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Nothing New Under The Sun: The Minimalism of Chief Justice Roberts and the Supreme Court's Recent Environmental Law Jurisprudence

Damien Schiff*

During the confirmation hearings of John G. Roberts, the future chief justice made clear that he would emphasize the importance of collegiality on the Court, assembling unanimous opinions, encouraging the deciding of cases on narrow grounds, in short, fostering judicial minimalism.¹ That approach could easily be criticized as pollyannish, insufficiently attuned to the realities of judging, especially as they are born out on the Nation's high court. And indeed recently the Chief Justice's approach has been criticized by those arguably in his own camp.² With the country into the third term of the Roberts Court, it seems appropriate to assess the Chief Justice's success in achieving common grounds, reducing fractiousness, and staying the judicial hand (or at least imbuing in his colleagues a sense of restraint). Perhaps no better field for adjudging the Chief Justice's success exists than environmental law; it is one of the most contentious areas of statutory law that the Court addresses. Also, it presents in focused form the great judicial temptation: whether to

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¹ See, e.g., Diane S. Sykes, "*Of A Judiciary Nature*": *Observations on Chief Justice's First Opinions*, 34 PEPP. L. REV. 1027, 1042 (2007).

² See, *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2582 (2007) (Scalia, J., concurring in the judgment) ("Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason."); *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2683 n.7 (2007) (Scalia, J., concurring in part and concurring in the judgment) ("Indeed, the [Chief Justice's] principal opinion's attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. . . . [T]his faux judicial restraint is judicial obfuscation.") (citation(internal citations omitted)).

enforce the judge's personal will or that of the legislature. Because environmental cases are largely played out in pure statutory (or administrative) law terms, they avoid the momentous constitutional questions that tend necessarily to preclude judicial accord. Plus, because environmental law is somewhat arcane and recondite, it is unusual for a Justice to have a particularly vested interest in vindicating any particular theme in environmental law.³

In this article I intend to trace the Roberts Court's approach to environmental law, and thereby measure the Chief Justice's relative success in convincing his colleagues of the importance and value of judicial minimalism, through a review of the six environmental cases the Court has decided in the last two terms.⁴ Those cases are two arising under the Clean Air Act,⁵ *Environmental Defense v. Duke Energy Corp.*⁶ and *Massachusetts v. EPA*⁷; three under the Clean Water Act,⁸ *Rapanos v. United States Army Corps of Engineers*,⁹ *S.D. Warren Co. v. Maine Board*

³ Justice Douglas was, I think it fair to say, an exception, as a proto-environmentalist. *See, e.g.*, WILLIAM O. DOUGLAS, *MY WILDERNESS* 137 (1960) ("Each Fall, when I say farewell to my friends at Goose Prairie and head east, there are the same pleas. 'Don't let them commercialize our high basins.' 'Don't let them cut any more trees.' 'Don't let them build any more roads.' These are messages to the powers that be in Washington, D.C.").

⁴ A word of explanation as to how I define "environmental cases." If the case concerns the interpretation of a law or regulation principally designed to govern conduct that immediately affects the physical environment, then I consider the case to "be about" environmental law. An example of a case that I chose not to include here but which some may classify as falling under the environmental law umbrella is *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786 (2007), which upheld against a Dormant Commerce Clause challenge a "flow control" ordinance requiring all trash haulers to tip their loads at a government-owned landfill. Certainly the case is to some degree "about" the environment (where and how localities will dispose of their waste), but the principal legal issue presented (whether an ordinance that discriminates equally against in-state and out-of-state trash haulers in favor of a government-owned monopoly is constitutionally permissible absent Congressional authorization) is intrinsically economic, not environmental.

⁵ 42 U.S.C. §§ 7401-7671q (2006). *et seq.*

⁶ 127 S. Ct. 1423 (2007).

⁷ 127 S. Ct. 1438 (2007).

⁸ 33 U.S.C. §§ 1251 *et seq.*-1387 (2006).

⁹ 126 S. Ct. 2208 (2006).

of *Environmental Protection*,¹⁰ and *National Association of Home Builders v. Defenders of Wildlife*¹¹ (which also concerned the Endangered Species Act¹²); and one Superfund¹³ case, *United States v. Atlantic Research Corp.*¹⁴

My method for analyzing these cases through the Roberts minimalist lens involves several factors: whether the Court's disposition is "environmentally friendly"; whether the result actually reached by the Court is consistent with a Roberts minimalist outcome; and, if the Court's outcome is consistent with Roberts's minimalism but not environmentally friendly, whether the Chief Justice's vote was decisive to that outcome.¹⁵ As part of the analysis, I shall ascertain whether the Chief Justice's minimalism is simply another name for originalism, textualism or any other interpretive theory that had currency among the Court's "conservatives" even prior to the Chief Justice's elevation; or if, instead, it is something new under the judicial sun and embodies a triumph of advocacy on the Chief Justice's part.

My analysis contains a few presuppositions, among them that there are sitting Justices for whom minimalism is an occasional good but for whom environmental protection is a trumping good. These are Justices who have no necessary objection to an opinion consistent with minimalism, but who indeed have an objection to an environmentally unfriendly outcome. The assumption is important because, as we shall see below, the Chief Justice's minimalism is content-independent (meaning that it is just as capable of producing an environmentally friendly as an environmentally unfriendly result). The Chief Justice's vote in a given case may be consistent with that of the aforementioned "environmentalist"

¹⁰ 126 S. Ct. 1843 (2006).

¹¹ 127 S. Ct. 2518 (2007).

¹² 16 U.S.C. §§ 1531-1599 (2006) *et seq.*

¹³ Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (2006). *et seq.*

¹⁴ 127 S. Ct. 2331 (2007).

¹⁵ I recognize that the relative success of the Chief Justice in winning his colleagues over to his minimalism is based upon more than just obtaining dispositions that are consistent with that theory's take on the law, because the collegial minimalism that the Chief Justice advances requires more than victories, it requires near unanimity among the Court's members, a task presumably made easier by minimalism's preference for narrow (and thus less far-reaching decisions).

Justices, but that consistency cannot necessarily be ascribed to a success of the Chief Justice's minimalism. Accordingly, a necessary condition to ascertaining the effect of the Chief Justice's minimalism on the Court, based on any given case, is that the case's disposition be environmentally unfriendly yet also minimalist (although traces of minimalism can surely be detected even in other circumstances). And I shall attempt to note that condition, where it exists, along the way.

Before addressing the cases, I shall set forth what I understand to be the Chief Justice's minimalism, relying principally upon Roberts's statements at his confirmation hearing. Then, I shall set forth a brief typology of various minimalist "camps," including Cass Sunstein's "narrow and shallow" minimalism,¹⁶ so-called "Burkean" minimalism,¹⁷ "neutral principles" minimalism,¹⁸ "prudentialist" minimalism¹⁹ (associated with the late Judge Henry Friendly), and "principled" minimalism.²⁰ I shall then categorize the Chief Justice's brand of minimalism within that typology. Once having identified the kind of minimalism to which the Chief Justice subscribes, I shall analyze the six environmental cases named above to determine whether (1) their outcomes are distinctively minimalist; (2) the Chief Justice's vote in those cases is consistent with his professed brand of minimalism; and (3) the Chief Justice's vote was decisive to the Court's minimalist (or otherwise) disposition.

I shall conclude that the Chief Justice's "minimalism" is really nothing more than the "faint-hearted" originalism advanced by Justice Scalia.²¹ This is originalism in that it takes the plain meaning of the text, as commonly and publicly understood at the time of the text's enactment as dispositive, and "faint-hearted" in that in some circumstances that

¹⁶ See, e.g., CASS SUNSTEIN, *ONE CASE AT A TIME* (Harvard University Press 1999).

¹⁷ See Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

¹⁸ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

¹⁹ See Daniel Breen, *Avoiding "Wild Blue Yonders": The Prudentialism of Henry J. Friendly and John Roberts*, 52 S.D. L. REV. 73 (2007).

²⁰ See Jonathan T. Molot, *Principled Minimalism: Restriking the Balance between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753 (2004).

²¹ Antonin Scalia, *Originalism: The Lesser Evil*, 57 UNIV. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist.")

meaning can be influenced by precedent or the interpretations of agencies). Also, that the Chief Justice has had, and will have, no jurisprudential influence, within the context of environmental law cases, on his colleagues who have not hitherto accepted the interpretive theories of the Court's jurisprudential conservatives.

I. MINIMALISM

A. *The "judicial humility" of Chief Justice Roberts: a tour d'horizon*

Perhaps the most apt descriptor for the Chief Justice's brand of minimalism is "judicial humility." Variations of that phrase popped up repeatedly during Roberts's confirmation hearings, and the term nicely identifies the Chief Justice's attitude toward the law. For in fact Roberts's minimalism is, jurisprudentially, not significantly different from the ostensible "maximalism" of Justices Scalia and Thomas,²² but his judicial personality does differ from these latter Justices', in what might be termed the "accidentals" of judging.

The Chief Justice's minimalism is best understood with reference to two broad categories, each consisting of three reference points. Those categories are "neutral principles,"²³ and what I term "rules of judicial comportment." The former category comprises three reference points: Text (which includes things like the "Case or Controversy" standing doctrines²⁴); Tradition (which includes the doctrine of *stare decisis*²⁵); and Deference (which consists principally in the recognition that the Judicial

²² For a discussion of maximalism, see Cass R. Sunstein, *Minimalism at War*, 2004 Sup. Ct. Rev. 47, 49-50; Alternatively, Professor Sunstein refers to Justices Scalia and Thomas as "fundamentalists," and places Chief Justice Roberts somewhere closer to the minimalist camp. See Cass R. Sunstein, *Minimalism v. Fundamentalism*, *The New Republic*, available at <http://www.tnr.com/doc.mhtml?i=20050801&s=sunstein080105> (Aug. 1, 2005).

²³ A phrase that I derive from Professor Wechsler's writings. Cf. Wechsler, *supra* note 18, at 1619-20.

²⁴ Cf. U.S. CONST. art. III, §2, cl. 1.

²⁵ BLACK'S LAW DICTIONARY (4th rev. ed. 1968) ("To abide by, or adhere to, decided cases.").

Branch is not the main federal policymaker, and thus which encourages judicial deference to legislative and administrative decisions). The latter category of the rules of judicial comportment also comprises three reference points: Consensus (pertaining principally to achieving unanimous or near-unanimous opinions on the Court), Clarity (with reference mainly to the desire to avoid plurality and concurring opinions and thus to achieve a clear holding of the Court), and Productivity (encouraging an increase in the number of cases the Court takes and decides).

I have gleaned these factors from a close reading of the Chief Justice's confirmation hearings. Below I set forth why I consider those factors to capture Roberts's judicial philosophy. I believe that the confirmation hearings are a better and more reliable source than the Chief Justice's opinions while on the Court of Appeals, because he was asked directly in the hearings what his thoughts are on judging and the role of the judge in the federal system; those same issues were addressed indirectly—if at all—while Roberts was a court of appeals judge.

In his opening statement to the Senate Judiciary Committee, Roberts made clear through an analogy that would turn up repeatedly in the hearings that he viewed the role of the judge as passive.

My personal appreciation that I owe a great debt to others reinforces my view that a certain humility should characterize the judicial role. Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.

Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath, and judges have to have the modesty to be open in the decisional process to the considered views of their

colleagues on the bench.²⁶

The judge's job when taking a passive role is not to enforce his own preferences or desires, not to make law, but rather to say what is the law. As part of that process, the judge ought to acknowledge that he is likely not the first person to be presented with the question, and that it is fitting for the judge to look at the work of past judges for insight into the question before him now. In this way, Tradition (in the form of *stare decisis*) provides a support to a judge's humility. As Roberts explained, "Given my view of the role of a judge, which focuses on the appropriate modesty and humility, the notion of dramatic departures is not one that I would hold out much hope for."²⁷

In the biographical statement submitted to the Judiciary Committee, Roberts was asked for his views on "judicial activism." He identified five characteristics of that activism which, when inverted, nicely reveal Roberts's views on judicial humility. For Roberts, judicial activism is indicated by:

- a. a tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. a tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. a tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.²⁸

²⁶ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing before the Senate Committee on the Judiciary*, 109th Cong. 55 (2005) [hereinafter *Hearings*].

²⁷ *Id.* at 251.

²⁸ *Id.* at 121.

Each of these “tendencies” can be rephrased to reflect the attitudes of the “humble” judge, who evinces a desire:

- a. to resolve legal disputes, not policy controversies;
- b. to remedy the injuries presented to the court, and not the injuries of hypothetical litigants;
- c. to make law one step at a time, and to eschew broadly crafted rules based upon few cases;
- d. to decide discrete “Cases or Controversies”; and
- e. to leave the intricacies and particularities of remedy to executive bodies.

Roberts elaborated on these points in written responses to questions propounded by Senator Kennedy:

I understand “judicial activism” to refer to a judge who has transgressed the limited role assigned to the judicial branch under the Constitution, and has either undertaken to exercise the legislative function by imposing his own personal policy preferences under the guise of legal interpretation, or has arrogated to himself the executive function by imposing his policy views of how the law should be administered.²⁹

Thus, a judge ceases to be “humble” and becomes “arrogant”—or in other words stops being a minimalist—at that point when he can no longer fairly be said to interpret the law. Of course, the humble judge is not supine, because the principal obligation of the judiciary is to say what the law is. The judge must be prepared to overturn laws that conflict with the Constitution (and presumably regulations that conflict with the authorizing statute), and such action can in no wise be termed judicial activism.³⁰

Roberts’s hallmarks of the “humble” judge nicely match the

²⁹ *Id.* at 591.

³⁰ *Id.* at 165.

jurisprudential practice of Henry J. Friendly, the famed Second Circuit Court of Appeals judge for whom Roberts clerked immediately out of law school. During his confirmation hearings, Roberts had high praise for Judge Friendly's approach to judging:

With Judge Friendly . . . he had such a total commitment to excellence in his craft at every stage of the process, just a total devotion to the rule of law and the confidence that if you just worked hard enough at it, you'd come up with the right answers. And it was his devotion to the rule of law that he took the most pleasure in. He liked the fact that the editorialists of the day couldn't decide whether he was a liberal or a conservative. . . .

. . . .

And also he did have an essential humility about him. He was an absolute genius. I mean there's no doubt about it, and certainly whatever he was reviewing, the decision of an agency, the decision or its legislature, the notion of saying, you know, we defer to them because it's their responsibility, I think everybody would have agreed we would have a better result if we just let him make the decision, regardless of what it was. But he had the essential humility to appreciate that he was a judge, and that this decision should be made by this agency or this decision by that legislature.³¹

In Judge Friendly Roberts sees all the traits of the "humble" judge: devotion to the rule of law, deference to policymakers and a noble reluctance to advance one's own thinking over that of one's colleagues. The interpreter can thereby divine the two categories of Roberts's minimalism, mentioned above: an adherence to neutral principles, such as Text and Tradition, which reduces the likelihood of judicial aggrandizement of policymaking power; and observance of certain standards of judicial comportment, such as Consensus and Clarity.

³¹ *Id.* at 202.

B. Judicial Humility Under the Microscope: Neutral Principles and the Rules of Judicial Comportment

A judge who subscribes to the Chief Justice's minimalism will follow closely the legal text before him,³² as well as the precedents of the Court, and will defer to policymaking bodies where appropriate. As for text, a Roberts minimalist is no deconstructionist.

I know that it's fashionable in some places to suggest that there are no right answers and that the judges are motivated by a constellation of different considerations, and because of that it should affect how we approach certain other issues. That's not the view of the law that I subscribe to.

I think when you folks legislate, you do have something in mind in particular, and you put it into words, and you expect judges not to put in their own preference, not to substitute their judgment for you, but to implement your view of what you are accomplishing in that statute.

I think when the Framers framed the Constitution it was the same thing, and the judges are not to put in their own personal views about the Constitution should say, but they are supposed to interpret it and apply the meaning that is in the Constitution, and I think there is meaning there, and I think there is meaning in your legislation, and the job of a good judge is to do as good a job as possible to get the right answer.

Again, I know there are those theorists who think that is futile, or because it is hard in particular cases, we should just throw up our hands and not try in any case, and I do not subscribe to that. I believe there are right answers, and judges, if they work hard enough, are likely to come up with them.³³

³² *Id.* at 319.

³³ *Id.* at 267; *see also id.* at 354.

Yet a judge is no automaton.³⁴ Above all, the Roberts minimalist is to follow neutral principles, and to eschew the insertion of his own beliefs into the interpretive process.³⁵ Part of that process requires that the judge at least begin with the original public meaning of the legal text in question,³⁶ and to look to traditional and historical practice to divine the meaning of otherwise ambiguous clauses.³⁷

As a corollary to adherence to text, a Roberts minimalist will pay close attention to the question of standing: to whether the litigant before the Court presents a controversy sufficiently adverse, and an injury sufficiently concrete, to invoke the judiciary's remedial powers.³⁸

Tradition for the Roberts minimalist entails a profound respect for the decisions of the Court.³⁹ Indeed, the degree to which a judge acknowledges and incorporates precedent into his rulings is a good indicator of just how "humble" he truly is.⁴⁰

Further, deference to the Republic's policymaking bodies is a watchword for the Roberts minimalist.⁴¹ And for good reason: if a judge begins to set policy, then it's likely that the judge has transgressed the bounds of the judicial role.⁴²

When questioned by Senator Grassley on how to proceed where the Court's precedents are not consistent with the Constitution's original meaning, the future Chief Justice revealed that his minimalism very nearly converges with the "faint-hearted originalism" of Justice Scalia.⁴³

Well, again, you would start with the precedents of

³⁴ *Id.* at 205.

³⁵ *Id.* at 227, 269-70, 327.

³⁶ *Id.* at 159. Which also excludes reliance upon foreign sources of law. *See id.* at 201.

³⁷ *Id.* at 323.

³⁸ *Id.* at 156, 161, 179, 342.

³⁹ *Id.* at 357.

⁴⁰ *Id.* at 158, 259-60.

⁴¹ *Id.* at 300.

⁴² *Id.* at 177-78, 206, 256, 353.

⁴³ *See* Scalia, *supra* note 21, at 864. For criticism of that approach, see, e.g., Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13-14 (2006) (contending that Justice's Scalia's interpretive methodology is results-oriented).

the Court on that decision. In other words, if you think the decision was correctly decided or wrongly decided, that doesn't answer the question of whether or not it should be revisited. You do have to look at whether or not the decision has led to workable rule. You have to consider whether it's created settled expectations that should not be disrupted in the interest of regularity in the legal system. You do have to look at whether or not the bases of the precedent have been eroded. Those are the main considerations that the Court has articulated.⁴⁴

But the Roberts minimalist will also distinguish between "original meaning" and "original application," the former and not the latter having binding effect. The distinction between the two can be illustrated with reference to the Fourteenth Amendment's Equal Protection Clause. On its face, the clause applies to all government activities, including public education. Yet it is fair to say that the drafters and ratifiers of the clause did not anticipate that it would forbid racially segregated public schools.⁴⁵

⁴⁴ *Hearings, supra* note 26 at 181. Roberts's devotion to precedent is also revealed in his surprisingly matter-of-fact acceptance of a constitutional right of privacy and of the doctrine of substantive due process. *Id* at 186, 207. Under prompting from Senator Graham, Roberts characterized Justice Scalia as a conservative, but declined to state whether he viewed himself as more conservative than Justice Scalia. *See id.* at 252. It is interesting to note in this respect that Justice Scalia, the avatar of faint-hearted originalism, declines to afford *stare decisis* effect to "a constitutional doctrine adopted by the Court [that] is not only mistaken but also unsusceptible of principled application." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting). Justice Scalia's originalism is not to be confused with what Professor Sunstein has termed "soft originalism." *See* Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J. L. & PUB. POL'Y 311, 313 (1996) (describing a "soft originalist" as one who "will take the Framers' understanding at a certain level of abstraction or generality").

⁴⁵ *See, e.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA* 75 (Free Press 1990) ("[*Brown*] did not choose the face the uncomfortable fact that the effect on public education was ignored [in the 14th Amendment's ratification debates] because no one then imagined the equal protection clause might affect school segregation."). This is not to say that *Brown*'s outcome is inconsistent with an originalist understanding of the 14th Amendment. *See generally* Michael W. McConnell, *Originalism and the Desegregation Decision*, 81 VA. L. REV. 947, 952-54 (1995); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995).

But according to the Roberts minimalist, the expectations of the drafter and ratifiers cannot trump the plain meaning of the rule they constitutionalized.⁴⁶

The Roberts minimalist is of course concerned with more than theory: he also cares for the process of judging. For a Supreme Court justice, that concern involves rules for crafting opinions. On that point the traits of modesty and humility, which for Roberts ground the minimalist judge, come to the fore. Thus, fractured decisions, where no single opinion commands a majority of the Court, are to be avoided.⁴⁷ As Roberts explained: “I think one of the things that the Chief Justice should have as a top priority is to try to bring about a greater degree of coherence and consensus in the opinions of the Court.”⁴⁸ But the Court should not avoid otherwise important issues through the certiorari process,⁴⁹ and the Chief Justice should not use his privilege of assigning opinions to shape a substantive outcome.⁵⁰ Above all, the minimalist must maintain a level of courtesy and collegiality that eschews rhetoric and preset answers.⁵¹

At root, Roberts’ minimalism is an intrinsic minimalism: the nature of the judicial role, of deciding cases and not making policy but just interpreting the law, ought to be sufficient to keep the judiciary in check.⁵² As Roberts bluntly put it, “I’m not an ideologue.”⁵³

Thus, all of these factors—text, precedent, historical tradition, deference to policymakers—support the Roberts’ minimalist faith in the rule of law and the ability—as well as the duty—of the judge to adhere to neutral principles when deciding cases:

I had someone ask me in this process . . . ‘Are you going to be on the side of the little guy?’ And you obviously want to give an immediate answer, but as you reflect on it, if the Constitution says that the little guy

⁴⁶ *Hearings*, *supra* note 26, at 182, 204, 298-99.

⁴⁷ *Id.* at 303, 358.

⁴⁸ *Id.* at 371.

⁴⁹ *Id.* at 336-37.

⁵⁰ *Id.* at 435.

⁵¹ *Id.* at 343.

⁵² *Id.* at 288.

⁵³ *Id.* at 443.

should win, the little guy is going to win in court before me. But if the Constitution says that the big guy should win, the big guy is going to win, because my obligation is to the Constitution. That's the oath. The oath that a judge takes is not that I will look out for particular interests, I'll be on the side of particular interests. The oath is to uphold the Constitution and laws of the United States, and that's what I would do.⁵⁴

The minimalism of Chief Justice Roberts is therefore characterized by the twin pillars of neutral principles and judicial reserve (or as I have elsewhere termed the rules of judicial comportment).⁵⁵ We turn now to a brief exposition of the typology of minimalism, with an eye toward categorizing Roberts's views within existing theories.

II. A TYPOLOGY OF MINIMALISM

Perhaps the most prominent minimalist theorist in legal academia today is Professor Cass Sunstein, of the University of Chicago. Professor Sunstein has over the past decade developed a sophisticated minimalist theory that relies upon concepts such as deliberative democracy, incompletely theorized agreements, and “narrow and shallow” judicial opinions; and his work draws to a large degree upon the proto-minimalist writings of Alexander Bickel.⁵⁶ Professor Sunstein is neither the first nor the only minimalist. Judge Henry Friendly of the Second Circuit Court of Appeals, whom we have already met tangentially through the review of Chief Justice Roberts's confirmation testimony, maintained a theory that

⁵⁴ *Id.* at 448.

⁵⁵ I am of course not the only commentator to note some of these facets to the Chief Justice's judicial personality. *See* Sykes, *supra* note 1, at 1042.

⁵⁶ *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (Yale Univ. Press 1986) (1961) (chapter on “The Passive Virtues”). *Cf.* Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 *MICH. L. REV.* 1951, 1957-58 (2005). Indeed, Professor Siegel concludes that the principal good of Sunstein's minimalism is that it has “breathed new life” into the “grand Bickelian tradition.” *Id.* at 2019.

has subsequently been characterized as “prudentialism,”⁵⁷ and which shares many points with Sunstein’s minimalism. A close relative to prudentialism, and one which likely influenced Judge Friendly’s theory of judging, is Professor Herbert Wechsler’s theory of “neutral principles,”⁵⁸ an exegetical approach that also finds much support in the Chief Justice’s statements. Lastly, Professor Jonathan Molot has recently advanced a conservative (as it were) variant to Sunstein’s minimalism, which he has termed principled minimalism, a theory which again shares much in common with the prudentialism of Judge Friendly and the neutral principles of Professor Wechsler.⁵⁹

Below I explain each of these minimalist “types” and conclude the section by placing Chief Justice Roberts’s minimalism among those types.

A. *Sunstein’s Minimalism*

Professor Sunstein has written much on the subject,⁶⁰ but from his numerous writings the essential elements of his brand of minimalism are easily extracted. There are two principle features to a minimalist decision: narrowness and shallowness.⁶¹ As Sunstein explains, minimalist narrowness entails “[p]roceeding one case at a time, [and] seek[ing] decisions that resolve the problem at hand without also resolving a series of other problems that might have relevant differences.”⁶² Thus, a Sunstein minimalist will avoid issuing broad rulings that would decide many cases not before the court.⁶³ Narrowness is justified because courts rarely have all the relevant information, and they lack an appreciation for how a broad rule will apply in circumstances not presented or conceived

⁵⁷ See Breen, *supra* note 19, at 78.

⁵⁸ See Wechsler, *supra* note 18, at 16.

⁵⁹ See Molot, *supra* note 20.

⁶⁰ See Sunstein, *Minimalism at War*, *supra* note 22; Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757 (2001); Cass R. Sunstein, *Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV L. REV. 1733 (1995).

⁶¹ SUNSTEIN, *supra* note 16, at 10-14.

⁶² Sunstein, *Minimalism at War*, *supra* note 22, at 48.

⁶³ SUNSTEIN, *supra* note 16, at 10.

of.⁶⁴

A Sunstein minimalist will also strive for shallow rulings.⁶⁵ A shallow decision is one that relies upon an incompletely theorized agreement; in other words, a decision that does not offer “deep” reasons as justification, principally because the polity has not itself decided upon a deep justification for the result that obtains.⁶⁶ A shallow decision allows a court to reach an outcome that most people would agree with, without having to articulate much theory to support that outcome.⁶⁷

Sunstein argues that his minimalism advances a number of desirable substantive outcomes. It fosters the so-called “passive virtues” of judging, among them: (1) declining to decide issues not before the court; (2) refusing to hear unripe cases; (3) avoiding constitutional issues; (4) respecting precedent; (5) declining to issue advisory opinions; and (6) and distinguishing between holding and dicta.⁶⁸ Sunstein also asserts that his minimalism reinforces democratic deliberation by both leaving issues to be decided by the People through their legislatures, and promoting reason-giving as well as public accountability.⁶⁹ As Sunstein claims, minimalism “makes a good deal of sense when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided (on moral or other grounds).”⁷⁰

Sunstein is careful to note that even his brand of minimalism must

⁶⁴ Sunstein, *Burkean Minimalism*, *supra* note 17, at 362.

⁶⁵ SUNSTEIN, *supra* note 16, at 14.

⁶⁶ *Id.* at 11, 13.

⁶⁷ Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123, 123 (2005). Although this aspect of Sunstein’s minimalism seems to invite the exercise of arbitrary power, Sunstein is careful to distinguish a principled yet shallow opinion from what he terms a “subminimalist” decision, one which really does lack sufficient reasons to support its outcome. SUNSTEIN, *supra* note 16, at 9-10. Interestingly, Sunstein notes that the Court’s decision in *Romer v. Evans*, which overturned a Colorado constitutional amendment that precluded governments from prohibiting discrimination on the basis of sexual orientation, is arguably an example of a subminimalist decision. *Id.* at 16.

⁶⁸ SUNSTEIN, *supra* note 16, at 4-5.

⁶⁹ *Id.* at 5.

⁷⁰ *Id.* To his great credit, Sunstein does not argue that minimalism is a panacea. See Sunstein, *Testing Minimalism*, *supra* note 67, at 128 (“When planning is important, minimalism is hazardous; when minimalism imposes high decisional burdens on others, the argument for minimalism is weakened.”).

be subdivided into various subtypes, including procedural minimalism, substantive minimalism, democracy-forcing minimalism, and certiorari minimalism.⁷¹ Perhaps the most significant of these is substantive minimalism, to which Sunstein devotes an entire chapter of his book to explaining and which, he claims, nicely coincides with the irreducible minimum of rights for a successful modern liberal democracy.⁷² In short, substantive minimalism consists of protection against arbitrary governmental action, protection for the rights of political speech and religious practice, protection against governmental taking of property, protection for voting, and a general acknowledgment of some degree of personal autonomy for every citizen.⁷³ Sunstein contends that these protections are for him descriptive rather than prescriptive; that is to say, he does not incorporate those rights or governmental duties into substantive minimalism because they are good, but rather because they represent what Americans have already recognized in two hundred years of constitutional development.

I think it important to note (as have Sunstein's critics⁷⁴) that Sunstein's minimalism is not really content-free (observe his substantive minimalism), and its use must be predicated upon an existing decisional algorithm. When that algorithm (however derived or justified) produces a result, then the minimalist construct applies to dictate whether that result should be tempered according to the narrow or shallow metric, or any of the passive virtues that serve as the handmaiden of minimalism. To put the point a concrete using abortion: the Sunstein minimalist must decide, by whatever means, whether there is a legal right to abortion; and once having decided that, he must then determine whether the scope of the rule

⁷¹ Sunstein, *Testing Minimalism*, *supra* note 67, at 124-25.

⁷² SUNSTEIN, *supra* note 16, at 63-64.

⁷³ *Id.* at 64-67.

⁷⁴ See James E. Fleming, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution*, 75 *FORDHAM L. REV.* 2885, 2906-09 (2007) (concluding that Sunstein's minimalism is perfectionist, *i.e.*, oriented toward the achievement of certain predetermined policy goals); Stephen B. Presser, *Was Ann Coulter Right? Some Realism about "Minimalism"*, 5 *AVE MARIA L. REV.* 23, 43 (2007) (arguing that Sunstein's minimalism may "simply mask[] a departure from the rule of law"); Sheldon Gelman, *The Hedgehog, the Fox, and the Minimalist*, 89 *GEO. L.J.* 2297, 2314-15 (2001) (concluding that "procedural" minimalism is not operative without Sunstein's "substantive" minimalism).

that he lays down to support the result must either be dumbed down or made opaque (shallow), and whether its application must be narrowed. Those considerations, as well as the ensuing decision, will be determined independently of the meaning of the Constitutional provision that supposedly justifies the case's outcome. To the extent that Sunstein's minimalism is content-dependent, it departs from the Chief Justice's understanding of the process of judging.

B. *Burkean Minimalism*

As perhaps an agnatic ancestor of Sunstein's minimalism, Sunstein offers the so-called minimalism of the great English politician and political thinker Edmund Burke.⁷⁵ A Burkean minimalist stresses social practice extending over time as illuminating the interpretation of the Constitution.⁷⁶ A Burkean minimalist resists a priori reasoning and eschews abstractions.⁷⁷ Social judgment is preferable to individual judgment, for the former is made up of many concurrent instances of the latter, and "it may well make sense [therefore] to adopt a presumption in [the social judgment's] favor."⁷⁸ The role of a Burkean minimalist judiciary is thus "to protect long-standing practices against renovations based on theories, or passions, that show an insufficient appreciation for those practices."⁷⁹ Alternatively, a Burkean minimalist may be one who consistently evinces a prejudice in favor of democratic outcomes, a presumption that Sunstein sees worked out in the jurisprudence of Justice Frankfurter.⁸⁰ The principal difference between straight Sunstein minimalism and Burkean minimalism is that the latter counsels close adherence to established practices, and is critical of judgments that depart from those practices.⁸¹

In that regard, Burkean minimalism shares much in common with the minimalism of the Chief Justice, in that Roberts grants an important

⁷⁵ See Sunstein, *supra* note 17, at n.1.

⁷⁶ *Id.* at 369.

⁷⁷ *Id.* at 369-70.

⁷⁸ *Id.* at 371.

⁷⁹ *Id.* at 373.

⁸⁰ *Id.* at 383.

⁸¹ *Id.* at 408.

role in legal interpretation to precedent and tradition. The Chief Justice perhaps parts company with the Burkean minimalist (as well as the Sunstein minimalist) in his refusal to craft judgments to accommodate democratic decisionmaking regardless of the outcome dictated by the text. Yet, in placing meaning above results, Roberts shows an affinity to the minimalism espoused by Professor Herbert Wechsler and Judge Henry Friendly, which we explore below.

C. *The Minimalism of Neutral Principles*

As we have seen from the review of the Chief Justice's confirmation hearings, one important component to his theory of minimalism is the notion that the judge must never insert his personal views or prejudices into the interpretive process. The judicial process is, in the Chief Justice's view, fundamentally interpretive and not creative. In this respect, the Chief Justice places himself in opposition to the Legal Realists, who, holding sway in the legal academy for most of the first half of the twentieth century, taught that the judicial process is in essence either largely or wholly the application of a judge's particular policy preferences to a legal dispute before him.⁸²

Much like John the Baptist crying in the desert, Professor Herbert Wechsler of Harvard Law School was a strong and forceful voice against Legal Realism. Wechsler set forth his view of the proper bounds to legal interpretation in a famous law review article entitled "Toward Neutral Principles of Constitutional Law."⁸³ In that essay, originally given as the Oliver Wendell Holmes lecture, Wechsler explained his position that the judge ought not to use legal interpretation as a flimsy pretext for the assertion of his own views of policy; and yet, at the same time, the fundamental duty of the judiciary is to say what the law is, whether or not the answer is politically popular, or has the immediate effect of seemingly frustrating democratic decision-making. It is this latter proviso to Wechsler's minimalism that both separates him from theorists like Sunstein and places him within the Chief Justice's jurisprudential

⁸² See generally Anthony D'Amato, *The Limits of Legal Realism*, 87 YALE L.J. 468 (1978).

⁸³ Wechsler, *supra* note 18.

constellation.

The [judicial] duty, to be sure, is not that of policing or advising legislatures or executives, nor even, as the uninstructed think, of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support. It is the duty to decide the litigated case and to decide it in accordance with the law, with all that that implies as to a rigorous insistence on the satisfaction of procedural and jurisdictional requirements.⁸⁴

As part of the duty to say what the law is, the judge, according to Wechsler, must eschew an ad hoc approach, because it is an invitation to judicial manipulation.⁸⁵ The judge must be duly deferential to precedent and tradition,⁸⁶ but needs not be bound by the original meaning of the text.⁸⁷

The judicial process, in sum, is the deciding of cases according to principles that extend beyond the exigencies of the case at bar. As Wechsler explained:

A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive. . . . The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees, or, it is vital that we add, to

⁸⁴ *Id.* at 6. Wechsler's insistence upon the observance of "procedural and jurisdictional requirements" reveals another parallel between his neutral principles and the Chief Justice's minimalism, the latter which especially emphasizes the federal court plaintiff's obligation to establish Article III standing.

⁸⁵ *Id.* at 15.

⁸⁶ *Id.* at 17.

⁸⁷ *Id.* at 18.

maintain the rejection of a claim that any given choice should be decreed.⁸⁸

Wechsler does not explain which values are the relevant values, or what the judge is to do when apparently neutral principles, equally capable of deciding a case, conflict. But to his great credit, Wechsler concedes that there is little principled basis for preferring “liberty” values over “economic” values.⁸⁹ Whatever the nature of the value in question, the judge’s task is simply to ensure that the values he imposes upon the other branches are values that find a basis in the legal text at issue.⁹⁰ In the end, “[t]he real test inheres . . . in the force of the analysis.”⁹¹

Thus, Wechsler’s “neutral principles” are minimalist both in their de-emphasis of the role of the judge’s personal views of the legal dispute before him to the interpretive task, and in their twin acknowledgments of the importance of tradition as well as the structural limitations of the federal judiciary. But Wechsler’s minimalism is decidedly not minimalist, at least in the vein of Sunstein, insofar as Wechsler does not allow for the judge to ignore the dictates of the text he is interpreting simply to avoid trenching upon the decision-making of the democratic branches, or to allow those branches to speak first to an issue of great import. In that sense, the Chief Justice can find much common cause with Wechsler; after all, it was the former who declared that he would rule for the “little guy” when the law required it, and for the “big guy” when the law required judgment in his favor.⁹² Where Wechsler and the Chief Justice part company, obviously, is on the degree of importance to ascribe to the text’s original meaning: for Wechsler, the original meaning is interesting but certainly not determinative, because the correctness of a decision is not predicated upon its adherence to the text’s original public meaning but rather upon whether its reasoning reflects reliance upon neutral principles derived from the text.

Wechsler merits, however, some indulgence, in that legal realism

⁸⁸ *Id.* at 19-20.

⁸⁹ *Id.* at 25-26.

⁹⁰ *Id.* at 25.

⁹¹ *Id.*

⁹² See *Hearings*, *supra* note 26, at 448.

and positivism were so well entrenched in the legal academy during his time that the assertion of an authentic originalism was likely not possible. But soon originalism would emerge as a viable alternative interpretive theory to an exasperated legal realism,⁹³ and be capable of serving one component in a new minimalism. It is an amusing coincidence that the greatest judicial expositor of this proto-originalism-cum-minimalism was Judge Henry Friendly, for whom Chief Justice Roberts clerked after law school.

D. *Friendly's Prudentialism*

Henry Friendly was one of the foremost American judges of the second half of the twentieth century, described by the equally prominent Justice Roger Traynor of the California Supreme Court as the "ablest judge of his generation."⁹⁴ Friendly received his legal training from Felix Frankfurter at Harvard Law School,⁹⁵ and much of Friendly's thought as a judge reflects the tenets of the Legal Process School which had much currency in the 1950s and 1960s.⁹⁶ But Friendly's twenty-plus years on the bench revealed a jurisprudential leaning that has been termed prudentialist, the hallmark of which is "the acute recognition that all judicial activity takes place in an established political context within which other institutions have equally legitimate roles to play in American life."⁹⁷ The prudentialist judge does not acknowledge the existence of "absolute personal rights;"⁹⁸ his defining attributes are "modesty and humility,"⁹⁹ and he recognizes rights "against the background of practices and beliefs that make up the American tradition of law and governance."¹⁰⁰ In short, the prudentialist judge: (1) respects precedent

⁹³ See Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 910 n.1-2 (1998).

⁹⁴ Roger Traynor, Henry J. Friendly, *Ablest Judge of His Generation*, 71 CAL. L. REV. 1039, 1039 (1983).

⁹⁵ Breen, *supra* note 19, at 80.

⁹⁶ *Id.* at 82-83.

⁹⁷ *Id.* at 86.

⁹⁸ *Id.* at 87.

⁹⁹ *Id.* 76

¹⁰⁰ *Id.* at 88.

and constitutional text; (2) defers to other branches' decisions; (3) is sensitive to the impact of judicial decisions on other branches; and (4) desires to take into account society's historic beliefs in defining the scope of individual rights.¹⁰¹

The parallels between these hallmarks of prudentialism and the Chief Justice's minimalism are striking.¹⁰² Roberts insists that a good judge's personality must be marked by a certain humility which is revealed through deference to tradition, text, and the decisions of coordinate branches of government.¹⁰³ Roberts is also cognizant of the importance of recognizing individual rights within the backdrop of the society's fundamental traditions. Perhaps the one point on which the Chief Justice's minimalism departs from prudentialism is in his commitment to enforcing the rule of law regardless of the impact of the Court's decision on society.¹⁰⁴ It is this tension between the supposed humility of the minimalist judge and his obligation to say what the law is, a tension which we have already seen in the work of Professor Sunstein, which outlines a major divide in minimalist theory, and one side of which we explore below.

E. *Principled Minimalism*

Professor Jonathan Molot has propounded a theory of what he terms principled minimalism, in opposition to the supposed unprincipled minimalism of Professor Sunstein. Molot notes the tension between judicial restraint and the judicial obligation to pronounce what the law is, and considers principled minimalism to resolve that tension. Drawing upon both Bickel and Wechsler,¹⁰⁵ Molot crafts a *via media*, as it were, between judicial discretion and judicial restraint. He cautions:

Judges who ignore the discretion inherent in the judicial enterprise, and who purport merely to apply legal

¹⁰¹ *Id.*

¹⁰² *See id.* at 89-90; 127-31.

¹⁰³ *See Hearings, supra* note 26, at 323.

¹⁰⁴ *See id.*

¹⁰⁵ *See Molot, supra* note 20, at 1775-76.

principles without altering their meaning, run the risk of aggrandizing their own power at the expense of future judges and aggrandizing the power of past judges over present ones. In contrast, judges who tend to acknowledge the creativity inherent in the judicial enterprise—and to recognize that legal principles are largely a product of past, present, and future judges who articulate them in the course of deciding cases—are less likely to let any single activist judge decide too much.¹⁰⁶

Molot goes on to explain that where judges lack confidence in the correctness of a neutral principle, the resulting decision should be narrowly crafted; and where judges cannot identify any neutral principle to justify the result to which they are drawn, the resulting decision must also be narrowly crafted. Molot thus creates a presumption of humility in difficult cases, where neutral principles are either suspect or are lacking.¹⁰⁷

Accordingly, principled minimalism is a function of judicial confidence in getting the answers right.¹⁰⁸ In that respect, it jibes nicely with Chief Justice Roberts's view that the Court must interpret the law to the fullest, and not allow concerns about results or effect to determine the substance of the Court's legal interpretation.¹⁰⁹ Principled minimalism also dovetails with the Chief Justice's desire to decide cases on narrow grounds, both to produce clarity in the law and to avoid unnecessarily broad grounds for decision.¹¹⁰ But where principled minimalism and the Chief Justice part ways may well be in the former's tacit supposition that some legal disputes do not have answers; and that post-modern response the Chief Justice would definitely reject.¹¹¹

F. *Classifying Roberts's Minimalism*

To understand where to place the Chief Justice's minimalism

¹⁰⁶ *Id.* at 1836 (footnotes omitted).

¹⁰⁷ *Id.* at 1836-37.

¹⁰⁸ *Id.* at 1837.

¹⁰⁹ See *Hearings*, *supra* note 26, at 448.

¹¹⁰ See *id.* at 303, 358, 371.

¹¹¹ See *id.* at 267, 354.

within the typology adumbrated above, it is best to conceive of modern-day variations of minimalism in terms of what I call a content-dependence criterion. By that I mean the degree to which minimalism requires a judge to stay his hand, *even where the legal answer is readily ascertainable*. Using that criterion, it is clear that Professor Sunstein's minimalism is extremely content-dependent, in that oftentimes a Sunstein minimalist judge will have to make more shallow or narrow his decision if the outcome of a wide and deep decision will frustrate democratic deliberation or any other value that Sunstein associates with so-called substantive minimalism. Somewhat closer to the mean would be Burkean minimalism, to the extent that a Burkean minimalist is limited in his interpretation by the traditions of the bench and society, factors that both encourage judicial humility but are also, significantly, part and parcel of the interpretive endeavor.

And moving further still from content dependence would be Wechsler's neutral principles, and Judge Friendly's prudentialism, both of which rely to an important degree upon the rule of law itself to avoid judicial overreach. Lastly, Professor Molot's principled minimalism seems somewhere between neutral principles and prudentialism: obviously Molot incorporates Wechsler's views but he is reluctant to embrace Wechsler's faith in the judiciary's ability to select the right neutral principle to decide a case. Nevertheless, principled minimalism is moderately more content-dependent than prudentialism, to the extent that the former seems to countenance judicial policymaking.

Where to place the Chief Justice on this continuum? The minimalism proffered by the Chief Justice is undoubtedly principled, in his adherence to text and tradition, and his willingness to defer to the decision-making of other branches of government. But is it minimalist in the sense of content-dependent? I would say no. The Chief Justice has made plain that the law provides an answer, and that answer must be adopted by the faithful judge regardless of the consequences. To be sure, the Chief Justice also speaks of judicial humility, and thus impliedly of minimalism, but that discussion seems born of the Chief Justice's attachment to those principles that for him guide the judicial process. In other words, the Chief Justice's minimalism is a function of his attachment to the doctrines of standing, stare decisis, textualism, and originalism, all of which limit judicial discretion but all of which form arguably the

beginning point of every judge's interpretation. Where the Chief Justice's minimalism parts company with more content-dependent variations of minimalism is precisely in the latter's willingness to stay the judicial hand where the dictates of principle require judicial action. In short, the Chief Justice's minimalism is very content independent, and thus closely resembles the jurisprudence of other prominent textualist-originalists, such as Justices Scalia and Thomas, who are not typically identified as minimalist.¹¹²

Having assessed both the nuts-and-bolts of the Chief Justice's minimalism, and how it fits with other theories of minimalism, we turn to an assessment of the Roberts' Court environmental cases.

III. THE CASES

As a first-cut matter, it seems relevant that of the six cases under analysis, three were unanimous (or nearly so) (*S.D. Warren Co.*, *Duke Energy*, and *Atlantic Research*), and the other three were either 5-4 or 4-1-4 (*Rapanos, Massachusetts*, and *National Association of Home Builders*). Thus, if a principal reason for the adoption of the minimalist program is to obtain frequent unanimous opinions, then the Chief Justice does not appear to be making headway in environmental cases.¹¹³ And if minimalism also includes deference to agency determinations, then the environmental cases of the Roberts Court are still, thus far, a mixed bag. In the synopses that follow, I do not intend to give an exhaustive (*i.e.*, like a case note) review of the environmental cases, but I do wish to give the reader a sufficient background to the cases to appreciate whether and to what extent they are permeated by the Chief Justice's minimalism.

¹¹² Often they are characterized as maximalist. See, e.g., Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. LAW REV. 4, at 11 (1996). But not always. See Eric R. Claeys, *Raich and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 795 (2005) (associating Justice Scalia with the minimalist camp).

¹¹³ Indeed, a third of the decisions produced during the 2006 Term were 5-4, the highest percentage in a decade, and the number of unanimous opinions has fallen from 32 percent in 2004 to 22 percent for the 2006 Term. Jeffrey Rosen, *A Conservative Activist Court*, *The New Republic* (July 14, 2007), available at <http://www.cbsnews.com/stories/2007/07/13/opinion/main3056257.shtml> (last visited Oct. 24, 2007).

A. *Environmental Defense v. Duke Energy Corp.*

This case arose out of an enforcement action by the federal government against Duke Energy for violations of the Clean Air Act. The government contended that Duke's operation of its power plants had violated regulations promulgated under the Prevention of Significant Deterioration (PSD) amendment to the Act. Those regulations require that for "major emitting facilities"¹¹⁴ constructed after the passage of the PSD amendment, or for such power plants that are subsequently modified, a permit must be obtained if the new plant or newly modified plant would increase its actual annual emission of a pollutant above the actual average for the two prior years.¹¹⁵ Less onerous emission standards, promulgated under the New Source Performance Standards (NSPS) amendment to the Clean Air Act, apply to non-major emitting facilities; under those regulations, a facility must use the best available pollution-limiting technology if the new facility (or newly modified facility) would increase its discharge of pollutants measured in kilograms per hour.¹¹⁶

The judicial dispute focused on whether the NSPS or PSD regulations applied to Duke's newly modified power plants; Duke's plants met the NSPS but not the PSD standards.¹¹⁷ The PSD amendment expressly adopts the NSPS amendment's definition for "modification."¹¹⁸ Duke argued that the means for measuring emissions must therefore be the same. The government (and environmental interveners) argued in opposition that merely because NSPS and PSD defined "modification" identically was insufficient to hamstring the Environmental Protection Agency (EPA) from promulgating different emission measurement standards under the two programs.

The Court, speaking unanimously¹¹⁹ through Justice Souter, agreed

¹¹⁴ 42 U.S.C. § 7475(a) (2006).

¹¹⁵ 40 C.F.R. § 51.166(b)(21)(ii) (2007).

¹¹⁶ 40 C.F.R. § 60.14(a) (2007).

¹¹⁷ *Env'tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, at 1430-31 (2007).

¹¹⁸ *See* 42 U.S.C. § 7479(2)(C) (2006).

¹¹⁹ Justice Thomas declined to join in the Court's discussion of the canon of interpretation that a statutory cross-reference mandates a consistent regulatory construction. *See Duke Energy*, 127 S. Ct. at 1437 (Thomas, J., concurring in part).

with the petitioners in that the common definition of “modification” does not require EPA to use a kilogram per hour measurement for both NSPS and PSD permits.¹²⁰ The Court rejected an attempt by the Court of Appeals to harmonize the NSPS and PSD regulations on the premise that both sets of regulations required a common emissions measurement. Rather, the Court concluded the two sets of regulations cannot be harmonized, in large measure because NSPS requires kilogram per hour in contrast to PSD’s two-year average mode of measurement.¹²¹ Because the appellate court’s construction of PSD regulations amounted to an invalidation of those regulations, and the Act limits challenges to the validity of regulations in enforcement proceedings,¹²² the Court vacated and remanded the matter,¹²³ presumably to allow the appellate court to determine whether the common definition of “modification” requires that the EPA promulgate identical regulations, and, if so, whether a challenge to the PSD regulations would be time-barred.

Owing to the case’s peculiar posture, it is difficult to divine whether its ultimate result will be environmentally friendly and whether the Chief Justice’s vote to reverse the Court of Appeals is consistent with his minimalism. Strictly speaking, the Court held only that (1) the EPA is not compelled to prescribe differing standards for NSPS and PSD, notwithstanding that both use the same definition of “modification,” and (2) the existing PSD regulations cannot be read to allow for a kilogram per hour measurement. On remand, the Court of Appeals has at least two available options. It can hold the PSD standards are an unreasonable interpretation of the statute and therefore void (assuming that the regulations can be challenged in an enforcement action at a later date). Or it can hold either a challenge to the PSD regulations is time-barred, or even if timely, that the regulations are a reasonable interpretation of the statute. Thus, the Court’s disposition of the matter does not dictate a particular substantive result. But it seems fair to conclude the likely outcome will subject Duke Energy to the more draconian PSD emission standards.

¹²⁰ *Id.* at 1433-34 (majority opinion).

¹²¹ *Id.* at 1434-36.

¹²² See 42 U.S.C. § 7607(b) (2006).

¹²³ *Duke Energy*, 127 S. Ct. at 1437.

NOTHING NEW UNDER THE SUN

Yet it is certainly true that the Court hardly did more than necessary to reverse the judgment.¹²⁴ The Court merely determined a common statutory term does not demand a common interpretation,¹²⁵ and the PSD regulations cannot be harmonized with the NSPS regulations,¹²⁶ insofar as they require different modes of emission measurement. The Court did not decide whether the PSD regulations are a reasonable interpretation of the statute,¹²⁷ or whether a challenge to those regulations would be time-barred.¹²⁸ In these respects, *Duke Energy* is consistent with the Chief Justice's minimalism, but because it is arguably pro-environment, it is not particularly probative of the Chief Justice's influence on his colleagues.

B. Massachusetts v. Environmental Protection Agency

The much vaunted “global warming” case concerned the Commonwealth of Massachusetts's attempt to force the EPA to regulate carbon dioxide from auto emissions. Massachusetts, along with several other states and private organizations, had petitioned the EPA for rulemaking on the grounds that carbon dioxide was an “air pollutant,” within the meaning of the Clean Air Act, that contributes to air pollution and may endanger public health or welfare.¹²⁹ The EPA had declined to act on the petition because it did not believe it was authorized under the Act to regulate vehicle emissions to control global warming. Furthermore, the EPA believed it lacked the means for resolving the global warming crisis, and other federal agencies should take the lead in the matter.¹³⁰

¹²⁴ Justice Thomas is undoubtedly correct that the Court's discussion of the canon of interpretation regarding repeated use of the same statutory term is unnecessary to the judgment, given that the Court also determined that the PSD regulations cannot be reconciled on the relevant point with the NSPS regulations. *See Duke Energy*, 127 S. Ct. *Id.* at 1437 (Thomas, J., concurring in part).

¹²⁵ *Duke Energy*, 127 S. Ct. *Id.* at 1434 (majority opinion).

¹²⁶ *See id.* at 1436.

¹²⁷ Rather, the Court merely indicated EPA's responsibility: to produce a regulatory “construction . . . [that] fall[s] within the limits of what is reasonable, as set by the Act's common definition.” *Id.* at 1434 (footnote omitted).

¹²⁸ *See id.* at 1436.

¹²⁹ 42 U.S.C. § 7521(a)(1) (2006).

¹³⁰ *Massachusetts v. EPA*, 127 S. Ct. 1438, at 1450 (2007).

On review, a divided panel of the D.C. Circuit affirmed the EPA's decision, but the Supreme Court, in a 5-4 opinion authored by Justice Stevens, concluded that the EPA's refusal to act on the petition was illegal. Before reaching the merits, however, the Court had to address the serious standing objections raised by the EPA. The EPA asserted that, even assuming that the past and imminent reduction in Massachusetts's coastline is attributable to global warming, it would be far too speculative to conclude that (1) Massachusetts's injury is fairly traceable to the EPA's failure to regulate carbon dioxide emitted from motor vehicles; or (2) regulation of those emissions would to any significant degree redress Massachusetts's injury, given the multifarious causes of global warming other than American vehicle emissions.

The majority rejected those arguments on the grounds that Massachusetts, as a state, enjoys special consideration in federal court when it seeks to vindicate its interest as *parens patriae*:

[Certain] sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the "emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Congress moreover has recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.¹³¹

The majority concluded that Massachusetts had established the injury, traceability, and redressability prongs of Article III standing.¹³² On the merits, the majority decided that EPA had the authority under the Act

¹³¹ *Id.* at 1454-55.

¹³² *See id.* at 1455-57.

to regulate carbon dioxide for its greenhouse effects,¹³³ but had illegally denied Massachusetts's rulemaking petition by basing its decision on policy, rather than scientific grounds.¹³⁴

Although the merits of the case are of import to administrative law,¹³⁵ for present purposes, I shall focus on the issue of standing, as that best reflects both the Chief Justice's minimalist position in *Massachusetts* and his failure to convince his colleagues in the majority of his minimalism. As a preliminary matter, I think it goes without saying that *Massachusetts* is almost an avatar of non-minimalist decision-making.¹³⁶ As will be seen below, the Court stretches (or expands, depending upon one's attitude) existing standing doctrine, and rejects the EPA's policy grounds for not regulating carbon dioxide emissions. Whether the Court was right is beside the point, and I do not mean to speak to that issue here. But if we were to place *Massachusetts* along Professor Sunstein's minimalist-maximalist continuum, we would not be unjustified in placing the case on the maximalist side.

The Chief Justice, joined by Justices Scalia, Kennedy, and Alito, dissented on the question of standing.¹³⁷ In his dissent, the Chief Justice shows his minimalist stripes. Indeed, in many respects, the opinion's opening paragraphs are a minimalist's *cri de coeur*. At the risk of verbosity, I reprint those paragraphs here to emphasize how the Chief

¹³³ See *id.* at 1459-62.

¹³⁴ See *id.* at 1462-63.

¹³⁵ I have written elsewhere on what I believe to be the media's gross over reading of the Court's holding on the merits. See Damien Schiff, *A question of power, not global warming*, S.F. CHRONICLE, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/29/EDGONP119U1.DTL&hw=global+warming&sn=002&sc=873> (last visited Oct. 24, 2007) Apr. 29, 2007, at E5.

¹³⁶ I say almost because, to its great credit, the majority did not order the EPA to regulate carbon dioxide, but rather allowed it to explain on remand why in its *scientific* judgment regulation of carbon dioxide would not be proper. See *Massachusetts*, 127 S. Ct. at 1463.

¹³⁷ Justice Scalia also wrote separately to dissent from the Court's merits holding, and was joined in that dissent by the Chief Justice, as well as Justice Thomas. See *Massachusetts*, 127 S. Ct. *Id.* at 1471-75 (Scalia, J., dissenting). Justice Scalia argued that (1) the EPA could reasonably interpret the phrase "agent of air pollution" not to include carbon dioxide, (2) the Clean Air Act does not require EPA to act immediately upon Massachusetts's rulemaking petition but would allow a deferral of action, and (3) the EPA had adequately explained why, in its judgment, regulation of carbon dioxide would not be appropriate at this time. *Id.*

Justice views a strict and healthy standing doctrine as essential to cabining the judiciary's role in questions of high political import:

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. It is not a problem, however, that has escaped the attention of policymakers in the executive and legislative branches of our government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change. [¶] Apparently dissatisfied with the pace of progress on this issue in the elected branches, petitioners have come to the courts claiming broad-ranging injury, in attempting to tie that injury to the government's alleged failure to comply with a rather narrow statutory provision. I would reject these challenges as nonjusticiable. Such a conclusion involves no judgment on whether global warming exists, what causes it, or the extent of the problem. Nor does it render petitioners without recourse. This Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here “is the function of Congress and Chief Executive,” and not the function of the federal courts.¹³⁸

Note how strongly the Chief Justice separates the merits of the dispute before the Court—which the media aptly recognized by terming *Massachusetts* the “global warming” case—from his would-be disposition of the case. Roberts recognizes that the majority's decision arrogates to the Court an issue that has been, and will continue to be, addressed by the political branches. Interestingly, Roberts also implies that the petitioners have come to the Court—the non-political branch of government—precisely because they have been unable to achieve their desired policy goals through the elected branches. The Chief Justice's criticism of the

¹³⁸ *Id.* at 1463-64 (Roberts, C.J., dissenting) (citations omitted).

majority's decision on the grounds that it attempts to resolve a broad-ranging injury harkens back to his confirmation hearings and his insistence upon securing an actual case or controversy before ruling.

In the rest of his dissent, the Chief Justice takes issue with the majority's analysis of each of the standing prongs, finding that the *parens patriae* doctrine cannot substitute for actual injury,¹³⁹ Massachusetts had not adequately established a loss of coastlands,¹⁴⁰ any loss of coastlands could not fairly be ascribed to the EPA's failure to regulate carbon dioxide from vehicle emissions,¹⁴¹ and even if the EPA were to regulate, it would be too speculative to conclude that that regulation would at all reduce Massachusetts's loss of coastlands.¹⁴²

That the majority could find standing in these attenuated circumstances struck the Chief Justice as indicative of a greater problem with the case: that it would invite the judiciary to serve as a policy forum rather than as a court of law.¹⁴³ The Chief Justice remarked that the majority's opinion recalled the Court's decision in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,¹⁴⁴ a decision that many had considered to have reached the outer limits of Article III standing. Roberts lamented that both *SCRAP* and the majority's decision in *Massachusetts* turn standing requirements into a "lawyer's game," when they should serve to promote "judicial self-restraint."¹⁴⁵ As the Chief Justice pithily remarked, the majority's decision "is *SCRAP* for a new generation."¹⁴⁶

Clearly, the Chief Justice failed to convince his colleagues of the virtues of minimalism in *Massachusetts*.¹⁴⁷ Does his own opinion reflect that minimalism? It would seem that it does. The Chief Justice

¹³⁹ *Id.* at 1465-66.

¹⁴⁰ *Id.* at 1467-68.

¹⁴¹ *Id.* at 1468-69.

¹⁴² *Id.* at 1469-70.

¹⁴³ *Id.* at 1470.

¹⁴⁴ 412 U.S. 669 (1973); see *Massachusetts*, 127 S. Ct. at 1470-71 (Roberts, C.J. dissenting).

¹⁴⁵ See *Massachusetts*, 127 S. Ct. at 1471 (Roberts, C.J., dissenting).

¹⁴⁶ *Id.*

¹⁴⁷ Although he noted that the Court's "special solicitude" analysis by its own terms applies only to states and thus does not dramatically expand the Court's current standing jurisprudence. See *id.*

throughout his dissent emphasized that his disagreement with the majority has nothing to do with the global warming crisis, but is born of a concern not to have the judiciary enter fields where it is neither competent to expatiate nor authorized to do so by the People. And we have already seen the Chief Justice's suspicion that Massachusetts and its fellow petitioners are inviting the Court to weigh in on an issue that has already been, and will continue to be, thoroughly debated in democratic forums. But we have here a cleavage in minimalism, between the intrinsic minimalism that marks prudentialism and the extrinsic minimalism that marks neutral principles and Sunstein's procedural minimalism. The Chief Justice would rather defer to the political branches on the question of EPA rulemaking, not so much because the judiciary will make a mess of things (although surely that is a consideration), or because EPA's denial of the petition is the best policy, but rather because the Constitution forbids the Court from addressing Massachusetts's complaint. In other words, the minimalism of the Chief Justice's dissent is tied to Article III itself, to the meaning of the Law itself, and is not a function of extrinsic, prudential concerns.

That the Chief Justice was not able to convince Justice Kennedy to join his standing opinion is particularly revealing, given that Justice Kennedy has joined in a number of the Court's standing-limiting decisions of the last two decades, including *Lujan v. National Wildlife Federation v. Lujan*,¹⁴⁸ *Lujan v. Defenders of Wildlife*,¹⁴⁹ and *Steel Co.* Moreover, Justice Kennedy dissented in *Laidlaw Services* [CHECK]. Thus, *Massachusetts* may represent a loss not just to the Chief Justice's minimalism, but also to his campaign to convince his colleagues of the virtues of intrinsic judicial self-restraint.

¹⁴⁸ 497 U.S. 871 (1990).

¹⁴⁹ 504 U.S. 555 (1992). Although in *Defenders*, Justice Kennedy concurred separately and indicated that he declined to reach the plurality's discussion of the redressability prong of the standing analysis. See *id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment).

C. National Association of Home Builders (NAHB) v. Defenders of Wildlife

Is the Endangered Species Act (ESA) a “super statute” that impliedly amends all federal agency mandates to make species preservation their number one priority? That was impliedly the issue raised in *NAHB*.¹⁵⁰ The case arose out the EPA’s decision not to consult under Section 7 of the ESA over the agency’s transfer of National Pollutant Discharge Elimination System (NPDES) authority to the State of Arizona. A bit of background: under ESA Section 7, a federal agency must ensure that none of its action jeopardizes the continued existence of an endangered or threatened species.¹⁵¹ Under Section 402(b) of the Clean Water Act, the EPA must transfer authority for the issuance of pollution discharge permits to a state once that state has met the nine criteria set forth in Section 402(b).¹⁵² In *NAHB*, environmental groups challenged the EPA’s decision not to consult over the effects of its transfer of NPDES authority to Arizona. Although the EPA advanced a number of reasons as to why its decision was proper,¹⁵³ the most important of those for present purposes was its position that, because Section 402(b) on its face did allow the EPA to decline to transfer NPDES permitting authority for non-CWA reasons, therefore once a state had met all nine criteria in Section 402(b), the EPA was required to transfer that authority, the ESA notwithstanding.¹⁵⁴

The Supreme Court, in a 5-4 decision authored by Justice Alito and joined in full by the Chief Justice, held that the ESA does not impliedly amend the CWA, and that once a state has met all nine criteria set forth in Section 402(b), the EPA must transfer NPDES permitting authority,

¹⁵⁰ A note of disclosure: I drafted an amicus brief in support of NAHB on the merits in the Supreme Court. Brief of Pacific Legal Foundation as Amici Curiae Supporting Petitioners, *NAHB v. Defenders of Wildlife, Inc.*, 127 S. Ct. 2518 (2007) (No. 06-340), available at 2007 WL 542419.

¹⁵¹ 16 U.S.C. § 1536(a)(2) (2006).

¹⁵² 33 U.S.C. § 1342(b) (2006).

¹⁵³ See *Natl. Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, at 2527 (2007); see also *Defenders of Wildlife, Inc. v. EPA*, 420 F.3d 946, 960-61 (9th Cir. 2005); 67 Fed. Reg. 79,629, 79,630 (Dec. 30, 2002).

¹⁵⁴ See *NAHB*, 127 S. Ct. at 2527.

regardless of the transfer's effects on endangered species.¹⁵⁵ Because the Chief Justice did not write an opinion in the case, we shall not tarry long here. But it is enough for present purposes to flesh out two characterizations of the case: it produces arguably an anti-environmental result, in that species and habitat protection does not become the federal government's *summum bonum*, and it bears many hallmarks of Roberts's minimalism.

First, the majority opinion relies heavily upon a canon of interpretation—implied repeals or amendments are disfavored—to determine whether the EPA's and the Fish and Wildlife Service's interpretations of ESA Section 7 is reasonable.¹⁵⁶ Although not strictly speaking part of a textualist analysis, the use of canons often goes hand in hand with a plain meaning interpretation, and a judge's adherence to textualism frequently accompanies an acceptance of canons in legal interpretation.¹⁵⁷ To that extent, therefore, the majority opinion both tracks the Chief Justice's minimalism and, more broadly, prudentialism.

Second, the majority opinion defers to the EPA's and the Fish and Wildlife Service's interpretation of the ESA's consultation provision.¹⁵⁸ Although the Court plausibly would have accepted a contrary interpretation—*i.e.*, one that would apply ESA Section 7 to all agency action, both discretionary and nondiscretionary¹⁵⁹ —, the majority also

¹⁵⁵ *Id.* at 2538.

¹⁵⁶ *Id.* at 2532-33.

¹⁵⁷ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 25-26 (Princeton University Press 1997); Damien M. Schiff, *Purposivism and the "Reasonable Legislator": A Review Essay of Justice Stephen Breyer's Active Liberty*, 33 WILLIAM MITCHELL L. REV. 1081, 1105-07, & n.150 (2007).

¹⁵⁸ See *NAHB*, 127 S. Ct. at 2533-36.

¹⁵⁹ See *id.* at 2533, 2535-36. Whether the agencies could reasonably interpret Section 7 to apply to nondiscretionary federal action is of some importance, given that a new administration might well push to promulgate new ESA regulations, although the effort, judged from recent attempts, is far from easy. As I read *NAHB*, the Court merely held that interpreting Section 7 the other way is a permissible interpretation of an ambiguous text, but is by no means the *only* reading to which the Court may defer. See *NAHB, id.* at 3535-36 ("Nothing in either [Section 7] or the other agency regulations interpreting that section . . . suggests that discretionary actions are *excluded* from the scope of the ESA.") (citation omitted). It is interesting to note that the leaked draft ESA regulations contained a provision that would state explicitly that Section 7 applies to discretionary federal action *pro tanto*. See Draft 50 C.F.R. § 402.03 ("Where an action involves a mixture of

recognized that interpreting Section 7 to apply only to discretionary federal action was entirely reasonable, and therefore entitled to deference.¹⁶⁰ In this regard, the majority opinion tracks the Chief Justice's minimalism by its deference to the executive agencies' interpretations of their governing statutes. Although such deference is in perfect accord with *Chevron*,¹⁶¹ the Court's nod to the agencies' expertise is particularly noteworthy here given the lower court's conclusion that the EPA's and the Service's interpretation was not entitled to deference because the EPA had reversed course during the processing of Arizona's NPDES transfer request.¹⁶²

Third, the majority opinion dispenses with what appears to be a conflicting precedent—*TVA v. Hill*¹⁶³—by reading it narrowly, or, to use Professor Sunstein's lexicon, by reducing its "width." The environmental groups argued that *TVA* required federal agencies to make species and habitat preservation the federal government's foremost goal, and cited to language in the Court's opinion to that effect.¹⁶⁴ But the majority rejected that broad reading largely on the grounds that *TVA* dealt only with a discretionary federal action and not, as was the case here, a nondiscretionary federal action.¹⁶⁵ Whatever the merits of the majority's attempt to distinguish *TVA*, it remains true that the majority's approach to *TVA* resembles what Professor Molot has termed "backward-looking"

discretionary and nondiscretionary activities, an action agency need only consult on the effects of the discretionary activities.").

¹⁶⁰ *NAHB*, 127 S. Ct. at 2534.

¹⁶¹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁶² *Defenders of Wildlife, Inc. v. EPA*, 420 F.3d 946, 959 (9th Cir. 2005) 420 F.3d at 959.

Justice Stevens in dissent also believed that deference was inapt, but for different reasons, chief among them the prohibition against agency *post hoc* rationalization. See *NAHB*, 127 S. Ct. at 2543-44 (Stevens, J., dissenting).

¹⁶³ 437 U.S. 153 (1978).

¹⁶⁴ See *NAHB*, 127 S. Ct. at 2536 (majority opinion); *id.* at 2540 (Stevens, J., dissenting) (quoting *TVA*, 437 U.S. at 185) (Section 7 "reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.").

(quoting *TVA*, 437 U.S. at 185).

¹⁶⁵ *NAHB*, 127 S. Ct. at 2536-37 (majority opinion).

principled minimalism,¹⁶⁶ which itself shares much with the Chief Justice's minimalism.

To a degree, the result in *NAHB* is not environmentally friendly in that it declined to place species and habitat preservation at the forefront of the federal regulatory suite. But the reasoning supporting the Court's decision is obviously content-neutral, in that the principal argument for the Court's outcome—the canon against implied repeals—would operate just as much in favor of environmental causes as it would against them, the only salient criterion being the chronological order of enactment. And all of the majority opinion's arguments—canons, deference, and distinguishing of case law—fit comfortably within the brand of minimalism that the Chief Justice has espoused. Thus, we can conclude that *NAHB* is a minimalist decision and is consistent with the Chief Justice's jurisprudence, and yet the fact that the case was decided 5-4 confirms that the Chief Justice's minimalism has not won over his environmentally friendly yet minimalist indifferent colleagues.

D. Rapanos v. United States

Perhaps one of the most important environmental cases of a generation, *Rapanos* concerned the extent of Clean Water Act jurisdiction over the Nation's waters exercised by the United States Army Corps of Engineers.¹⁶⁷ The Act prohibits the discharge of pollutants—which includes dredge and fill material—into the “navigable waters” of the United States.¹⁶⁸ “Navigable waters” are defined simply as “the waters of the United States.”¹⁶⁹ The EPA and the Corps had interpreted “waters of the United States” to include any and all wetlands that have a hydrological

¹⁶⁶ See Molot, *supra* note 20, at 1833.

¹⁶⁷ Another note of disclosure: my firm represented Mr. Rapanos and his wife before the Sixth Circuit and the Supreme Court. I played a very minor role in the preparation of the case for the Supreme Court, but I have written elsewhere on the Court's decision. See M. Reed Hopper & Damien M. Schiff, *The Rapanos Case*, ENGAGE, 64 (Oct. 2006), available at http://www.fed-soc.org/doclib/20070321_EngageOct06.pdf, at 64.

¹⁶⁸ See 33 U.S.C. §§ 1311(a), 1344 (2006).

¹⁶⁹ See 33 U.S.C. *Id.* § 1362(7) (2006).

connection with a navigable-in-fact waterbody.¹⁷⁰ The petitioner in *Rapanos* had been charged both civilly and criminally for violating the CWA by placing fill material on several wetlands that he owned, which were connected to navigable waterways, in at least one instance some twenty miles distant,¹⁷¹ through a circuitous path consisting of drainage ditches and streams.¹⁷² The question placed before the Court, therefore, was whether the agency's interpretation of the CWA was reasonable and entitled to deference.

The Court, in a 4-1-4 decision, determined that the record, as then constituted, could not support jurisdiction over the petitioners' properties. All five justices voting to remand the case concluded that the Corps's hydrological connection rule is an impermissible interpretation of the statute.¹⁷³ Justice Scalia authored a plurality opinion, joined by the Chief Justice and Justices Thomas and Alito, in which he applied a textualist analysis and concluded that, although the phrase "waters of the United States" must include some waters that are not navigable-in-fact, the language cannot be stretched to include topographical features that are not traditionally referred to as waterbodies.¹⁷⁴ Justice Kennedy, concurring in the judgment only, took issue with the plurality's reading and opted for a more purposivist approach,¹⁷⁵ and developed a "significant nexus" test for jurisdiction, whereby CWA jurisdiction attaches if the property in question has a significant effect on the physical, chemical, or biological integrity of a navigable-in-fact waterway.¹⁷⁶

Justice Scalia's plurality opinion bears many traits of the Chief Justice's minimalism. It closely hews to the statutory text but at the same time accommodates precedent. Incorporation of precedent is best seen in

¹⁷⁰ See *Rapanos v. United States*, 126 S. Ct. 2208, at 2217-19 (plurality opinion). The pertinent regulation is published at 33 C.F.R. § 328.3 (2007).

¹⁷¹ See Brief of Petitioner at 5, Petitioners' Opening Brief at 5, *Rapanos v. United States*, 126 S. Ct. 2208, No. 04-1034 (2006) (No. 04-1034), available at 2005 WL 3295630.

¹⁷² See *id.* at 5-6.

¹⁷³ See *Rapanos*, 126 S. Ct. at 2226-27 (plurality opinion); *id.* at 2247, 2251-52 (Kennedy, J., concurring in the judgment).

¹⁷⁴ *Id.* at 2220-21 (plurality opinion).

¹⁷⁵ See Schiff, *supra* note 156, at 1082-85 (explanation of purposivism).

¹⁷⁶ *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring in the judgment).

Justice Scalia's handling of *Riverside Bayview Homes*,¹⁷⁷ a unanimous 1985 decision in which the Court affirmed CWA jurisdiction over wetlands adjacent to a navigable-in-fact waterway.¹⁷⁸ On the basis of that precedent, the plurality was forced to disagree with the petitioners' position that CWA jurisdiction extends only to navigable-in-fact waterways and discharges that actually reach those waterways.¹⁷⁹ But the plurality exhibited "backward looking" minimalism in its limited reading of *Riverside Bayview*: Justice Scalia read Justice White's opinion as addressing *only* the issue of jurisdiction over wetlands immediately adjacent to navigable in fact waterways, and as hinging upon the legal judgment that deference to the Corps would be appropriate given the ecological judgment that one could not tell, in *Riverside Bayview*, where the river ended and the wetland began.¹⁸⁰

That the plurality opinion is consistent with the Chief Justice's minimalism is confirmed by the concurrence authored by Roberts. In that short piece, the Chief Justice noted that the agencies could have avoided the loss the Court handed them had they promulgated new regulations. In 2001, the Court in *Solid Waste Agency of Northen Cook County* overturned another Corps jurisdictional rule, known as the Migratory Bird Rule, in holding that CWA jurisdiction does not extend to isolated ponds.¹⁸¹ Shortly thereafter, the agencies proposed new rulemaking, but presumably for political reasons no new regulation was promulgated. The Chief Justice, consistent with his minimalist tendency to defer to agency interpretations, lamented that the EPA and the Corps had failed to correct their extravagant view of CWA jurisdiction through new rulemaking.¹⁸² Roberts emphasized that had the agencies in fact issued new regulations, they almost assuredly would have won a legal challenge, given the

¹⁷⁷ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

¹⁷⁸ *See id.* at 134.

¹⁷⁹ *See Rapanos*, 126 S. Ct. at 2220 (plurality opinion).

¹⁸⁰ *See id.* at 2225-26. In sharp contrast to the plurality's interpretation, Justice Stevens in dissent considered *Rapanos* to be controlled by *Riverside Bayview*. *Id.* at 2255 (Stevens, J., dissenting).

¹⁸¹ *Solid Waste Agric. of N. Cook County. v. Army Corps of Engin'rs*, 531 U.S. 159, 171-72 (2001).

¹⁸² *Rapanos*, 126 S. Ct. at 2235-36 (Roberts, C.J., concurring).

Court's generous deference.¹⁸³

And a useful distinction may be drawn between the *Rapanos* plurality (along with the Chief Justice's concurrence) and the principal dissent authored by Justice Stevens. I would submit that the latter represents an extreme form of minimalism, akin to Professor Sunstein's theory, in its almost total deference to the EPA's and the Corps's interpretation and administration of the CWA. I would also submit that Justice Stevens's dissent exhibits what I have termed in this article a strong content-dependence, *viz.*, the dissent's readiness to defer to the agencies¹⁸⁴ (and thus stay the judicial hand) seems to be born in good measure of a desire to facilitate the policy goals of the Act.¹⁸⁵

Although one might superficially label *Rapanos* an anti-environmental case, on close analysis that characterization does not hold up, principally because nothing in the Court's decision precludes the states from enacting vigorous clean water laws. Because the case resulted in a reversal of the lower court's judgment, the decision can be viewed as a victory for the Chief Justice's minimalism. But in another respect the case represents a loss: the failure of the Court to issue a single opinion garnering a majority of the Justices' votes. The Chief Justice alluded to that very failure in his concurrence.¹⁸⁶ Perhaps that outcome represents a strategic error on the Chief Justice's part, in assigning the drafting of the principal opinion to Justice Scalia. But if so, then even that failure is consistent with the Chief Justice's jurisprudence: recall that in his confirmation hearings he disavowed any desire to use opinion assignments strategically.¹⁸⁷ On balance, *Rapanos* is consistent with the Chief Justice's minimalism, in the centrality of text to the decision, the limited reading of

¹⁸³ *Id.*

¹⁸⁴ *See id.* at 2257 (Stevens, J., dissenting).

¹⁸⁵ *See id.* at 2265 (Stevens, J., dissenting). Justice Stevens's desire to defer to the EPA and the Corps in this matter contrasts sharply with his adamant refusal to accord any deference to the agency interpretation of Section 7 of the ESA at issue in *NAHB*. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife, NAHB*, 127 S. Ct. 2518, at 2543-44 (2007). In his defense, however, Justice Stevens argued in *NAHB* that EPA was not entitled to deference in interpreting the ESA (as opposed to the Clean Water Act), and that the Secretary of the Interior's favorable interpretation of the ESA was issued after the consultation at issue. *Id.*

¹⁸⁶ *See Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

¹⁸⁷ *See Hearings, supra* note 26, at 56435.

precedent, and the aborted deference to the EPA and the Corps.

E. S.D. Warren Co. v. Maine Board of Environmental Protection (BEP)

Argued the same day as *Rapanos*, *S.D. Warren Co.* presented the issue of whether the issuance of water from a dam could be considered a “discharge” within the meaning of the CWA, even though the water emitted is not polluted. *S.D. Warren* owned several hydroelectric dams and sought permit renewal from the Federal Energy Regulatory Commission. The BEP contended that as part of the permit renewal process, *S.D. Warren* had to obtain a water quality certification under CWA Section 401, which imposes the certification requirement on any activity associated with a “discharge.”¹⁸⁸ *S.D. Warren* argued that the flowing out of water from its dams could not be considered a discharge because the water was not polluted.

In a unanimous decision authored by Justice Souter, the Court held that *S.D. Warren*’s dams were in fact discharging water. The Court noted that the CWA defines “discharge” to include the discharge of a pollutant, and concluded that “discharge” must therefore mean something more than just pollution emission, else the CWA’s “discharge” definition would be superfluous.¹⁸⁹ The Court recognized that the ordinary meaning of “discharge” is “flowing or issuing out,” and the emission of water from *S.D. Warren*’s dams comfortably fit within that definition.¹⁹⁰ That conclusion was consistent with the Court’s decision in *PUD No. 1 of Jefferson City v. Washington Department of Ecology*¹⁹¹, in which the Court observed that a dam operator would have to obtain a Section 401 certification for the discharge of dredge and fill material during the course of the dam’s construction, and for the water that would be released from the dam.¹⁹² Both of those activities would involve point source pollution.¹⁹³ The Court further acknowledged that its interpretation was

¹⁸⁸ *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 126 S. Ct. 1843, 1847 (2006). 33 U.S.C. § 1311.

¹⁸⁹ *Id.* *S.D. Warren Co.*, 126 S. Ct. at 1847.

¹⁹⁰ *Id.*

¹⁹¹ 511 U.S. 700 (1994).

¹⁹² *Id.* at 711.

¹⁹³ *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097-98 (9th Cir. 1998).

(1) consistent with the relevant agency's interpretation¹⁹⁴, (2) not in tension with canons of interpretation¹⁹⁵, (3) uninformed by the Court's decision in *South Florida Water Management District v. Miccosukee Tribe*¹⁹⁶, (4) supported by the CWA's legislative history¹⁹⁷, and (5) consistent with Congress's intention to protect and restore the chemical, physical, and biological integrity, broadly understood, of the Nation's waters¹⁹⁸.

As has been noted elsewhere,¹⁹⁹ *S.D. Warren Co.* is a non-controversial opinion. Nevertheless, we can still analyze the case to determine whether it is consistent in its reasoning with the Chief Justice's minimalism. On that score the answer is a clear "yes." The case adheres closely to a textualist analysis: Justice Souter's principal argument for the Court's disposition is based upon a dictionary definition of the statutory term "discharge." Questions of agency deference did not arise because there was no regulation in point. Admittedly, to a certain extent *S.D. Warren Co.* is the type of case whose disposition would likely be the same regardless of the ideological strip of the interpreting judge, but the Chief Justice's ability to secure a unanimous opinion represents to some degree a triumph of what I have termed his rules of judicial comportment, which are a subset of his minimalism. It is interesting to ponder whether the Court would have remained unanimous had the textualist outcome resulted in the holding that certification does not apply to "discharges" from dams, an arguably environmentally unfriendly result. Certainly, where the textualist answer parts company with environmental policy, the Court usually fractures along ideological lines, the best minimalist intentions of the Chief Justice notwithstanding, as happened in *Rapanos* and perhaps also *NAHB*.

¹⁹⁴ See *S.D. Warren Co.*, 126 S. Ct. at 1848.

¹⁹⁵ *Id.* at 1849-50.

¹⁹⁶ 541 U.S. 95 (2004), see *S.D. Warren Co.*, 126 S. Ct. at 1850.

¹⁹⁷ *S.D. Warren Co.*, 126 S. Ct. at 1851-52.

¹⁹⁸ *Id.* at 1852-53.

¹⁹⁹ See Nancy Kubasek, *The New Chief Justice: Friend or Foe of Environmentalists?*, 35 REAL EST. L.J. 464 (2006) (*S.D. Warren* "was also a rather non-controversial case of statutory interpretation").

F. United States v. Atlantic Research Corp.

Another environmental case garnering a unanimous opinion, *Atlantic Research* presented the issue of whether a potentially responsible party (PRP) under CERCLA could seek to recover the costs incurred in voluntarily cleaning up a contaminated site where neither the PRP nor the cost recovery defendant had ever been sued by the government or made a defendant in a CERCLA contribution action.

The interpretive question thus centered on CERCLA Section 107(a)(4), which makes PRPs (like Atlantic Research) potentially liable for:

- (A) “all costs of removal or remedial action incurred by the United States government or a State or an Indian tribe not inconsistent with the national contingency plan²⁰⁰; [and]
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.²⁰¹

Atlantic Research argued that Subsection 4(B) authorized it (by virtue of the phrase “any other person”) to sue for cost recovery, and that the phrase excluded only those persons mentioned in the preceding subparagraph, *viz.* the United States, the several States, or the Indian tribes. The government, in contrast, argued that the phrase “any other person” refers to those persons who are not identified as PRPs in Section 107(a)(1)-(4).²⁰²

The Court, per Justice Thomas, using traditional tools of statutory construction, concluded that Atlantic Research may seek cost recovery under Section 107(a)(4)(B). Emphasizing that statutes must be read as a whole, and the obvious structural parallels between Subsections (4)(A) and (4)(B), Justice Thomas concluded that the plain language of the statute

²⁰⁰ “The national contingency plan specifies procedures for preparing and responding to contaminations and was promulgated by the [EPA]” *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 n.2 (2004).

²⁰¹ 42U.S.C. §9607(a)(4)(A)-(B).

²⁰² *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, at 2335-36 (2007).

supported Atlantic Research's interpretation.²⁰³

Justice Thomas also criticized the government's interpretation, on at least three significant grounds. First, nothing in Subsection (4)(B) could naturally be read to refer to the preceding Subsections (1) through (3); to read Subsection (4)(B) in that manner would "destroy the symmetry" of Subsections (4)(A) and (4)(B).²⁰⁴ Second, the government's interpretation would functionally render Subsection (a)(4)(B) a dead letter, because Section 107(a)(1)-(3) encompasses so many persons as PRPs.²⁰⁵ Third, the Court's interpretation would "create friction" between Section 107 cost recovery actions and Section 113 contribution actions, for the latter are available to PRPs who have actually been made subject to suit, whereas the former are available to those parties who have incurred costs voluntarily.²⁰⁶ Thus, the Court concluded that CERCLA's "plain terms" required that Atlantic Research be able to maintain a cost recovery action.²⁰⁷

Like *S.D. Warren Co.*, *Atlantic Research* is a case that may well turn out the same regardless of the interpretive methodology adopted by the interpreting judge. But just as in *S.D. Warren Co.*, I believe that we can divine minimalist traits in the decision in *Atlantic Research*. Most prominently, Justice Thomas's analysis is (not surprisingly) driven by a plain meaning analysis, guided by canons of construction, and cognizant of the structure of the statutory section as well as the statute as a whole. Also, Justice Thomas is careful to avoid a purposivist analysis, instead hinging his arguments on points independent of whether the Court's interpretation will facilitate the clean-up of contaminated sites.²⁰⁸ And again as in *S.D. Warren Co.*, the Court's unanimous resolution of the question presented is consistent with the Chief Justice's rules of judicial comportment. It also bears noting that the Court's disposition is environmentally friendly, to the extent that it creates incentives for voluntary clean-up.

²⁰³ *Id.* at 2336.

²⁰⁴ *See id.*

²⁰⁵ *Id.* at 2336-37.

²⁰⁶ *Id.* at 2337-38.

²⁰⁷ *See id.* at 2339.2338.

²⁰⁸ It is true that Justice Thomas notes how the Court's interpretation will not create friction between Sections 107 and

IV. NOTHING NEW UNDER THE SUN: ROBERT'S MINIMALISM

As I set forth at the beginning of this Article, to determine whether the Chief Justice's minimalism has had a measurable effect on the Court's environmental law jurisprudence requires analysis of the relevant cases according to several factors: whether the Court's decision is consistent with Roberts's brand of minimalism; whether the Court's result is environmentally friendly; and, if the Court's decision is minimalist but not environmentally friendly, whether the Chief Justice's vote was decisive to the outcome. Our review of the Roberts Court's six environmental cases reveals a mixed bag of results.

First, of the six cases, the Court's disposition in four of them are consistent, to varying degrees, with Roberts's minimalism. The two cases not consistent with his minimalism are *Massachusetts*, in which the Chief Justice wrote an extended dissent, and *Rapanos*, in which he concurred specifically to express his disappointment that the Court could not produce a majority opinion. Thus, on this factor, at least superficially, it would seem that Roberts's minimalism has triumphed.

Second, of the six cases, four are environmentally friendly: *Duke Energy, Massachusetts, S.D. Warren Co.*, and *Atlantic Research*. Thus, it may be that, even though *Duke Energy, S.D. Warren Co.*, and *Atlantic Research* are minimalist opinions, the Chief Justice's methodology may not have had anything to do with the Court's disposition (assuming of course that there are potentially at least five other Justices on the Court who are willing to produce an environmentally friendly and maximalist result).

Third, the only case fully consistent with Roberts's minimalism in which his vote was decisive is *NAHB*. I do not include *Rapanos* here because I do not consider Justice Kennedy's significant nexus test to be consistent with Roberts's minimalism, although that test will be the one to which many if not most lower courts look for guidance.²⁰⁹

²⁰⁹ *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006) (determining that government may establish jurisdiction under the Kennedy test only); *N. Cal. River Watch v. City of Healdsburg*, 2007 WL 2230186 (9th Cir. Aug. 6, 2007) (same). *But see* *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (determining that government may establish jurisdiction under either the Scalia or Kennedy test); *United States v. Chevron*

NOTHING NEW UNDER THE SUN

But as I mentioned earlier, our analysis is complicated by the fact that the Chief Justice's minimalism in important respects is nothing new: it is really just another version of textualism/originalism operating under a different label. The Chief Justice's stated fidelity to text, tradition, the rule of law, content-independent legal reasoning, the separation of powers, and deference to expert determinations by administrative agencies, is consistent with the interpretive methodology espoused by Justice Scalia, and to a slightly lesser degree, Justice Thomas.²¹⁰ Even on the periphery of the Chief Justice's minimalism, *i.e.*, the rules of judicial comportment, it is not at all clear whether the Chief Justice has had any impact on the Court's environmental law jurisprudence. For on the three most controversial environmental cases of the last two terms (*Rapanos*, *Massachusetts*, and *NAHB*), the Court split 4-1-4, 5-4, and 5-4. Clarity and common grounds, in cases where those attributes of opinion writing most matter, seem lacking under the Roberts Court in the environmental arena.

What may be most significant about the Roberts Court is that, contrary to the doomsday predictions of some advocacy groups²¹¹ and legal commentators,²¹² the Supreme Court has not assumed an anti-environment posture. The majority of the Court's environmental decisions of the last two terms are environmentally friendly in result, and to the

Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. 2006) (determining that government may establish jurisdiction under the Scalia test only).

²¹⁰ My hedging with Justice Thomas is chiefly because of his views of *stare decisis*. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 19 (2004) (Thomas, J., concurring) (writing that the Establishment Clause should not be incorporated and thus should not apply to the states via the Fourteenth Amendment); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."); Scott D. Gerber, "*My Rookie Years Are Over*": *Clarence Thomas After Ten Years*, 10 AM. U.J. GENDER SOC. POL'Y & L. 343, 345 (2002) ("Justice Thomas seems even more willing now than he was during his acclimation period to say that well-established precedents and/or entire areas of the law should be rethought."); Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context*, 85 N.C. L. REV. 847, 871 n.143 (2007) (noting that Justice Thomas does not believe in *stare decisis* in cases of constitutional moment).

²¹¹ See *Hearings*, *supra* note 26, at 824-28 (statement for the record of Earth Justice).

²¹² See Kubasek, *supra* note 199.

extent that the Chief Justice has had any affect on those decisions, that affect is substantively neutral, at least *vis à vis* environmental protection. Perhaps the most that can be said on this point is that, if the Congress or the President operates under a pro-environment policy, then a Supreme Court led by Chief Justice Roberts will likely reflect that policy, owing to its history of hewing to text and deference to agency decision-making. If, however, either the Congress or the Administration is not environmentally friendly, then it would be unlikely that the Roberts Court would evince an identifiably pro-environment jurisprudence. Thus, the acid test for what I have termed the Chief Justice's content-independent minimalism may come with the impending Presidential and Congressional elections.