
ENVIRONMENTAL LAW & PROPERTY RIGHTS

THE RECORD OF THE ROBERTS COURT IN ENVIRONMENTAL CASES: PRO-BUSINESS OR PRO-GOVERNMENT?

By Jonathan H. Adler*

The Supreme Court's October 2008 Term was not particularly good for environmentalist groups. Indeed, it was their "worst term ever," according to Georgetown University law professor Richard Lazarus.¹ The Court heard five environmental law cases that Term.² In each case, the side favored by environmentalist groups had prevailed below, and in each case the Supreme Court reversed. According to Richard Frank of the University of California at Berkeley's Boalt Hall, it was "a miserable year for the environment in the Supreme Court."³

It is unusual for the Supreme Court to take five environmental cases in a single Term.⁴ It is even more unusual for the Court to side uniformly against environmental interests. Was the October 2008 Term an outlier? Or was it an indication of a newfound hostility to environmental protection on the Supreme Court?

Many commentators rushed to embrace the latter conclusion. Environmental attorney Glenn Sugameli of Earthjustice accused the Court of adopting "pro-business blinders."⁵ *Slate's* Dahlia Lithwick wrote that "environmentalists are always buried" by the Roberts Court.⁶ Douglas Kendall of the Constitutional Accountability Center told the *National Law Journal* that the Roberts Court "is chipping away at the very foundations of environmental law in this country."⁷

Concerns that the Roberts Court is hostile to environmental protection draw upon a larger narrative that the Roberts Court is both more conservative and more favorably disposed to business interests than its predecessors.⁸ Chief Justice Roberts and Justice Alito had yet to sit on the Court for two full Terms before commentators began to accuse the Court of a "pro-business" bias.⁹ In March 2008, the *New York Times Magazine* published a lengthy article by George Washington University law professor Jeffrey Rosen, "Supreme Court, Inc.," making the case that the Supreme Court had undergone an "ideological sea change," shifting its allegiance from "progressive and consumer groups" to the business community.¹⁰ The paper itself accused the Court of "a knee-jerk inclination to rule for corporations over workers and consumers"¹¹ and decried the Court's "reputation for being reflexively pro-business."¹² Other news organizations repeated the claim that President George W. Bush's Supreme Court nominations had helped to create a "pro-business judiciary."¹³

Legal scholars debate whether the Roberts Court has, in fact, been "pro-business" during its first several terms.¹⁴ While

the Court appears to have taken a greater interest in business-related cases, particularly in terms of the percentage of its smaller docket, it is unclear that the Court has been any more "pro-business" than its predecessors in any meaningful sense. While business litigants have had their share of victories over the past several terms, they have also had more than a few stinging and far-reaching defeats, particularly in the area of preemption. While business groups won nearly every preemption case between 2006 and 2009, it has since lost several important preemption cases, including *Wyeth v. Levine*¹⁵ and *Cuomo v. Clearing House Association*.¹⁶

I conducted a preliminary analysis of the Roberts Court's decisions in environmental cases for a January 2009 *Santa Clara Law Review* symposium on "Big Business and the Roberts Court."¹⁷ In this analysis, I concluded that there was no evidence of a "pro-business" tilt in the Roberts Court's environmental decisions. If anything, the Court's decisions in environmental cases suggested a tendency to side with government agencies and state interests, and not any particular hostility to regulation or sympathy for business litigants. In the intervening months, little has changed. Taking into account those decisions handed down since that symposium does not alter the conclusions. The remainder of this article summarizes the Roberts Court's approach to environmental cases, drawing upon the research and analysis contained in my prior article, and explains the basis for these conclusions.

WHAT IS "PRO-BUSINESS" OR "ANTI-ENVIRONMENT"?

Court commentaries routinely slap labels on Court decisions—"pro-business," "pro-consumer," "anti-environment," etc.—without providing any meaningful context or discussion for what such labels mean. It certainly appears the Roberts Court is more interested in business-related cases than its predecessors, insofar as the Court appears to have taken more such cases, even as its docket has shrunk. "The Court's increased attention to business related cases—even as its overall docket has continued to shrink—is indeed eye-catching," according to Michael Greve of the American Enterprise Institute.¹⁸ Business-related cases have accounted for one-third to one-half of the Court's docket in recent years, depending on how one defines the term.¹⁹

The phrase "pro-business court" is undoubtedly intended to signify more than the Court's increased willingness to consider complex legal questions of great importance to the business community. It is a phrase that signifies a substantive inclination, if not necessarily an actual bias, to decide cases in a particular way. But what is this inclination or bias? Is it a preference for business litigants? Or a preference for legal outcome that "business" prefers? And what outcomes are these? In many areas of the law, businesses are on both sides. Does

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“pro-business” mean a preference for a freer or less regulated marketplace? But this is not always good for businesses—pro-market and pro-business are not the same thing.

The identities of the litigants are poor proxies for the underlying merits, as well as whether a given result benefits a broader group or interest. That an individual corporation or business group is on one side or another of a case does not mean that it represents what is good for “business.” Business-related cases regularly pit businesses against one another, and many businesses benefit from legal rules that might be harmful to business activity more broadly.

In his *New York Times Magazine* article, Rosen reported that “the Roberts Court has heard seven [antitrust cases] in its first two terms—and all of them were decided in favor of the corporate defendants.”²⁰ This is true, and Rosen presented it as evidence in support of his thesis that the Roberts Court is “pro-business.” Yet the plaintiffs in all but one of these cases were businesses as well. So in all but one of the Roberts Court’s antitrust cases in its first two Terms, “business” won and “business” lost. So whether the prevailing party was a business tells us very little.

Because the Roberts Court has tended to side with *defendants* in antitrust cases, perhaps it would be fair to label these decisions as “pro-business” insofar as these decisions have made it more difficult to challenge established business practices as anti-competitive. Perhaps, but this is still overly simplistic, as focusing on whether plaintiffs or defendants won more cases reveals very little about the underlying merits of the cases.²¹ Only a handful of cases are at issue. Unless one makes the improbable assumption that the cases represent a random and representative sample of available cases, any effort to determine whether these decisions reveal a “pro-business” inclination have to address the underlying merits of the specific claims considered by the Court. Reversing an outlying pro-plaintiff Ninth Circuit opinion so as to create greater uniformity and consistency within the case law is quite different from overturning decades of precedent or turning the law in a decidedly more “pro-defendant” direction.

Several antitrust scholars have argued that the underlying theme of the Roberts Court’s antitrust decisions is not that the Court is “pro-business” but that it is “pro-consumer welfare.”²² From this perspective, the Roberts Court has internalized the insights of the Chicago School of antitrust analysis and seeks to prevent legal challenges to pro-competitive business arrangements. As Judge Douglas Ginsburg and Leah Brannon wrote recently, the Roberts Court appears to be “methodically re-working antitrust doctrine to bring it into alignment with modern economic understanding.”²³ From this perspective, it would be more accurate to call the Roberts Court’s antitrust decisions “pro-consumer” or “pro-market” than “pro-business.” Among other things, the Court’s antitrust decisions could make it more difficult for businesses to use antitrust law to hobble more efficient competitors.

The same caution is due when seeking to characterize environmental decisions as “pro-business” or even “anti-environment.” It is overly simplistic to characterize environmental cases as contests between “business” and “the environment.” Environmental policy decisions tend to benefit some business

interests even as they may impose costs on others. Enactment of some federal environmental laws was actively supported by some corporate interests. Indeed, the federalization of environmental law was driven, in part, by national firms that sought to displace variable and potentially more stringent state standards.²⁴ In some cases, business interests have sought to use regulatory policy as a means of achieving comparative advantage, often by disadvantaging competitors.²⁵ Environmental controversies often pit one set of industry groups against another, as when incinerators and cement kilns face off on air emission standards or oil and agribusiness fight over energy policy.²⁶ This was also true in the Roberts Court’s most high profile environmental case, *Massachusetts v. EPA*, as businesses hoping to gain financially from the imposition greenhouse gas controls supported the petitioners, while most business groups lined up on the other side.²⁷ Indeed, one of the firms seeking greater environmental regulation in *Massachusetts* was before the Roberts Court two years later seeking less stringent environmental regulation in another context.²⁸

Although business interests are not uniform or monolithic, it is nonetheless possible to identify a particular side in a given case with business interests generally. That is, in some cases it is relatively clear which side is more in line with the majority of business interests. In the environmental context, while there are businesses that stand to benefit from increased regulation, the “pro-business” position is usually (if not exclusively) the position that is more resistant to regulation.

Even if we can identify the “pro-business” side in a given case, not all “pro-business” positions or decisions are the same. There is a meaningful difference between a court decision that maintains a status quo favored by business interests and a decision that shifts the law in a “pro-business” direction. Ratifying a legislative deal or administrative ruling supported by business interests is quite different from judicial invalidation of regulatory initiatives. Adopting a narrow interpretation of a federal statute creating private rights of action against corporations is quite different from imposing constitutional limits on punitive damages or regulatory impositions. The latter may be evidence of an actual “pro-business” tilt, while the former may illustrate nothing more than deference to the political branches, and may only yield “pro-business” outcomes so long as the political branches are sufficiently sympathetic to business interests. And insofar as the vast majority of cases in which the Roberts Court has adopted “pro-business” outcomes are of the former variety, this should inform our assessment of the extent to which it is a meaningfully “pro-business” court, particularly as recent political shifts may portend a less business-friendly legislative and executive branch.

THE ROBERTS COURT’S ENVIRONMENTAL DECISIONS

Accepting the qualifications outlined above, is it fair to characterize the Roberts Court as “pro-business” in environmental cases? And what does this tell us about the Roberts Court more broadly? Since John Roberts became Chief Justice, the Court has decided 10 of its 18 environmental cases in a “pro-business” way. At the same time, the federal government’s position has prevailed in 10 of the 15 cases in which it took a position, and government positions prevailed

against private challenges in 11 of 16 cases. This is an admittedly small set of cases from which to draw definitive conclusions, but they can form the basis of a preliminary assessment: the Roberts Court's decisions in environmental cases show little evidence of any pro-business orientation and the Court appears to be more deferential to governmental interests than it is solicitous of business concerns.

If we step back from the numbers, and consider the substantive effects of the cases, there is even less evidence of a "pro-business" inclination on the Court. Most of the business wins occurred in relatively narrow cases that had little effect on pre-existing law, while several of the losses are quite dramatic and will have profound effects on economic interests. The aggregate effect of the pro-business decisions on environmental law and future environmental litigation has been quite meager, while the less business-friendly decisions could have substantial legal and practical consequences for many years to come.

Consider the four most significant victories for business interests in environmental cases during the Roberts Court era: *Exxon Shipping v. Baker*,²⁹ *National Association of Home Builders v. Defenders of Wildlife*,³⁰ *Rapanos v. United States*,³¹ and *Burlington Northern & Santa Fe Railway Co. v. United States*.³² In *Exxon Shipping v. Baker*, the Court struck down a multi-billion-dollar punitive damage award against Exxon but also unanimously rejected the oil giant's claim that punitive damage awards were preempted by federal law, and the majority confined its holding limiting punitive damage awards to cases arising under the federal common law of maritime.³³ The Court's decision in *NAHB v. Defenders of Wildlife* imposed a significant limitation on the application of the Endangered Species Act to pre-existing statutory obligations, but in doing so it affirmed historical agency practice and long-standing lower court decisions on the question. In *Rapanos*, the Court adopted a potentially significant limitation on federal jurisdiction over wetlands lacking a "significant nexus" to navigable waters but also reaffirmed that the U.S. Army Corps of Engineers and Environmental Protection Agency retain substantial authority to define "substantial nexus" so as to reclaim much of the jurisdictional ground that was lost.³⁴

Burlington Northern & Santa Fe Railway v. United States, which narrowed the scope of "arranger" liability and clarified the standards for apportioning cleanup costs among potentially responsible parties under Superfund, could be more significant, even if only due to the dollar amounts at stake in some Superfund cleanups. Justice Stevens' decision for an eight-justice majority may have unsettled some environmentalist expectations, but the holding rested squarely on a plain reading of the statutory text. Concluding that "arranger" liability only applies to those who take actions directed at the disposal of hazardous waste and cannot be applied to anyone who sells or transfers a product with knowledge that it might be mishandled, the opinion is hardly evidence of judicial hostility to regulation of private business. In *United States v. Atlantic Research Corp.*, a private firm won another Superfund case against the federal government, but this was a Superfund cost-recovery action and the business position was also supported by environmentalists.

Contrast these decisions with those cases in which the Court sided against business interests. The most important

environmental case decided by the Roberts Court—indeed, one of the most important cases of any sort decided in the past several years—was *Massachusetts v. EPA*, in which the Court both loosened the standing requirements for litigants seeking greater federal regulation and expanded the scope of the Clean Air Act to cover greenhouse gases, including carbon dioxide, the most ubiquitous by-product of industrial civilization.³⁵ As a substantive matter, this case alone is more adverse to business interests than all of the business "wins" put together.

As a legal matter, the most significant aspect of *Massachusetts v. EPA* may be its treatment of standing. Not only did the Court apply the traditional requirements for Article III standing in a particularly undemanding fashion, it also announced a new rule of "special solicitude" for states and potentially expanded the ability of citizen-suit plaintiffs to meet Article III's causation and redressability requirements. The Court subsequently rejected environmentalist standing claims in *Summers v. Earth Island Institute*,³⁶ but there is nothing in *Summers* that qualifies the expansive approach to standing adopted in *Massachusetts*.

As a practical matter, *Massachusetts v. EPA* is particularly important because it will trigger the federal regulation of greenhouse gases, most notably carbon dioxide. While the Court specifically eschewed directly mandating that the EPA regulate greenhouse gases, remanding the matter back to the Agency for further proceedings given the Agency's failure to offer a "reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change,"³⁷ there is little doubt that such regulation will result. Indeed, at the time of this writing, regulation has already begun. Relying upon *Massachusetts v. EPA*, the EPA has made a formal finding that greenhouse gas emissions from motor vehicles cause or contribute to air pollution "which may reasonably be anticipated to endanger public health or welfare."³⁸ This finding triggers regulation of motor vehicle emissions under Section 202 of the Act and sets in motion other regulatory requirements as well.³⁹

Massachusetts v. EPA was not the only loss for the business community. The Court rebuffed challenges to the application of environmental laws to various business activities, as in *S.D. Warren v. Maine Board of Environmental Protection*⁴⁰ and *Environmental Defense v. Duke Energy*.⁴¹ *S.D. Warren* was a rather straightforward case in which the Court unanimously rejected S.D. Warren's contention that a hydroelectric dam that removes and then redeposits water from a river results in a "discharge into the navigable waters" requiring state certification under the Clean Water Act. *Environmental Defense*, on the other hand, is a potentially significant case in which the Court strengthened the EPA's hand in a series of enforcement actions against utilities under the Clean Air Act New Source Review program. In *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*,⁴² the Court took a small step back from protecting private waste management firms from solid waste flow control ordinances and government-sanctioned monopolies, potentially clearing the way for the creation of government-run monopoly waste processing services and the balkanization of interstate markets in waste management services. In other cases, the Court either expanded the government's ability to impose on

business interests or limited the ability of businesses to challenge government regulations.⁴³

THE OCTOBER 2008 TERM

Five of the Roberts Court's environmental decisions came in the October 2008 Term. As noted above, the side favored by business, and disfavored by environmentalists, prevailed in each case. But here again there may be less than meets the eye. Environmentalists may have gone 0-for-5, but this could say more about the cases under review than the Supreme Court.

Four of the five environmental cases heard by the Court in the October 2008 term came from the U.S. Court of Appeals for the Ninth Circuit. In these cases, the Court voted 25-15 to overturn the Ninth Circuit's decisions. Only one of the cases, *Summers v. Earth Island Institute*, was decided 5-4. *Burlington Northern* was decided 8-1, while the other two (*Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* and *Winter v. Natural Resources Defense Council*) were decided 6-3. Given how closely-divided the Supreme Court is on so many hot-button issues, it is notable that only one of the five environmental cases was decided by a 5-4 vote. This could just as easily show that the Ninth Circuit is environmentally extreme as that the Supreme Court is hostile to environmental protection or particularly "pro-business" in environmental cases.

As noted above, the Roberts Court's record in environmental cases is but one piece of the larger narrative that the Court has become significantly more conservative with the confirmations of Chief Justice Roberts and Justice Alito. Yet there is scant evidence that Roberts and Alito have made the Court particularly more conservative or pro-business on environmental issues, even if one focuses exclusively on the October 2008 term.

A *New York Times* story on how environmentalist groups lost all five environmental cases before the Court last term quoted Temple University law professor Amy Sinden saying that the cases this Term "could all have come out very differently if we still had O'Connor on the court."⁴⁴ This is quite doubtful. As already noted, only one of the cases, *Summers v. Earth Island Institute*, was decided 5-4. It is certainly plausible that Justice O'Connor might have voted to confer standing on the environmentalist plaintiffs in this case, thus producing an environmentalist win, but it's far from certain. Justice O'Connor dissented in *Lujan v. Defenders of Wildlife*,⁴⁵ but she joined the majority opinion in the earlier case of *Lujan v. National Wildlife Federation*⁴⁶ and wrote a restrictive standing opinion in *Allen v. Wright*.⁴⁷ But even if she would have voted differently from Justice Alito in this case, there's substantial reason to doubt she would also have voted any differently in the remaining four cases—and, even if she had, her vote would not have changed the outcome. In all likelihood, no more than one of the October 2008 cases could have come out any differently were Justice O'Connor still a member of the Court.

CONCLUSION: PRO-BUSINESS OR PRO-GOVERNMENT?

There is little evidence of any "pro-business" orientation in the environmental cases decided by the Roberts Court to date, but there may be evidence of something else. Business interests did not prevail as often as governmental interests did.

The federal government's position prevailed in ten of the fifteen cases in which it took a position, including some in which the federal government took the "pro-business" position. In an eleventh case—*United Haulers Association*—local governments prevailed against private parties.⁴⁸ Thus, in eleven of sixteen cases, the government position prevailed. The remaining cases pitted two states against each other and two private parties against each other, respectively.⁴⁹

This pattern is even more striking when one considers the cases in which the federal government lost. In *Massachusetts v. EPA*, the Court rejected the position advocated by the federal government. Yet the case's outcome can still be considered "pro-government" in many respects. Massachusetts and other state governments were among the prevailing parties, and the Court stressed the importance of that fact in resolving the standing issue. It announced that state governments, as sovereign entities, were entitled to a "special solicitude" in the standing inquiry, thereby privileging state litigants over others.

Massachusetts v. EPA is "pro-government" in another respect: the outcome of the case is greatly-expanded federal regulatory authority. Further, in holding that greenhouse gases are subject to regulation as "pollutants" under the Clean Air Act and forcing the EPA to base its decision on whether to regulate such emissions upon its assessment of existing climate science, the Court effectively ensured that the EPA will regulate greenhouse gas emissions from motor vehicles, as well as from stationary sources, including many emission sources which have never before been regulated under federal law.

Rapanos and *Burlington Northern* are the only cases in which the Roberts Court imposed any meaningful limit on federal regulatory authority. Yet it would be easy to overstate the impact of these cases. *Rapanos* in particular leaves the federal government with ample room to impose extensive regulation on wetlands should the EPA and Army Corps of Engineers elect to revise their regulations.⁵⁰ The Court certainly hinted that federal regulation of private land use is subject to federalism limitations, but it refrained from explicitly imposing such a limit, further blunting the impact of the holding.

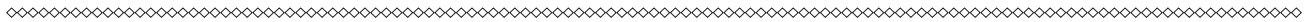
If the Roberts Court is, in fact, more solicitous of governmental authority than business or environmental interests, this should become evident in the years to come. The Bush Administration was inclined to support the same position favored by business interests in some environmental cases, as it did in *Massachusetts*, *Winter*, *Entergy*, *NAHB*, and *Summers*. If, as expected, the Obama Administration is more supportive of increased environmental regulation and less supportive of business concerns, the Department of Justice will side with business concerns less often, thereby forcing the Court to choose, and providing a test of the hypothesis that the Roberts Court is more deferential to government authority than it is supportive of business interests.

A few final caveats are in order. First, the Roberts Court has considered only eighteen environmental cases in its first four terms. This is a small number of cases upon which to arrive at any definitive conclusion about its approach to environmental—or any other—types of cases. As the Court hears more cases, it will become easier to see whether there is

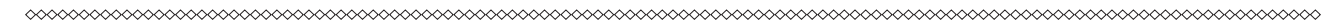
a discernible trend or inclination, or whether these tentative conclusions were an artifact of the specific cases heard over the past few years. Finally, and perhaps most importantly, whether a given case embodies a “pro-business” outcome is an entirely different question from whether the decision was

substantively correct. The aim of this paper has not been to make any judgments about the correctness of the Court’s various decisions, but rather to assess claims about what the pattern of decisions to date reveal.

| <u>Case</u> | <u>Cite</u> | <u>Issue</u> | <u>Vote</u> | <u>Pro-Business Outcome</u> | <u>Pro-Government Outcome</u> |
|---|-----------------------|--|-------------|-----------------------------|-------------------------------|
| <i>S.D. Warren Co. v. Maine Board of Environmental Protection</i> | 547 U.S. 370 (2006) | Whether hydroelectric dam causes “discharge into the navigable waters” requiring state certification under Clean Water Act | 9-0 | No | Yes |
| <i>Rapanos v. United States</i> | 547 U.S. 715 (2006) | Whether (and when) wetlands adjacent to tributaries of navigable waters are “waters of the United States” under the Clean Water Act and applicable federal regulations | 5-4 | Yes | No |
| <i>BP America Production Co. v. Burton</i> | 549 U.S. 84 (2006) | Whether six-year statute of limitations for government contract actions applies to administrative payment orders for gas royalty underpayments issued by the Minerals Management Service | 7-0* | No | Yes |
| <i>Rockwell International Corp. v. United States</i> | 549 U.S. 457 (2007) | Whether “original source” requirement of False Claims Act is jurisdictional | 6-2** | Yes | No |
| <i>Massachusetts v. EPA</i> | 549 U.S. 497 (2007) | Whether EPA has authority to regulate greenhouse gas emissions under the Clean Air Act | 5-4 | No | No |
| <i>Environmental Defense v. Duke Energy Corp.</i> | 549 U.S. 561 (2007) | Whether EPA is required to apply same definition of “modification” for promulgation of PSD and NSPS standards under Clean Air Act | 5-4 | No | Yes |
| <i>United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority</i> | 550 U.S. 330 (2007) | Whether county flow control ordinances requiring use of state-owned waste facilities violate the Dormant Commerce Clause. | 6-3 | No | Yes |
| <i>United States v. Atlantic Research Corp.</i> | 127 S.Ct. 2331 (2007) | Whether CERCLA provides potentially responsible party a cause of action to recover costs of voluntary cleanup | 9-0 | Yes | No |



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|--|-----------------------------|---|--------|-----|-----|
| <i>National Ass'n of Home Builders v. Defenders of Wildlife</i> | 127 S.Ct. 2518 (2007) | Whether consultation requirements under Endangered Species Act apply to non-discretionary federal agency decisions governed by explicit statutory criteria. | 5-4 | Yes | Yes |
| <i>Wilkie v. Robbins</i> | 127 S.Ct. 2588 (2007) | Whether landowner has private cause of action against Bureau of Land Management officials for effort to extort easement | 7-2 | No | Yes |
| <i>John R. Sand & Gravel Co. v. United States</i> | 128 S.Ct. 750 (2008) | Whether statute of limitations for takings claims against federal government is jurisdictional | 7-2 | No | Yes |
| <i>New Jersey v. Delaware</i> | 128 S.Ct. 1410 (2008) | Whether interstate compact granted New Jersey exclusive jurisdiction over riparian improvements extending beyond low-water mark | 6-2** | No | N/A |
| <i>Exxon Shipping Co. v. Baker</i> | 128 S.Ct. 2605 (2008) | Whether federal maritime common law limits amount of punitive damages awarded in suit for oil spill | 5-3*** | Yes | N/A |
| <i>Winter v. Natural Resources Defense Council</i> | 129 S.Ct. 365 (2008) | Whether court of appeals erred in affirming preliminary injunction against use of naval sonar for failure to comply with National Environmental Policy Act | 6-3 | Yes | Yes |
| <i>Summers v. Earth Island Institute</i> | 129 S.Ct. 1142 (2009) | Whether environmental organization's challenge to Forest Service regulations is justiciable | 5-4 | Yes | Yes |
| <i>Entergy Corp. v. EPA</i> | 129 S.Ct. 1498 (2009) | Whether EPA may use cost-benefit analysis in determining what constitutes the "best technology available" to limit environmental effects of cooling water intake structures under the Clean Water Act | 6-3 | Yes | Yes |
| <i>Coeur Alaska, Inc. v. Southeast Alaska Conservation Council</i> | 129 S.Ct. 2458 (2009) | Whether the U.S. Army Corps of Engineers may issue a permit under Section 404 for discharge of fill material otherwise subject to effluent limitations under the Clean Water Act | 6-3 | Yes | Yes |



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|--|-----------------------|--|-----|-----|----|
| <i>Burlington Northern & Santa Fe Railway Co. v. United States</i> | 129 S.Ct. 1870 (2009) | Whether (and when) it is appropriate to impose joint and several liability or apportion damages and scope of arranger liability under CERCLA | 8-1 | Yes | No |
|--|-----------------------|--|-----|-----|----|

* Chief Justice Roberts and Justice Breyer did not participate.

** Justice Breyer did not participate.

*** Justice Alito did not participate

Endnotes

1 Adam Liptak, *Environment Groups Find Less Support on Court*, N.Y. TIMES, July 3, 2009 (quoting Richard Lazarus).

2 Winter v. Natural Res. Def. Council, 129 S.Ct. 365 (2008); Summers v. Earth Island Inst., 129 S.Ct. 1142 (2009); Entergy Corp. v. Riverkeeper Inc., 129 S.Ct. 1498 (2009); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S.Ct. 2458 (2009); Burlington N. & Santa Fe Ry. Co. v. United States, 129 S.Ct. 1876 (2009).

3 Lawrence Hurley, *Environmental Issues Lose in Supreme Court: Mining Decision is Fifth to Disappoint Activists This Term*, DAILY JOURNAL, June 25, 2009.

4 The number of environmental cases decided in the October 2008 term is even more notable given the substantial decline in the number of cases heard by the Court each term.

5 Hurley, *supra* note 3.

6 Dahlia Lithwick, *Spoonfuls of Sugar: Americans' Continued Love Affair with the John Roberts Court*, SLATE, Sept. 26, 2009, available at <http://www.slate.com/id/2229517/pagnum/all/>.

7 Marcia Coyle, *High Court Losses Stun Environmentalists*, NAT'L L. J., June 29, 2009.

8 See generally Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947 (2008) (arguing that the Roberts Court is the most conservative and most "pro-business" Supreme Court since the 1930s). For a counterargument, see Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983 (2008).

9 See, e.g. Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 432-37 (2007) (asserting that the "conservatism" of the Roberts Court was "manifest in its being more protective of business interests than its recent predecessors"); see also Erwin Chemerinsky, *The Supreme Court: Sharp Turn to the Right*, CAL. BAR. J., August 2007; Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews to Pattern of Roberts Court*, WASH. POST, Jun. 22, 2007, at D1; Nick Timiraos, *Roberts Court Unites on Business*, WALL ST. J., Jun 30, 2007 ("The first full term of the Roberts Court ended this past week with rulings that pushed the law in a direction favored by business."); Steven Pearlstein, *Business Reigns Supreme*, WASH. POST, Jul. 1, 2007; Tony Mauro, *High Court Reveals a Mind for Business*, LEGAL TIMES, Jul. 2, 2007.

10 Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES MAG., Mar. 16, 2008. See also Jeffrey Rosen, *Keynote Address: Santa Clara Law Review Symposium: Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929 (2009) (defending the initial thesis with some qualifications). Rosen's initial article provoked substantial commentary and criticism, much of which is discussed in a series of posts at the Volokh Conspiracy blog at http://volokh.com/posts/chain_1205805605.shtml.

11 Editorial, *A Verdict for Workers, for a Change*, N.Y. TIMES, Mar. 2, 2008.

12 Editorial, *The Court and Workers*, N.Y. TIMES, Jun. 21, 2008.

13 Jonathan Crawford, *Bush's Lasting Legacy: A Pro-Business Judiciary*, KIPLINGER BUS. LETTERS, Mar. 10, 2008, available at http://www.kiplinger.com/businessresource/forecast/archive/Bush_Leaves_a_Last_Leaving_Legacy_080310.html.

14 See generally *Santa Clara Law Review Symposium: Big Business and the*

Roberts Court, 49 SANTA CLARA L. REV. 943-1122 (2009).

15 129 S. Ct. 1187 (2009).

16 129 S.Ct. 2710 (2009).

17 See Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 (2009).

18 Michael Greve, *Does the Court Mean Business?* FEDERALIST OUTLOOK No. 26, Sept. 2007, at 1.

19 See Rosen, *supra* note 10 ("Forty percent of the cases the court heard last term involved business interests, up from around 30 percent in recent years."); Greve, *Does the Court Mean Business?*, *supra* note 18, at 1 ("In the 2006 term, twenty-five of sixty-seven cases dealt with business-related issues."); Mauro, *High Court Reveals Mind for Business*, *supra* note 9 ("Fully half of the Court's 71 cases involved business."). But see Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. 997, 1000-02 (2009) (suggesting there has been no appreciable increase in the proportion of the Court's docket devoted to business-related cases).

20 Rosen, *supra* note 10.

21 See Posting of Josh Wright to Truth on the Market, *Abuse of Plaintiff Win Rates as Evidence that Antitrust Law Is Too Lenient*, <http://www.truthonthemarket.com/2008/10/14/abuse-of-plaintiff-win-rates-as-evidence-that-antitrust-law-is-too-lenient/> (Oct. 14, 2008, 12:22 EST).

22 See, e.g., Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, GLOBAL COMPETITION POL'Y, Vol. 3, No. 2 (2007).

23 See Douglas H. Ginsburg & Leah Brannon, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, GLOBAL COMPETITION POL'Y, Vol. 3, No. 2 (2007).

24 See, e.g., E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON & ORG. 313, 326-9 (1985); David Schoenbrod, *Why States, Not EPA, Should Set Pollution Standards*, in ENVIRONMENTAL FEDERALISM 259, 260-62 (Terry L. Anderson & P.J. Hill eds., 1997).

25 See generally Jonathan H. Adler, *Clean Politics, Dirty Profits: Rent-Seeking Behind the Green Curtain*, in POL. ENVIRONMENTALISM (Terry Anderson ed., 2000); Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845 (1999); ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (Michael S. Greve & Fred L. Smith Jr. eds., 1992).

26 See Adler, *Clean Politics*, *supra* note 25.

27 Among those businesses and trade associations that supported the state and environmental petitioners in *Massachusetts v. EPA* were the Aspen Skiing Corporation, Calpine, and Entergy. Various trade associations and groups representing renewable energy interests also supported the imposition of greenhouse gas controls. See *Massachusetts v. EPA*, 549 U.S. 497, 511 n.15 (2007). See also generally Stuart Buck & Bruce Yandle, *Bootleggers, Baptists, and the Global Warming Battle*, 26 HARV. ENVTL. L. REV. 177 (2002).

28 See Entergy Corp. v. Riverkeeper Inc., 129 S.Ct. 1498 (2009).

29 128 S.Ct. 2605 (2008).

30 127 S.Ct. 2518 (2007).

31 547 U.S. 715 (2006).

32 129 S.Ct. 1870 (2009).

33 128 S.Ct. 2605, 2618-19 (2008).

34 See Jonathan H. Adler, *Reckoning with Rapanos: Revisiting “Waters of the United States” and the Limits of Federal Wetland Regulation*, 14 MO. ENVTL. L. & POL’Y REV. 1 (2006); Jonathan H. Adler, *Once More, With Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, in THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS 81 (L. Kinvin Wroth ed., 2007).

35 For more on the implications of *Massachusetts v. EPA*, see Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. BRIEF 63 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf>; Jonathan H. Adler, *Massachusetts v. EPA Heats Up Climate Policy No Less Than Administrative Law: A Comment on Professors Watts and Wildermuth*, 102 NW. U. L. REV. COLLOQUY 32 (2007), available at <http://www.law.northwestern.edu/lawreview/Colloquy/2007/20/LRColl2007n20Adler.pdf>.

36 129 S.Ct. 1142 (2009).

37 127 S.Ct. at 1463.

38 Section 202(a)(1) of the Clean Air Act provides, in relevant part:

The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1).

39 See Jonathan H. Adler, *The EPA’s Carbon Footprint*, REASON (March 2010).

40 547 U.S. 370 (2006).

41 549 U.S. 561 (2007).

42 550 U.S. 330 (2007).

43 See, e.g., *BP America Production Co. v. Burton*, 549 U.S. 84 (2006); *John R. Sand & Gravel Co. v. United States*, 128 S.Ct. 750 (2008).

44 See Liptak, *supra* note 1.

45 504 U.S. 555 (1992).

46 497 U.S. 871 (1990).

47 467 U.S. 737 (1984).

48 The remaining cases, *New Jersey v. Delaware*, 128 S.Ct. 1410 (2008), and *Exxon Shipping v. Baker*, 128 S.Ct. 2605 (2008), pitted two states against each other and two private parties against each other respectively.

49 *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008); *New Jersey v. Delaware*, 128 S.Ct. 1410 (2008). Note in the latter case, however, that the Court adopted a “pro-government” position insofar as it adopted a compact interpretation that provides for overlapping and duplicative government jurisdiction.

50 See *supra* note 34 and the sources cited therein.

