RIGHT ENVIRONMENTALISM: Repurposing Conservative Constitutionalism

Michael Allan Wolf*

ABSTRACT

*The new normal of environmental law will likely feature reduced enforcement of existing federal environmental statutes, elimination of federal regulations deemed anti-business, slashed funding for climate change response programs, and state preemption of local sustainability initiatives. Attorneys representing environmental interests will be "bringing a knife to a gunfight" should they continue to attack such stalwart principles of conservative jurisprudence as federalism, textualism, and originalism, or to seek the reversal of strong precedents that narrow standing, limit the reach of the Commerce and Necessary and Proper Clauses, and expand the scope of the Takings Clause to include allegedly confiscatory environmental and land use regulations. What is needed is a litigation strategy that goes beyond accommodating, adjusting, or massaging conservative jurisprudence. Counsel should advance arguments that will most effectively result in victories for the side identified with environmental protection and sustainability. This article provides the framework for the adoption and advancement of conservative constitutional principles (a set of doctrines that I call "right environmentalism"), presents six illustrative scenarios, and discusses two examples from the early twentieth century of counsel successfully appealing to conservatives on the Court (*Muller v. Oregon *and* Buchanan v. Warley*), examples that can serve as models for today's very serious challenges.*

---

* Richard E. Nelson Chair in Local Government Law, University of Florida Levin College of Law. The author thanks the organizers and participants of the Third Annual Conference of American Legal Educators for providing a wonderful forum for the exchange of ideas; his generous and insightful colleagues at UF, especially Mary Jane Angelo, Alyson Flournoy, Christine Klein, and Amy Stein; and Richard Lazarus, for his example as counsel dedicated to winning for his client and for his insights on Supreme Court advocacy. As should be apparent from the text, the author is also very grateful to the late Doug Kendall for his inspiring contributions to the fight for environmental constitutionalism.

INTRODUCTION

Federalism is at once a threat and an opportunity for environmentalists. For this reason, environmentalists cannot react to the Court's federalism jurisprudence with a simple message that "federalism is bad."
– Douglas T. Kendall[1]

Did the Justices rule in Oregon's favor in Muller *because they were impressed by the extraordinary quality of the Brandeis brief? Or did they hold for Oregon because the Brandeis brief seemed to confirm their preconceptions about the relationship between the sexes, the physical superiority of men, women's inherent vulnerability, and society's interest in "the well-being of wom[e]n" as actual or potential mothers as a matter vital "to preserve the strength and vigor of the race"? Had the reports excerpted in the Brandeis brief been inconsistent with the prevailing wisdom about women's confined place in man's world, the Court may well have viewed the material with a more skeptical eye.*
– Justice Ruth Bader Ginsburg[2]

For the third time in the twenty-first century, a presidential election has presented serious challenges to and deep frustration for environmentalists.[3] Any hope that candidate Donald Trump's climate change skepticism was mere bluster designed to inspire the base was exploded by his announcement on June 1, 2017, that "the United States will cease all implementation of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country."[4]

To call these bleak times for advocates of strong American environmental and sustainability initiatives is an understatement. Climate change skeptics reside in the White House and head the EPA; conservative majorities dominate both houses of Congress; and more than thirty states have

---

1. Douglas T. Kendall, *Redefining Federalism*, *in* STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE 259, 260 (Michael Allan Wolf ed., 2005).

2. Ruth Bader Ginsburg, Muller v. Oregon*: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 365 (2009) (footnote omitted).

3. The first example was George W. Bush's controversial defeat in 2000 of Vice President Al Gore, a politician long associated with environmentalism. Four years later, in a year in which environmentalists suffered several losses in the Supreme Court, President Bush secured a second term by defeating Senator John Kerry. In 2005, Chief Justice Roberts and Justice Alito, the younger Bush's first two appointments, joined the high court.

4. *Statement by President Trump on the Paris Climate Accord*, WHITE HOUSE (June 1, 2017, 3:32 PM), https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord.

Republican governors or Republican-majority state legislatures. There is ample evidence—from uniform state legislation, the 2016 party platform, to polling numbers—that Republican voters, elected officials, and party operatives are opposed to a wide range of sustainability programs—domestic (at all levels) and international.

The new normal for the foreseeable future will likely feature reduced enforcement of existing federal environmental statutes, elimination of federal regulations deemed anti-business, slashed funding for climate change response programs, and state preemption of local sustainability initiatives. Strengthened conservative hegemony at the federal and state levels could very well result in enactment of substantive amendments to longstanding environmental protection statutes and new regulations promulgated at the behest of regulated industries and developers.

One of the last things a planet at or near the climate change tipping point needs is a federal judiciary reshaped by an American President and Senate[5] that will stifle environmental protection and sustainability initiatives opposed in court by regulated businesses and landowners, by federal agencies and the Department of Justice, and by state attorneys general. A few weeks before President Trump's Paris announcement, on April 7, 2017, the Senate approved Neil Gorsuch, the son of the embattled Director of the Environmental Protection Agency (EPA) during President Ronald Reagan's first term, to replace Justice Scalia. While, as a judge on the United States Court of Appeals for the Tenth Circuit, Gorsuch's environmental law record was minimal, one observer, UCLA law professor Ann Carlson, voiced

---

5. *See generally* NOMINATION OF JOHN K. BUSH TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT QUESTIONS FOR THE RECORD (2017), https://www.judiciary.senate.gov/imo/media/doc/Bush%20Responses%20to%20QFRs.pdf. Senator Diane Feinstein (Democrat from California) queried the nominee (who was subsequently confirmed by a vote of fifty-one to forty-seven on July 21, 2017) regarding posts from his "Elephants in the Bluegrass" blog on the topic of climate change:

> In your blog, you repeatedly refer to climate change and global warming in quotation marks. For example, in one post you wrote, "'Saving' the world from 'climate change' will just have to wait until we go to bed victorious after the UofL-North Carolina game." In another post, you wrote, "Since when has banning offshore drilling been a positive for 'global warming'?"

Id. at 5 (citations omitted) (first quoting John K. Bush, *Enviro-Do-Gooders Can't Hold a Candle to NCAA Basketball*, ELEPHANTS BLUEGRASS (Mar. 29, 2008, 7:08 PM), https://elephantsinthebluegrass.blogspot.com/2008/03/enviro-do-gooders-cant-hold-candle-to.html; then quoting John K. Bush, *McCain's New Energy Ad Makes Sense*, ELEPHANTS BLUEGRASS (June 19, 2008, 7:11 AM), https://elephantsinthebluegrass.blogspot.com/2008/06/mccains-new-ad-makes-sense.html).

concern that his opposition to *Chevron* deference and to the dormant Commerce Clause might indicate that "he'll be a reliable conservative vote and a foe of environmental protection most of the time."[6]

Attorneys representing environmental interests in federal courts, especially the Supreme Court, will be "bringing a knife to a gunfight" should they continue to attack head-on such stalwart principles of conservative jurisprudence as federalism, textualism, and originalism, or to seek the reversal of strong precedents that narrow standing, limit the reach of the Commerce and Necessary and Proper Clauses, and expand the scope of the Takings Clause to include allegedly confiscatory environmental and land use regulations. What is needed during these fraught times is a litigation strategy that goes beyond accommodating, adjusting, or massaging conservative jurisprudence. Because the goal of litigation is to prevail for one's client in the case before the court, not to shape airtight theories that consistently adhere to ideological ideals, counsel (including authors of amicus briefs) should *advance* arguments that will most effectively result in victories for the side identified with environmental protection and sustainability.

This article provides the framework for the advancement of conservative constitutional principles, a set of doctrines called "right environmentalism."[7] Part I discusses the five premises upon which the proposed shift in advocacy is based. While the scientific, political, and legal landscapes are far from favorable, there are some positive developments, especially at the local and state government levels.

In Part II, the article reviews earlier attempts to reconceive elements of conservative jurisprudence for environmental purposes, focusing particularly on the ideas of Doug Kendall and James Ryan. As a complement to these efforts, Part III of this article presents a set of scenarios in which environmental and sustainability initiatives are at risk and argues that, when

6. Ann Carlson, *Predicting How Neil Gorsuch Would Rule on Environmental Issues*, LEGAL PLANET (Jan. 31, 2017), http://legal-planet.org/2017/01/31/predicting-how-neil-gorsuch-would-rule-on-environmental-issues/.

7. The use of the word *right* refers to the ideological or political opposite of *left*, not necessarily to the opposite of *incorrect*. To assert that a form of constitutionalism is correct would involve the author and reader in explorations of the meaning of law, constitutions, and absolute truths that are far beyond the scope of this article.

it will further environmental protection and sustainability outcomes, advocates should assert the following:

- Federalist principles embedded in the Tenth Amendment and in the structure of the original Constitution, such as the idea that states possess traditional police power functions, establish a system of dual sovereignty.
- Preemption of state or local law by a "superior" sovereign must be express, not implied.
- State law should not be subject to preemption by federal administrative agency officials.
- *Chevron* deference should be analyzed with a healthy dose of skepticism.
- The Takings Clause reaches not only regulatory actions, but also judicial changes that result in loss of private property rights.
- The idea of a "dormant" Commerce Clause is contrary to the text and purpose of the Constitution.

Part IV presents the reader with two instructive examples of advocates from the "left"[8] making successful arguments during an earlier period of conservative hegemony on the Supreme Court—the opening decades of the twentieth century. *Muller v. Oregon*[9] resulted in a significant breach in the strong wall of conservative labor law jurisprudence. Contrary to popular belief, the prime movers behind the "Brandeis Brief" in *Muller* were highly successful professional women whose lives and achievements belie the arguments that the conservative majority in the case adopted. This article acknowledges the negative legacy of *Muller*, but considers right environmentalism a risk worth taking given the high stakes to human life on the planet.

---

8. The author uses the term "left," rather than "liberal" or "progressive," as the opposite of "right" or conservative. For decades, Democratic politicians have avoided the term "liberal" as if it is a badge of weakness or infamy. I avoid the term "progressive" as well, despite the fact that many Democratic politicians and intellectuals prefer it. "Progressive," especially when it is capitalized, refers to a specific period of American history when a large and influential group of politicians and intellectuals (associated with the Democratic, Republican, and Progressive parties) endorsed a wide-ranging set of ideas and practices, some of which—especially race- and ethnic-based immigration restriction, racial segregation, and eugenics—those on the political left abandoned decades ago. That leaves "left" as the next best alternative. For more of the author's thoughts concerning Progressivism, see generally Charles M. Haar & Michael Allan Wolf, Commentary, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158 (2002), and Michael Allan Wolf, *Looking Backward: Richard Epstein Ponders the "Progressive" Peril*, 105 MICH. L. REV. 1233 (2007) (book review).

9. 208 U.S. 412 (1908).

Similarly, in *Buchanan v. Warley*,[10] arguments regarding property rights and *Lochnerian* liberties played a prominent role in the successful efforts of counsel secured by the National Association for the Advancement of Colored People (NAACP) to convince the Justices to strike down Louisville, Kentucky's racial zoning scheme.[11] While the legacy of *Buchanan*, like that of *Muller*, is mixed, the successful strategy provides a valuable example for environmentalist counsel to follow when facing a conservative bench.

I. FIVE PREMISES

The observations and recommendations contained in this article are based on five interrelated premises that reflect current political, governmental, and ideological realities; postulate unstated beliefs; and propose a litigation posture. While readers may quibble with one or more of these assumptions, two things are beyond cavil: first, that the overwhelming consensus among climate scientists is that climate change is real, anthropogenic, and potentially catastrophic for humans on this planet; and second, that members of the Roberts Court have shown little penchant for environmental regulation and have rendered a body of law that is most unhospitable to sustainability.

A. Choose Your Metaphor: Congressional Abdication or Gridlock

It has become commonplace for commentators to refer to the political status of federal statutory environmental law as moribund, the product either of conscious abdication of responsibility by, or unintentional gridlock in, a sharply divided and highly partisan Congress. The question of intent, while interesting, is irrelevant to this discussion, as there is little likelihood that lawmakers in Washington will try to replicate the spate of environmental statutes that their predecessors enacted in bipartisan fashion in the 1970s, or even the more modest modifications made during the Reagan administration. In the past, environmental disasters provided some bipartisan impetus, as with the Oil Pollution Act of 1990,[12] signed by President George H. W. Bush nearly seventeen months after the *Exxon Valdez* spill. In the twenty-first century, even a mega-disaster such as the *Deepwater Horizon* explosion and spill is no match for a Congress more notable for its logjams than for its

10. 245 U.S. 60 (1917).
11. *Id.* at 82.
12. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

productivity. The modest exception that proves the predominant rule of inaction was passage of the Frank R. Lautenberg Chemical Safety for the 21st Century Act,[13] which President Barack Obama signed on June 22, 2016.

The situation seems highly unlikely to change, even with a Republican in the White House and Republican majorities in both congressional chambers. Not even the devastating trio of hurricanes Harvey, Irma, and Maria is likely to result in meaningful legislation addressing the effects of climate change. There is the risk that, once health care, tax reform, infrastructure, and other high-profile campaign issues are addressed, federal lawmakers may turn their attention to dismantling existing wetlands, endangered species, and environmental protection programs. A much more plausible scenario is that federal agencies in the Trump executive branch, like their Republican predecessors during the presidencies of Reagan and the two Bushes, will do their best to modify, eliminate, and replace regulations implemented by regulators appointed by Jimmy Carter, Bill Clinton, and Barack Obama.[14] Indeed, we have already seen retrenchment in the area of climate change during the Trump administration by means of regulation and executive order.

B. State and Local Governments on the Front Lines

In a dramatic reversal of the pattern of environmental lawmaking during the early 1970s—when members of both parties in Congress worked with President Nixon to enact an ambitious set of federal statutes specifically designed to replace weak state laws—the new century has seen officials in many states and localities filling the governance void. Nonfederal initiatives range from carbon trading to green building codes to sea-level rise resiliency to green energy initiatives and much, much more. As Professor John Nolon has noted,

> [T]here has been a remarkable trend among local governments to adopt laws that protect natural resources and environmental functions. . . . They include local comprehensive plans expressing environmental values, zoning districts created to protect watershed areas, environmental standards contained in subdivision and site

13. Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016).

14. *See, e.g.*, *EPA Takes Another Step to Advance President Trump's America First Strategy, Proposes Repeal of "Clean Power Plan,"* EPA (Oct. 10, 2017), https://www.epa.gov/newsreleases/epa-takes-another-step-advance-president-trumps-america-first-strategy-proposes-repeal.

> plan regulations, and stand-alone environmental laws adopted to protect particular natural resources such as ridgelines, wetlands, floodplains, stream banks, existing vegetative cover, and forests.[15]

We should not be surprised that local governments are on the front lines of sustainable regulation, given (1) the prominent role that land use plays in growing the nation's carbon footprint, (2) the fact that regulation of land use remains primarily a matter of local control, and (3) the relative ease in effecting responsive governmental responses (as compared with stagnation or even opposition at the federal and state levels).

C. An Ideological Court

The following observation made by Professor Richard Lazarus, an accomplished Supreme Court advocate, is as true today as it was when it was published in 2000:

> At best, many of the Justices do not view environmental law as a distinct area of law, but as merely a factual context for the raising of more important crosscutting legal issues. At worst, some of the Justices appear to see the kind of legal regime environmental law promotes as precisely the kind of centralized, intrusive system of laws that they believe to be both constitutionally suspect and unwise as a matter of social policy.[16]

Even though only a few dozen civil cases run the certiorari gauntlet to the high court each year, there has a been a relatively robust number of environmental law decisions since the elevation of John Roberts to the position of Chief Justice of the United States. This does not indicate, however, a strong interest by the Justices in the wisdom or efficacy of environmental controls, sustainability initiatives, or natural resource conservation. In other words, there is little indication that the Justices are making "political" decisions in environmental cases, "political" meaning situations in which the judges put themselves in the position of a legislator and decide whether or not they would vote in favor of a statute or ordinance.

While some environmental law decisions involve the interpretation of key terms found in federal statutes, in many other cases the Justices are more

---

15. John R. Nolon, *Shifting Paradigms Transform Environmental and Land Use Law: The Emergence of the Law of Sustainable Development*, 24 FORDHAM ENVTL. L. REV. 242, 251 (2013).

16. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 771–72 (2000).

interested in the "more important crosscutting legal issues"[17] presented to the Court by cases that happen to be environmentally flavored. In these cases, the Court has employed litigation as a forum for addressing broader, more ideological questions such as federalism versus nationalism, original understanding versus organic constitutionalism, strict separation of powers versus deference to the expertise of nonelected agency officials, and an aggressive view of private property rights versus strong protection for the general welfare.

It is this judicial concern with ideological "isms"—federalism, originalism, libertarianism and the like—that, surprisingly, holds the best hope for advocates who seek to advance environmental and sustainability agendas. Consider, for example, the unanimous decision in *Hawaii Housing Authority v. Midkiff*,[18] a 1984 case in which the Court upheld the state's Land Reform Act of 1967, a statute that "created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees."[19] Justice O'Connor, writing for a Court that included such sturdy conservatives as Chief Justice Burger and future Chief Justice Rehnquist, made clear that this was not a question of whether the state's redistribution scheme was wise:

> When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power.[20]

In this instance devotion to federalism and judicial restraint trumped any political distaste for a redistribution of wealth from very large to small landowners. Replicating this pattern holds some hope for defenders of equally distasteful environmental and sustainability initiatives that appear to burden productive businesses and regulated industries to further tree-hugging agendas.

---

17. *Id.* at 771.
18. 467 U.S. 229 (1984).
19. *Id.* at 233.
20. *Id.* at 242–43.

D. Secret Believers?

The fact that no members of the current Court have been especially vocal about the perils of climate change does not necessarily mean that these judges are climate science deniers or skeptics. Three current members of the Roberts Court (Justices Breyer, Ginsburg, and Kennedy) joined Justice Stevens's opinion in *Massachusetts v. EPA*,[21] which opened as follows:

> A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a "greenhouse gas."[22]

Granted, Chief Justice Roberts's dissent was decidedly noncommittal on the effects of global warming.[23] But this does not mean that the more conservative Justices are skeptics of science per se or necessarily oppose the use of scientific information or expertise in order to resolve cases.

A review of Roberts Court opinions reveals several instances in which current members of the Court have favorably cited scientific findings in their opinions. In *Rapanos v. United States*,[24] a case involving the scope of the Clean Water Act, Justice Kennedy's important concurrence noted:

> Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular. To give just one example, *amici* here have noted that nutrient-rich runoff from the Mississippi River has created a hypoxic, or oxygen-depleted, "dead zone" in the Gulf of Mexico that at times approaches the size of Massachusetts and New Jersey. Scientific evidence indicates that wetlands play a critical role in controlling and filtering runoff.[25]

Patent law cases decided by the Roberts Court have also relied on scientific knowledge. The majority opinion of Justice Clarence Thomas in

---

21. 549 U.S. 497 (2007).

22. *Id.* at 504–05.

23. *See id.* at 535 (Roberts, C.J., dissenting) ("Global warming may be a 'crisis,' even 'the most pressing environmental problem of our time.' Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it." (citation omitted) (quoting Petition for Writ of Certiorari, Massachusetts v. EPA, 549 U.S. 497 (No. 05-1120))).

24. 547 U.S. 715 (2006).

25. *Id.* at 777 (Kennedy, J., concurring) (citation omitted).

Ass'n for Molecular Pathology v. Myriad Genetics, Inc.,[26] in which he was joined by Chief Justice Roberts, and Justices Alito, Breyer, Ginsburg, Kagan, and Sotomayor, relies heavily on scientific findings. This is far from surprising as the issues before the Court were whether "a naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated," and whether "cDNA is patent eligible because it is not naturally occurring."[27] Similarly, in *DePierre v. United States*,[28] Chief Justice Roberts and Justices Alito, Kennedy, and Thomas were among those who joined Justice Sotomayor's opinion for the Court, which relied heavily on chemical and medical information regarding the chemical composition of "cocaine in its base form," otherwise known as C17H21N04,[29] as well as "[t]he chemical reaction [that] changes the cocaine hydrochloride molecule into a chemically basic cocaine molecule," resulting in "crack cocaine."[30]

Because beliefs about human effects on climate change and about the objectivity of climate scientists vary starkly by political affiliation,[31] it is important to consider the posture in which a climate-change-related legal challenge reaches the nation's highest tribunal. We can envision two varieties of cases. In "politically inclined" cases, the Justices are being asked by environmentalists to *force* reluctant federal officials to act—as in *Massachusetts v. EPA*. Any lingering skepticism regarding climate change science that more conservative Justices share with those who identify as Republican could well result in judicial reluctance to act, that is, to "vote" for a climate change solution.

In the second variety, "ideologically inclined" cases, counsel ask the Justices, for example, to recognize that common law causes of action are not superseded by statutory law, to defer to state or local elected officials who have chosen to respond to climate change, or to consider the invalidity of novel federal regulations that are contrary to the spirit, if not the letter, of congressional legislation. In these instances, the Justices are being asked not to "vote" up or down on the challenged law, but instead to consider the impact of their ruling on fundamental ideals such as federalism, original

26. 569 U.S. 576 (2013).

27. *Id.* at 580.

28. 564 U.S. 70 (2011).

29. *Id.* at 73.

30. *Id.* at 73–74; *see also* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 851 (2011) (Breyer, J., dissenting) ("There are many scientific studies that support California's views.").

31. *See, e.g.*, CARY FUNK & BRIAN KENNEDY, PEW RESEARCH CTR., THE POLITICS OF CLIMATE 4 (2016), http://www.pewinternet.org/2016/10/04/the-politics-of-climate/. The breakdown for the 48% of Americans who believe that "Earth is warming mostly due to human activity" includes 15% of conservative Republicans and 34% of moderate-to-liberal Republicans versus 63% of moderate-to-conservative Democrats and 79% of liberal Democrats. *Id.* at 1.

understanding, and the separation of powers. In these cases any skepticism regarding the legitimacy of climate science will be white noise at worst.

E. Eyes Ever on the Prize

The key challenge for defenders of environmental and sustainability initiatives is to resist the temptation to make knee-jerk responses to aspects of conservative jurisprudence that have long stood in stark contrast to their world view, perhaps since their introductory constitutional law courses. Like the left-leaning Supreme Court counsel in *Muller* and *Buchanan* who carried the day by making arguments that appealed to conservative members of the bench, as discussed in Part IV below, sustainability advocates need to keep their eye on the prize—winning the case so that government officials can continue to respond creatively and effectively to the causes and impacts of climate change—even if it means holding their noses while drafting their briefs and delivering oral arguments.

Two factors necessitate this shift in litigation tactics: (1) the fragile state of the planet, and (2) the current and anticipated ideological make-up of the Supreme Court (indeed of federal appellate and many state high courts as well). For the time being, and keeping in mind Justice Brennan's "rule of five,"[32] it would be most efficacious to shape arguments designed to appeal to the conservative jurisprudence favored by the Justices on the right to right-middle of the spectrum.

An interesting anecdote might provide some consolation for environmental law advocates who are uncomfortable with this proposal. When Professor Lazarus was unable to represent the Tahoe Regional Planning Agency in the Supreme Court because of a scheduling conflict, his law school friend—the skilled appellate advocate John Roberts—filled in and did a splendid job countering the arguments of private property rights advocates.[33] Unfortunately for those defending environmental and sustainable initiatives in his Court, contrary to the predictions of at least one

---

32. For one version of Justice Brennan's "rule," see Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763 (1995).

33. *See* Evan Thomas, *Judging Roberts*, NEWSWEEK (July 31, 2005, 8:00 PM), http://www.newsweek.com/judging-roberts-121293. Professor Lazarus, like the future Chief an advocate's advocate, confirmed to the fascinated author the basic facts of this story. *See* Transcript of Oral Argument at 36, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (No. 00-1167), 2002 WL 43288, at *36 ("MR. ROBERTS: A temporary ban on development doesn't render property valueless.").

private property hawk, Roberts the Chief Justice has not left "'property owners . . . twisting in the wind.'"[34]

II. A PARALLEL TRACK: RECONCEIVING FEDERALISM AND TEXTUALISM

In 2004, Doug Kendall, a gifted litigator and legal scholar who founded the Community Rights Counsel (CRC) in 1997 (a public interest law firm) and served as its Executive Director, called for a redefinition of federalism in opposition to what he and his colleagues called "libertarian federalism," which members of the Supreme Court employed "in striking down environmental protections at the federal, state, and local level."[35] As stated in the epigraph that begins this article, Kendall perceived federalism to be "at once a threat and an opportunity for environmentalists," and rather than ceding this important component of American constitutionalism to his opponents, he asserted that "environmentalists need to treat the Court's focus on federalism as an opportunity to channel the Court to a version of federalism that provides leeway for the emergence of environmental law at the state and local level."[36]

Four years later, the CRC would expand its focus through a new entity—the Constitutional Accountability Center (CAC). Kendall and his colleagues, most notably James Ryan, brought a larger, more comprehensive conservative principle into their sights—textualism. As with federalism, CAC advocates offered an alternative conceptualization called "honest textualism," based on the belief that

> [t]he Constitution was written by revolutionaries and amended by those who prevailed in the most tumultuous social upheavals in our nation's history—the Reconstruction Republicans after the Civil War, the Progressives and the women's vote movements in the early 20th Century, the Civil Rights and student movements in the 1950s and 1960s.[37]

---

34. *See, e.g.*, Leonard A. Leo, *Taking Roberts's Rep*, NAT'L REV. (Aug. 22, 2005, 12:14 PM), http://www.nationalreview.com/article/215226/taking-robertss-rep-leonard-leo (quoting James Burling, Pac. Legal Found., *John Roberts: A Supreme Property Rights Disaster in the Making*, AM. LAND RIGHTS ASS'N (Sept. 9, 2005), http://www.landrights.org/ActionAlerts/alra-6360321bb2d.html, *reprinted in Roberts—A Property Rights Disaster*, AM. LAND RIGHTS ASS'N, http://www.landrights.org/ActionAlerts/alra-6360321bb2d.html (last visited Sept. 9, 2005)).

35. Kendall, *supra* note 1, at 259.

36. *Id.* at 260.

37. *What Is Constitutional Accountability*, CONST. ACCOUNTABILITY CTR., https://www.theusconstitution.org/about/method (last visited Mar. 12, 2018).

Ryan's 2011 article, *Laying Claim to the Constitution: The Promise of the New Textualism*,[38] is an impressive demonstration that, thanks to the scholarship of Akhil Amar, Jack Balkin, Reva Siegel, and many others, we can declare both "living constitutionalism" and "old-style originalism" to be "largely dead."[39]

Kendall's advocacy and Ryan's ideas made for an impressive combination, as defenders of environmental regulation and of other conservative bugbears strove to recover jurisprudential ground captured by the right during the Rehnquist Court. Ryan and the legal *commentators* whose work he explores are to be commended for their ambitious efforts to reconceive textualism. Thankfully this project continues to attract more and more talented academics.[40] Nevertheless, legal *advocates* do not have the luxury of academic tenure and are answerable to real clients whose fortunes rise or fall on the votes of judges and justices who may be set in their ways and thoughts concerning the Constitution, its meaning, and its underlying values.

This article, though mindful and respectful of the acts and ideas of Kendall, Ryan, and others who have embarked on this project to reconceive federalism, textualism, and other conservative principles, proposes an interim strategy until the Court's configuration shifts center-left. New versions of federalism, textualism, and other heretofore rightish "isms" can serve as fallback positions in party briefs and as suggestions for constructive change in amicus briefs. However, for now, when possible (as in the two historical cases discussed in Part IV), advocates before the Supreme Court should *lead* with arguments based on established, conservative jurisprudential principles when defending environmental and sustainable initiatives.

III. RIGHT ENVIRONMENTALISM APPLIED: SIX SCENARIOS, SIX SOLUTIONS

In order to explain how right environmentalism works in action, it is helpful to consider several scenarios involving acts and omissions by government officials and private parties that either advance or threaten the goals of ecological health or climate change mitigation and adaptation. The description of each scenario is followed by a description of how an advocate

38. James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011).

39. *Id.* at 1524.

40. *See generally, e.g.*, Jack M. Balkin, *The American Constitution as "Our Law,"* 25 YALE J.L. & HUMAN. 113 (2013).

might frame a "right environmental" argument that includes key language from a current member of the Supreme Court.

This is at best a representative sampling, as the real-world variations on this theme are, unfortunately, seemingly endless. One of the most regretful aspects of the modern American polity is the ease with which legislators, judges, business executives, voters, and other decisionmakers are so quick to question climate change science and to attack environmental regulation as anti-capitalist, and even to identify local government sustainability initiatives as part of a nefarious one-world conspiracy.[41]

When reviewing each of these scenarios, the reader should keep in mind a tally of how, based on their votes in the past and on their political and ideological leanings, each of the current Justices would most likely rule. The author believes that, based on these factors, three to four current members of the Court would likely vote in favor of the environmental/sustainable position. That leaves counsel with the task of picking up one or two more votes from Justices whose track records are not exactly bright green. Perhaps by leading with an argument from the right, the final tally will reach or exceed five.

A. Scenario One: Preventing States from Requiring Disclosure of Fracking Chemicals

Concerned about protecting the proprietary interests of energy companies that engage in hydraulic fracturing ("fracking") to recover oil and gas, the Environmental Protection Agency issues a regulation that expressly preempts a state statute that requires energy companies to complete a "chemical disclosure registry form" within sixty days after completing hydraulic fracturing.[42] *The state sues claiming that the federal government has no authority to preempt state statutes and regulations in this area, particularly when the purpose of the legislation is to protect health, safety, and the environment. The EPA responds by citing Section 322 of the*

41. *See, e.g.*, Richard K. Norton, *Agenda 21 and Its Discontents: Is Sustainable Development a Global Imperative or Globalizing Conspiracy?*, 46 URB. LAW. 325, 325–26 (2014).

42. *See, e.g.*, 58 PA. STAT. AND CONS. STAT. ANN. § 3222.1(b)–(c) (West 2018), *invalidated by* Robinson Township v. Commonwealth, 147 A.3d 536 (Pa. 2016).

> *Energy Policy Act of 2005,*[43] *and explains that the regulation was promulgated in accordance with that statutory provision.*

The end of the twentieth century saw the revival of the Tenth Amendment as an effective articulation of state sovereignty. While the notion of "states' rights" earned a highly negative reputation during the civil rights struggles of the 1950s and 1960s, today federalist judges and commentators feel free to champion the notion of "dual sovereignty" in the absence of a clear delineation of federal (national) power. State counsel who are challenging the regulation described in this scenario should take advantage of the Tenth Amendment revival by asserting that, in the absence of a clear, statutory articulation of federal supremacy, the EPA lacks the authority to preempt the health and safety measure passed by the duly elected legislators of the state.

Statements by current Justices envisioning and supporting strong state power and authority abound.[44] Chief Justice Roberts, at the beginning of his opinion in *National Federation of Independent Business v. Sebelius*,[45] provides this vigorous endorsement of federalist principles that can be used to shield state legislation against a federal regulator that allegedly is "going rogue":

> The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any

43. Energy Policy Act of 2005, Pub. L. No. 109-58, § 322, 119 Stat. 594, 694 (codified at 42 U.S.C. § 300h(d)(1)(B)(ii) (2012)) ("The term 'underground injection' . . . excludes . . . the underground injection of fluids or propping agents . . . pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.").

44. *See, e.g.*, United States v. Comstock, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring) ("A separate concern stems from the Court's explanation of the Tenth Amendment. . . . [T]he powers reserved to the States are so broad that they remain undefined. Residual power, sometimes referred to (perhaps imperfectly) as the police power, belongs to the States and the States alone."); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002) (Thomas, J.) ("Dual sovereignty is a defining feature of our Nation's constitutional blueprint. States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'" (citation omitted) (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991))).

45. 567 U.S. 519 (2012).

> government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power."[46]

Leading with a strong federalist argument based on a robust view of the Tenth Amendment could be the key to rescuing this environmental statutory provision.

B. Scenario Two: Striking Down State Legislation that Enhances Just Compensation for Homeowners

> *While CO2 emissions from burning natural gas are less than coal, diesel, and gasoline, they (and other greenhouse gas emissions attributable to natural gas) are not negligible.*[47] *Responding to this reality and in hopes of slowing down efforts to expand the production and use of natural gas, a state legislature amends its eminent domain statutes to provide that (1) homeowners residing on property for which eminent domain is employed to site a natural gas pipeline are entitled to just compensation at 150% of fair market value for the right-of-way taken, and (2) property owners whose land is subjected to eminent domain in order to site a natural gas pipeline will be able to repurchase the right-of-way at the original purchase price should the right-of-way not be constructed within one year of the takings.*[48] *A natural gas company that plans to lay a natural gas pipeline in the state sues, asserting that the language of 15 U.S.C. § 717f(h) preempts these two state statutory changes.*[49]

---

46. *Id.* at 535–36.

47. *See, e.g.*, *How Much Carbon Dioxide Is Produced When Different Fuels Are Burned?*, U.S. ENERGY INFO. ADMIN. (June 8, 2017), https://www.eia.gov/tools/faqs/faq.php?id=73&t=11 (finding that 117 pounds of CO2 were emitted per million Btu for natural gas, 157.2 for gasoline without ethanol, 161.3 for diesel fuel, and 228.6 for anthracite coal); *see also Environmental Impacts of Natural Gas*, UNION CONCERNED SCIENTISTS, http://www.ucsusa.org/clean-energy/coal-and-other-fossil-fuels/environmental-impacts-of-natural-gas#.WdU8wFuPKUk (last visited Mar. 12, 2018) ("Emissions from smokestacks and tailpipes, however, do not tell the full story.").

48. For examples of states with similar provisions that were added after the Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), see 13 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79F.03[3][B][iv] (Michael Allan Wolf ed., 2018).

49. Section 717f(h) reads as follows:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate,

While express federal preemption of state and local laws has long been a feature of American jurisprudence (as has state preemption of local laws), judges and commentators have engaged in a long-running dispute concerning the nature and wisdom of implied versions of preemption. As with the first scenario, federalist principles are at play here, as the state will assert that these statutory provisions fall within the police power. Moreover, the federal statute provides that "the practice and procedure" of the eminent domain proceeding for a natural gas pipeline "shall conform as nearly as may be" with those used in the relevant state.[50] In this instance, however, the natural gas company will argue that the enhanced just compensation and notice provisions function as substantive burdens on the exercise of eminent domain, designed to make pipeline projects more expensive and difficult to complete.

Should the conflict between the state and federal governments find its way to the Supreme Court, counsel for the state can find solace and support in the serious reservations expressed by Justice Thomas in a number of implied preemption cases. In *Wyeth v. Levine*,[51] for example, Justice Thomas concurred with the majority's holding that the Food and Drug Administration's approval of the labeling of a drug did not preempt products liability claims based on state law.[52] When it came to the rationale for this holding, Justice Thomas departs from his colleagues:

> I cannot join the majority's implicit endorsement of far-reaching implied pre-emption doctrines. In particular, I have become increasingly skeptical of this Court's "purposes and objectives" pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law. Because implied pre-emption doctrines that wander far

---

> and maintain a pipe line or pipe lines for the transportation of natural gas, . . . it may acquire the same by the exercise of the right of eminent domain . . . . The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated . . . .

15 U.S.C. § 717f(h) (2012).

50. *Id.*
51. 555 U.S. 555 (2009).
52. *Id.* at 582 (Thomas, J., concurring in the judgment).

> from the statutory text are inconsistent with the Constitution, I concur only in the judgment.[53]

He pulls no punches in expressing his objection, calling "inherently flawed" the "Court's entire body of 'purposes and objectives' pre-emption jurisprudence."[54] Moreover, "our federal system in general, and the Supremacy Clause in particular, accords pre-emptive effect to only those policies that are actually authorized by and effectuated through the statutory text."[55]

Justice Thomas's jurisprudence thus has much to offer to state counsel contending against the aggressive use of federal law to strike down state statutes or regulations that are not directly and expressly preempted. Moreover, because state courts often employ the same preemption analyses used by the Supreme Court,[56] local government counsel defending sustainability initiatives against claims of state preemption would also benefit from Justice Thomas's position.

C. Scenario Three: Excluding Wetlands from the Definition of "Waters of the United States"

> *On February 28, 2017, President Trump issued an executive order on "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule," which provides that the EPA and U.S. Army "shall review the final rule entitled 'Clean Water Rule: Definition of "Waters of the United States,"' 80 Fed. Reg. 37054 (June 29, 2015), for consistency with the policy set forth in section 1 of this order and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law."*[57] *In accordance with this instruction, the EPA and the U.S. Army Corps of Engineers promulgate a new rule that redefines "Waters of the United States," making clear that "wetlands" are no longer included in the definition. Environmental and natural resource protection organizations sue, alleging that these federal agencies do not have*

---

53. *Id.* at 583.

54. *Id*. at 594 (citations omitted).

55. *Id.* at 602.

56. *See, e.g.*, Cohen v. Bd. of Appeals, 795 N.E.2d 619, 622 (N.Y. 2003) ("The Legislature may expressly state its intent to preempt, or that intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme, including the need for statewide uniformity in a particular area.").

57. Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).

> *authority to issue a regulation that violates the spirit, if not the letter, of the Clean Water Act.*[58] *In defense of the new rule, counsel for the federal government assert that the court must defer to the agency interpretation of the Act, in accordance with the ruling in and principles of* Chevron, U.S.A., Inc. v. National Resource Defense Counsel, Inc.[59]

Chevron deference is one of the mainstays of federal administrative law. It is the perfect illustration of the principle of reciprocity because judges following this principle will end up deferring to federal regulators with whom they are politically and ideologically sympathetic in one case and, often following a change in presidential administrations, with whom they are not sympathetic in the next case. In addition to attempting to demonstrate how *Chevron* deference is not appropriate given the long association of the Clean Water Act with wetlands protection (and funding of wetlands protection programs by the federal government), counsel challenging the new rule should heed the warnings issued by *Chevron* skeptics on the Court.

In a 2016 decision,[60] a panel of the United States Court of Appeals for the Tenth Circuit concluded that a decision of the Board of Immigration Appeals did not have retroactive effect.[61] The author of the panel opinion was then-Judge Neil Gorsuch. In an interesting turn, Judge Gorsuch wrote a concurring opinion as well, which turned out to be an extensive and searing critique of *Chevron* deference. Environmental counsel plagued by regulations issued by industry-friendly federal regulators should pay careful attention.

Judge Gorsuch begins his concurrence by noting that *Chevron* and a later Supreme Court extension of the deference principle, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[62] "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[63] Rather than allowing this "behemoth"[64] to continue to ravage the separation of powers imbedded in the Constitution, Judge Gorsuch attacks the monster head-on in a provocative discussion that questions the validity, wisdom, consistency, and

---

58. *See* 33 U.S.C. § 1362(7) (2012) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.").

59. 467 U.S. 837 (1984).

60. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016).

61. *Id.* at 1148.

62. 545 U.S. 967 (2005).

63. *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

64. *Id.*

legacy of *Chevron* deference to agency officials. Here is his pièce de résistance:

> [W]hat would happen in a world without *Chevron*? If this goliath of modern administrative law were to fall? Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes. The only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law *is* . . . . We managed to live with the administrative state before *Chevron*. We could do it again. Put simply, it seems to me that in a world without *Chevron* very little would change—except perhaps the most important things.[65]

Now-Justice Gorsuch joins at least one more *Chevron* critic on the Supreme Court, as Justice Thomas has expressed deep concerns about "the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference."[66]

D. Scenario Four: Permitting Reconstruction of Buildings Destroyed by Coastal Storm Surge

> *A municipality located in part on a barrier island on the Atlantic coast was directly hit two years ago by a Category 2 hurricane. The majority of the hundreds of structures located on the eastern (ocean side) of the barrier island suffered medium to severe damage caused by very high winds and flooding from significant storm surge. The hurricane also caused severe beach erosion. As a result of severe damage caused by several tropical storms and another hurricane during the past decade, the municipality passed an ordinance that identified an "Erosion/Surge Zone" (ESZ) that covers the easternmost section of the barrier island, including the land upon which sat most of the structures damaged by the Category 2 storm. All property owners within the ESZ received written notice informing them that the municipality strongly discouraged rebuilding structures "significantly damaged by a hurricane or tropical storm" within the ESZ. Despite this, as early as two weeks after the Category 2 storm, several landowners in the ESZ began rebuilding structures that had been destroyed. By the end of six months, most of the damaged structures in the ESZ had been rebuilt.*

65. *Id.* at 1158.
66. Michigan v. EPA, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

> *Municipal officials granted building permits for all of this rebuilding in the ESZ.*
>
> *Almost one year to the day after the Category 2 hurricane made landfall, a Category 1 hurricane hit the municipality during normal high tide, causing even more damage than the predecessor storm. Structures located on property landward of the ESZ suffered significant harms during the second storm. Experts hired by the landward property owners attribute a significant percentage of this damage to the fact that structures were rebuilt in the ESZ. Based on this information, the landward property owners sue the municipality claiming that by permitting the rebuilding in the ESZ the government has effected a regulatory and physical occupation taking of their properties. The municipality responds by claiming that flooding caused by a hurricane has nothing to do with the Takings Clause, which mandates just compensation for the taking of property for a public use.*

For the past few decades, environmentalist counsel, partnering with government attorneys at all levels, have opposed Court conservatives' attempts to invalidate land use regulations designed for environmental protection and sustainability by expanding the reach of the Takings Clause far beyond eminent domain and other physical appropriations. Under this scenario, however, the landward property owners' regulatory takings arguments should garner support from amicus briefs filed by environmental organizations used to arguing the other side of the issue. In 2012, Justice Ginsburg, writing for a unanimous Court in *Arkansas Game & Fish Commission v. United States*,[67] a case involving releases from a federally controlled dam that caused flooding on state forest land, held that "recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability,"[68] despite language from a longstanding precedent stating that "it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land."[69] Justice Ginsburg reasoned that there is "no solid grounding in precedent for setting flooding apart from all other government intrusions on property. And the Government has presented no other persuasive reason to do so."[70]

---

67. 568 U.S. 23 (2012).
68. *Id.* at 26.
69. Sanguinetti v. United States, 264 U.S. 146, 149 (1924).
70. *Ark. Game & Fish Comm'n*, 568 U.S. at 36.

There is further support for an expansive reading of the Takings Clause in Chief Justice Roberts's dissenting opinion in the Court's most recent takings case. *Murr v. Wisconsin*[71] was an unsuccessful regulatory takings challenge in which the majority upheld a lot merger provision designed to protect riverfront property from overdevelopment.[72] Joined by Justices Thomas and Alito, the Chief Justice summarized the rationale for recognizing takings that do not involve eminent domain or physical appropriations:

> Governments can infringe private property interests for public use not only through appropriations, but through regulations as well. If compensation were required for one but not the other, "the natural tendency of human nature" would be to extend regulations "until at last private property disappears." Our regulatory takings decisions, then, have recognized that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." This rule strikes a balance between property owners' rights and the government's authority to advance the common good.[73]

In this scenario, the decision of municipal officials to permit private development in the ESZ effected a violation of the landward owners' property rights that amounted to a taking. In this instance, a costly takings judgment rendered against one local government would provide an instructive lesson for government officials in similarly situated communities who enable landowners to use their insurance proceeds to exacerbate coastal calamities.

E. Scenario Five: Recognizing Aesthetic Nuisance for the First Time

> *Upset with her energy bills and enthusiastic about using renewable energy to reduce dramatically her carbon footprint and to set an example for her community, a residential landowner acquires two lots in a subdivision—lots 20 and 21. She moves into the house on lot 20 and decides to erect a wind turbine and build a solar array on lot 21, which is currently empty. There are no zoning or neighborhood covenant problems with her plans for lot 21, but there is a real problem with the owner of lot 22, who lives in a beautiful house next door to (and with generous views of) lot 21. After the wind turbine and solar array are completed, the owner of*

71. 137 S. Ct. 1933 (2017).

72. *Id.* at 1950.

73. *Id.* at 1951 (Roberts, C.J., dissenting) (quoting Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

> *lot 22 sues his neighbor claiming that the turbine and the solar array amount to an aesthetic private nuisance because they unreasonably and substantially interfere with his use and enjoyment of his home. Not all states recognize aesthetic nuisances,*[74] *including (at the time the lawsuit was filed) the state in which the subdivision is located. For that reason, the state trial court dismisses the private nuisance suit, and the state intermediate appellate court affirms. The state supreme court reverses, however, and for the first time joins those states that recognize aesthetic private nuisances. As a result, the owner of lot 21 is ordered to remove the wind turbine and the solar array at great inconvenience and expense. The owner of lot 21 then takes her case to the U.S. Supreme Court, asserting that by changing the common law of private nuisance to her extreme detriment, the state supreme court had effected a judicial taking of her private property. Counsel for the state questions whether the Takings Clause applies to judicial decisions.*

While change and evolution are essential features of the Anglo-American common law system, sometimes litigants find themselves on the losing end when a state high court takes a step in a new direction. Normally we would chalk up that loss as an unfortunate by-product of legal adaptation. At least three members of the current Supreme Court, however, have indicated that, given the right (or wrong) set of facts, a change in judge-made law could actually effect an uncompensated "judicial taking" that violates the commands of the Fifth Amendment. The key case is *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[75] in which coastal landowners opposed to state-approved beach restoration projects asserted that, by allegedly changing state law to their detriment, the Supreme Court of Florida had unconstitutionally taken the landowners' established private property rights.

All eight participating Justices found that no taking had occurred because the landowners could not "show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land."[76] In portions of the opinion in which he was joined by only three colleagues—

---

74. *See* 9 POWELL, *supra* note 48, § 64.04[4] ("While over the past few decades, courts, in dictum, and commentators have challenged the traditional reluctance to find a nuisance based solely on aesthetic grounds, there remains significant resistance."); *see also* Laubenstein v. Bode Tower, L.L.C., 392 P.3d 706, 710 (Okla. 2016) ("Nuisance claims founded solely on aesthetic harm are not actionable.").

75. 560 U.S. 702 (2010).

76. *Id.* at 730.

Chief Justice Roberts, Justice Alito, and Justice Thomas—Justice Scalia articulates the rationale for judicial takings:

> There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.[77]

A few paragraphs later, the four Justices explained when such a taking would occur:

> [T]he Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking . . . . [T]he particular state *actor* is irrelevant. If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.[78]

The renewable energy user of lot 21 should be heartened by these words, as they strongly suggest that the state supreme court's change in the direction of private nuisance law denied her of "what was once an established right of private property,"[79] that is, her vested right to build and continue to use her wind turbine and solar array.

F. Scenario Six: Reducing Sales Taxes for Items that Are Produced and Shipped Intrastate

> *Hoping to reduce greenhouse gas emissions, the state legislature seeks to encourage local companies to manufacture, produce, and ship locally. The lawmakers pass and the governor signs a bill that cuts in half the state sales taxes for all items that are manufactured and produced within the state and shipped intrastate no more than one hundred miles to the first purchaser. Manufacturers whose factories are located within twenty miles of the state border sue the state, alleging that the dormant Commerce Clause, which instructs that only Congress can regulate interstate commerce, forbids this*

77. *Id.* at 714 (citation omitted).
78. *Id.* at 715.
79. *Id.*

> *kind of intrastate favoritism, which amounts to discrimination against out-of-state businesses.*

The "dormant" (or "negative") Commerce Clause is the bête noire of many texualists, originalists, federalists, and law students studying for constitutional law examinations. One way of understanding the doctrine is to add a phrase to Article I, Section 8 of the Constitution, as follows: "The Congress, *and only Congress*, shall have Power . . . To regulate Commerce . . . among the several states . . . ."[80] Environmental law and the dormant Commerce Clause have had an interesting and complicated relationship, as observed by Professor Christine Klein: "[D]espite its rhetoric that land and water regulation are areas reserved to the states, the Court's dormant commerce holdings have limited the states' ability to enact such legislation in every case that has come before the Court."[81]

The Supreme Court's dormant Commerce Clause jurisprudence took a very interesting turn in its 2007 decision in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*,[82] upholding flow control ordinances employed by two New York counties even though those ordinances "require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation."[83] Two of the opinions in *United Haulers*—Chief Justice Roberts's opinion for the Court and Justice Thomas's concurring opinion—would be of special interest to the state in this scenario.

The Chief Justice rejects aggressive use of the often-perplexing doctrine: "The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market

---

80. *See* U.S. CONST. art. I, § 8 (emphasis added).

81. Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 57 (2003).

82. 550 U.S. 330 (2007).

83. *Id.* at 334.

competition."[84] Justice Thomas's rhetoric is stronger and of even greater value to the state in this scenario:

> The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice. As the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence.[85]

To this Justice, the dormant Commerce Clause is an affront to state sovereignty and the principle of a limited central government. After reviewing a confusing line of precedents, he writes:

> In the face of congressional silence, the States are free to set the balance between protectionism and the free market. Instead of accepting this constitutional reality, the Court's negative Commerce Clause jurisprudence gives nine Justices of this Court the power to decide the appropriate balance.[86]

Justice Gorsuch, when serving on the Tenth Circuit, has voiced similar skepticism regarding the dormant Commerce Clause in *Energy & Environment Legal Institute v. Epel*.[87] What is most intriguing about *Epel* is that the setting for Judge Gorsuch's discussion was an unsuccessful challenge by out-of-state coal producers to Colorado's renewable energy mandate. Could this be an example of right environmentalism?

States that are aggressive in the fight against climate change want to be able to use a wide range of police power tools, economic and otherwise. The dormant Commerce Clause may be a hindrance to those efforts, which makes the words and beliefs of Justices Thomas and Gorsuch (and to a lesser extent the Chief Justice) so noteworthy.

IV. LEADING WITH THE RIGHT: LESSONS FROM *MULLER* AND *BUCHANAN*

It is one thing to suggest an advocacy strategy that *should* work; it is quite another to suggest one that *has* worked, and more than once. There have been periods in American constitutional history when Progressive, liberal, or

84. *Id.* at 343.
85. *Id.* at 349 (Thomas, J., concurring in the judgment) (citations omitted).
86. *Id.* at 352.
87. 793 F.3d 1169, 1171 (10th Cir. 2015).

otherwise left-leaning advocates have faced a decidedly conservative bench at the Supreme Court. The anachronistically labeled "*Lochner* Era," which actually ran roughly from the close of the nineteenth century to the late 1930s,[88] was a period in which the majority of justices tolerated government-mandated racial segregation, best symbolized by *Plessy v. Ferguson*,[89] and opposed worker protection statutes such as state maximum-hours legislation, most notoriously in *Lochner v. New York*[90] itself. Nevertheless, the Supreme Court majority departed from the spirit, if not the letter, of these two important precedents in cases decided in 1908 (only three years after *Lochner*) and 1917 (thirty-seven years before the Court finally reversed *Plessy* in *Brown v. Board of Education*[91]). Full expositions of the facts leading up to, the litigation histories, the decisions, and the legacies of *Muller* and *Buchanan* are far beyond the bounds of this article. What is highly relevant are the decisions made by the advocates as they faced an apparently hostile Supreme Court.

A. Muller*: Protecting the "Entering Wedge"*

Muller v. Oregon[92] may be the only Supreme Court case that is known more for a party's brief than for the holding and facts. The decision upholding a state statute providing that "no female (shall) be employed in any mechanical establishment, or factory, or laundry in this State more than ten hours during any one day"[93] was announced less three years after the Court in *Lochner* held that New York's ten-hour legislation for bakers (males and females) was invalidated because there was "no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker."[94] Only one Justice had left the Court in the interim—Henry Brown,

88. *See, e.g.*, David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 10 (2003) ("If the *Lochner* era unofficially began in 1897 with *Allgeyer v. Louisiana* and ended in 1937 with *West Coast Hotel v. Parrish*, then twenty-six Justices served on the *Lochner* era Court over a period of forty years." (footnotes omitted)).

89. 163 U.S. 537, 550–51 (1896) ("[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools . . . .").

90. 198 U.S. 45, 64 (1905).

91. 347 U.S. 483 (1954).

92. 208 U.S. 412 (1908).

93. *Id.* at 416 (quoting 1903 Or. Laws 148).

94. *Lochner*, 198 U.S. at 58.

who had authored the majority opinion in *Plessy*. There was no guarantee that Brown's replacement, Attorney General William Moody would side with the four dissenters in the 1905 case.

The Supreme Court of Oregon had upheld the statute as a valid exercise of the state's police power,[95] but laundry owner Curt Muller, fined for violating the law, took his case to the U.S. Supreme Court. At this point Florence Kelley got actively involved in the case. Kelley, the founding general secretary of the National Consumers League (NCL), was a socialist Northwestern University law graduate who had "drafted the Illinois maximum-hours law of 1893, led a campaign of women's groups to enact it, and as chief factory inspector, headed the staff of twelve that enforced it."[96] She retained the services of the reformist Boston lawyer, Louis D. Brandeis. Assisting with the sales pitch to Brandeis was Josephine Goldmark, NCL's publications secretary and the chair of the organization's Committee on Legal Defense of Labor Laws, and Brandeis's sister-in-law.[97]

One important reason why Kelley and other Progressive reformers supported labor laws designed to protect women was that they "would serve as an 'entering wedge' for protective laws for all workers. They would set precedents on which reformers could capitalize."[98] The defeat in *Lochner* put these laws, and the "entering wedge" in great jeopardy. According to Professor Melvin Urofsky, "Brandeis realized that the Oregon statute would not stand a chance in the high court unless he could distinguish it from *Lochner*, and the only way to do that involved meeting the Court on its own terms."[99] "On its own terms" in this case did not mean making a Progressive argument that challenged the notion of "liberty of contract" or sought to have the justices reverse their 1905 precedent. "On its own terms" meant "defend[ing] the Oregon law by showing a direct connection between working hours and women's health, family life, and morals."[100]

Goldmark headed up the research team (including her sister Pauline, Kelley, and several others) that "unearthed the reports of English factory commissions and medical commissions; translated sources from western Europe; and amassed information from states with women's hours laws."[101]

---

95. State v. Muller, 85 P. 855, 857 (Or. 1906).

96. NANCY WOLOCH, *MULLER V. OREGON*: A BRIEF HISTORY WITH DOCUMENTS 22 (1996); *see* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 212–13 (2009).

97. UROFSKY, *supra* note 96, at 213; WOLOCH, *supra* note 96, at 23–25.

98. WOLOCH, *supra* note 96, at 9.

99. UROFSKY, *supra* note 96, at 214.

100. *Id.*

101. WOLOCH, *supra* note 96, at 28.

The resulting Brandeis-Goldmark Brief, in the hands of a skilled advocate who would join the Court a decade later, did the trick.

Justice Brewer cited Brandeis by name and noted the importance of the findings compiled by Goldmark's team:

> It may not be amiss . . . to notice the course of legislation, as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters, an epitome of which is found in the margin.[102]

Moreover, the "epitome" the Court placed in a footnote exceeded 500 words, nearly one-fifth the length of the entire opinion. Brandeis, Kelley, and Goldmark landed a solid punch with their right lead.

B. Buchanan*: Protecting Property*

Twenty-one years after the Court declared separate but equal public accommodations constitutionally permissible in *Plessy*, and nine years before the justices upheld zoning based on height, area, and use classifications as a legitimate exercise of the police power in *Village of Euclid v. Ambler Realty Co.*,[103] Louisville, Kentucky's racial zoning ordinance[104] was patterned after similar ordinances in Baltimore, Atlanta, and other southern and border states.[105]

Buchanan has all the markings of a collusive (or at least "friendly") lawsuit. William Warley, a successful African-American activist and reformer who helped found and served as the first president of the city's

---

102. Muller v. Oregon, 208 U.S. 412, 419 (1908).

103. 272 U.S. 365 (1926). *See generally* MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: *EUCLID V. AMBLER* (2008). Dean William Michael Treanor, in a comment to the author, suggested that *Euclid* would also qualify as a case in which conservative justices accepted a progressive result based in part on arguments made by appellate counsel.

104. *See* Buchanan v. Warley, 245 U.S. 60, 70–71 (1917). The Court described the ordinance:

> By the first section of the ordinance it is made unlawful for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by white people than are occupied as residences, places of abode, or places of public assembly by colored people.

Section 2 applied to whites living in predominantly non-white neighborhoods. *Id.* at 71.

105. *See* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 935 (1998).

NAACP, arranged for the purchase of a residence from a white real estate agent (Charles Buchanan) in a "predominately white neighborhood," with a contract provision obliging "Warley . . . to buy or pay for the lot only if he could legally occupy the house on it."[106] When Warley repudiated the purchase owing to the ordinance, Buchanan sued (using an NAACP attorney), and Warley used the city attorney to defend the ordinance that the NAACP in reality sought to invalidate.[107] After losing in two state courts, Buchanan prevailed in the U.S. Supreme Court on a due process property rights theory, not on an equal protection challenge based on illegal racial discrimination.

Sandwiched as it was between two cases sending contrary messages regarding racial segregation and police power, *Buchanan* certainly is an aberration. As Professor Gordon Hylton has noted, the ruling against the government in *Buchanan* was contrary to the prevailing pattern in the first two decades of the twentieth century: "Time after time, and with only one dissenting vote in two decades, the Court found that the police power was sufficiently broad to warrant restrictions on the use of land, even when they eliminated existing uses and imposed severe economic loss on landowners."[108]

The NAACP's victory in *Buchanan* is also testimony to creative and effective advocacy. There were actually two briefs for the plaintiff in error before the high court. Louisville attorney Clayton B. Blakey's arguments tackled the racial discrimination dimensions of the case head-on.[109] By contrast, the brief prepared by NAACP President Moorfield Storey and Harold S. Davis, targeted the more conservative justices who had not yet dissented from *Plessy* and its segregationist legacy, particularly in the second

---

106. Russell Wigginton, *"But He Did What He Could": William Warley Leads Louisville's Fight for Justice, 1902–1946*, 76 FILSON HIST. Q. 427, 438 (2002); *see also* Klarman, *supra* note 105, at 936–37.

107. Wigginton, *supra* note 106, at 439.

108. Joseph Gordon Hylton, *Prelude to* Euclid*: The United States Supreme Court and the Constitutionality of Land Use Regulation, 1900–1920*, 3 WASH. U. J.L. & POL'Y 1, 2 (2000).

109. Consider some of the headings for his argument (particularly the final one):

- ORDINANCE DOES NOT CONCERN A SUBJECT TO WHICH POLICE POWER MAY BE EXTENDED
- ORDINANCE DISCRIMINATES BETWEEN THE WHITE AND COLORED RACES
- SEPARATE COACH LAWS DISCUSSED
- WHAT AMERICA OWES THE NEGRO.

Brief for Plaintiff in Error at Index, Buchanan v. Warley, 245 U.S. 60 (1917) (No. 33).

(of five) sections, which carried the heading: "*The ordinance destroys property rights which had become vested before it took effect*."[110]

Justice Day, writing for a unanimous Court, took the bait, first waxing poetically about property rights:

> Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.[111]

Later in the opinion, Justice Day clarifies what this case is *not* about:

> The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.[112]

Plessy and *Lochner* would remain intact and, thanks to the right argument offered by the NAACP's counsel, the racist, offensive ordinance would be declared invalid.[113]

CONCLUSION

The advocacy strategy embodied in right environmentalism, advancing ideologically conservative arguments designed to achieve a majority of votes for the side identified with environmental protection and sustainability, has great potential, given the support of historical precedents and the skills of many attorneys dedicated to these important causes. Admittedly, in addition to the certainty that this strategy will not prevail every time it is employed, there are some risks, two of which this closing section addresses.

---

110. *Id.* at 14. The opening section—"*The ordinance must be judged by its effect*"—was another attempt to appeal to the conservatives as Storey and Davis quoted language to that effect from *Lochner* itself. *Id.* at 11–12.

111. *Buchanan*, 245 U.S. at 74 (citation omitted).

112. *Id.* at 81.

113. On the unfortunate persistence of racial zoning, even after the triumph in *Buchanan*, see RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 46 (2017) ("Other cities continued to adopt racial zoning ordinances after *Buchanan*, insisting that because their rules differed slightly from Louisville's, the Court's prohibition didn't apply.").

The first risk is that right environmentalism will lead to negative unintended consequences. The reason for advancing arguments opposed to *Chevron* deference, in favor of expanding the reach of regulatory takings, and the like is not to shift the law rightward in all cases and for all clients. Nevertheless, there is a risk that, contrary to the advocate's intent, the Court will use this case as a building block for future cases that might boomerang back to the detriment of environmental protection and sustainability.

Indeed that is part of the story of the success of the Brandeis-Goldmark Brief in *Muller*. Unfortunately, Justice Brewer used the information contained in the brief as a springboard for his own repugnant ideas. As Justice Ginsburg puts it, Brewer "saw the data as confirming eternal, decidedly unscientific truths about men and women."[114] Attorney Ginsburg would spend a good deal of her highly productive career as an advocate fighting against the negative legacy of *Muller* and similar cases because of "the support they appear[ed] to give [to] . . . perpetuation of the treatment of women as less than full persons within the meaning of the Constitution."[115]

Admittedly, a repeat of the *Muller* saga in the environmental context would be regretful at best, harmful at worst. There is no logical reason why we should consider only the possibility of *negative* unintended consequences, however. Examples of positive unintended consequences abound in Supreme Court lore. Perhaps the best example is the legacy of Chief Justice Burger's literal (and tiny-fish-friendly) reading of key language from the Endangered Species Act of 1973 in *Tennessee Valley Authority v. Hill*.[116] With all the variables at play in the drafting, enactment, enforcement, and judicial interpretation of law—complicated by scientific, political, and economic variables—only a fool or a psychic would claim knowledge of the ultimate outcome of any advocacy strategy or judicial opinion.

The second risk is that counsel employing right environmentalism will be labeled hypocritical or intellectually disingenuous. It is not every inconsistency—just the foolish ones—that are the hobgoblins of little minds (or great ones, for that matter). Engaging in litigation, even appellate litigation at the most elevated levels, is not akin to crafting and defending a jurisprudential essay or a law review article on constitutional law doctrine. Sometimes authors of amicus briefs, especially the ones circulated by law

---

114. Ginsburg, *supra* note 2, at 365.

115. *Id.* at 370 (quoting Brief for Appellant at 41, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4)).

116. *See* 437 U.S. 153, 174, 184 (1978). For commentary and original documents chronicling the strange saga of the snail darter, see generally MICHAEL ALLAN WOLF, THE SUPREME COURT AND THE ENVIRONMENT: THE RELUCTANT PROTECTOR 114–21, 163–83 (2012).

professors, forget this, to the consternation of their readers and the efficiency of the appellate review system. The goal of an advocate is to craft an argument that will convince the court and achieve victory for the client.

Yes, right environmentalism carries risks. Nonetheless, losing efforts, negative unintended consequences, and accusations of intellectual inconsistency (or worse) are very small prices to pay given the high stakes—not to mention the high temperatures, the high greenhouse gas emissions, and the high sea levels—involved.