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2009

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### Repository Citation

Adler, Jonathan H., "Business, the Environment, and the Roberts Court: A Preliminary Assessment" (2009).  
*Faculty Publications*. 28.

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## BUSINESS, THE ENVIRONMENT, AND THE ROBERTS COURT: A PRELIMINARY ASSESSMENT

Jonathan H. Adler\*

It did not take long for the Roberts Court to earn its reputation as a “pro-business” Court. Even before publication of Jeffrey Rosen’s much-discussed *New York Times Magazine* article, *Supreme Court, Inc.*,<sup>1</sup> many commentators had proclaimed that this Court looks out for business. Indeed, some were ready to make this charge before the current Court had sat two full terms together.<sup>2</sup> According to these accounts, the addition of Chief Justice John Roberts and Associate Justice Samuel Alito has made the Court more receptive to business interests, and more likely to side with corporations against individual

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\*Professor of Law and Director, Center for Business Law and Regulation, Case Western Reserve University School of Law. This paper was prepared for the *Santa Clara Law Review* symposium on “Big Business and the Roberts Court,” January 23, 2009. The author would like to thank Ted Frank and Michael Greve for comments on a draft of this article. The author is responsible for any remaining error or inabilities.

1. Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES, Mar. 16, 2008, § MM (Magazine), at 38. This article provoked substantial commentary and criticism, some of which is discussed in a series of posts, see Posting of Jonathan Adler, Ilya Somin, & Eugene Volokh to The Volokh Conspiracy, [http://volokh.com/posts/chain\\_1205805605.shtml](http://volokh.com/posts/chain_1205805605.shtml) (Mar. 17, 2008, 22:10–Mar. 20, 2008, 00:18).

2. See, e.g., Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 423, 432–37 (2007) [hereinafter Chemerinsky, *Turning Sharply*] (explaining that the “conservatism” of the Roberts Court was “manifest in its being more protective of business interests than its recent predecessors”); see also Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews to Pattern of Roberts Court*, WASH. POST, Jun. 22, 2007, at D01; *Business Reigns Supreme*, WASH. POST, July 1, 2007, at F03; Nick Timiraos, *Hot Topic: Roberts Court Unites on Business*, WALL ST. J., June 30, 2007, at A5 (“The first full term of the Roberts Court ended this past week with rulings that pushed the law in a direction favored by business.”); Erwin Chemerinsky, *The Supreme Court: Sharp Turn to the Right*, CAL. B. J., August 2007, [http://calbar.ca.gov/state/calbar/calbar\\_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/August2007&sCatHtmlPath=cbj/2007-08\\_TH\\_01\\_supremecourt.html&sCatHtmlTitle=Top%20Headlines](http://calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/August2007&sCatHtmlPath=cbj/2007-08_TH_01_supremecourt.html&sCatHtmlTitle=Top%20Headlines); Tony Mauro, *High Court Reveals a Mind for Business*, LEGAL TIMES, July 2, 2007, <http://www.wlf.org/upload/070207legaltimes.pdf>. These commentaries appeared at or near the end of the Supreme Court’s October 2006 term. At this point, John Roberts had been Chief Justice for two terms, but Samuel Alito had only been an associate justice for a term and a half. The Senate confirmed Justice Alito on January 31, 2006.

employees or consumers.<sup>3</sup>

The purpose of this article is to evaluate the claim that the Roberts Court is “pro-business” with particular attention to the Court’s approach to business concerns in environmental law cases. This is necessarily a tentative enterprise. As of this writing, the Roberts Court has been together for fewer than four full terms.<sup>4</sup> The Court has decided only sixteen environmental cases, and two potentially significant business-related environmental cases are pending. Nevertheless, examination of the environmental law cases decided to date may help illuminate the extent of the Court’s concern for business interests.

Environmental law cases often pit business interests against other social values, such as public health and welfare, species preservation, and resource conservation. Environmental cases almost always involve business litigants, if not as parties then as *amici curiae*. Even where business groups are not directly involved, environmental law decisions tend to have implications for the way business is conducted. Environmental law decisions can have substantial economic impacts on corporations, resource-dependent communities, and private landowners.

Reviewing the environmental law decisions of the Roberts Court to date reveals no evidence of a “pro-business” bias. This does not disprove the claim that the Roberts Court is pro-business. There are relatively few data points, so the lack of evidence for a pro-business orientation could be an artifact of the specific mix of environmental cases heard by the Court. While the sixteen environmental cases decided to date implicate several major environmental statutes and span a wide range of legal issues, there is no reason to assume these cases are broadly representative of the field. It is possible that the business claims in these cases were not particularly strong, or that any concern for business was outweighed by other preferences, perhaps even a preference for greater environmental protection. Nonetheless, the lack of evidence for a pro-business orientation may offer some indication of how this Court will approach business claims in the context of environmental law in the years ahead.

The next section of this article considers what it could mean to say that the Roberts Court is “pro-business,” and identifies several

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3. See, e.g., Chemerinsky, *Turning Sharply*, *supra* note 2, at 424 (“[T]he Court tended to favor businesses over employees and consumers.”).

4. The enterprise is particularly tentative because of the Court’s small docket. With fewer cases decided each term, the likelihood that any given term (or combination of terms) is representative of the Court’s overall orientation is reduced.

qualifications that should be attached to any such claims. Part III then turns to the environmental law decisions of the Roberts Court, and explains how these decisions, taken as a whole, do not support the claim that the Roberts Court is “pro-business.” The paper then concludes by considering other possible explanations for the pattern of decisions in the Court’s environmental law cases.

### I. IS THE ROBERTS COURT “PRO-BUSINESS”?

Claims that the Roberts Court is a “pro-business” court are quite common. In *Supreme Court, Inc.*, Rosen claimed that the Court has become exceedingly sympathetic to business concerns.<sup>5</sup> A subsequent *New York Times* editorial decried the Roberts Court’s “reputation for being reflexively pro-business.”<sup>6</sup> *Kiplinger* reported that a “pro-business judiciary” is likely to be among the most significant legacies of the Bush Administration.<sup>7</sup> A reporter for *ProPublica* lamented, “pro-worker decisions have so far been exceptions in a pro-business record.”<sup>8</sup> Dean Erwin Chemerinsky has gone further, claiming “the Roberts Court is the most pro-business Court of any since the mid-1930s.”<sup>9</sup>

The Roberts Court appears to have taken a greater interest in business-related cases than prior courts.<sup>10</sup> Such cases have accounted for one-third to one-half of the Court’s docket in recent years.<sup>11</sup> The shrunken size of the Court’s docket further serves to magnify this apparent trend (though it also makes the mix of cases each term less

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5. Rosen, *supra* note 1.

6. Editorial, *The Court and Workers*, N.Y. TIMES, June 21, 2008, at A18.

7. Jonathan Crawford, *Bush’s Lasting Legacy: A Pro-Business Judiciary*, KIPLINGER BUS. FORECAST, Mar. 10, 2008, [http://www.kiplinger.com/businessresource/forecast/archive/Bush\\_Leaves\\_a\\_Last\\_Legacy\\_080310.html](http://www.kiplinger.com/businessresource/forecast/archive/Bush_Leaves_a_Last_Legacy_080310.html).

8. Chisun Lee, *Another Economic Election Issue: Supreme Court Nominations*, PROPUBLICA, Oct. 17, 2008, <http://www.propublica.org/article/another-economic-election-issue-supreme-court-nominations-1017>.

9. See Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008). For a response to this article, see Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983 (2008).

10. Michael Greve, *Does the Court Mean Business?*, FEDERALIST OUTLOOK, Sept. 2007, at 1 (“The Court’s increased attention to business related cases—even as its overall docket has continued to shrink—is indeed eye-catching.”).

11. There is some imprecision in the numbers because not all commentators define “business-related” in the same way. See Greve, *supra* note 10, at 1 (“In the 2006 term, twenty-five of sixty-seven cases dealt with business-related issues.”); Rosen, *supra* note 1 (“Forty percent of the cases the court heard last term involved business interests, up from around 30 percent in recent years.”); Mauro, *supra* note 2 (“Fully half of the Court’s 71 cases involved business.”).

representative of the Court's work overall). Whereas the Court would hear approximately 150 cases per term in the 1980s, the Court issued opinions in fewer than seventy cases in October Terms 2006 and 2007. As the Court takes fewer total cases, the same number of business-related cases occupy a greater share of the Court's work, heightening the perception that the business of this Court is the law of business.

Most of those who charge that the Roberts Courts is "pro-business" no doubt mean something more than that the Court is more interested in resolving business-related legal disputes. Rosen, for instance, characterizes the Court's recent pro-business tilt as an "ideological sea change" from prior eras in which the Court was more sympathetic to "progressive and consumer groups."<sup>12</sup> Dean Chemerinsky argues the Court tends "to favor business over employees and consumers."<sup>13</sup>

Decisions in which a corporation prevails are taken as evidence that the Court is pro-business. Rosen notes that the litigation arm of the Chamber of Commerce has fared particularly well in recent terms.<sup>14</sup> But knowing that private companies were on one side or another of a given case may not tell us all that much by itself. Many areas of business law routinely pit corporations against each other, and many businesses stand to gain from regulatory or judicial intervention in the economy. Some business groups were among those supporting the petitioners in *Massachusetts v. EPA*,<sup>15</sup> but few would argue that the Court's decision to unleash federal regulation of greenhouse gases was "pro-business." Furthermore, knowing that the Chamber of Commerce has been a successful litigant or *amicus curiae* could say as much about their selection of cases—or even the legal merits of the arguments—as it does about the Court's orientation.<sup>16</sup>

Consider, briefly, the Court's antitrust decisions, which many

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12. Rosen, *supra* note 1.

13. Chemerinsky, *Turning Sharply*, *supra* note 2, at 424.

14. Rosen, *supra* note 1.

15. Among those organizations that originally petitioned the EPA to regulate greenhouse gases in 1999 were Applied Power Technologies, Bio-Fuels America, the California Solar Energy Industries Association, Clements Environmental Corporation, New Mexico Solar Energy Association, and Solar Energy Industries Association. *See Massachusetts v. EPA*, 549 U.S. 497, 511 n.15 (2007). Among the organizations and corporations filing briefs in support of the petitioners in the case were the Aspen Skiing Corporation, Calpine Corporation, and Entergy Corporation.

16. For instance, a review of the cases in which the Chamber participated before the Supreme Court shows that participation by the Solicitor General's office appears to be a better predictor of whether the "pro-business" side will prevail in a given case. *See generally* Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. XX (2009); Sri Srinivasan & Bradley W. Joondeph, *Business, the Roberts Court, and the Solicitor General: Why the Recent Supreme Court's Decisions May Not Reveal Very Much*, 49 SANTA CLARA L. REV. XX (2009).

commentators have pointed to as evidence of the Court's emerging pro-business orientation. Rosen, for instance, 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."<sup>17</sup> This is true. But the plaintiffs in all but one of these cases were businesses as well.<sup>18</sup> So while businesses have tended to prevail in the Roberts Court's antitrust decisions, they have tended to lose as well.<sup>19</sup> Because antitrust cases tend to "pit business against business," as Rosen acknowledges,<sup>20</sup> knowing the identity of the prevailing party does not tell us much about whether the decisions are "pro-business." Moreover, plaintiff or defendant win rates tell us very little about the underlying merits of the cases.<sup>21</sup> Unless one assumes that the Court's cases in any given area represent a random sample of the available cases, which is unlikely, any analysis must account for the merits of the underlying cases. Reversing an outlier pro-plaintiff decision from the Ninth Circuit<sup>22</sup> is not the same as overturning decades of settled law to benefit defendants,<sup>23</sup> yet a pure quantitative analysis focusing on prevailing parties could conflate the two.

A more nuanced assessment of these cases could note that, in the aggregate, they tend to make it more difficult to challenge business practices as anti-competitive. Dean Chemerinsky, for instance, notes that several of the Roberts Court cases have made it "much more difficult to sue businesses for antitrust violations."<sup>24</sup> Yet this does not mean that the Court's antitrust decisions are "pro-business." Many antitrust scholars suggest that the Roberts Court is not as much "pro-

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17. Rosen, *supra* note 1.

18. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

19. See Posting of Josh Wright to Truth on the Market, <http://www.truthonthemarket.com/index.php?s=Are+the+Roberts+Court+Antitrust+Decisions+Really+Pro-Business%3F> (Mar. 20, 2008, 17:55).

20. Rosen, *supra* note 1.

21. See Posting of Josh Wright to Truth on the Market, <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).

22. See, e.g., *Volvo Trucks N. Am. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (overturning Ninth Circuit decision holding that Robinson-Patman Act's prohibition on price discrimination applies to special order products made for and sold to pre-identified customers after process of competitive bidding); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (overturning Ninth Circuit decision that it could be *per se* illegal under §1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which it sells its products).

23. See *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overturning *Dr. Miles Medical Co. v. Jon D. Park & Sons*, 220 U.S. 373 (1911) which had held vertical price restraints are *per se* illegal under Section 1 of the Sherman Act).

24. Chemerinsky, *Turning Sharply*, *supra* note 2, at 436.

business,” as it is “pro-consumer welfare” and, consequently, “pro-market.” 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.<sup>25</sup> Thus, Judge Douglas Ginsburg and Leah Brannon argue that the Roberts Court is “methodically re-working antitrust doctrine to bring it into alignment with modern economic understanding.”<sup>26</sup> From this perspective, the pro-business or pro-defendant pattern of the Roberts Court’s antitrust decisions could just as easily be described as “pro-consumer” or “pro-competition.”

The foregoing highlights that when evaluating claims that the Roberts Court is “pro-business” it is important to ask “compared to what?” Depending upon one’s baseline, the claim that a court is “pro-business” can mean quite different things. There is a difference between eliminating a long-standing cause of action against business defendants and refusing to open the door to a new generation of suits against corporations. Both are, in a sense, “pro-business,” but they are quite distinct.

The current Court may look overly sympathetic to business when compared to the progressive crusading of some prior Courts. As Rosen notes, there is no justice ready to follow William O. Douglas’ counsel to “bend the law in favor of the environment and against the corporations.”<sup>27</sup> Yet this hardly makes Chief Justice Roberts or Justice Alito reincarnations of the pre-New Deal Horsemen. Thus far there is little evidence that either of the newest justices—or *any* of the current justices for that matter—is particularly eager to bend the law and stretch conventional legal doctrines for the benefit of businesses. With the possible exception of the Court’s punitive damages decisions (some of which, incidentally, actually pre-date the Roberts Court),<sup>28</sup> the Court has steered away from developing or enforcing constitutional rules that would preclude regulation or sanction of business activities.

It is likewise important to consider whether in rendering “pro-business” decisions the Court is itself shifting the law in a pro-business direction or merely ratifying a pro-business legislative deal or administrative ruling. While the former may be evidence of an actual

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25. See generally Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, COMPETITION POL’Y INT’L, Autumn 2007, at 25.

26. See Douglas H. Ginsburg & Leah Brannon, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, COMPETITION POL’Y INT’L, Autumn 2007, at XX, XX.

27. Rosen, *supra* note 1 (quoting William O. Douglas).

28. See, e.g., *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) (holding “grossly excessive” punitive damage awards violate Due Process Clause of the Fourteenth Amendment).

“pro-business” bias, the latter may illustrate nothing more than deference to the political branches, and may only yield “pro-business” outcomes so long as the political branches are sympathetic to business interests. A highly deferential court may seem quite “pro-business” when upholding the decisions of Republican-controlled agencies, but much less so once a Democratic administration is in control. Data showing that the Court often sides with the Solicitor General’s office in business cases could well be evidence that the Court is more deferential to the federal government than it is objectively “pro-business.” Moreover, a more nuanced examination of the pattern of decisions in business-related cases may reveal that what appears to be a “pro-business” orientation may be something else entirely.<sup>29</sup>

Another distinction to keep in mind is whether the Court is adopting business-friendly default rules, or entrenching pro-business rules. So, for instance, there is a meaningful difference between decisions in which the Court adopts a statutory interpretation favored by business interests, and which Congress retains the ability to overturn (as with *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>30</sup>), and decisions in which the Court announces a substantive rule of constitutional law that benefits business (as in some of the punitive damages cases). In the former instance the Court may be doing nothing more than deferring to the legislature on whether to shift the law in a less business-friendly direction. In the latter, the Court is entrenching a substantive rule that will benefit business forever. Thus, in *Stoneridge Investment Partners, L.L.C. v. Scientific-Atlanta, Inc.*, the Court rejected the invitation to recognize “scheme liability” for securities fraud.<sup>31</sup> The Warren Court may have been less reluctant to open the door to such litigation, yet there is nothing in Justice Kennedy’s *Stoneridge* opinion that would preclude Congress from authorizing such suits in the future. Insofar as the vast majority of cases in which the Roberts Court has adopted “pro-business” outcomes are subject to legislative or administrative override, this should inform our assessment of the extent to which it is a meaningfully “pro-business” court, particularly as recent political trends may portend a less business-friendly legislative and executive

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29. For example, former Solicitor General Kenneth Starr suggests that the business cases show that the Court “is not so much pro-business as it is massively skeptical of civil litigation, especially nationwide civil litigation.” Kenneth W. Starr, *The Roberts Court and the Business Cases*, 25 PEPP. L. REV. 541, 541 (2008).

30. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Congress subsequently overturned this decision with the Lily Ledbetter Fair Pay Act. See Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 29, 2009, <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html?hp>.

31. *Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2007).



branch.

Given the limited period of time to evaluate the Roberts Court's approach to business cases, *any* assessment is necessarily tentative. After the Court's 2007 decision in *Ledbetter*<sup>32</sup> many were ready to claim the Court favors business employers over employees. Yet in several subsequent employment discrimination cases, the Court sided with employees.<sup>33</sup> Generalizations about the Court's approach to employment discrimination based upon *Ledbetter* were premature and inaccurate. Because the Roberts Court is still a work in progress, any conclusory assessment may come with an expiration date.

With all of the above qualifications in mind, I am willing to offer a tentative assessment of the Court's posture toward business cases. To the extent that the Roberts Court is pro-business, it is so not because it has embraced an aggressive agenda to either impose constitutional constraints on the government's power to regulate economic activity, or to rewrite the law to favor business interests. Rather, the Roberts Court can be called "pro-business" insofar as it is sympathetic to some basic business-oriented legal claims, reads statutes narrowly, resists finding implied causes of action, has adopted a skeptical view of antitrust complaints, and does not place its finger on the scales to assist non-business litigants. This approach is highly deferential to the political branches, particularly the legislature, and will produce "pro-business" results only insofar as the other branches adopt or maintain relatively business-friendly postures. With a more interventionist Congress or less sympathetic Solicitor General's office, this approach might not be "pro-business" at all.

## II. ARE THE ROBERTS COURT'S ENVIRONMENTAL DECISIONS "PRO-BUSINESS"?

Environmental cases have been a small, but significant, portion of the Roberts Court's docket. The Court decided thirteen environmental law cases in its first three years. It further agreed to hear five environmental cases in the October Term 2008, three of which have been decided as of the time of this writing. The eighteen environmental cases heard by the Roberts Court are listed in table 1.<sup>34</sup>

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32. *Ledbetter*, 550 U.S. 618 (2007).

33. See *Crawford v. Metro. Gov't of Nashville & Davidson County*, 129 S. Ct. 846 (2009); *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951 (2008); *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008); *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008).

<sup>34</sup> For purposes of this study, I opted not to include *United States v. Navajo Nation* as an "environmental" case. While this case involved a dispute over royalties for a coal lease on Indian lands, it did not involve any significant environmental issues. Had it been included, however, it would have been considered a "pro-business" decision in which the

As already noted, this is an admittedly small set of cases from which to draw definitive conclusions, but they can form the basis of a preliminary assessment. Another important qualification is that viewing environmental cases as posing business interests on one side and environmental interests on the other is overly simplistic. Environmental policy decisions tend to benefit some business interests even as they may impose costs on others.<sup>35</sup> 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.<sup>36</sup> In some cases, business interests have sought to use regulatory policy as a means of achieving comparative advantage, often by disadvantaging competitors.<sup>37</sup> Environmental controversies often pit one set of industry groups against another, as when incinerators and cement kilns faced off on air emission standards or oil and agribusiness fight over energy policy.<sup>38</sup> As noted above, businesses that expect to gain financially from the imposition of regulatory controls on greenhouse gases supported the petitioners in *Massachusetts v. EPA*, even if the majority of the business community was on the other side.<sup>39</sup>

Despite the prevalence of business interests on all sides of many environmental issues, it is fair to say that in most environmental cases before the Supreme Court it is possible to identify the position that is supported by the balance of business groups and that will produce a rule that, on the whole, works to the benefit of business. Such decisions may well have other beneficiaries, and may not be motivated by any concern for business interests, but they can nonetheless be evaluated based upon their effect upon the business community.

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government's position also prevailed. See *United States v. Navajo Nation*, \_\_\_ S.Ct. \_\_\_ (2009).

35. See generally ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (Michael S. Greve & Fred L. Smith Jr. eds., 1992); Jonathan H. Adler, *Clean Politics, Dirty Profits: Rent-Seeking Behind the Green Curtain*, in POLITICAL ENVIRONMENTALISM 1 (Terry L. Anderson ed., 2000) [hereinafter Adler, *Clean Politics*]; Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845 (1999).

36. 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); see also Adler, *Clean Politics*, *supra* note 35; David Schoenbrod, *Why States, Not EPA, Should Set Pollution Standards*, in ENVIRONMENTAL FEDERALISM 260-62 (Terry L. Anderson and P.J. Hill eds. 1997)..

37. See *infra* note 35 and sources cited therein.

38. See Adler, *Clean Politics*, *supra* note 35.

39. See *infra* note 15. See also, generally, Stuart Buck & Bruce Yandle, *Bootleggers, Baptists, and the Global Warming Battle*, 26 HARV. ENV. L. REV. 177 (2002).

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. For the purposes of this paper, labeling a decision as “pro-business” is *not* a proxy for the merits. The merits of the cases, individually or as a whole, are a subject for another paper.

Taken together, the Roberts Court’s decisions in environmental cases show no evidence of a “pro-business” bias or orientation. The Roberts Court adopted what could be considered the “pro-business” position in eight of the sixteen environmental cases it has decided thus far.<sup>40</sup> If we step back from the numbers, and consider the substantive effects of the cases, there is even less evidence of a business-friendly approach. Most of the business wins occurred in relatively narrow cases that had little effect on pre-existing law, while several of the losses were 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 will be quite meager, while the less business-friendly decisions could have substantial legal and practical consequences for many years to come.

Consider the three most significant business “wins” in environmental cases decided in the past three years: *Exxon Shipping Co. v. Baker*,<sup>41</sup> *National Association of Home Builders v. Defenders of Wildlife*,<sup>42</sup> and *Rapanos v. United States*.<sup>43</sup> In *Exxon Shipping v. Baker* the Court unanimously rejected Exxon’s claim that punitive damage awards were preempted by federal law and confined its holding limiting punitive damage awards to cases arising under the federal common law of maritime.<sup>44</sup> The Court’s decision in *National Association of Home Builders* 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

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40. An earlier assessment, looking at just the Roberts Court’s first seven environmental decisions, likewise found “no discernable pro-business bias thus far.” See David Schultz, *Give A Hoot, Don’t Pollute: The Roberts Court and the Environment*, 17 PENN. ST. ENVTL. L. REV. 191, 191 (2009).

41. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

42. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

43. *Rapanos v. United States*, 547 U.S. 715 (2006).

44. *Exxon Shipping*, 128 S. Ct., at 2618–19.

“substantial nexus” so as to reclaim much of the jurisdictional ground that was lost.

Insofar as these decisions are ‘pro-business’ they are all quite modest. Solid base hits, to be sure, but not home runs. Their significance pales in comparison to *Massachusetts v. EPA*,<sup>45</sup> by far the most significant environmental decision decided by the Roberts Court thus far. Combined with the other cases in which the Court sided against business interests, it is difficult to argue that the Roberts Court’s environmental decisions have been of net benefit to business interests.

Eight of the Roberts Court’s environmental decisions could be considered “pro-business.” These decisions are *Rapanos v. United States*,<sup>46</sup> *Rockwell International Corp. v. United States*,<sup>47</sup> *United States v. Atlantic Research Corp.*,<sup>48</sup> *National Association of Home Builders v. Defenders of Wildlife*,<sup>49</sup> *Exxon Shipping Co. v. Baker*,<sup>50</sup> *Winter v. Natural Resources Defense Council*,<sup>51</sup> *Summers v. Earth Island Institute*,<sup>52</sup> and *Entergy Corporation v. Riverkeeper*.<sup>53</sup>

*Exxon Shipping v. Baker* received substantial attention as a “pro-business” decision in part because of its storied history, and in part because it involved the largest punitive-damage award in American history.<sup>54</sup> In March 1989, the *Exxon Valdez* supertanker ran aground off the coast of Alaska, spilling nearly eleven million barrels of oil into Prince William Sound. Largely due to the sound’s remote location, cleanup efforts were delayed and the spill quickly spread to cover thousands of square miles of ocean. Exxon pleaded guilty to various environmental violations, and several lawsuits followed, one of which led to a jury award of just over \$500 million in compensatory damages and \$5 billion in punitive damages, subsequently reduced to \$2.5 billion on appeal.<sup>55</sup>

A divided Court struck down the punitive damage award, holding that a compensatory-to-punitive ratio greater than 1:1 is excessive under the federal common law of admiralty.<sup>56</sup> This was a significant

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

46. *Rapanos*, 547 U.S. 715.

47. *Rockwell Int’l Corp. v. United States*, 549 U.S. 457 (2007).

48. *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007).

49. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

50. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

51. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008).

52. *Summers v. Earth Island Institute*, 129 S.Ct. 442 (2009).

53. *Entergy Corp. v. Riverkeeper, Inc.*, \_\_\_ S.Ct. \_\_\_ (2009).

54. Rosen, *supra* note 1.

55. *Exxon Shipping*, 128 S. Ct. at 2614.

56. *Id.* at 2634.

victory for Exxon, but it was a less significant victory for business generally. First, and perhaps most importantly, the Court's holding limiting the award of punitive damages to an amount equal to the compensatory damages was confined to the federal maritime common law, and there is little reason to believe the Court would impose an equivalent limit in constitutional challenges to punitive damages. Among other things, two of the Justices who joined the judgment of the Court—Justices Thomas and Scalia—did so explicitly on the grounds that the Court's holding was so limited and reaffirmed their opposition to imposing any constitutional limitations on punitive damages in state court.<sup>57</sup> Moreover, the Court allowed the imposition of punitive damages even though the underlying conduct was neither intentional nor profitable for Exxon, leading some commentators to suggest the decision could be “a floor, rather than a ceiling” for cases in which the defendant's conduct was more egregious.<sup>58</sup>

While the Court's punitive damages holding grabbed the headlines, another aspect of *Exxon Shipping* could well have a greater impact on environmental law. Specifically, the Court unanimously rejected Exxon's argument that punitive damages in water pollution cases are preempted by the Clean Water Act (CWA).<sup>59</sup> Writing for a unanimous Court, Justice Souter explained there was little indication Congress sought to “occupy the entire field of pollution remedies” and no reason to believe that “punitive damages for private harms will have any frustrating effect on the CWA remedial scheme.”<sup>60</sup> This is potentially significant as common law claims for punitive damages under federal maritime law are relatively rare, whereas industry claims that state tort remedies are preempted by federal statute are more common. Moreover, the Court's anti-preemption holding in *Exxon Shipping* is rather conspicuous as business preemption claims have prevailed in the majority of preemption cases decided by the Roberts Court thus far.

The Court's decision in *Rapanos* was a victory for business interests insofar as it reaffirmed the Court's prior holding that federal regulatory jurisdiction over “waters of the United States” is limited.<sup>61</sup>

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57. *Id.* at 2634 (Scalia, J., concurring).

58. See Ted Frank, *The Era of Big Punitive Damage Awards Is Not Over*, WALL ST. J., July 10, 2008, at A13.

59. *Exxon Shipping*, 128 S.Ct. at 2619.

60. *Id.*

61. *Rapanos v. United States*, 547 U.S. 715 (2006). For a more extended analysis of the *Rapanos* decision 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) [hereinafter Adler, *Reckoning*] and Jonathan H. Adler, *Once More*,

In *Rapanos*, a slim and divided majority rejected the U.S. Court of Appeals for the Sixth Circuit's expansive interpretation of federal regulatory jurisdiction, but could not agree on a single rationale. The Court splintered 4-1-4, limiting the decision's scope and creating uncertainty about the precise contours of the Court's holding. Despite the failure to produce a majority opinion, the *Rapanos* court reaffirmed the central holding of the Court's 2000 decision in *Solid Waste Agency v. United States Army Corps of Engineers*<sup>62</sup> that "waters of the United States" only extend to those waters and wetlands that have a "significant nexus" to truly navigable waters and are "inseparably bound up with the 'waters' of the United States,"<sup>63</sup> and made clear that CWA jurisdiction has meaningful limits.

Four of the justices in *Rapanos* joined an opinion by Justice Scalia holding that federal jurisdiction over "waters of the United States" under the Clean Water Act could only extend to "those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."<sup>64</sup> A fifth justice, Justice Kennedy, held that "Corps' jurisdiction over wetlands depends upon the existence of a *significant* nexus between the wetlands in question and navigable waters in a traditional sense."<sup>65</sup>

After *Rapanos*, federal regulators must make a greater showing than many lower courts had required to assert federal jurisdiction over privately owned wetlands adjacent to or near tributaries of navigable waters. Insofar as federal regulations purport to define "waters of the United States" to include intrastate waters "the use, degradation, or destruction of which could effect interstate commerce or foreign commerce,"<sup>66</sup> and wetlands adjacent to such waters,<sup>67</sup> they exceed the scope of federal Clean Water Act jurisdiction. Yet the benefits of *Rapanos* for the regulated community have been rather limited. The divided nature of the Court's decision in *Rapanos* has resulted in some

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*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).

62. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

63. *Id.* at 168 (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985)).

64. *Rapanos*, 547 U.S. at 740 (plurality opinion of Scalia, J.).

65. *Id.* at 779 (emphasis added) (Kennedy, J., concurring in the judgment); *see also id.* at 767 ("Absent a significant nexus, jurisdiction under the Act is lacking."). According to Justice Kennedy, "navigable waters" are "waters that are or were navigable in fact, or that could reasonably be so made." *Id.* at 758.

66. 33 C.F.R. § 328.3(a)(3) (2008).

67. 33 C.F.R. § 328.3(a)(7).

amount of regulatory uncertainty, as lower courts, federal regulators, and the regulated community struggled to sort out the decision's implications.<sup>68</sup> Furthermore, neither of the opinions of those justices who joined in the judgment impose stringent limits on future assertions of regulatory jurisdiction. Justice Kennedy's opinion provides federal regulators with ample room to delineate the sorts of ecological factors that may be used to demonstrate that there is a "significant nexus" between a given wetland and navigable waters. Justice Scalia's opinion also provides more leeway than some may realize, as key portions of the opinion are conspicuously couched in the language of *Chevron U.S.A., Inc. v. Natural Resources Defense Council* step-two, suggesting at least some of the concurring justices would accept a more expansive reading of CWA jurisdiction adopted pursuant to a notice-and-comment rulemaking.<sup>69</sup>

The Court reached a somewhat similar result in another Clean Water Act case, *Entergy Corp. v. Riverkeeper*, in which the Court upheld the Environmental Protection Agency's reliance upon cost-benefit analysis in setting technology standards for powerplant cooling water intake structures.<sup>70</sup> Section 316(b) of the Clean Water Act requires adoption of the "best technology available for minimizing adverse environmental impact" from the withdrawal of water for the cooling of power facilities.<sup>71</sup> Pursuant to this requirement, in 2004 the EPA adopted performance standards requiring existing covered facilities to dramatically reduce the mortality of aquatic organisms through the use of various technologies the EPA deemed to be commercially available and economically practicable."<sup>72</sup> The EPA declined to adopt more stringent standards, such as a requirement that all regulated facilities adopt closed-cycle cooling systems or their equivalent, because they were deemed too costly in relation to the additional environmental benefits from adopting such technologies.

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68. Some of the lower court decisions interpreting *Rapanos* are discussed in Adler, *Reckoning*, *supra* note 58.

69. See *Rapanos*, 547 U.S. at 739 ("The Corps' expansive interpretation of the 'waters of the United States' is . . . not 'based on a permissible construction of the statute.'") (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). Under *Chevron*, agency interpretations of ambiguous statutory provisions may receive deference from courts provided that, among other things, the interpretation is "based on a permissible construction" of the relevant statutory text. See *id.*

<sup>70</sup> \_\_\_ S.Ct. \_\_\_ (2009).

<sup>71</sup> 33 U.S.C. §1326(b).

<sup>72</sup> 69 Fed. Reg. 41602. These so-called "Phase II" standards apply to facilities that withdraw at least 50 million gallons of water per day, at least one-quarter of which is used for cooling purposes. *Id.* at 41576.

Specifically, EPA concluded a more stringent standard would increase industry compliance costs nine-fold but not generate significant offsetting environmental benefits.<sup>73</sup>

Environmental organizations challenged the cooling water intake standards arguing the EPA to consider economic costs and benefits when setting standards under Section 316(b) in all but the most extreme circumstances. Six justices rejected this argument, concluding that the relevant statutory language is sufficiently ambiguous to allow the EPA to consider the relevant costs and benefits when identifying the “best technology available for minimizing adverse environmental impact.” Writing for five justices, Justice Scalia explained that the “best” technology could be that which generates the least adverse environmental impacts, but could also be “the technology that *most efficiently*” reduces adverse environmental impacts.<sup>74</sup> Justice Breyer, concurring in part and dissenting in part, likewise concluded that the Clean Water Act permitted at least the limited use of cost-benefit comparisons in setting technology standards for cooling water intake structures.<sup>75</sup>

While the Court upheld the use of cost-benefit comparisons under Section 316(b), it explicitly held that whether to rely upon such analyses was left to the discretion of the EPA. Under the Court’s reading, the relevant statutory language neither required nor prohibited the use of such analyses, and the EPA remains free to alter its regulatory approach in the future. Thus, while the Court upheld a relatively pro-business regulatory policy in *Entergy*, it also left the EPA ample ability to implement Section 316(b) in a more stringent and less business friendly manner in the future. In *National Association of Home Builders*, the Court decided on the application of the Endangered Species Act (ESA) consultation requirements to arguably non-discretionary decisions under other laws.<sup>76</sup> At issue was whether the Environmental Protection Agency was required to engage in section seven consultation under the ESA before transferring permitting authority to a state environmental agency as provided for under the Clean Water Act. Section seven of the ESA requires all federal agencies to consult with the Fish & Wildlife Service or National Marine Fisheries Service to ensure that no action “authorized, funded, or carried out” by such agencies will jeopardize an endangered or

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<sup>73</sup> See *Entergy*, \_\_ S.Ct. at \_\_ (slip op. at 5).

<sup>74</sup> *Id.* (emphasis in original) (slip op. at 8).

<sup>75</sup> *Id.* (Breyer, J., concurring in part and dissenting in part).

<sup>76</sup> Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).



threatened species.<sup>77</sup> Under the CWA, however, the EPA is required to approve the transfer of National Pollution Discharge Elimination System (NPDES) permitting authority to a state if nine statutorily specified criteria are met.<sup>78</sup> In this case, the EPA approved the transfer of permitting authority to the State of Arizona, even though this could lead to the issuance of NPDES permits without considering the potential impact on certain endangered species, because it determined that Arizona met the nine criteria specified in the CWA.

*National Association of Home Builders* was a close case. Upholding the EPA determination would blunt the impact of the ESA, but would keep the permit transfer provisions of the CWA intact. Reversing the EPA determination could significantly expand the universe of agency decisions now subject to potential ESA consultation. Faced with this choice, the Court sided with the EPA's interpretation. This was a "pro-business" decision because the Court refused to impose the ESA's consultation requirements on agency decisions traditionally made in accordance with specified statutory criteria. The impact of this decision is rather minimal, however, as it does little to change the status quo.<sup>79</sup> Thus, while a contrary decision might have been a significant loss for business interests, the Court's decision may not amount to much of a victory.

The obligation of federal agencies to take actions protecting animal species was also at issue in *Winter v. Natural Resources Defense Council*, in which the Court was asked to resolve a conflict between the military and marine mammals.<sup>80</sup> Several environmental organizations had successfully sought a preliminary injunction against the Navy's use of mid-frequency active sonar because it had failed to complete an Environmental Impact Statement. As first presented to the Court, it looked like a potential blockbuster, raising interesting separation of powers questions, such as the ability of the executive to authorize noncompliance with environmental statutes. Yet as it happened, the ultimate disposition of the case was rather narrow. Ruling 6-3, the Court overturned the preliminary injunction on the grounds that the U.S. Court of Appeals had applied too loose a standard

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77. See 16 U.S.C. § 1536 (a)(2) (2006).

78. See 33 U.S.C. § 1342(c) (2006).

79. Two of the three appellate courts to have considered this question reached the same conclusion as the Supreme Court. See *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998); *Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992). The third was the U.S. Court of Appeals for the Ninth Circuit, see *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2006), *rev'd* 551 U.S. 644 (2007).

80. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008).

and that that the potential threat to marine mammals was outweighed by the national interest in military readiness.<sup>81</sup> As with *National Association of Home Builders*, this was an outcome favored by business interests, but unlikely to have a substantial practical effect. Chief Justice Roberts' opinion for the Court in *Winter* stresses the importance of military readiness throughout, making it likely that the decision will have minimal effects in other contexts.<sup>82</sup>

*Summers v. Earth Island Institute* was a small and predictable win for the pro-business decision insofar as it reaffirmed the Court's long-standing requirement that citizen-suit plaintiffs suffer an injury-in-fact in order to satisfy the requirements of Article III standing.<sup>83</sup> In *Summers*, environmentalist plaintiffs had sought to challenge to a revision of U.S. Forest Service regulations governing small-scale fire-rehabilitation and timber-salvage projects. In 2003, they challenged the regulatory revisions as applied to a specific project, but the government eventually settled, creating a standing problem insofar as they sought to maintain their suit against the underlying procedural rule change. No longer able to identify a specific project that would be affected by the rule that could be the source of their injury, the Supreme Court held, 5-4, that they no longer had standing to maintain their suit because they could not demonstrate they would suffer an "injury-in-fact" that is both actual or imminent and concrete and particularized. Just as the plaintiffs in *Lujan v. Defenders of Wildlife* could not satisfy the injury requirement with their someday intentions to visit endangered species threatened by the government's failure to enforce Endangered Species Act limitations on federally funded projects overseas, the *Summers* plaintiffs could not satisfy the injury requirement by arguing that implementation of the Forest Service's regulation would result in an unlawful timber-salvage project on an as-yet-unidentified parcel at some as-yet-unidentified point in the future.<sup>84</sup>

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81. *Id.* at 376 ("[E]ven if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. A proper consideration of these factors alone requires denial of the requested injunctive relief.").

82. Chief Justice Roberts decision opened quoting President George Washington: "To be prepared for war is one of the most effectual means of preserving peace." *Id.* at 370 (quoting George Washington, U.S. President, First Annual Address (Jan. 8, 1790), in 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 68 (2004)). The opinion ended quoting President Theodore Roosevelt that "the only way in which a navy can ever be made efficient is by practice at sea, under all the conditions which would have to be met if war existed." *Id.* at 382 (quoting President's Annual Message, 42 CONG. REC. 67, 81 (1907)).

<sup>83</sup> 129 S.Ct. 442 (2009).

<sup>84</sup> See *id.* at \_\_\_ (slip op. at 7-8).

By rejecting standing “in the absence of a live dispute over a concrete application” of specific regulations,<sup>85</sup> *Summers* reaffirmed the Court’s hostility to programmatic public interest litigation. The rule reaffirmed in *Summers* makes it more difficult to challenge underlying policy changes, as prospective plaintiffs need to identify how the policy change, as applied in a specific context, tangibly harms their interests. Industry *amici* supported this result insofar as they sought to reduce citizen-suit litigation against projects on federal lands, particularly where (as in this case) such suits result in nationwide injunctions. Resource-using industries active on federal lands, such as the timber industry, also sought to insulate the contested Forest Service rule from legal challenge. Forcing environmentalist groups to challenge individual applications of a given policy change would make it more difficult to overturn the underlying rule. Yet *Summers* broke no meaningfully new ground in the law of standing, and was thus not a particularly significant win for business interests.

The final two pro-business decisions are also rather minor. In *Atlantic Research v. United States*, the Court unanimously affirmed that companies that engage in voluntary clean ups of hazardous waste sites may pursue recovery actions against other potentially responsible parties under the Comprehensive Environmental Response, Cleanup, and Liability Act (CERCLA, aka “Superfund”). This case was a pro-business decision insofar as a private company had sought cost recovery from the United States government, and other companies in equivalent situations will be able to seek cost recovery, as has long been assumed. Yet its pro-business effect is somewhat limited, as it also opens the door to cost recovery actions against private firms.

In *Rockwell International Corp. v. United States*,<sup>86</sup> the Court made it marginally more difficult for alleged whistleblowers to bring *qui tam* actions under the False Claims Act, but does nothing to prevent such suits by the federal government itself. One of the primary practical effects of this decision is that government contractors sued under the False Claims Act are less likely to face requests for attorneys fees from such suits, a result business certainly favors. This may also have the result of reducing the overall number of such suits. Insofar as it is a victory for business, however, it is significant for government contractors, not the business community at large.

Contrasting the cases in which business emerged victorious with those in which business lost demonstrates that the Roberts Court’s

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<sup>85</sup> *Id.* at \_\_ (slip op. at 1).

<sup>86</sup> *Rockwell Int’l Corp. v. United States*, 548 U.S. 941 (2006).

environmental cases have not been, on the whole, “pro-business.”<sup>87</sup> The most important environmental case decided by the Roberts Court—indeed, one of the most important cases of any sort decided in the past three years—was *Massachusetts v. EPA*, in which the Court both loosened the standing requirements for litigants seeking greater federal regulation, expanded the scope of the Clean Air Act to cover the most ubiquitous by-products of industrial civilization, and (as a practical matter) requires federal regulation of greenhouse gases.<sup>88</sup> As a substantive matter, this case alone is more adverse to business interests than all of the business “wins” put together. Several singles don’t matter all that much if one’s opponent responds with a grand slam.

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 standing’s causation and redressability requirements. Whereas *Summers* largely reaffirmed the Court’s traditional standing requirements, as articulated in *Lujan*, *Massachusetts* opened the door to additional litigation by those seeking to increase the stringency of federal environmental regulations.

In a surprising move, the *Massachusetts* majority proclaimed that state standing claims are “entitled to special solicitude” in federal court.<sup>89</sup> The Court rested this holding on a century-old case, *Georgia v. Tennessee Copper*.<sup>90</sup> In this case, a downwind state, Georgia, sought judicial relief from upwind pollution under the federal common law of interstate nuisance. Justice Holmes, writing for the Court, looked favorably on Georgia’s claims and held the state could seek equitable relief that was potentially unavailable to private litigants. This case may have established an important principle about the availability of equitable relief for state litigants, but it had little to do with Article III standing. Indeed, this may explain why the case was not cited in a single brief filed with the Court.<sup>91</sup>

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87. It should be reiterated that the claim of this paper is *not* that these decisions have been “anti-business.” Rather, the claim is simply that there is no evidence of a pro-business bias or pro-business pattern of decisions.

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

89. *Id.* at 518.

90. *Georgia v. Tenn. Copper*, 206 U.S. 230 (1907).

91. The first mention of *Georgia v. Tennessee Copper* in the *Massachusetts v. EPA* litigation came during oral argument when it was referenced by Justice Kennedy. See Transcript of Oral Argument at 15, *Mass*, 549 U.S. 497 (No. 05-1120).

While the *Massachusetts* majority could have grounded their newfound approach to state standing in the framework provided by prior court decisions, such as *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*,<sup>92</sup> it did not. If vindicating state interests was so important, the Court could also have relied upon other state sovereign interests, such as a state's interest in preventing the potential federal preemption of its own laws. This view was actually urged upon the Court by state *amici*.<sup>93</sup> Yet the Court did not adopt the approach actually urged by the state petitioners or *amici*, opting to invent a new doctrine of "special solicitude" instead. This newfound "special solicitude" for state litigants could help ease the way for greater legal activism by state attorneys general, including so-called "regulation by litigation."<sup>94</sup> States increasingly use litigation as a means of pursuing social and environmental policy goals, and *Massachusetts v. EPA* could make it easier for state attorneys general to pursue such strategies in federal court.

The newfound "solicitude" for states was not the only alteration of standing doctrine in *Massachusetts*. The Court also made it easier for prospective petitioners to overcome the causation and redressability prongs of the Article III standing requirements. In *Lujan* the Court had held that the "normal standards for redressability and immediacy" are relaxed when a statute vests a litigant with a "procedural right."<sup>95</sup> This is the rationale for recognizing environmental litigants' standing to enforce the National Environmental Policy Act and other laws that impose only procedural obligations on regulatory agencies. In *Massachusetts* the Court concluded that the petitioners should get the benefit of this relaxed standing standard. According to Justice Stevens' opinion, section 307 of the Clean Air Act accorded plaintiffs a "procedural right" justifying a relaxation of "the normal standards of redressability and immediacy" under *Lujan v. Defenders of Wildlife*.<sup>96</sup>

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92. *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592 (1982).

93. This argument was made in an amicus curiae brief in *Massachusetts v. EPA* submitted on behalf of several states. See Brief of the States of Arizona & Iowa et al. as Amici Curiae in Support of Petitioners, *Massachusetts*, 549 U.S. 497 (No. 05-1120), available at <http://www.communityrights.org/PDFs/MassBriefs/Mass%20v%20EPA--Amici%20States.pdf>. For a critique of these alternative arguments for state standing, see Brief of The Cato Institute and Law Professors Jonathan H. Adler, James L. Huffman, and Andrew P. Morriss as Amici Curiae in Support of Respondents at 14, *Massachusetts*, 549 U.S. 497 (2007) (No. 05-1120), at 14-17, available at [http://www.cato.org/pubs/legalbriefs/ma\\_v\\_epa\\_10-24-06.pdf](http://www.cato.org/pubs/legalbriefs/ma_v_epa_10-24-06.pdf).

94. See generally ANDREW P. MORRISS ET AL., REGULATION BY LITIGATION (2008); REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002).

95. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

96. *Massachusetts*, 549 U.S. at 517.

This is potentially quite significant, as section 307 is just a jurisdictional provision, and not a source of procedural rights. Indeed, such language has never before been construed to establish a procedural right in a standing case. In his majority opinion, Justice Stevens acknowledged that for the Court to recognize a procedural right that would justify a lowering of the standing bar, “Congress must at least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.”<sup>97</sup> Yet section 307 does nothing of the sort. It simply identifies which challenges to EPA rulemakings under the Clean Air Act must be filed in the U.S. Court of Appeals for D.C. Circuit, as opposed to those that must be filed in regional circuit courts of appeals. Yet due to the Court’s innovative reading of this provision, the familiar requirements explicated in *Lujan* may well present a less daunting challenge to future litigants in regulatory matters.

As a practical matter, *Massachusetts v. EPA* is also a tremendously important case because it will trigger the federal regulation of greenhouse gases, most notably carbon dioxide, the most ubiquitous by-product of modern industrial civilization. While the Court specifically eschewed directly mandating that the EPA regulate, instead remanding the matter back to the Agency for further proceedings given the EPA’s failure to offer a “reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change,”<sup>98</sup> there is little doubt that such regulation will result.

Section 202 of the Clean Air Act provides that the EPA “shall” set emission standards for new vehicles for “any air pollutant” the Administrator concludes causes or contributes to air pollution, “which may reasonably be anticipated to endanger public health or welfare.”<sup>99</sup> Once it is established that greenhouse gases are air pollutants for the purpose of this provision, the EPA has little choice to regulate unless it is prepared to argue that the accumulation of greenhouse gases in the atmosphere cannot “reasonably be anticipated to endanger public health or welfare.” Even were the current EPA inclined to question

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97. *Id.* (quoting *Lujan*, 504 U.S. at 572 n.7 (Kennedy, J., concurring)).

98. *Massachusetts*, 549 U.S. at 517.

99. 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) (2006).

this assumption, the agency's own prior statements and actions virtually compel a finding that greenhouse gas emissions could harm public health or welfare. Indeed, in the very *Federal Register* notice in which the Bush EPA disclaimed any authority over such emissions, the agency nonetheless reaffirmed the need to address climate change and "reduce the risk" posed by a warming planet.<sup>100</sup>

Regulation of greenhouse gas emissions from new motor vehicles is only the beginning, however. The same finding that triggers regulation under section 202 will trigger regulation under other provisions of the Clean Air Act as well. Section 111, for instance, requires the Agency to set emission performance standards for stationary sources that "cause[] or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>101</sup> If greenhouse gases satisfy the requirements of Section 202, they will almost certainly satisfy this provision as well.

It's also quite possible that a finding of endangerment under Section 202 could force the EPA to set national air quality standards for greenhouse gases, giving state and federal regulators a truly Sisipheysean task. Section 108 of the Clean Air Act requires EPA to set such standards for any pollutant, "emissions of which, in [the EPA Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" that is emitted into the ambient air by "numerous or diverse mobile or stationary sources."<sup>102</sup> The finding necessary to trigger this section is essentially the same as that for sections 202 and 111.

Setting a standard under section 108 would, in turn, require states to develop and issue "state implementation plans" for how metropolitan areas would meet the standard. Here is where the real difficulties would begin. There is simply no way for states, acting independently through the State Implementation Plan process provided for under the Clean Air Act or otherwise, to comply with federal standards for ambient levels of greenhouse gases. Such gases are dispersed throughout the global atmosphere. Carbon dioxide emissions anywhere on the planet contribute to global concentrations of greenhouse gases, and any benefit from emission reductions in any one place are dispersed across the globe. As a consequence, there is nothing any given jurisdiction can do to comply with a federal carbon dioxide standard unless emissions are controlled worldwide.<sup>103</sup>

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100. 68 Fed. Reg. 52925 (Sept. 8, 2003).

101. 42 U.S.C. § 7411.

102. 42 U.S.C. § 7408.

103. See Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate*

Yet *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 Co. v. Maine Board of Environmental Protection*<sup>104</sup> and *Environmental Defense v. Duke Energy*.<sup>105</sup> *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.

At issue in *Environmental Defense* was when repair, maintenance, and upgrades at coal-fired utilities constitute a "modification" that triggers the imposition of emission controls under the EPA's "new source review" program. For years, the EPA and the utility industry sparred over whether new source review controls were triggered by an increase in a facility's actual emissions, or just by increases in a facility's rate of emissions. At stake was whether utilities and other industrial facilities covered by the federal Clean Air Act would be required to install costly pollution controls when maintaining or upgrading older facilities. According to various industry groups, EPA's interpretation could expose many facilities to "New Source Review" requirements when engaging in fairly routine maintenance and upkeep.<sup>106</sup> A study released by the National Rural Electric Cooperative Association asserted that a loss for Duke Energy would increase energy costs and undermine power reliability, particularly in rural areas.<sup>107</sup> Although the specific statutory holding was rather narrow, the case was significant. In siding with the EPA's interpretation of its own regulations and statutory interpretation, the Court strengthened the agency's hand in a series of enforcement actions against utilities under this program.

In *United Haulers Ass'n v. Oneida-Herkimer Solid Waste*

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*Policies*, 155 U. PENN. L. REV. 101, 105 (2007) ("[L]ocal abatement actions pose local costs, yet deliver essentially no local climate benefits.").

104. *S.D. Warren Co., v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370 (2006).

105. *Env'tl. Def. v. Duke Energy*, 549 U.S. 561 (2007).

106. See Brief for Manufacturers Association Work Group as Amici Curiae Supporting Respondents, *Env'tl. Def.*, 549 U.S. 561 (No. 05-848).

107. Bernard L. Weinstein & Terry L. Clower, *Environmental Defense v. Duke Energy: How a Supreme Court Reversal on the Interpretation of New Source Review Could Imperil Rural America* (Oct. 2006), <http://www.nreca.org/Documents/PublicPolicy/Newsourcereviewupdate10-06.pdf>; see also Bernard L. Weinstein & Terry L. Clower, *The EPA's Reinterpretation of New Source Review Rules: Implications for Economic Development in Rural America* (May 2002), <http://www.unt.edu/cedr/NSR.pdf>.



*Management Authority*, the Court took a small step back from protecting private waste management firms from solid waste flow control ordinances and government-sanctioned monopolies.<sup>108</sup> In 1994, in *C & A Carbone, Inc. v. Clarkstown*, the Court had held that the Dormant Commerce Clause prohibits local communities from enforcing local flow control ordinances that require waste haulers to send all waste to a single private waste processing facility.<sup>109</sup> In *United Haulers*, the Court announced that the *Carbone* rule only applies to private facilities, and that the dormant commerce clause does not prohibit local communities from enacting an identical statute for the benefit of a *public* waste processing facility, clearing the way for the creation of government-run monopoly waste processing services and the balkanization of interstate markets in waste management services. This is a setback for business interests in two respects. First, it makes it easier for local governments to regulate and control private waste flows. Second, the decision may indicate the Court is backing away from strict enforcement of Dormant Commerce Clause limitations on local government actions that tend to balkanize interstate markets in waste management services.

In several 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. In *BP America Production Co. v. Burton*, the Court unanimously held that the standard six-year statute of limitations for government contract actions did not apply to administrative payment orders for offshore gas royalty underpayments issued by the Minerals Management Service.<sup>110</sup> Yet in *John R. Sand & Gravel Co. v. United States* the Court held that the statute of limitations governing takings claims against the federal government in the U.S. Court of Federal Claims is "jurisdictional," and bars takings claims even if waived by the government.<sup>111</sup> Thus, in these cases the Court made it easier for the government to seek royalty payments for private firms, but more difficult for private firms to pursue takings claims against the government.

This tendency to tilt the playing field against business litigants can also be seen in *Wilkie v. Robbins*.<sup>112</sup> In this case, a private landowner sued Bureau of Land Management employees for allegedly seeking to

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108. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

109. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994).

110. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006).

111. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008).

112. *Wilkie v. Robbins*, 551 U.S. 537 (2007).

coerce him into giving the government an easement across his land. The landowner alleged a pattern of egregious conduct, ranging from selective enforcement of federal regulations to tortuous interference with his business and intrusion upon the privacy of his guests, all aimed at getting him to cede a property interest.<sup>113</sup> This pattern of conduct, he alleged, should give rise to a *Bivens* action, or other legal remedies in federal court, as the government should not be able to retaliate against a landowner for refusing to cede his constitutionally protected property rights.

The Court rejected the landowner's claim, refusing to allow for a *Bivens*-like action in an area where such actions had not been recognized before. Although this case involved a ranch owner, rather than a large corporation, it was closely watched by industries that use or rely upon federal lands. Several trade associations, including the Public Lands Council and various cattlemen's associations, filed amicus briefs on the landowner's behalf fearing that a decision for the government could strengthen the hand of government agencies vis-à-vis resource-dependent industries that operate on federal lands. Thus, even if this decision did not directly involve business interests, it adopted a rule that could be averse to those businesses that routinely operate on federal lands.

As a suit between two states over the interpretation of a century-old interstate compact, *New Jersey v. Delaware*<sup>114</sup> might not seem like an environmental case that implicated business interests at all. Yet the underlying dispute concerned the proposed construction of a liquefied natural gas unloading terminal to be operated by a subsidiary of British Petroleum.<sup>115</sup> The legal question was whether New Jersey could authorize the construction of an improvement that would extend off of New Jersey's shore into Delaware's territory. This required interpreting the 1905 Compact between the two states governing riparian improvements made in the Delaware River, to determine whether Delaware could prohibit New Jersey's planned development.

In the end, the Court sided with Delaware, holding that New Jersey could not unilaterally authorize construction. If the facility was to proceed, both states would have to give the go ahead. Had the Court sought to interpret the Compact so as to facilitate economic development, it might have refused to adopt an interpretation of the compact that would subject facilities of this sort to the overlapping jurisdiction of both states. This was the position urged by Justice

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113. *Id.*

114. *New Jersey v. Delaware*, 128 S. Ct. 1410 (2008).

115. *Id.* at 1417–18.

Scalia in dissent. He argued that if certain portions of the Compact were read to give one state a veto over such projects undertaken by the other, it would negate the utility of giving each state exclusive jurisdiction over wharfing out projects from its own side of the river.<sup>116</sup> Whether or not this is the proper interpretation of the Compact, it is the interpretation one might have expected from a Court concerned about facilitating business activity and economic development.

### III. PRO-BUSINESS OR PRO-GOVERNMENT?

The Roberts Court's environmental decisions issued to date suggest neither a disposition toward business nor a hostility toward environmental regulation. The "pro-business" position has prevailed in some cases, and lost in others. If the relative magnitude of the cases is taken into account, it is even more difficult to argue that the Roberts Court has been "pro-business" in this area.

While there is no evidence of a "pro-business" orientation in the environmental cases decided by the Roberts Court to date, there may be evidence of something else. Business interests may not have prevailed too often, but governmental interests did. The federal government's position prevailed in nine of the thirteen cases in which it took a position, including four in which the federal government adopted the "pro-business" position.<sup>117</sup> In a tenth case—*United Haulers Association*—a local government prevailed against private parties.<sup>118</sup> Thus, in ten of fourteen cases—over two-thirds of the relevant environmental cases—the government position prevailed.

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.<sup>119</sup> 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.

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116. *Id.* at 1430 (Scalia, J. dissenting).

117. These two cases are *National Association of Home Builders v. Defenders of Wildlife* and *Natural Resources Defense Council v. Winter*.

118. 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. In the former case, however, the court adopted a "pro-government" position insofar as it approved a compact interpretation that provides for overlapping and duplicative jurisdiction.

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

*Massachusetts v. EPA* is “pro-government” in another respect: the decision greatly expanded federal regulatory authority and will result in a significant increase in federal environmental regulation. 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.

The federal government lost in *Atlantic Research*, but this decision has no impact on the federal government’s ability to implement the federal Superfund program. If anything, by reaffirming the ability of companies to seek cost recovery from other potentially responsible parties for voluntary cleanup actions, it serves the government’s broader interest in ensuring the quick and cost-effective cleanup of hazardous waste sites.<sup>120</sup> The government nominally lost in *Rockwell International* as well, but it is again difficult to argue that the decision meaningfully compromised the federal government’s interests. By narrowing the scope of the “original source” exception to the “public disclosure bar” on federal court jurisdiction over *qui tam* actions under the False Claims Act, the Court did not prevent the federal government from continuing to pursue such claims. To the contrary, in *Rockwell* the Court left the action by the Attorney General against Rockwell in place and suggested it would be “bizarre” to set aside the government’s judgment because of a lack of jurisdiction over the *qui tam* relator’s claim.<sup>121</sup>

*Rapanos* is the only decision of the Roberts Court that imposed any meaningful limit on federal regulatory authority. Yet, as discussed above, the impact of this decision is relatively modest. The disposition of *Rapanos* 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. 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.<sup>122</sup>

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120. See Jeffrey M. Gaba, *United States v. Atlantic Research: The Supreme Court Almost Gets It Right*, 37 ENVTL. L. REP. 10810, 10816 (2007) (“*Atlantic Research* was an important step in ensuring that the remedial objectives of CERCLA are satisfied.”).

121. *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 477–78 (2007).

122. Indeed, John Rapanos may not have considered the decision much of a victory, as he ended up paying a \$150,000 settlement and agreeing to construct 100 acres of new wetlands

At the time of this writing, the Court has heard arguments in, but has yet to decide, two more potentially significant environmental cases. These pending cases are unlikely to disturb this paper's conclusions, however. The federal government is a party in each, and has adopted the "pro-business" position in one. Thus, even if the Court adopts business-friendly positions in both of these cases, it will still appear that the Roberts Court reaches "pro-government" results in environmental cases more often than "pro-business" results.

#### CONCLUSION

There is no meaningful evidence that the Roberts Court has adopted a substantive pro-business orientation in its environmental cases—at least not in those cases decided thus far. This is a tentative conclusion, however. There are two environmental cases still pending this term, concerning Superfund liability and the scope of the Clean Water Act's permitting requirements. Additional litigation on other environmental questions in the years to come could also alter the picture, particularly once the Court begins to hear challenges to the Obama Administration's environmental initiatives.

The lack of a pro-business orientation in the environmental context does not mean the Court is not more business-friendly in other areas, perhaps such as preemption, arbitration, or securities litigation. Yet while there are no signs of a business-friendly approach to environmental cases, there are signs the Court tends to favor governmental interests, and those of the federal government in particular. Thus far in the Roberts Court, governmental interests have prevailed in environmental cases with greater frequency than business interests. If this pattern continues, then whether the Court hands down business-friendly decisions may depend on whether the political branches are or continue to be receptive to business concerns.

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to compensate for those he destroyed. See Ed White, *Deal Reached in Decades-Old Michigan Wetlands Dispute*, ASSOCIATED PRESS, DEC. 29, 2008, available at [http://blog.cleveland.com/business/2008/12/deal\\_reached\\_in\\_decadesold\\_mic.html](http://blog.cleveland.com/business/2008/12/deal_reached_in_decadesold_mic.html).

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## APPENDIX

Table 1. Environmental Cases Heard by the Roberts Court

Case	Issue	Vote	Pro-Business Outcome
S.D. Warren Co. v. Maine Board of Environmental Protection 547 U.S. 370 (2006)	Whether hydroelectric dam causes “discharge into the navigable waters” requiring state certification under Clean Water Act	9–0	No
Rapanos v. United States 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
BP America Production Co. v. Burton 549 U.S. 84 (2006)	Whether six-year statute of limitations for government contract actins applies to administrative payment orders for gas royalty underpayments issued by the Minerals Management Service	7–0*	No
Rockwell International Corp. v. United States 549 U.S. 457 (2007)	Whether “original source” requirement of False Claims Act is jurisdictional	6–2†	Yes
Massachusetts v. EPA 549 U.S. 497 (2007)	Whether EPA has authority to regulate greenhouse gas emissions under the Clean Air Act	5–4	No
Environmental Defense v. Duke Energy Corp. 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

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Table 1. Environmental Cases Heard by the Roberts Court (*continued*)

Case	Issue	Vote	Pro-Business Outcome
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United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority 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
United States v. Atlantic Research Corp. 127 S. Ct. 2331 (2007)	Whether CERCLA provides potentially responsible party a cause of action to recover costs of voluntary cleanup	9-0 Yes
National Association of Home Builders v. Defenders of Wildlife 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
Wilkie v. Robbins 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
John R. Sand & Gravel Co. v. United States 128 S. Ct. 750 (2008)	Whether statute of limitations for takings claims against federal government is jurisdictional	7-2 No
New Jersey v. Delaware 128 S. Ct. 1410 (2008)	Whether interstate compact granted New Jersey exclusive jurisdiction over riparian improvements extending beyond low-water mark	6-2† No
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Table 1. Environmental Cases Heard by the Roberts Court (*continued*)

Case	Issue	Vote	Pro-Business Outcome
Exxon Shipping Co. v. Baker 128 S. Ct. 2605 (2008)	Whether federal maritime common law limits amount of punitive damages awarded in suit for oil spill	5-3‡	Yes
Winter v. Natural	Whether court of Appeals erred in	6-3	Yes

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Resources Defense Council 129 S. Ct. 365 (2008)	affirming preliminary injunction against use of Naval sonar for failure to comply with National Environmental Policy Act		
Summers, et al. v. Earth Island Institute	Whether environmental organization has standing to challenge a change in Forest Service regulations absent live dispute over concrete application of rule	5-4	Yes
Entergy Corp. v. Riverkeeper	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
Pending Cases			

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council	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	...	...
Burlington Northern and Santa Fe Railway Company v. United States	Whether (and when) it is appropriate to impose joint and several liability or apportion damages under CERCLA	...	...

\* Chief Justice Roberts and Justice Breyer did not participate.

† Justice Breyer did not participate.

‡ Justice Alito did not participate