure, once the Court grants review, the Court gains a fuller appreciation of the competing legal arguments, and it quite often ends up affirming the lower court's judgment, sometimes unanimously. But the resulting skewed docket nonetheless still means that the Court is far less ready to correct mistakes in cases environmentalists won in the lower courts than in cases they lost. And there is no obvious reason to presume that the lower courts only make mistakes in the former category and not in the latter too. A contributing factor to such skewing, however, may also be that environmentalists who have lost in the lower courts have been understandably wary of taking their cases to the Court over the past fifty years because of its conservative leanings. Just when modern environmental law was taking off in the United States in the early 1970s, President Richard Nixon was transforming the Supreme Court, which had not long before been fairly liberal, into a far more conservative Court. Nixon appointed four new Justices to the Court in fewer than three years, including a Chief Justice—Warren Burger—who replaced Earl Warren. *About the Court: Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/9T5R-46C9]. Since 1972, only two years after the EPA was created and Congress passed the Clean Air Act, the Court has been reliably conservative, and it has been increasingly conservative over time as conservative Republican Presidents have dominated the nominations for the past fifty years. *See id.* Nor is a general reluctance to have the Court hear cases in which environmentalists have lost limited to certiorari petition–shy environmental advocates. In a not-for-attribution conversation with a Justice a few years ago, the Justice confided that they followed the same practice. They would not vote in favor of review in a case important to them that they thought was decided incorrectly by the lower court unless they were confident that, once granted, they could later secure five votes to win. While it takes only four Justices to agree to hear a case, it of course requires five votes to win. LAZARUS, *supra* note 52, at 230 & n.32.

96. Lazarus, *supra* note 82, at 722–23.

the highest of those then on the Court. It far exceeded Justice Scalia's strikingly low score of 13.8 and the scores of Justices Thomas (20.0) and Kennedy (25.9). But, of course, his score came nowhere close to Justice Douglas's, who retired from the Court in 1975. An environmentalist hero and former member of the Board of the Sierra Club,[97] Douglas boasted of a score of 100—apparently no matter the legal issue presented, and perhaps even the relative strength of the competing arguments, Douglas always voted in favor of the outcome supported by environmentalists. Justice Breyer's EP score of 66.6 was also higher than Justices Brennan (58.3), Marshall 61.3), Blackmun (58.3), Stevens (50.6), Souter (57.1), and Ginsburg (63.6) but not to any significant extent, especially because both Justice Breyer and Ginsburg had both served for far fewer years than Justices Brennan, Marshall, and Stevens and therefore reflected very different cases too. Justices Brennan, Marshall, and Stevens were accordingly being measured based on cases in which it might have been harder on the merits to vote for the side favored by environmentalists.[98]

Two decades later, the number of environmental cases in which Justice Breyer has participated has naturally risen, and interestingly his new EP score (62.3) is essentially the same as before and as the two other Justices with high scores—Sotomayor (64) and Kagan (68). Yet Justice Breyer's score is sufficiently higher than former Justices Scalia (23.4) and Kennedy (36.0) and current members such as Chief Justice Roberts (20), Justice Thomas (20.6), and Justice Alito (10.5) for their overlapping cases since 1994 to suggest significant differences in the application of law to environmental protection. Justice Alito's score of 10.5 is astoundingly low. The only cases in which Alito voted on the side supported by environmentalists were in four cases that the Court decided unanimously in their favor.[99]

On the other end of the spectrum, although former Justices Stevens, Souter, and Ginsburg's scores in 2000 were a tad lower than Justice Breyer's at that time, all of their scores became higher—Stevens (78.4), Souter (80.6), and Ginsburg (71.9)—than Justice Breyer's for the cases on which they overlapped while serving on the Court. The gap between Justice Breyer and both Justice Stevens and Souter is not especially significant but arguably enough to suggest a potential difference in their respective willingness to

97. *See* M. MARGARET MCKEOWN, CITIZEN JUSTICE: THE ENVIRONMENTAL LEGACY OF WILLIAM O. DOUGLAS—PUBLIC ADVOCATE AND CONSERVATION CHAMPION 107–22, 146–47, 188–89 (2022).

98. *Id.* at 725–28.

99. S.D. Warren Co. v. Me. Bd. of Env't Prot., 547 U.S. 370 (2006); Env't Def. Fund v. Duke Energy Corp., 549 U.S. 561 (2007); United States v. Atl. Rsch. Corp., 551 U.S. 128 (2007); Guam v. United States, 141 S. Ct. 1608 (2021).

consider how the environmental protection dimension of the case might be relevant to their resolution of the legal issue before the Court and, for Justices Stevens and Souter, in favor of a more protective outcome.[100]

Finally, not all environmental cases are, of course, equally important, and the individual votes are more significant in some cases than in others. Some cases are far more significant in terms of their import for environmental protection. Whether EPA has authority to regulate greenhouse gas emissions under the Clean Air Act[101] is clearly more important than whether a certain river in Alaska is "public land" for the purposes of the Alaska National Interest Lands Conservation Act.[102] And, because in some of those more important cases the vote was also closely divided, the vote of any one Justice in the majority is outcome-determinative. In that distinct respect, the individual vote of any single Justice in a five-Justice majority is more significant.

Based on this criteria, Justice Breyer's votes in several cases were especially significant, including *Alaska Department of Environmental Conservation v. EPA*,[103] upholding the EPA's authority to override Alaska's issuance of a permit under the Clean Air Act; *Kelo v. City of New London*,[104] sustaining a local government's exercise of its eminent domain power to condemn residential property to promote commercial development; *Massachusetts v. EPA*,[105] both upholding environmental-plaintiff standing and rejecting the EPA's claim that it lacked authority to regulate greenhouse gas emissions under the Clean Air Act; and *Murr v. Wisconsin*,[106] rejecting a regulatory takings claim against a local environmental restriction on residential development. Those are all, moreover, cases environmentalists won.

By contrast, in only one of the sixty-one environmental law cases in which Justice Breyer participated and environmentalists lost did he provide the critical vote against their position.[107] Justice Breyer voted against the legal outcome favored by environmentalists on twenty-three occasions. In eleven of those cases, the Court ruled unanimously and in three others the vote was eight to one against the environmentalist position. Justice Breyer supplied the sixth and seventh vote for the majority in six cases and dissented

100. *See infra* Appendix B.
101. Massachusetts v. EPA, 549 U.S. 497, 533–34 (2007).
102. Sturgeon v. Frost, 139 S. Ct. 1066, 1085 (2019).
103. Alaska Dep't of Env't Conservation v. EPA, 540 U.S. 461, 502 (2004).
104. Kelo v. City of New London, 545 U.S. 469, 488–89 (2005).
105. *Massachusetts*, 549 U.S. at 520, 534–35.
106. Murr v. Wisconsin, 137 S. Ct. 1933, 1949–50 (2017).
107. *See infra* Appendix A.

in the last two. The only case in which Justice Breyer's vote was outcome-determinative in a case that environmentalists lost during the past twenty-eight years was the Court's ruling in June 2021 that the condemnation authority provided by the federal Natural Gas Act to recipients of a Federal Energy Regulatory Commission certificate of public convenience and necessity extended to the right to acquire state-owned property. Interestingly, the five-Justice majority was an unusual one, consisting of Justice Breyer, Chief Justice Roberts, who authored the Court's opinion, and Justices Alito, Sotomayor, and Kavanaugh.[108]

B. JUSTICE BREYER'S OPINIONS IN ENVIRONMENTAL CASES

Justice Breyer has written opinions in nineteen environmental cases, which is a disproportionately large number of the sixty-one environmental cases in which he has participated. He has written three majority opinions for the Court,[109] six concurring opinions,[110] and ten opinions either dissenting in full or in part.[111] Although Justice Breyer's majority opinions are clearly the most significant because they alone announce binding legal precedent, the concurring and dissenting opinions may well be the most personally revealing because they largely resulted from the Justice's own decision to write an opinion expressing his views rather than, as with majority opinions, an assignment from the senior Justice in the majority to write the official opinion of the Court.[112] The majority opinion, however, nonetheless can very much reflect the priorities and values of its author, especially whether the Justice chooses to write the opinion narrowly and tries to attract as many votes as possible or instead drafts the opinion in as sweeping a way as possible consistent with maintaining the bare minimum of five votes required for a majority.[113]

108. PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2263 (2021).

109. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998); Pub. Lands Council v. Babbitt, 529 U.S. 728 (2000); Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462 (2020).

110. Gen. Elec. v. Joiner, 522 U.S. 136 (1997); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); Bates v. Dow Agrosciences, 544 U.S. 431 (2005); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009); Stop the Beach Renourishment v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010).

111. Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Norfolk & Western Ry. v. Ayers, 538 U.S. 135 (2003); Nat'l Ass'n of Home Builders v. Def. of Wildlife, 551 U.S. 644 (2007); Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008); Summers v. Earth Island Inst., 555 U.S. 488 (2009); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009); Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); U.S. Fish & Wildlife Serv. v. Sierra Club, 141 S. Ct. 777 (2021); Cedar Point Nursery v. Hassid, 141 S. Ct 2063 (2021).

112. One caveat is that when several Justices are all dissenting on a common ground, the most senior Justice dissenting may informally decide which of the Justices should author the dissent. However, that assignment lacks the weight and obvious significance of an assignment to author an opinion of the Court.

113. Richard J. Lazarus, *Back to "Business" at the Supreme Court: The "Administrative Side" of Chief Justice Roberts*, 129 HARV. L. REV. 33, 38–39 (2015).

1. Justice Breyer's Majority Opinions

Justice Breyer wrote the majority opinions in *Ohio Forestry Association v. Sierra Club*,[114] *Public Lands Council v. Babbitt*,[115] and *County of Maui v. Hawaii Wildlife Fund*.[116] None is a headliner. Nor is that at all surprising, given that Justice Breyer remained the most junior Justice for his first twelve years on the Court,[117] which does not lend itself to especially high-profile opinion assignments from his more senior colleagues. That status is also likely why it was not until 2019 that Chief Justice Roberts assigned Justice Breyer a moderately more important environmental case, *County of Maui*, though still far short of a blockbuster.

All three Court opinions by Justice Breyer evidence his essential pragmatism, a catchword that the White House promoted when he was nominated and that was accordingly captured in the first *New York Times* headline announcing his nomination.[118] His pragmatism was similarly the theme of favorable testimony provided before Congress by one of his leading academic supporters.[119]

Ohio Forestry is a classic opinion assigned to a junior Justice. Indeed, it might well be classified as one of the "dogs" of the docket that Term, a term of art the Justices use informally in referring to the kind of case no Justice has any particular interest in writing.[120] At issue was whether the Sierra Club's challenge to the Forest Service's plan for managing the Wayne National Forest in Ohio was justiciable.[121] The Court ruled unanimously that the lawsuit was not ripe for review on the ground that the plan did not itself create any adverse effects of a "strictly legal kind" because it did not purport to authorize any particular action within the forest.[122] It would be far more sensible, Justice Breyer's opinion for the Court reasoned, to wait until "the Plan is implemented" which would allow the reviewing court to benefit from "further factual development" of the issues.[123]

Justice Breyer's opinion for the Court evidences significant sensitivity

114. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998).
115. Pub. Lands Council v. Babbitt, 529 U.S. 728 (2000).
116. Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462 (2020).
117. *See Justices 1798 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/F4SL-7RSH].
118. Gwen Ifill, *Pragmatic Jurist: Bipartisan Support Seen as Clinton Sidesteps Risky Senate Fight*, N.Y. TIMES, May 14, 1994, at 1.
119. *See Breyer Confirmation Hearings*, *supra* note 1, at 424–26 (statement of Kathleen M. Sullivan) (describing Breyer "as a pragmatist in the tradition of Holmes").
120. Lazarus, *supra* note 113, at 63–64.
121. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732 (1998).
122. *Id.* at 733.
123. *Id.* at 733, 737.

to the administrative preferences of the federal agency and to the resources of the federal judiciary. The ruling that the case was not ripe emphasizes how allowing the Sierra Club's lawsuit to proceed would have "require[d] time-consuming judicial consideration of the details of an elaborate, technically based plan . . . without benefit of the focus that a particular logging proposal could provide."[124] There is obvious force to the Court's concern. But the opinion evidences no comparable consideration of the litigation resource challenges that a public interest organization like Sierra Club faces in trying to oversee a series of site-specific logging proposals over time. What the Court posits as the better approach may well be better in theory, but the challenges of such constant site-specific oversight may in fact be preclusive as a practical matter of any meaningful review of future logging decisions in a national forest.

To that same end, the Court declined to consider a series of other ways that the Forest Plan could immediately harm the Sierra Club and its members. The Court reasoned that Sierra Club's argument "suffer[ed] from the legally fatal problem that it ma[de] its first appearance [before the] Court in the briefs on the merits."[125] That is a fair point, and the Court is not at all out of bounds in strictly applying administrative law exhaustion principles in denying consideration of Sierra Club's argument. Yet, here too, the ruling ignores the practical limits of a resource-strapped public interest organization maintaining lawsuits in an effort to ensure other unrepresented interests are given voice. An organization like the Sierra Club is hard-pressed to monitor all the site-specific decisions that Forest Service personnel are making on a daily basis throughout a national forest. For this reason, the Club's only practical recourse may be to persuade a court, as they tried unsuccessfully to accomplish in the *Ohio Forestry* case, to establish some guidelines for the exercise of Forest Service personnel discretion in the future. And the Court's lack of sensitivity to that practical limitation contrasts unfavorably with the many ways that the Justices, in my experience both litigating for and against the United States, routinely allow the federal government to raise new arguments and bring to the Court's attention new facts not considered below, because of the Justices' awareness of the practical limits in the government's ability to oversee all of its lower court litigation.

The Court's providing such practical flexibility to the United States makes great sense. Otherwise, the Court would be making significant pronouncements of law affecting the country based on incomplete arguments

124. *Id.* at 736.
125. *Id.* at 738.

and flawed factual assumptions. And, given the thousands of cases the federal government handles in the lower courts, it is exceedingly limited in its ability to ensure that all the best arguments are made in the timeliest manner. The Court, however, could demonstrate some sensitivity to the practical needs of environmental citizen suit litigants too. Justice Breyer's opinion for the unanimous Court in *Ohio Forestry* evidences no such awareness of the problem.

Public Lands Council v. Babbitt[126] was a logical sequel to *Ohio Forestry.* Again, Chief Justice William Rehnquist assigned the junior Justice Breyer the task of writing an opinion for a unanimous Court in another public lands administrative law case that was likely of little, if any, interest to the Justices. The major difference was that, rather than environmental plaintiffs challenging the Forest Service's management of a national forest, it was commercial livestock interests challenging the Bureau of Land Management's administration of grazing permits on public lands.

The basic result was the same. The Court concluded that the federal agency's regulations governing the issuance of permits were valid under the relevant statutory language and that the commercial plaintiffs' concerns that they might be harmed in how those regulations were applied in the future were largely premature.[127] The plaintiffs should instead wait, not unlike the environmental plaintiffs in *Ohio Forestry*, until the federal agency actually applied the regulations in a specific factual context that harmed them.[128] While the reasoning is similar is tone, there is still a significant practical difference between the two cases because the commercial party subject to a grazing regulation will naturally always know as soon as such harm happens in the future, which is not true for an environmental organization striving to learn of any possible site-specific decision to allow logging or other potentially harmful activity within a very large area of land such as a national forest.[129]

It took twenty more years for Justice Breyer to write a third opinion for the Court in an environmental case, *County of Maui v. Hawaii Wildlife Fund*.[130] And, reflecting his more senior status by that time, the case is far more significant than either *Ohio Forestry* or *Public Lands Council*. It is not a mere unanimous toss-off. *County of Maui* instead presents a rather thorny and important question of statutory interpretation under the Clean Water Act—the type of question that nicely lends itself to Justice Breyer's

126. Pub. Lands Council v. Babbitt, 529 U.S. 728 (2000).
127. *See id.* at 750.
128. *Id.* at 743–44.
129. *Id.* at 739–44.
130. Cnty. of Maui v. Haw. Wildlife Fund,140 S. Ct. 1462 (2020).

proclivity to pragmatic solutions.

The precise legal issue raised in *County of Maui* concerns how direct or indirect an addition of pollutants into navigable waters must be to constitute a "discharge" of a pollutant into navigable waters requiring a pollution permit under the Clean Water Act.[131] In *County of Maui* itself, the municipal sewage treatment facility seeking to avoid the permit requirement injected contaminated water into a well located about a half mile from the Pacific Ocean—but the discharge naturally reached the Pacific within a few months through the ground water.[132] The facility contended that no permit was required unless the pollutants were directly introduced into a navigable water body like the Pacific, meaning that the pollution was exempted from the Clean Water Act permit requirement if it travelled even just a few inches through groundwater or over the surface land before reaching the ocean.[133] The EPA agreed that any travel through groundwater placed the addition of pollutants outside the Clean Water Act but contrasted that any travel over surface land would depend on a more contextual analysis of directness.[134]

In rejecting both those limits, Justice Breyer's opinion for a six-Justice majority held that a Clean Water Act permit was required "when there is a discharge from a point source directly into navigable waters or when there is the functional equivalent of a direct discharge."[135] The Court's ruling displays Justice Breyer's willingness to embrace a nuanced and accordingly ultimately vague legal test—such as "functional equivalence"—when he believes clearer legal rules fail to account for all the factors that should be relevant in solving a problem. The Court's "functional equivalence" test rejects any hard-and-fast lines for when an addition of a pollutant is too indirect in favor of a multi-factor inquiry. The opinion candidly acknowledges that there are "too many potentially relevant factors applicable to factually different cases for this Court to use more specific language,"[136] while both highlighting seven relevant factors and underscoring that "time and distance will be the most important factors in most cases, but not necessarily every case."[137] Interestingly, the Chief Justice expressed confusion at oral argument about what Justice Breyer's "functional equivalence" test meant, when Justice Breyer then raised the possibility of such a test,[138] but nonetheless subsequently chose Justice Breyer to write the

131. *Id.* at 1468; *see also* 33 U.S.C. § 1321.
132. *See Cnty. of Maui*, 140 S. Ct. at 1469.
133. *See id.* at 1473.
134. *Id.* at 1469–71.
135. *Id.* at 1476.
136. *Id.*
137. *Id.* at 1477.
138. Transcript of Oral Argument at 38, Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462

Court's opinion.

The *County of Maui* ruling is significant for environmental law. Although the Court nominally vacated the lower court's judgment favorable to the environmental plaintiffs and remanded the case to that court for reconsideration in light of its ruling, the functional equivalent test amounted to a clear win for the plaintiffs. They will do well under that test, as will environmental plaintiffs in a host of cases across the country who have brought Clean Water Act citizen suits against sources that discharge to navigable waters in a proximate but still indirect water through groundwater and over land. For instance, in the immediate aftermath of the *County of Maui* ruling, environmentalists targeted leakage of coal ash into navigable water bodies from power plants.[139] Although *County of Maui* does not rise to the front page headline status of a case like *Friends of the Earth v. Laidlaw*,[140] expanding Article III standing for environmental citizen suit plaintiffs, or *Massachusetts v EPA*,[141] establishing the EPA's authority to regulate greenhouse gases under the Clean Air Act, the case will make a big difference in application to lots of factual circumstances and represents an increasingly rare environmentalist victory as the Court's own bench becomes more conservative.

2. Justice Breyer's Concurring Opinions

As described above, Justice Breyer's separate opinions are even more revealing because, unlike majority opinions that are assigned by the most senior Justice in the majority, one can be more confident that the Justice writing separately is expressing their own views. Justice Breyer wrote six concurring opinions, four of which both address significant legal issues and relate directly to the concerns raised by environmentalists when Justice Breyer was nominated. In each, Justice Breyer expressed views that promoted the very regulatory reform themes antithetical to many environmentalists. His doing so each time in a concurring opinion makes clear that these themes remained very important to him, just as environmentalists had feared at the time of his nomination.

First, in *General Electric v. Joiner*,[142] decided in 1997, Justice Breyer wrote separately while also joining the majority ruling that upheld the trial

(2020) (No. 18-260).

139. Ellen M. Gilmer, *Environmentalists Eye Power Plants After Supreme Court Ruling*, BLOOMBERG L., (April 24, 2020, 12:57 PM), https://news.bloomberglaw.com/environment-and-energy/environmentalists-eye-power-plants-after-supreme-court-ruling [https://perma.cc/8WDC-27GM].

140. Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167 (2000).

141. Massachusetts v. EPA, 549 U.S. 497 (2007).

142. Gen. Elec. v. Joiner, 522 U.S. 136 (1997).

court's decision to exclude from jury consideration expert testimony proffered to demonstrate a link between the plaintiffs' exposure to polychlorinated biphenyls ("PCBs") and small-cell lung cancer.[143] In his separate opinion, Justice Breyer stressed that "modern life, including good health and economic well-being, depends upon the use of artificial or manufactured substances,"[144] presumably alluding to a chemical like PCBs, and the need for judges to use their gatekeeping authority to ensure that tort liability did not effectively "destroy" the "wrong" chemicals.[145] Such a concern with the potential for excessive tort liability to harm businesses was in the late 1990s a major talking point for business leaders seeking to curb large tort liability awards.[146]

In *Whitman v. American Trucking Associations*,[147] decided in 2001, Justice Breyer's concurring opinion was the one blight on an otherwise glorious day for environmentalists. In *Whitman*, Justice Scalia authored a unanimous opinion for the Court that repudiated what had been a major attack on the constitutionality of a central part of the Clean Air Act. The Court rejected the D.C. Circuit's remarkable ruling that the Act violated the nondelegation doctrine by requiring the EPA to promulgate national ambient air quality standards requisite to protect public health without basing its determination of those standards on an intelligible principle such as cost-benefit analysis.[148]

Scalia's opinion not only rejected the notion that cost-benefit analysis was required to satisfy the nondelegation doctrine's requirement of an intelligible principle, but it further ruled that the relevant provisions of the Clean Air Act barred the EPA from considering economic costs at all in promulgating the national standards.[149] It was a sweeping win for both environmentalists and the EPA. But what made their victory even sweeter still was that it was unanimous and written by Justice Scalia, the Court's leading conservative.

Justice Breyer's separate concurring opinion fell far short of dampening the victor's spirits that day, but his words were nonetheless chillingly expressive of some of the worst fears of environmentalists upon his confirmation. He disputed Scalia's powerful statement that the EPA could

143. *Id.* at 147 (Breyer, J., concurring).
144. *Id.* at 148.
145. *Id.* at 149.
146. *See, e.g.*, Barry Meier, *Companies Likely to Seek Federal Court Reviews*, N.Y. TIMES, May 21, 1996, at A19; William Glaberson, *The Nation: Looking for Attention with a Billion-Dollar Message*, N.Y. TIMES, July 18, 1999, at WK3.
147. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).
148. *Id.* at 472–76.
149. *Id.* at 486.

consider compliance costs only if Congress's textual commitment to such consideration was "clear."[150] According to Justice Breyer, "other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting [rather than] forbidding" regulatory agencies from adopting "rational regulation" that considered a proposed regulation's adverse economic effects.[151]

Even more telling, Justice Breyer conflated economic costs with public health, just as industry had long been arguing should be done. According to Justice Breyer, because an overly protective environmental protection requirement that returned society to the "Stone Age" would clearly not be "requisite to protect the public health," "the EPA, in setting standards that 'protect the public health' with 'an adequate margin of safety'" should be deemed to be able to weigh compliance costs against environmental benefits at least to guard against disproportionately high costs for only trivial benefits.[152]

For environmentalists, Justice Breyer's language sounded unsettlingly similar to the business community's claims that a healthy society was a wealthy society and environmental protection laws that reduced business profitability were accordingly undermining rather than promoting public health.[153] Had Justice Breyer authored his concurring opinion in any context other than a concurring opinion with no legal import and when environmentalists were otherwise enjoying an enormous victory, it might have garnered far more attention and concern. But, on a day of widespread relief and celebration, few paid attention to Justice Breyer's concurrence.

Justice Breyer's concurrence in *Bates v. Dow Agriculture Sciences LLC*,[154] decided in 2004, strikes a similar concern about the adverse impacts of excessive government regulation. In *Bates*, however, the issue arose in the context of a federal preemption case, in which a pesticide manufacturer was arguing that federal pesticide regulation preempted state common law tort liability.[155] The majority opinion, which Justice Breyer joined, rejected the manufacturer's more sweeping preemption theories, concluded that some state tort law liability might not be preempted, and remanded the case back

150. *Id.* at 490 (Breyer, J., concurring).

151. *Id.*

152. *Id.* at 495–96.

153. *See, e.g.*, Brief of Amicus Curiae Mercatus Center in Support of Cross-Petitioner at 12–22, *Whitman*, 531 U.S. 457 (No. 99-1426); Brief of Amici Curiae Pacific Legal Foundation and California Chamber of Commerce in Support of Cross-Petitioners American Trucking Associations, Inc., et al. at 15–18, *Whitman*, 531 U.S. 457 (No. 99-1426).

154. Bates v. Dow Agric. Scis. LLC, 544 U.S. 431 (2005).

155. *See id.* at 435, 448–49.

to the lower courts for further proceedings.[156] Justice Breyer wrote separately to emphasize that the EPA, the federal agency charged with administering the federal pesticide statute at issue, enjoyed authority to promulgate regulations that effectively preempted state tort liability to avoid "a counter-productive 'crazy-quilt of anti-misbranding requirements.' "[157]

Finally, similarly sensitive to his perception of excessive environmental regulations was Justice Breyer's separate concurrence in *Coeur Alaska, Inc. v. Southeast Conservation Council*[158] in 2009, in which the Justice provided the more conservative wing of the Court with its sixth vote in a major loss to environmentalists. At issue in *Coeur Alaska* was in effect whether a gold mine that was discharging toxic slurry into a lake three miles away could avoid having to comply with section 402 of the Clean Water Act, which would likely have barred the activity, by characterizing their toxic slurry as "fill," thereby triggering section 404 of the Act, which separately and less restrictively regulates the addition of fill into navigable waters.[159] The gold mine had placed enormous volumes of toxic slurry into the lake, which was 51 feet deep, 800 feet wide, and 2,000 feet long.[160] And the EPA freely acknowledged that the slurry would kill all of the lake's fish and nearly all of its aquatic life.[161]

To the environmental plaintiffs and the Ninth Circuit in its lower court ruling, the gold mine's claim that it was "fill" rather than pollutant seemed like a blatant end run around the Water Act's section 402 limitations on the addition of pollutants into navigable waters. But, relying on the EPA's agreement that section 404 rather than section 402 applied, the Court ruled in industry's favor.[162] Justice Breyer agreed, declining to join Justice Ginsburg's dissent, which both Justices Stevens and Souter joined. Exhibiting the same preference for deferring to expert technical agencies promoted by his 1993 book, Justice Breyer explained the reasons why he joined the majority: "I cannot say whether the EPA's compromise represents the best overall environmental result; but I do believe it amounts to the kind of detailed decision that the statutes delegate authority to the EPA, not the courts, to make (subject to the bounds of reasonableness)."[163]

The contrast between Justice Breyer's willingness to defer to the EPA,

156. *See id.* at 452–54.
157. *Id.* at 455 (Breyer, J., concurring) (quoting *id.* at 448 (majority opinion)).
158. Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009).
159. *See id.* at 265–67.
160. *Id.* at 294 (Breyer, J., concurring).
161. *Id.* at 297 (Ginsburg, Stevens, Souter, JJ., dissenting).
162. *Id.* at 291 (majority opinion).
163. *Id.* at 294 (Breyer, J., concurring).

notwithstanding the extreme results, and Justice Ginsburg's dissent for herself and Justices Stevens and Souter was stark:

> The Court's reading . . . strains credulity. A discharge of a pollutant, otherwise prohibited by firm statutory command, becomes lawful if it contains sufficient solid material to raise the bottom of a water body, transformed into a waste disposal facility. Whole categories of regulated industries can thereby gain immunity from a variety of pollution-control standards.[164]

Justice Ginsburg, unlike Justice Breyer, was not willing to assume that the EPA would ensure this loophole was not abused in future applications, especially given the dissent's view that it had been abused in the facts of the case then before the Court.[165]

3. Justice Breyer's Dissenting Opinions in Part or in Full

Justice Breyer wrote separate opinions that dissented either in part or in full on ten occasions. In some, he concurred in part or in full with conservative majorities, and in others he dissented in part from liberal majorities. And on a few occasions, he dissented in full. The latter category tended to be those instances when Justice Breyer expressed views wholly favorable to the legal arguments of environmentalists.

Two of the cases involved tort liability. In *Norfolk & Western Railway v. Ayers*,[166] decided in 2003, Justice Breyer dissented from that part of the Court's ruling that allowed tort plaintiffs who had been exposed to asbestos fibers and were suffering from asbestosis to recover for damages from their related reasonable fear of cancer.[167] Justice Breyer acknowledged that the legal issue was "a close and difficult one."[168] But he dissented in part from Justice Ginsburg's majority opinion because he was worried both about the "impossibility of knowing an appropriate compensation" for such fear[169] and that compensating victims for their fear might leave too little money remaining later on for victims who ultimately suffered from cancer.[170] On the other hand, in *Exxon Shipping Co. v. Baker*,[171] decided in 2008, Justice Breyer dissented from a majority ruling limiting punitive damages from the Exxon Valdez Alaska oil spill based on his view that the punitive damages

164. *Id.* at 302 (Ginsburg, Stevens, Souter, JJ., dissenting).
165. *See id*. at 303 n.5.
166. Norfolk & Western Ry. v. Ayers, 538 U.S. 135 (2003).
167. *See id.* at 182 (Breyer, J., concurring in part and dissenting in part).
168. *Id.*
169. *Id.* at 185.
170. *Id.* at 185–87.
171. Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).

awarded the oil spill victims in that case need not be reduced.[172]

Unlike in *Norfolk* and *Exxon Shipping*, in *Winter v. Natural Resources Defense Council, Inc.*,[173] *Entergy v. Riverkeeper*,[174] and *Utility Air Regulatory Group v. EPA*,[175] it was Justice Breyer's partial concurrences with a conservative majority rather than his dissent from a liberal majority that were telling. In each, Justice Breyer's separate opinion reflected his pragmatism and general desire to provide federal expert agencies with flexibility absent excessive judicial second-guessing.

In *Winter*, Justice Breyer declined to join Ginsburg's dissent from the majority ruling overturning a lower court injunction of U.S. Navy exercises that the environmental plaintiffs alleged were harming marine mammals.[176] Justice Breyer concurred in part with the conservative Justices who made up a majority and concluded that the plaintiffs' evidentiary support was too "weak or uncertain" to justify the "seriousness of the harm" that the Navy maintained the injunction would do "to the Navy's ability to maintain an adequate national defense."[177]

In *Entergy*, Justice Breyer returned most explicitly to his argument, reflected in his 1993 book and earlier concurring opinion in *American Trucking*, that cost-benefit analysis is essential in setting rational environmental protection standards. Justice Stevens, joined by Justices Souter and Ginsburg, dissented from the majority ruling that the Clean Water Act permitted the EPA to engage in cost-benefit analysis in deciding the extent to which a power plant's cooling water intake structure must minimize its adverse environmental impact.[178] Justice Breyer, however, agreed that such analysis was permissible, arguing that "an absolute prohibition would bring about irrational results."[179] While suggesting some limits on how demanding such a cost-benefit analysis could be, he also cautioned that "in an age of limited resources available to deal with grave environmental problems, . . . too much wasteful expenditures devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems."[180]

In *Utility Air Regulatory Group*, Justice Breyer again concurred in part

172. *Id*. at 525–26 (Breyer, J., concurring in part and dissenting in part).
173. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008).
174. Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009).
175. Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014).
176. *See Winter*, 555 U.S. at 33; *id.* at 43 (Ginsburg, J., dissenting).
177. *Id.* at 36–37 (Breyer, J., concurring in part and dissenting in part).
178. *Entergy*, 556 U.S. at 236 (Stevens, Souter, Ginsburg, JJ., dissenting)
179. *Id.* at 232 (Breyer, J., concurring in part and dissenting in part).
180. *Id.* at 233.

with a conservative majority but this time to a very different policy end. The majority opinion, authored by Justice Scalia, ruled that the term "any pollutant" under the Clean Air Act did not extend to greenhouse gas pollutants as applied to one significant part of the Act.[181] Justice Breyer proffered a different approach that, like the majority, avoided the EPA's being compelled to regulate sources that the EPA agreed would be administratively impractical, but by interpreting instead the term "any source" in a manner that would ultimately provide the EPA more discretionary authority to choose how best to regulate greenhouse gas emissions. As described by Justice Breyer, "[t]he Court's decision to read greenhouse gases out of the [Prevention of Significant Deterioration] program drain[ed] the Act of its flexibility."[182] And Justice Breyer's preferred approach "le[ft] the EPA with the sort of discretion as to interstitial matters that Congress likely intended it to retain."[183]

On the other hand, the Justice's practical approach prompted him to dissent in full from the Court's ruling in *U.S. Fish & Wildlife Service v. Sierra Club*,[184] decided in March 2021, in favor of a federal agency's decision not to release a document to environmental plaintiffs under the Freedom of Information Act.[185] That Act requires agencies to release to the public final agency decision-making documents unless they are deliberative in nature, reflecting Congress tempering its desire for public disclosure with a competing desire not to unduly chill those candid internal exchanges of ideas that might not occur if the participants knew all their thinking would later be made part of the public record.[186]

Pursuant to the Endangered Species Act, the Interior Department's Fish & Wildlife Service and the Commerce Department's National Marine Fisheries Service provide formal "biological opinions" to any federal agency whose proposed action may "adversely affect" an endangered or threatened species or its critical habitat.[187] In *U.S. Fish & Wildlife Service*, the two Services were preparing biological opinions on a proposed rule by the EPA under the Clean Water Act to regulate power plant cooling water intake structures because of the potentially adverse impact of those structures on aquatic wildlife.[188]

181. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 320–24 (2014).
182. *Id.* at 341 (Breyer, Ginsburg, Kagan, JJ., concurring in part and dissenting in part).
183. *Id.* at 342.
184. U.S. Fish & Wildlife Serv. v. Sierra Club,141 S. Ct. 777 (2021).
185. *See id.* at 783; *see also* 5 U.S.C. § 552(b).
186. 5 U.S.C. § 552(b)(5); *U.S. Fish & Wildlife Serv.*, 141 S. Ct. at 785–86.
187. *U.S. Fish & Wildlife Serv.*, 141 S. Ct. at 783–84; *see also* 16 U.S.C. § 1536(a)(2).
188. *U.S. Fish & Wildlife Serv.*, 141 S. Ct. at 783–84.

Had the Services provided the EPA with a final biological opinion, the parties would not have disputed that such a final opinion would have been subject to public disclosure.[189] In the case, however, the two Services never submitted a final biological opinion because the EPA ultimately rescinded its initially proposed rule after receiving an early draft of the Services' biological opinion that had not yet been formally approved by either Service for submission.[190] In challenging the EPA's final cooling water intake structure, Sierra Club sought a copy of the informal draft biological opinions on the original proposed rule, which it hoped to use to attack the final rule.[191]

The majority easily concluded, based on FOIA's text, that such draft biological opinions—especially ones never approved by the relevant officials of the two services—need not be disclosed because they lacked any formal legal status within the ESA: "The deliberative process privilege protects the draft biological opinions at issue here because they reflect a preliminary view—not a final decision—about the likely effect of the EPA's proposed rule on endangered species."[192] Such preliminary assessments were, the Court concluded, "both predecisional and deliberative."[193]

In dissent, Justice Breyer naturally took a more practical approach, looking not at the formal name of the relevant document, but its function in the agency decision-making process. Because, Justice Breyer reasoned, "[t]he function of a Draft Biological Opinion finding jeopardy [of an endangered species] . . . is much the same as that of a Final Biological Opinion" and triggers the same process within EPA, the same reasons that justify public release of the final biological opinion apply with equal force to the draft.[194] However, because it was not clear whether the biological opinions at issue in the record were "drafts" or merely "Drafts of Draft Biological Opinion," because they had never been approved by all relevant officials in the two Services, Justice Breyer contended the case should be remanded back to the court of appeals to decide their status.[195]

In short, in some instances Justice Breyer's lack of commitment to formalism supports policy ends favored by environmentalists, as in *U.S. Fish & Wildlife Service*. But in other instances, as in *Coeur Alaska*, he frustrates environmentalists by allowing the government to avoid what seems, on the face of the relevant statutory language, to be a clear transgression of

189. *See id.* at 786–87.
190. *See id.* at 784.
191. *See id.* at 784–85.
192. *Id.* at 786.
193. *Id.* at 788.
194. *Id.* at 790 (Breyer & Sotomayor, JJ., dissenting).
195. *Id.* at 791–92.

congressional purpose.

However, Justice Breyer's support for the constitutionality of environmental restrictions has been unqualified in Fifth Amendment takings cases. He has participated in ten Fifth Amendment takings cases while on the Court. And he voted against the regulatory takings claim in nine of those cases[196] and against a *per se* physical takings claim in the tenth case.[197] In one of those regulatory cases, *Palazzolo v. Rhode Island*,[198] he filed a separate dissent to underscore his agreement both with Justice Ginsburg that the case was not ripe and with Justice O'Connor that it was relevant to regulatory takings analysis whether the landowner was challenging a land use restriction that existed at the time of their purchase of the property.[199] And in *Cedar Point Nursery v. Hassid*,[200] Justice Breyer filed a dissenting opinion on the ground that the majority erred by analyzing the state regulation of land use as a per se physical taking rather than as a possible regulatory taking.[201]

Finally, Justice Breyer also earned high marks from environmentalists for his support of environmental plaintiff Article III standing. Like regulatory takings, Article III standing has been a persistent issue in environmental law since the 1970s.[202] Justice Breyer voted in favor of environmental plaintiffs in the two most important standing cases during his tenure on the Court, *Friends of the Earth v. Laidlaw*[203] and *Massachusetts v. EPA*,[204] and he authored the opinion for himself and three other Justices dissenting from the Court's ruling against the plaintiffs' standing in *Summers v. Earth Island Institute*[205] in 2009.[206] Justice Breyer took direct issue with the majority's ruling that the environmental plaintiffs had failed to

196. Dolan v. City of Tigard, 512 U.S. 374 (1995); City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999); Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302 (2002); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005); Stop the Beach Renourishment v. Fla. Dep't of Revenue, 560 U.S. 702 (2010) (judicial taking); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013); Murr v. Wisconsin, 137 S. Ct. 1933 (2017); Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019).

197. Cedar Point Nursery v. Hassid, 141 S. Ct 2063 (2021).

198. *Palazzolo*, 533 U.S. 606.

199. *Id.* at 654–55 (Breyer, J., dissenting).

200. *Cedar Point Nursery*, 141 S. Ct. 2063.

201. *Id.* at 2089–90 (Breyer, J., dissenting).

202. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. Students Challenging Regul. Admin. Procs., 412 U.S. 669 (1973); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990); Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

203. Friends of the Earth, Inc. v. Laidlaw Env't Servs., 528 U.S. 167 (2000).

204. Massachusetts v. EPA, 549 U.S. 497 (2007).

205. Summers v. Earth Island Inst., 555 U.S. 488 (2009).

206. *Id.* at 501 (Breyer, Stevens, Souter, Ginsburg, JJ., dissenting).

demonstrate a concrete injury in their lawsuit challenging the U.S. Forest Service's salvage sale of timber from a national forest.[207]

III. ASSESSING JUSTICE BREYER'S ENVIRONMENTAL LAW LEGACY: FRIEND OR FOE OF ENVIRONMENTAL PROTECTION?

Justice Breyer is likely the only Justice ever chosen because of his perceived views on environmental law. But, ironically not because he was viewed as an ardent environmentalist. Just the opposite. He was thought to be a Justice who would instead be more sensitive to business than to environmental protection concerns.

That is both why Breyer failed to secure the nomination to the Court in 1993 and environmentalists opposed his selection in 1994—strongly favoring Secretary of the Interior Bruce Babbitt. And it is also why Republican Senate Leadership, including the Senate Minority Leader Bob Dole and the Judiciary Committee's Ranking Minority Member Orrin Hatch, informed the White House that they would fight Babbitt's nomination and promised a smooth confirmation process for Judge Breyer. As described at this Article's outset, President Clinton chose not to fight, notwithstanding environmentalists' warnings that Judge Breyer would be bad for environmental law and even "hazardous to our health."[208]

So, which has Justice Breyer turned out to be—friend or foe? The answer seems relatively clear: friendly, if still shy of an unqualified friend. As reflected in a rough sense in his EP score, especially compared to those of his colleagues on the bench, Justice Breyer has voted in favor of results supported by environmentalists far more than most of the other Justices on the Court. And, in almost all of the most important environmental cases of the past twenty-eight years, he was a reliable vote joining the majority in the big cases environmentalists won—often providing the critical fifth vote—and no less a reliable vote in dissent with liberal justices sounding the alarm in the big cases environmentalists lost—as he did in *West Virginia v. EPA*, the very last environmental case decided by the Court when Justice Breyer was on the bench.[209] These cases include major cases decided under framework environmental laws like the Clean Air and Clean Water Acts, as well as those involving major issues of constitutional law, such as Article III standing, congressional Commerce Clause authority, and regulatory takings. Justice Breyer has been a reliable, forceful vote for environmental protection in the biggest cases that mattered the most.

207. *Id*. at 501–10.
208. *Breyer Confirmation Hearings*, *supra* note 1.
209. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

Environmentalist concerns about Justice Breyer's support for regulatory reform proved overblown in application, but not because they were wrong about his views on the central role that cost-benefit analysis should play in setting environmental standards and his willingness to believe that such standards are unduly protective. They weren't incorrect. Especially in his concurring opinions and in a scattering of his votes, Justice Breyer made clear, just as they feared, his belief in the essential role of cost-benefit analysis as well as his receptivity to concerns that environmental protection requirements may be so exceedingly expensive as to undermine, rather than promote, public health.[210]

However, in no case did Justice Breyer's distinct views make a difference. He never once provided the critical "fifth vote" in any case in which he expressed those policy preferences for cost-benefit analysis.[211] And his concurring voice was of no legal effect at all. Of course, had the makeup of the Court when those cases were decided been tilted slightly more to the left, Justice Breyer's vote might well have made a critical difference, just as environmentalists had worried it would. But that concern was never realized in almost three decades.

Justice Breyer has also proved far less dogmatic in his views than assumed by his detractors at the time of his nomination. While supporting EPA's authority to use cost-benefit analysis in his separate concurring opinion in *Entergy*, Justice Breyer agreed with the environmental respondents that Congress had intentionally curbed EPA's ability to rely on cost-benefit analysis in the Clean Water Act.[212] Where Justice Breyer departed from the environmental respondents was his view that EPA nonetheless was permitted to take such analysis into account so long as the agency did so in a very limited way: to guard against costs wholly disproportionate to environmental benefits—a far more modest invocation of cost-benefit analysis than that sought by industry.[213] Justice Breyer also later fully joined Justice Kagan's forceful dissent in *Michigan v. EPA*,[214]

210. JONATHAN Z. CANNON, ENVIRONMENT IN THE BALANCE: THE GREEN MOVEMENT AND THE SUPREME COURT 126–27, 133–34 (2015).

211. The only case in which Breyer provided the decisive vote for the majority in which the position favored by environmentalists did not prevail was the recent *PennEast* case described above, which did not implicate cost-benefit analysis. The only legal issue raised in *PennEast* was whether the eminent domain authority possessed by a natural gas company pursuant to its receipt of a certificate of public convenience and necessity from the Federal Energy Regulatory Commission extended to the condemnation of state-owned property. *See supra* note 108 and accompanying text.

212. Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 232 (2009) ("As this language suggests, the Act's sponsors had reasons for minimizing the EPA's investigation of, and reliance, upon cost-benefit comparisons.").

213. *Id.* at 134.

214. Michigan v. EPA, 576 U.S. 743, 764 (2015) (Kagan, Ginsburg, Breyer, Sotomayor, JJ., dissenting).

which criticized the majority for concluding that EPA was required to consider potential compliance costs in determining whether regulation of toxic mercury emissions from power plants was "appropriate." Justice Breyer agreed with the other *Michigan* dissenters that Congress had instead instructed EPA to base its threshold determination of the appropriateness of emissions controls only on the extent of environmental harm posed by such emissions. None of the Justices, including the four dissenters, disputed that the Clean Air Act required EPA to consider control costs in subsequently determining the extent of emissions reduction subsequently required of power plants.[215]

Finally, critics of Justice Breyer's nomination to the Court failed to appreciate how Justice Breyer's pragmatism and openness to consideration of regulatory costs and cost-benefit analysis might prompt the Justice to favor upholding EPA regulations those critics favored. In two very significant Clean Air Act cases, *EPA v. EME Homer City Generation* in 2014 and the recently-decided *West Virginia v. EPA*, EPA's legal arguments in favor of the regulations at issue—the Clean Air Interstate Rule in *EME Homer*[216] and the Clean Power Plan in *West Virginia*[217]—were weakened by the absence of clear support in the relevant statutory text. But what strengthened each of those EPA regulations was that both sets of ambitious regulations justified their broad reading of that language by the extent to which it permitted the EPA to take costs and benefits into account. In short, the kinds of economic analysis Justice Breyer favored allowed EPA to adopt *more*, not less, demanding environmental protection requirements.

To be sure, Justice Breyer has been no Justice Douglas. He has not voted in favor of the position favored by environmentalists in all cases. But nor is it clear that the nation, including environmentalists, should necessarily want such a Justice on the Court. Such a Justice might be a very good environmentalist, but not an especially good judge.

As described above, in eleven of the twenty-three environmental cases in which Justice Breyer voted against the position favored by environmentalists, all the Justices voted the same way.[218] None dissented, neither Justice Souter, Stevens, Kagan, nor Sotomayor. All the other most progressive Justices on the Court agreed that there was no, or at least too little, merit to the legal position favored by environmentalists. In three more of those twenty-three cases, environmentalists lost by a vote of eight to one.

215. *Id.* at 769–78.
216. EPA v. EME Homer City Generation L.P., 572 U.S. 489 (2013).
217. West Virginia v. EPA, 142 S. Ct. 2587 (2022).
218. *See infra* Appendix B.

Perhaps a Justice who dissented in those cases could be credited with perceiving actual strength in legal arguments that the others were missing. But it is also quite possible that they would be engaging in the very kind of ideologically driven judicial decision-making that environmentalists correctly condemn in those Justices with very low EP scores like Justices Alito and Scalia. Even those of us who care deeply about environmental protection, and worry no less deeply about the failings of our elected branches of government, should not see a judiciary that decides cases strictly on personal ideology rather than fair consideration of the actual strengths of the competing legal arguments as the proper solution to those failings.

Finally, contrary to the predictions of those advising President Clinton in June 1993, Justice Breyer has not remotely proven to be a dispassionate, "bloodless," "cold fish" Justice lacking any "innate sense of justice."[219] To be sure, Justice Breyer is no Justice Sonia Sotomayor—a Justice whose writings evince a compassion for victims of injustice without ready modern parallel. He is a committed pragmatist. But his striking pragmatism should not be mistaken for a lack of passion. He has proven himself deeply committed to social justice and the fundamental role of the judiciary in its pursuit. He has made that philosophy clear in both his judicial opinions and in his writings outside of the Court, especially his 2005 book, *Active Liberty*, in which the Justice contends that judges should not merely attend to the need to ensure that individuals are free from governmental coercion but also ensure they enjoy freedom to participate fully in government itself, including the right to vote.[220]

CONCLUSION

Justice Breyer was certainly not environmentalists' dream pick in 1994. And they had good reason to be concerned. But he has proved in actual practice to be an outstanding jurist for the nation and an excellent Justice for environmental protection law.

More fundamentally, Justice Breyer's record on the Court suggests the wisdom of rethinking what it means to be a "dream" justice. Should it mean having a Justice who shares one's ideological preferences on certain issues like environmental protection and will vote accordingly? Or should it mean having a Justice whose votes are rooted in a broader understanding of the proper role of the courts in interpreting law and deciding cases, including the central role our Constitution assigns to the judiciary to safeguard certain

219. *See supra* notes 22–25 and accompanying text.

220. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 32 (2005).

individual and collective rights? While the former Justice may reliably receive an EP score of 100, the latter is the better Justice, even if that means they sometimes will, as they should, rule in ways that disappoint.[221]

221. Professor William Funk may have nailed it at the time of Justice Breyer's confirmation. *See* Funk, *supra* note 38, at 736 ("Environmental law does have a friend on the Court, albeit a friend who places his duty to the law higher than his love for the environment.").

APPENDIX A

ENVIRONMENTAL LAW CASES OCTOBER TERM 1994–OCTOBER TERM 2021

Case Name	Citation	EP Designation
Dolan v. City of Tigard	512 U.S. 374 (1994)	Dissent
Babbitt v. Sweet Home Chapter Communities for A Great Oregon	515 U.S. 687 (1995)	Majority
Meghrig v. KFC Western	516 U.S. 479 (1996)	Dissent
General Electric v. Joiner	522 U.S. 136 (1997)	Dissent
Steel Company v. Citizens for a Better Environment	523 U.S. 83 (1998)	Dissent/Concur
Ohio Forestry Association v. Sierra Club	523 U.S. 726 (1998)	Dissent
United States v. Bestfoods	524 U.S. 51 (1998)	Majority
City of Monterey v. Del Monte Dunes at Monterey, Ltd.	526 U.S. 687 (1999)	Concur
Friends of the Earth v. Laidlaw Environmental Services, Inc.	528 U.S. 167 (2000)	Majority
Public Lands Council v. Babbitt	529 U.S. 728 (2000)	Majority
Solid Waste Agency of Northern Cook County v. United States	531 U.S. 159 (2001)	Dissent
Whitman v. American Trucking Associations	531 U.S. 457 (2001)	Majority
Palazzolo v. Rhode Island	533 U.S. 606 (2001)	Dissent
Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency	535 U.S. 302 (2002)	Majority
Norfolk & Western Railway v. Ayers	538 U.S. 135 (2003)	Majority
Alaska Department of Environmental Conservation v. EPA	540 U.S. 461 (2004)	Majority
South Florida Water Management Dist. v. Miccosukee Tribe	541 U.S. 95 (2004)	Majority
Engine Manufacturers Association v. South Coast Air Quality Management District	541 U.S. 246 (2004)	Dissent
Department of Transportation v. Public Citizen	541 U.S. 752 (2004)	Dissent

Norton v. Southern Utah Wilderness Association	542 U.S. 55 (2004)	Dissent
Bates v. Dow Agrosciences	544 U.S. 431 (2005)	Majority
Lingle v. Chevron U.S.A., Inc.	544 U.S. 528 (2005)	Majority
Kelo v. City of New London	545 U.S. 469 (2005)	Majority
S.D. Warren v. Maine Board of Environmental Protection	547 U.S. 370 (2006)	Majority
Rapanos v. United States	547 U.S. 715 (2006)	Dissent
Massachusetts v. EPA	549 U.S. 497 (2007)	Majority
Environmental Defense Fund v. Duke Energy Corporation	549 U.S. 561 (2007)	Majority
United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority	550 U.S. 330 (2007)	Plurality
United States v. Atlantic Research Corporation	551 U.S. 128 (2007)	Majority
National Association of Home Builders v. Defenders of Wildlife	551 U.S. 644 (2007)	Dissent
Exxon Shipping Company v. Baker	554 U.S. 471 (2008)	Dissent in part
Winter v. National Resources Defense Council, Inc.	555 U.S. 7 (2008)	Dissent
Summers v. Earth Island Institute	555 U.S. 488 (2009)	Dissent
Entergy Corporation v. Riverkeeper, Inc.	556 U.S. 208 (2009)	Dissent
Burlington Northern & Santa Fe Railway Company v. United States	556 U.S. 599 (2009)	Dissent
Coeur Alaska, Inc. v. Southeast Alaska Conservation Council	557 U.S. 261 (2009)	Dissent
Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection	560 U.S. 702 (2010)	Concurrence in part
Monsanto Company v. Geertson Seed Farm	561 U.S. 139 (2010)	Dissent
American Electric Power Company v. Connecticut	564 U.S. 410 (2011)	Dissent
Sackett v. EPA	566 U.S. 120 (2012)	Dissent
Arkansas Game and Fish Commission v. United States	568 U.S. 23 (2012)	Dissent
Decker v. Northwest Environmental Defense Center	568 U.S. 597 (2013)	Dissent

Koontz v. St. Johns River Water Management District	570 U.S. 595 (2013)	Dissent
EPA v. EME Homer City Generation L.P.	572 U.S. 489 (2014)	Majority
Utility Air Regulatory Group v. EPA	573 U.S. 302 (2014)	Concur/Dissent
Michigan v. EPA	576 U.S. 743 (2015)	Dissent
Federal Energy Regulatory Commission v. Electric Power Supply Association	577 U.S. 260 (2016)	Majority
Sturgeon v. Frost	577 U.S. 424 (2016)	Dissent
United States Army Corps of Engineers v. Hawkes Company	578 U.S. 590 (2016)	Dissent
Murr v. Wisconsin	137 S. Ct. 1933 (2017)	Majority
Weyerhaeuser Company v. United States Fish and Wildlife Service	139 S. Ct. 361 (2018)	Dissent
Sturgeon v. Frost II	139 S. Ct. 1066 (2019)	Dissent
Virginia Uranium, Inc. v Warren	139 S. Ct. 1894 (2019)	Majority
Knick v. Township of Scott	139 S. Ct. 2162 (2019)	Dissent
Atlantic Richfield Co. v. Christian	140 S. Ct. 1335 (2020)	All But Alito
County of Maui v. Hawaii Wildlife Fund	140 S. Ct. 1462 (2020)	Majority
United States Forest Service v. Cowpasture River Preservation Association	140 S. Ct 1837 (2020)	Dissent
United States Fish and Wildlife Service v. Sierra Club	141 S. Ct. 777 (2021)	Dissent
Guam v. United States	141 S. Ct 1608 (2021)	Majority
Cedar Point Nursery v. Hassid	141 S. Ct. 2063 (2021)	Dissent
Hollyfrontier Cheyenne Refining, LLC v. Renewable Fuels Association	141 S. Ct 2172 (2021)	Dissent
PennEast Pipeline Company v. New Jersey	141 S. Ct 2244 (2021)	Dissent
West Virginia v. EPA	142 S. Ct. 2587 (2022)	Dissent

APPENDIX B

ENVIRONMENTAL PROTECTION ("EP") SCORES OF SELECTED INDIVIDUAL JUSTICES

OCTOBER TERM 1994–OCTOBER TERM 2021

Justice	Number of Cases	EP Points	EP Score
Breyer	61	38	62.3
Scalia	47	11	23.4
Stevens	37	29	78.4
Kennedy	50	18	36
Thomas	63	13	20.6
Souter	36	29	80.6
Ginsburg	57	41	71.9
CJ Roberts	40	8	20
Alito	38	4	10.5
Sotomayor	25	16	64
Kagan	25	17	68