

## Opening Argument

### A Chief Justice Already Testing Environmental Law's Pillars



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President

The memos written by the President's nominee for Chief Justice of the United States as a young lawyer have brought John Roberts into sharper focus, both as a lawyer and as a human being. On the one hand, his conservative legal stances have alarmed civil rights and women's groups; on the other, pundits have noted his sharp wit on topics as varied as Michael Jackson, Girl Scout cookies, and patterns for presidential china. Yet after all the weighty analysis and comic relief, environmentalists have circled round to where we started: pondering Roberts's cryptic remarks about a "hapless toad." While we hope this phrase is just another witticism, we fear it may shed light not only on Roberts's views, but on some troubling judicial trends.

For decades, environmental protection has been built on four pillars: national laws that establish minimum standards for addressing nationwide problems; cooperative sharing of federal power with the states; latitude for state governments to experiment and innovate; and citizen participation in enforcing decisions at both federal and state levels. These pillars have

been built through bipartisan legislation, implemented by Democratic and Republican presidents, upheld by the courts, and supported by a steady majority of the public.

The environmental pillars were profoundly shaken by the Rehnquist Court's "new federalism." That Court's rethinking of the roles of federal and state governments has injected constitutional issues into even routine environmental cases, and linked their fate to that of some unlikely companions. The definitive word on federal power, and thus on federal environmental law, may have come from last term's medical marijuana decision, or might emerge from the new term's case on physician-assisted suicide — issues normally far removed from smokestack emissions or endangered species conservation.

Practicing in the topmost legal circles when the four pillars were being jostled, Roberts had occasion to touch upon each of them:

- On federal power, Judge Roberts's most noteworthy opinion, in a 2003 Endangered Species Act dispute over the "hapless toad that, for reasons of its own, lives its entire life in California," suggests he may be skeptical about the act's nationwide reach. Scarier still, his apparent view is shared by several other judges on the administration's short list, all of whom have expressed it in more strident language.

- On the federal-state balance, Roberts helped the State of Alaska challenge U.S. EPA's decision to veto a state-issued air pollution permit. To Roberts's client, the federal action was "second-guessing" a state prerogative, but to EPA (and other states that supported EPA) it was an unremarkable exercise of oversight, authorized by the Clean Air Act. Justice O'Connor's vote created a bare 5-4 majority in favor of federal authority. Environmentalists worry whether future justices will hew closer to O'Connor, or tip the balance to the dissenters.

- On state innovation, states' attempts to go beyond federal minimum standards often get preempted in court. Roberts recently was part

of an appellate panel that voided the District of Columbia's ban on hazardous rail shipments, citing conflicts with federal railroad law. In contrast, the trial judge had found that D.C.'s goals of public safety and environmental protection merely complemented the federal regime. Reasonable minds differ on this issue, but an overly broad view of federal preemption would hamper other state environmental initiatives, including recent efforts to limit greenhouse gases.

- On citizen enforcement, Roberts has argued for a restrictive theory of citizen suits that is closely associated with Justice Scalia, questioning whether courts may "exercise such oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue." As with the hapless toad, environmentalists fear that Roberts's glib tone betrays insensitivity to the long-term ecological and intergenerational interests that arise in environmental cases.

Whether a Chief Justice Roberts would fulfill environmentalists' worst fears remains to be seen; in fairness, his defense of measures to protect Lake Tahoe is widely praised. But regardless of his actual views, what's remarkable is that these once-bedrock principles are even in play in the first place — and that challenges to all of them can be traced in the career of a single elite lawyer. That is not the handiwork of one attorney, one judge, or even of nine justices, but of a pervasive anti-regulatory movement that questions, and litigates, the basic framework of environmental law.

For environmentalists, Roberts's nomination is important both in its own right and as a reminder of larger threats to environmental protection. With his nomination as chief, we will continue to see a closely divided Supreme Court that has shown increasing interest in hearing environmental cases. We will have a number of lower court judges who are more clearly hostile to environmental law. And we will face the prospect of the next nomination, when we will once again be weighing whether the nominee sees protecting the environment as serious business.