

# William & Mary Environmental Law and Policy Review

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Volume 46 (2021-2022)  
Issue 3 *Environmental Justice in America:  
Where We Have Been & Can Go*

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Article 8

4-2022

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### Repository Citation

Canaan Suitt, *The Promise and Perils of Textualism for Environmental Advocacy*, 46 Wm. & Mary Env't L. & Pol'y Rev. 811 (2022), <https://scholarship.law.wm.edu/wmelpr/vol46/iss3/8>

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# THE PROMISE AND PERILS OF TEXTUALISM FOR ENVIRONMENTAL ADVOCACY

CANAAN SUITT\*

## INTRODUCTION

“Gorsuch?”<sup>1</sup> The incredulity of this question captures many observers’ reactions on June 15, 2020, the day the Supreme Court of the United States delivered a landmark victory to LGBTQ employees in *Bostock v. Clayton County*.<sup>2</sup> The six to three lineup of Justices was surprising given the Court’s ideological composition—five conservatives and four liberals.<sup>3</sup> Even more surprising was the opinion’s author—President Donald Trump’s first appointee to the Court, Neil Gorsuch.<sup>4</sup> Gorsuch was nominated by President Trump for his sterling conservative credentials<sup>5</sup> and was lauded by social conservatives who saw his nomination as a victory for their favored causes, including religious liberty and anti-abortion measures.<sup>6</sup> The shock of *Bostock* was that Gorsuch delivered a major victory for a cause, namely LGBTQ rights, that is strongly disfavored by a major constituency that pushed for his appointment.

The method of constitutional interpretation by which Gorsuch brought about the progressive victory—textualism—sparked debate and

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<sup>1</sup> Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court’s Surprising LGBTQ Decision*, WASH. POST (June 16, 2020), [https://www.washingtonpost.com/politics/courts\\_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077\\_story.html](https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html) [https://perma.cc/YPQ4-TE2T].

<sup>2</sup> *Id.*; see also *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1734 (2020).

<sup>3</sup> See Julie Moreau, *Supreme Court’s LGBTQ Ruling Could Have ‘Broad Implications,’ Legal Experts Say*, NBC NEWS (June 23, 2020, 4:40 AM), <https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779> [https://perma.cc/FLZ2-PK3T].

<sup>4</sup> Barnes, *supra* note 1; see Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html> [https://perma.cc/JZS6-WSEC].

<sup>5</sup> See Andrew Walker, *Social Conservatives Should Rally Around Neil Gorsuch*, THE FEDERALIST (Jan. 31, 2017), <https://thefederalist.com/2017/01/31/social-conservatives-rally-around-neil-gorsuch/> [https://perma.cc/L8QM-L9QT].

<sup>6</sup> See Callum Borchers, *Trump’s Nomination of Neil Gorsuch Is a Promise Kept to Conservative Media*, WASH. POST (Jan. 31, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/31/trumps-nomination-of-neil-gorsuch-is-a-promise-kept-to-conservative-media/> [https://perma.cc/C7ML-NTSW].

speculation among commentators across the ideological spectrum.<sup>7</sup> Championed by the late Justice Antonin Scalia,<sup>8</sup> whom Gorsuch replaced on the Court following a prolonged vacancy,<sup>9</sup> textualism is an interpretive method that at its core looks to the text of the law to determine the law's meaning.<sup>10</sup> Though Justice Elena Kagan, a liberal, famously stated at Harvard's 2015 Scalia Lecture that "we're all textualists now"<sup>11</sup>—a declaration seemingly confirmed by *Bostock*—textualism is historically connected with conservative legal values of judicial restraint and fidelity to the Constitution.<sup>12</sup> While some fellow textualists were dismayed by Gorsuch's reasoning in *Bostock*—including Justice Samuel Alito, who warned in dissent that Gorsuch's opinion was like a pirate ship sailing under a textualist flag but really advancing society's current values<sup>13</sup>—other textualists cheered the decision as a straightforward triumph for the method.<sup>14</sup>

Other *Bostock* commentators saw the possibility of something more significant in the opinion. Might textualism be used as a tool to advance other progressive causes? Even before *Bostock*, reeling under the impacts of President Donald Trump's fast-paced appointments to the federal judiciary,<sup>15</sup> commentators had urged lawyers advancing liberal causes to become savvy with originalist and textualist arguments—in other words, to begin speaking the language of the new judicial landscape.<sup>16</sup> This strategy seemed validated by the ruling in *Bostock*. The thinking goes that if

<sup>7</sup> See Jared Odessky & Leigh Thomas, *Commentary Roundup: Bostock v. Clayton County*, ONLABOR (June 16, 2020), <https://www.onlabor.org/commentary-round-up-bostock-v-clayton-county/> [https://perma.cc/3JA2-LJWA].

<sup>8</sup> See Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 858 (2017).

<sup>9</sup> Amy Howe, *Senate Confirms Gorsuch*, SCOTUSBLOG (Apr. 7, 2017, 1:33 PM), <https://www.scotusblog.com/2017/04/senate-confirms-gorsuch/> [https://perma.cc/9K7T-DAAA].

<sup>10</sup> See *infra* notes 32–37 and accompanying text.

<sup>11</sup> See Roy T. Englert Jr., *On Textualism, Sex Discrimination and Clean Water*, NAT'L L.J. (July 18, 2019, 3:58 PM), <https://www.law.com/nationallawjournal/2019/07/18/on-textualism-sex-discrimination-and-clean-water/> [https://perma.cc/2Z72-A5E3].

<sup>12</sup> See *infra* notes 43–45 and accompanying text.

<sup>13</sup> See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1755–56 (2020) (Alito, J., dissenting).

<sup>14</sup> See, e.g., Ilya Shapiro, *After Bostock, We're All Textualists Now*, CATO INST. (June 15, 2020), <https://www.cato.org/commentary/after-bostock-were-all-textualists-now> [https://perma.cc/8LHR-WRMF].

<sup>15</sup> See Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [https://perma.cc/2KY9-7863].

<sup>16</sup> See Richard L. Hasen, *Liberals Must Embrace a Bankrupt Judicial Philosophy to Have Any Chance of Winning at the Supreme Court*, SLATE (Oct. 18, 2018, 9:30 AM), <https://slate.com/news-and-politics/2018/10/originalism-textualism-supreme-court-liberal-strategy.html> [https://perma.cc/WB4A-KQ9K].

textualist arguments, favored by conservatives, had worked to advance a cause disfavored by conservatives in *Bostock*, there might be broader application of the textualist strategy for advancing traditionally progressive or liberal causes before conservative judges.

One proposal of this sort is related to environmental advocacy. For example, Ann E. Carlson wrote that Gorsuch's textualist rationale in *Bostock* could be used by environmental advocates in efforts to persuade the Court to endorse a broad interpretation of the Clean Air Act.<sup>17</sup> According to Carlson, a textualist interpretation of the Act would place regulation of greenhouse gasses by the Environmental Protection Agency firmly within its extent.<sup>18</sup>

This Note argues that a reliance on textualist arguments to win environmental victories from conservative judges in the new judicial landscape involves a simplistic view of judicial decision-making, according to which a method of constitutional or statutory interpretation is dispositive of a given ruling. Methods of interpretation interact with other factors, including judges' ideological and institutional commitments, in determining cases. Textualism is a method of constitutional interpretation favored by conservative judges, but it is also part of a broader suite of conservative commitments and attitudes that complicate the role of textualism and may counteract textualism's perceived benefit for environmental causes. The upshot is that a strong focus on textualism as a way to cope in the new judicial landscape may do more harm than good for the goal of environmental advocacy.

This Note proceeds in the following way. Part I addresses the question of why textualism has become a subject of great interest for both conservative and liberal legal advocates. Appointing judges with sterling conservative credentials has been a central aim of the modern conservative legal movement that dates from the 1980s.<sup>19</sup> A commitment to originalism and textualism is a key litmus test for these conservative judges.<sup>20</sup>

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<sup>17</sup> John Schwartz & Geneva Abdul, *How a Ruling on Gay and Transgender Rights May Help the Climate*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/climate/how-a-ruling-on-gay-and-transgender-rights-may-help-the-climate.html> [https://perma.cc/6SWB-HFPZ].

<sup>18</sup> *Id.*; see also Ann Carlson, *What Does Today's Decision Holding that Employers Can't Discriminate Against LGBTQ Employees Have to Do with Climate Change?*, LEGALPLANET (June 15, 2020), <https://legal-planet.org/2020/06/15/what-does-todays-decision-holding-that-employers-cant-discriminate-against-lgbtq-employees-have-to-do-with-climate-change/> [https://perma.cc/XE78-D2XQ].

<sup>19</sup> See *infra* Section I.B.

<sup>20</sup> See *infra* notes 46–51 and accompanying text.

In the Trump administration, the conservative legal movement saw great success in appointing conservative judges to the U.S. federal judiciary.<sup>21</sup> This success confronted liberals with strategic questions of how to proceed in the new conservative judicial landscape.<sup>22</sup> In this context, textualism was discussed as a strategy for success. Part II critiques this strategy. First, there is a theoretical argument against the usefulness of textualism for scoring victories for causes disfavored by conservatives. Textualism's appeal in the new judicial landscape is that it is a supposedly non-partisan legal tool that can be used to persuade partisan-opponent judges. This thinking buys into one of the key rationales for textualism, i.e., the idea that textualism inherently promotes judicial restraint and fidelity to the law. However, textualism does not bar judicial activism or ideological influence; to the contrary, it easily functions as a conduit of such activism and ideology. Second, textualism as a method of interpretation favored by conservative judges is part of a broader set of commitments that judges bring into cases. In the context of environmental advocacy, there is evidence of general conservative skepticism to environmental causes.<sup>23</sup> More importantly, opposition to the regulatory state is another key litmus test for judges appointed in the Trump administration, and opposition to environmental causes can be a proxy for opposition to the regulatory state. Third, the record of textualist judges on the environment is not promising. The Conclusion considers alternatives to a textualist strategy. While there is certainly no reason to abandon textualist arguments, relying on textualism as a silver bullet can be counterproductive and lead to complacency. More systemic solutions are needed for lasting environmental victories in the federal courts.

#### I. WHY TEXTUALISM? WHY NOW?

Why has textualism, seemingly a dry academic theory of statutory interpretation, become a focal point of discussions about the state of the U.S. federal judiciary and political landscape, spilling out of academic contexts into mainstream discourse? The reason for textualism's "moment" is twofold. On the one hand, textualism is a theory that has been strongly advanced by theorists and advocates in the modern conservative legal movement. Former Justice Antonin Scalia stands out as the pioneer

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<sup>21</sup> See *infra* notes 56–80 and accompanying text.

<sup>22</sup> See *infra* notes 81–89 and accompanying text.

<sup>23</sup> See *infra* note 111 and accompanying text.

in this respect.<sup>24</sup> On the other hand, as the modern conservative legal movement has been successful in stocking the federal judiciary with conservative judges, commentators (whether friends or enemies) have had to take note of what these conservative judges believe, how they approach cases, and what this means for various legal causes. During the Trump administration, many staunch conservative judges were appointed to the federal judiciary, making this issue especially pertinent. This Part considers the successes of the conservative legal movement during the Trump administration and why textualism was latched onto as a strategy in response to this situation.

A. *Textualism and Conservatism*

If it is true that “we’re all textualists now,” as Justice Kagan stated in 2015,<sup>25</sup> this was not always the case. Historically, the Supreme Court and lower federal courts have used a variety of sources and methods to interpret statutes,<sup>26</sup> including a consideration of legislative intent, purpose, and policy.<sup>27</sup> This pluralism of sources and interpretive methods was sometimes portrayed as theoretical disarray, as when Henry Hart and Albert Sacks remarked in 1958, “American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”<sup>28</sup> Indeed, as Margaret H. Lemos has argued, it is still true that in practice judges use an eclectic blend of interpretive strategies depending on the case at hand, notwithstanding an increased obsession within legal academia with finding the one true interpretive method.<sup>29</sup> Nevertheless, Kagan’s statement accurately reflects the fact that textualism is now widespread but that it did not always occupy its current position of influence.<sup>30</sup> Furthermore, the context of Kagan’s remark—the Scalia lecture at Harvard University—points to the key factor in textualism’s ascendancy: influential advocates, like former Justice Scalia, who campaigned for its use.<sup>31</sup>

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<sup>24</sup> See Jesse D.H. Snyder, *How Textualism Has Changed the Conversation in the Supreme Court*, 48 U. BALT. L. REV. 413, 419 (2019).

<sup>25</sup> *Id.* at 413.

<sup>26</sup> See *id.* at 416.

<sup>27</sup> See Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 856 (2014).

<sup>28</sup> See *id.* at 855.

<sup>29</sup> *Id.*

<sup>30</sup> See Siegel, *supra* note 8, at 858.

<sup>31</sup> *Id.*

As Jonathan Siegel observes, there are different degrees of textualism.<sup>32</sup> One might think that the statutory text itself should be an important or even the most important factor in statutory interpretation, and yet also think that other factors such as legislative history, purpose, or policy should weigh in as well.<sup>33</sup> In this sense of textualism, which merely foregrounds the importance of the text, one can be a textualist even if one uses non-textualist arguments.<sup>34</sup> This would seem to be the case with Kagan, for example, who recognizes the text's importance and therefore describes herself as a textualist but is not thereby opposed or foreclosed to other interpretive strategies.<sup>35</sup> But there is a more stringent version of textualism according to which the text *is* the law, and statutory analysis must not only begin but also end with considering what the text says, without going beyond it.<sup>36</sup> It is this more demanding sense that captures the textualism of Scalia.<sup>37</sup>

Textualism in this more demanding sense—along with its counterpart in constitutional interpretation, originalism—was forged by conservatives in opposition to the perceived judicial activism of the Warren and Burger courts of the 1960s and 1970s.<sup>38</sup> According to conservative critics, liberal judges of the era acted in a way that was essentially lawless.<sup>39</sup> That is, rather than being constrained by the law, these judges injected their own political preferences into legal decisions, speaking where the law was silent, effectively legislating from the bench.<sup>40</sup> For conservative critics, this practice was tantamount to an attack on the rule of law.<sup>41</sup> Furthermore, Scalia and others contended there was no reliable interpretive method available to constrain these activist judges.<sup>42</sup> A strong textualism that begins and ends with the statutory text was put forward as an antidote to the perceived rampant subjectivism and activism of judges.<sup>43</sup>

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<sup>32</sup> *Id.* at 859.

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> Siegel, *supra* note 8, at 859.

<sup>37</sup> *Id.*

<sup>38</sup> *See* Lemos, *supra* note 27, at 853; *see also* Whitley Kaufman, *The Truth About Originalism*, 9 PLURALIST 39, 49 (2014).

<sup>39</sup> *See* DAVID A. STRAUSS & GEOFFREY R. STONE, *DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT* 2 (2019).

<sup>40</sup> *See* Catherine Cook, *Legislating from the Bench*, HARV. POL. REV. (Mar. 3, 2009), <https://harvardpolitics.com/legislating-from-the-bench/> [<https://perma.cc/G7UX-7PHP>].

<sup>41</sup> *See* STRAUSS & STONE, *supra* note 39, at 2–3.

<sup>42</sup> *See* Lemos, *supra* note 27, at 856–57.

<sup>43</sup> *Id.* at 859–60.

Fidelity and restraint were the core values of this new methodology.<sup>44</sup> By using textualist methods, judges could go as far as the law allows and no further, avoid inserting their own ideological preferences, and advance the rule of law.<sup>45</sup>

Thus, textualism was advanced by conservative theorists as an alternative method of restraint to perceived liberal overreach. Alongside the ascendancy of textualism and its counterpart originalism, the modern conservative legal movement grew in numbers and gained institutional influence through the decades-long effort of groups like the Federalist Society.<sup>46</sup> Indeed, the ascendancy of textualism should be understood in terms of the concomitant growth and institutional strength of legal conservatism. The connection is that thinkers within the conservative legal movement embraced and advanced textualism, so that as the movement grew in influence, so did textualism.<sup>47</sup> Of course, as Lemos and others have argued, it would be inaccurate to say that there is an inherent or inevitable connection between textualism and conservatism.<sup>48</sup> This Note agrees with that point—theoretically, textualism is not inherently conservative. It is possible to imagine an alternative timeline in which textualism as a method of statutory interpretation became associated with liberalism due to its historically contingent connections with liberal thinkers and causes.<sup>49</sup> As it is, textualism is in fact tied by contingent connections such as political movements and campaigns to conservatism.<sup>50</sup> While there is nothing inherently conservative about textualism from a theoretical point of view, from a recent historical standpoint, textualism has been advanced and has achieved widespread influence within conservative political circles and, importantly, it is often found in connection with other conservative values and commitments.<sup>51</sup> Hence, notwithstanding the contingency of the connection between textualism and conservatism, the connection

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<sup>44</sup> See Kaufman, *supra* note 38, at 40, 43.

<sup>45</sup> See Lemos, *supra* note 27, at 895.

<sup>46</sup> See Lawrence Baum & Neal Devins, *How the Federalist Society Became the De Facto Selector of Republican Supreme Court Justices*, SLATE (Jan. 31, 2017, 10:12 AM), <https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html> [<https://perma.cc/L5DG-ZCEV>].

<sup>47</sup> See Lemos, *supra* note 27, at 891.

<sup>48</sup> *Id.* at 853.

<sup>49</sup> It is also worth noting that there are theorists who have attempted to retool textualism for progressive causes. See, e.g., James E. Ryan, *Laying Claim to the Constitution: The Promise of the New Textualism*, 97 VA. L. REV. 1523, 1527–28 (2011).

<sup>50</sup> See Lemos, *supra* note 27, at 891.

<sup>51</sup> *Id.*

is real. This Note therefore avoids debates about the inherent political valence of textualism as a method and focuses on the fact that textualism is a method inextricably tied with the rise of modern legal conservatism.

*B. Creating a Conservative Judiciary*

While one of the central goals of textualism was to cabin judicial activism with a principled method committed to restraint and the rule of law, one of the central aims of the modern conservative legal movement is to build up a pool of conservative judicial candidates to reshape the federal judiciary in conservatism's image.<sup>52</sup> At the time of the conservative legal movement's inception in the 1980s, there were relatively few pedigreed conservative judges.<sup>53</sup> Additionally, thanks in part to the less extreme political polarization of the era, Republican presidents such as Nixon and Reagan still appointed judges with liberal viewpoints, using factors other than ideological purity to select nominees.<sup>54</sup> As conservatism moved further to the right ideologically, the explicit aim of organizations like the Federalist Society was to make up for the dearth of qualified conservative judicial candidates.<sup>55</sup>

Some of the conservative legal movement's greatest successes have come in the last few years during the Trump administration. One of then-candidate Trump's main campaign promises in 2016 was to put conservative judges on the federal courts—to "appoint judges very much in the mold of Justice Scalia," as Trump put it at the second Presidential debate.<sup>56</sup> To assuage those who had doubts about Trump's conservative bona fides in 2016, Trump released a list of eleven potential Supreme Court nominees,<sup>57</sup> a practice he repeated in his 2020 campaign.<sup>58</sup> Reviewing the

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<sup>52</sup> See Baum & Devins, *supra* note 46.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See Jeremy Kidd, *New Metrics and the Politics of Judicial Selection*, 70 ALA. L. REV. 785, 788 (2019).

<sup>57</sup> Amber Phillips, *Who are the 11 People on Donald Trump's Short List for the Supreme Court?*, WASH. POST (May. 18, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/05/18/who-are-the-11-people-on-donald-trumps-short-list-for-the-supreme-court/?postshare=3241463601459681> [<https://perma.cc/V2NN-M9XS>].

<sup>58</sup> Amy Howe, *Trump Releases New List of Potential Supreme Court Nominees*, SCOTUS BLOG (Sept. 9, 2020, 6:18 PM), <https://www.scotusblog.com/2020/09/trump-releases-new-list-of-potential-supreme-court-nominees/> [<https://perma.cc/6EZK-ATLA>].

2016 list, Shannen Coffin, counsel to former Vice President Dick Cheney, approvingly summed up: “These are people who share a common concern for approaching the Constitution as written, not making it up as you go along. They wouldn’t be imposing their own judgments on interpretations.”<sup>59</sup> Yet if some, like Coffin, praised Trump’s list of judges because the picks would show restraint, other social conservatives praised the list because the judges would be advocates for religious liberty and other conservative causes.<sup>60</sup> Thus, whether the promise of restraint or advocacy allured, conservatives and those for whom Supreme Court nominees was the most important issue overwhelmingly supported Trump.<sup>61</sup>

And it turned out that President Trump made good on this promise.<sup>62</sup> In doing so, he dramatically reshaped the federal judiciary.<sup>63</sup> Of course, President Trump did not work alone. The successes were in part the result of Republicans having both the Presidency and the Senate, as well as Senate Majority Leader Mitch McConnell’s willingness to dispense with the judicial filibuster,<sup>64</sup> and thus the Republicans’ ability to appoint judges without meaningful resistance from the Democratic Party.<sup>65</sup> Indeed, Senate Majority Leader McConnell made it a central goal to appoint judges.<sup>66</sup> Even as Trump lost re-election to Joseph Biden in the Presidential Election of November 3, 2020,<sup>67</sup> entering into “lame duck” status,

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<sup>59</sup> Ben Kamisar & Lydia Wheeler, *Trump Soothes the Right with List of Supreme Court Picks*, THE HILL (May 18, 2016, 8:04 PM), <https://thehill.com/blogs/ballot-box/presidential-races/280381-trump-unveils-list-of-11-potential-supreme-court-nominees> [<https://perma.cc/98RP-LUMT>].

<sup>60</sup> See Borchers, *supra* note 6.

<sup>61</sup> See Ramesh Ponnuru, *Why Conservatives Care More About the Supreme Court*, BLOOMBERG (Sept. 23, 2020, 9:00 AM), <https://www.bloomberg.com/opinion/articles/2020-09-23/why-conservatives-care-more-than-liberals-about-supreme-court-politics> [<https://perma.cc/XKD2-XZPN>].

<sup>62</sup> See Ruiz et al., *supra* note 15.

<sup>63</sup> *Id.*

<sup>64</sup> Leigh Ann Caldwell, *Republicans Use ‘Nuclear Option’ to Clear the Way for Gorsuch Confirmation*, NBC NEWS (Apr. 6, 2017, 2:52 PM), <https://www.nbcnews.com/politics/congress/senate-democrats-block-neil-gorsuch-s-supreme-court-nomination-n743326> [<https://perma.cc/6J2X-HRP3>].

<sup>65</sup> See Li Zhou, *Democrats’ Very Limited Options for Stopping Mitch McConnell’s Judicial Onslaught*, VOX (Nov. 14, 2018, 2:35 PM), <https://www.vox.com/2018/11/14/18016022/mcconnell-judicial-nominees-democrats> [<https://perma.cc/DMX4-6E23>].

<sup>66</sup> Susan Davis & Kelsey Snell, *Mitch McConnell On Filling The Federal Bench: ‘This Is My Top Priority’*, NPR (May 24, 2018, 7:54 PM), <https://www.npr.org/2018/05/24/614228261/mitch-mcconnell-on-filling-the-federal-bench-this-is-my-top-priority> [<https://perma.cc/5VHE-GKT4>].

<sup>67</sup> Jonathan Martin & Alexander Burns, *Biden Wins Presidency, Ending Four Tumultuous*

Republicans pushed forward with judicial confirmations, “breaking a 123-year tradition against voting on judicial nominees of an outgoing President of the defeated Party during a lame duck session.”<sup>68</sup> The upshot of this effort was that at the end of President Trump’s term, the Republican-controlled Senate had confirmed fifty-four of President Trump’s nominees to the federal courts of appeal (just one less than President Obama appointed in his eight years), or nearly one-third of federal appellate judges.<sup>69</sup> Additionally, President Trump appointed 174 federal district court judges.<sup>70</sup> By appointing so many judges, President Trump, among other things, flipped two traditionally liberal circuits—the Second<sup>71</sup> and Ninth<sup>72</sup>—to Republican-appointed majorities. On the Supreme Court, President Trump appointed three Justices during his four years: Neil Gorsuch,<sup>73</sup> Brett Kavanaugh,<sup>74</sup> and Amy Coney Barrett.<sup>75</sup> With Barrett’s confirmation to the Court on October 26, 2020, the Court shifted further rightward with a strong six to three conservative majority.<sup>76</sup>

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*Years Under Trump*, N.Y. TIMES (April 26, 2021), <https://www.nytimes.com/2020/11/07/us/politics/biden-election.html> [<https://perma.cc/8YLX-CG7R>].

<sup>68</sup> Madison Alder, *Trump, GOP Defy Precedent with Lame Duck Judicial Appointees (1)*, BLOOMBERG (Nov. 18, 2020, 6:06 PM), <https://news.bloomberglaw.com/us-law-week/trump-gop-defy-precedent-with-lame-duck-judicial-confirmations> [<https://perma.cc/8SXU-S9R9>].

<sup>69</sup> Lawrence Hurley, *On Guns, Abortion and Voting Rights, Trump Leaves Lasting Mark on U.S. Judiciary*, REUTERS (Jan. 15, 2021, 6:52 AM), <https://www.reuters.com/article/us-usa-trump-judges/on-guns-abortion-and-voting-rights-trump-leaves-lasting-mark-on-u-s-judiciary-idUSKBN29K162> [<https://perma.cc/EMZ4-BXJQ>].

<sup>70</sup> *Id.*

<sup>71</sup> Madison Alder, *Trump Flips New York–Based 2nd Circuit as Menashi Confirmed (2)*, BLOOMBERG (Nov. 14, 2019, 6:32 PM), <https://news.bloomberglaw.com/us-law-week/trump-flips-new-york-based-second-circuit-as-menashi-confirmed> [<https://perma.cc/7292-QPZ9>].

<sup>72</sup> Maura Dolan, *Trump Has Flipped the 9th Circuit—and Some New Judges Are Causing a ‘Shock Wave’*, L.A. TIMES (Feb. 22, 2020, 7:06 AM), <https://www.latimes.com/california/story/2020-02-22/trump-conservative-judges-9th-circuit> [<https://perma.cc/NSJ3-DS7Q>].

<sup>73</sup> Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> [<https://perma.cc/5CM3-JK5X>].

<sup>74</sup> Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/8MHN-Y936>].

<sup>75</sup> Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html> [<https://perma.cc/94JR-BK4J>].

<sup>76</sup> Nicholas Wu & Christal Hayes, *Amy Coney Barrett Confirmed to the Supreme Court, Giving Conservatives a 6–3 Majority*, USA TODAY (Oct. 27, 2020, 8:47 AM), <https://www.usatoday.com/story/news/politics/2020/10/26/amy-coney-barrett-senate-vote-confirm-judge-supreme-court/3741746001/> [<https://perma.cc/77ZB-KG9Z>].

President Trump frequently touted his conservative overhaul of the federal judiciary as one of his defining achievements.<sup>77</sup> For a deeply polarizing figure like President Trump, Trump's assessment of his success with judicial appointments seems to be something that everyone, friend and enemy, could agree on. Even though Trump lost re-election, the impact of his judicial appointments will last for decades.<sup>78</sup> Indeed, the staying power of the judiciary—lifetime appointments—is one of the key motivations for the Republican Party.<sup>79</sup> Even if the Republican Party loses power at the federal level—as it did in 2020 across the board, judges remain and can shape law and policy for a generation.<sup>80</sup>

C. *The Environmentalist Response*

Environmental advocates immediately saw the significance of President Trump's reshaping of the federal judiciary for environmental protections.<sup>81</sup> Judicial appointments were not the only concern. Over the course of his tenure, President Trump eliminated over 100 environmental rules aimed at protecting the environment.<sup>82</sup> Many of these rollbacks were of Obama-era policies and were carried out by the Environmental Protection Agency.<sup>83</sup> The extent of these rollbacks was unprecedented and deeply concerning to environmental advocates.<sup>84</sup> Nevertheless, there was the possibility of these rollbacks being reversed and a new course taken—indeed, this is precisely what happened with the new Biden administration, which immediately initiated review of Trump-era rollbacks.<sup>85</sup> President

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<sup>77</sup> See Ruiz et al., *supra* note 15.

<sup>78</sup> See Carrie Johnson, *Wave Of Young Judges Pushed By McConnell Will Be 'Ruling For Decades To Come'*, NPR (July 2, 2020, 5:01 AM), <https://www.npr.org/2020/07/02/886285772/trump-and-mcconnell-via-swath-of-judges-will-affect-u-s-law-for-decades> [<https://perma.cc/9ZYQ-M8FU>].

<sup>79</sup> See John Fabian Witt, *How the Republican Party Took Over the Supreme Court*, THE NEW REPUBLIC (Apr. 7, 2020), <https://newrepublic.com/article/156855/republican-party-took-supreme-court> [<https://perma.cc/N64P-DK2N>].

<sup>80</sup> See Johnson, *supra* note 78.

<sup>81</sup> See, e.g., Robin Bravender et al., *Trump Races to Pick Judges Who Oversee Environment Cases*, SCI. AM. (Nov. 27, 2017), <https://www.scientificamerican.com/article/trump-races-to-pick-judges-who-oversee-environment-cases/> [<https://perma.cc/N4DE-LLVA>].

<sup>82</sup> Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html> [<https://perma.cc/9CEH-L7AS>].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Coral Davenport, *Restoring Environmental Rules Rolled Back by Trump Could*

Trump's judicial appointments, however, cannot be so easily undone. Environmental lawyers began to realize that the reshaping of the judiciary could be more significant in its scope and impact than the rollbacks.<sup>86</sup>

Against this dire backdrop, strategies for navigating the new legal landscape became pressing. Michael Allan Wolf, for example, advised environmental advocates to advance conservative legal principles—e.g., federalism—in their arguments if they hope to find success in the current judicial landscape, which has become dominated by conservative judges alongside a concomitant trend towards business-friendly deregulation and reduced enforcement of federal environmental statutes.<sup>87</sup> Writing in 2018, Wolf praised scholarly efforts to rework textualism into a tool amenable to progressive causes, but concluded that such efforts are ultimately of mere scholarly interest.<sup>88</sup> However, as noted in the Introduction, post-*Bostock*, textualism was enthusiastically discussed by other commentators as a strategy for advancing environmental causes in the new judicial landscape.<sup>89</sup> As seen above, and contrary to Wolf's assertion, textualism has never just been a matter of academic or scholarly interest. It has been articulated and advanced within the modern conservative legal movement by real judges and practitioners. Because of textualism's practical connection with conservatism, and its demonstrable success in the case of *Bostock*, it was reasonable to include textualism in the toolbox of environmental advocacy. However, as the next Part argues, reliance on textualism is a deeply flawed strategy.

## II. THE PITFALLS OF TEXTUALISM

This Part presents three arguments against the textualist strategy. First, a theoretical argument that critiques the basis of the strategic appeal of textualism to environmental advocates, namely that it is a non-partisan tool of statutory interpretation that appeals to partisan-opponents. This thinking buys into one of the key rationales for textualism, namely, that it inherently promotes judicial restraint and fidelity to the law. Despite oft-repeated claims to the contrary, textualism does not bar judicial

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*Take Years*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2021/01/22/climate/biden-environment.html> [<https://perma.cc/L5DN-7TC6>].

<sup>86</sup> See Elizabeth Shogren, *Trump's Judges: A Second Front in the Environmental Rollback*, YALE ENV'T 360 (Aug. 28, 2017), <https://e360.yale.edu/features/trumps-judges-the-second-front-in-an-environmental-onslaught> [<https://perma.cc/FC2Z-TRSL>].

<sup>87</sup> Michael Alan Wolf, *Right Environmentalism: Repurposing Conservative Constitutionalism*, 50 ARIZ. STATE L.J. 651, 654 (2018).

<sup>88</sup> *Id.* at 665.

<sup>89</sup> See Carlson, *supra* note 18.

activism or ideological influence; in fact, it easily functions as a conduit of these things. Next, this Part will consider the ideological commitments to which textualism is a conduit, showing how textualism as a method favored by conservatives is part of a broader set of conservative positions that disfavor environmental protection. Finally, this Part will indicate these anti-environmental protection views in the record of Scalia and his current self-identified protégés on the Court.

A. *A Key Theoretical Difficulty with Textualism*

As seen above, one of the central values underlying textualism as touted by its proponents is that textualism restrains judicial activism and promotes the rule of law. How does textualism as an interpretive method purport to do this? By limiting judicial consideration to the text of the law, textualism aims to elide the role of interpretation itself, that is, to eliminate the interpreter's (i.e., judge's) contribution, letting the text speak for itself. What this means for the interpreter is that they must simply read the text and do what it says—or, as Chief Justice John Roberts famously said during his confirmation hearing, to act like umpires calling strikes.<sup>90</sup> This elimination of the act of interpretation at the center of textualism is not only paradoxical, it is unworkable. Thus, despite the rhetoric with which textualism is often celebrated, textualism does not bar judicial activism or ideological influence; to the contrary, it may easily function as a conduit of judicial activism and ideology.

Cass Sunstein has illustrated the problem with textualism's aspiration to complete objectivity with the duck-rabbit image, famously discussed by philosopher Ludwig Wittgenstein in his *Philosophical Investigations*.<sup>91</sup> Wittgenstein uses the duck-rabbit image to distinguish between "seeing that" and "seeing as."<sup>92</sup> As Sunstein puts it,

If you see a table, you see *that* it is a table. If you see a duck in the duck-rabbit image, you are seeing the image *as* a duck. Seeing it in that way is not mandated or foreordained by the image itself. You are doing the relevant work, even if you are doing it automatically or unconsciously.<sup>93</sup>

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<sup>90</sup> Roberts: 'My Job Is to Call Balls and Strikes and Not to Pitch or Bat', CNN (Sept. 25, 2005, 4:58 PM), <https://www.cnn.com/2005/POLITICS/09/12/roberts.statement/> [<https://perma.cc/3YMA-TCZ8>].

<sup>91</sup> CASS R. SUNSTEIN, TEXTUALISM AND THE DUCK-RABBIT ILLUSION 2 (2020).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 3 (italics in original).

If the image itself does not determine what someone sees in it, what explains why some people see a duck while others see a rabbit? According to a widely accepted theory known as priming or preconditioning, “whether people see the image as a duck or a rabbit *depends on whether they find one or another more familiar*.”<sup>94</sup>

Applying these reflections on the duck-rabbit image to textualism, Sunstein notes that oftentimes, the language of a legal text is ambiguous.<sup>95</sup> Furthermore, just as the duck-rabbit image does not itself determine whether one sees it as a rabbit or as a duck, there is often nothing in such ambiguous legal texts to determine how a reader should interpret it or in what way to “see” the text’s meaning.<sup>96</sup> The role of interpretation, in other words, is inescapable—and with the act of interpretation, the element of subjectivism that textualism purports to eliminate. Merely pointing back to the text and demanding that one follow it does not solve the matter.<sup>97</sup> While it is a commendable goal to try to interpret the text on its own terms and not let one’s biases govern, textualism’s core directive to “follow the text” is hollow.<sup>98</sup>

There is, then, an ironic truth in Alito’s *Bostock* dissent, in which he accuses Gorsuch of sailing under a textualist pirate flag, that is, saying that he is using textualism while in fact merely advancing society’s present values.<sup>99</sup> The irony is that textualism cannot help but involve the interests of some member or segment of society. The presumption that textualism is a bulwark against the intrusion of political or ideological interests is fundamental to the rhetorical appeal of textualism, but it is also impracticable.

### B. *Ideological Inputs*

If textualism is not a bar to judges’ personal and ideological contributions in the act of interpretation, a judge’s commitment to textualism should be considered alongside other salient features of their political leanings that inform interpretation. In the context of environmental advocacy, two features are especially salient: general conservative skepticism of environmental causes and modern conservatism’s pro-business, anti-regulatory commitment.

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<sup>94</sup> *Id.* at 6.

<sup>95</sup> *Id.* at 9.

<sup>96</sup> *See id.* at 13.

<sup>97</sup> *See* SUNSTEIN, *supra* note 91, at 13, 15.

<sup>98</sup> *See id.* at 15.

<sup>99</sup> *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1755–56 (2020) (Alito, J., dissenting).

Modern conservatism is a coalition constituted by many strands.<sup>100</sup> One of its central strands, libertarianism, stands opposed to overreaching governmental control and regulation.<sup>101</sup> Conservative opposition to environmental protection is often a proxy for opposition to governmental overreach and regulation.<sup>102</sup>

One of the most striking examples of modern conservatism's libertarianism, in which individual liberties are conceived as pro-business and free market, is former Justice Lewis Powell's memo for the U.S. Chamber of Commerce.<sup>103</sup> The Powell memo envisions private enterprise and conservative values to be in retreat, beleaguered by an ascendant liberalism in culture.<sup>104</sup> Powell gives special attention to elite institutions such as universities, which he regards as bastions of liberalism.<sup>105</sup> The general strategy that Powell lays out in the memo is to capture institutions currently under liberal sway and to use them to promote a conservative perspective, including especially a pro-business stance.<sup>106</sup> As Lawrence Glickman points out, there was nothing new in Powell's memo when compared with earlier statements by conservative elites about the problems confronting conservatism and how to address them.<sup>107</sup> The memo was, however, influential, setting the agenda for a modern activist conservatism.<sup>108</sup>

More recently, Cass Sunstein and Adrian Vermeule have written on how conservative ideology underlies opposition to the modern regulatory state.<sup>109</sup> Seeing the administrative state as opposed to the rule of law and despotic, conservative critics of the administrative state aim to dismantle it through a variety of methods.<sup>110</sup> When it comes to the question of whether environmental advocacy is a disfavored cause for conservatives, this context is essential. It is true that a higher percentage of

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<sup>100</sup> See, e.g., Cas Mudde, *The Rise (And Fall?) of American Conservatism*, 72 J. POL. 588, 589 (2010).

<sup>101</sup> See *id.*

<sup>102</sup> See Jonathan H. Adler, *The Conservative Record on Environmental Policy*, 39 NEW ATLANTIS 133, 133, 142 (2013).

<sup>103</sup> *The Lewis Powell Memo: A Corporate Blueprint to Dominate Democracy*, GREENPEACE, <https://www.greenpeace.org/usa/democracy/the-lewis-powell-memo-a-corporate-blueprint-to-dominate-democracy/> [<https://perma.cc/H9RG-H4DK>] (last visited Apr. 3, 2022).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> LAWRENCE B. GLICKMAN, *FREE ENTERPRISE: AN AMERICAN HISTORY* 29–30 (2019).

<sup>108</sup> *Id.*

<sup>109</sup> See CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 19–20 (Harv. Univ. Press 2020).

<sup>110</sup> *Id.*

people who identify as conservatives doubt or deny climate change as compared to those who identify as liberal.<sup>111</sup> Furthermore, former President Trump, many Republican elites, and a large sector of the Republican Party base have vocally denied the reality of climate change over the last few years.<sup>112</sup> This denialism was not new with President Trump; it goes back decades.<sup>113</sup>

Conservative opposition to environmental protection, then, may be due to outright climate denialism, or such denialism may be combined with a commitment to dismantling the regulatory state. The crucial point is that an opposition to government overreach and the policy preferences flowing from that opposition—reigning in agency power, slashing regulations—can be de facto anti-environmental protection. The opposition is ostensibly to government as such, and this manifests as an opposition to environmental protection.<sup>114</sup>

Importantly, one such manifestation of this anti-regulatory stance relates back to President Trump's judicial appointments. One of the key players in selecting President Trump's judicial nominees early on was former White House Counsel Don McGahn.<sup>115</sup> McGahn, as a liaison between the Trump administration and conservative legal groups—most importantly the Federalist Society—pushed nominees who were pro-business and favorable to deregulation.<sup>116</sup> Specifically, McGahn sought candidates who shared an opposition to the administrative state.<sup>117</sup> In fact, this goal was paramount over selecting judges with social conservative credentials, a divergence of priorities that conflicted with another powerful bloc of the conservative base.<sup>118</sup> Advancing an anti-regulatory agenda was central in selecting President Trump's judicial nominees.<sup>119</sup>

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<sup>111</sup> Andy Stone, *Study Reveals Wavering in Conservative Climate Beliefs*, FORBES (Mar. 20, 2020, 1:13 PM), <https://www.forbes.com/sites/andystone/2020/03/20/study-reveals-wavering-in-conservative-climate-beliefs/?sh=373bb4383b64> [https://perma.cc/W8PZ-S36D].

<sup>112</sup> See Lisa Friedman & Christopher Flavelle, *A Late Burst of Climate Denial Extends the Era of Trump Disinformation*, N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2021/01/12/climate/trump-disinformation-climate-change.html> [https://perma.cc/8W2C-S33A].

<sup>113</sup> See Adler, *supra* note 102, at 133.

<sup>114</sup> See *id.*

<sup>115</sup> See Evan Thomas, *How Supreme Court Nominations Became So Partisan*, N.Y. TIMES (June 23, 2019), <https://www.nytimes.com/2019/06/23/books/review/carl-hulse-confirmation-bias.html> [https://perma.cc/VWS3-KQ9J].

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See RUTH MARCUS, *SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER* 63–64 (2020).

<sup>119</sup> See *id.*

C. *Scalia & His Followers*

Having addressed the theoretical point that textualism as a method of interpretation does not prevent ideological inputs in the act of interpreting a text, and then considering salient ideological inputs that inform conservative approaches to the environment, this Section returns to Justice Scalia, who, as seen above, was a pioneer of the new textualism.<sup>120</sup> It also considers the torch-bearers of Scalia's jurisprudence on the current Supreme Court and their records on the environment: Gorsuch, Kavanaugh, and Barrett.<sup>121</sup>

Through a survey of Justice Scalia's opinions in environmental cases,<sup>122</sup> Rachel Kenigsberg concludes that in the period from 1990 to 2000, Scalia seemed to adhere to his textualist principles in environmental cases.<sup>123</sup> By contrast, in the period from 2001 to the end of his career in 2016, Scalia increasingly abandoned textualism in environmental cases and instead "began to rely on both legislative intent and economic arguments" in favor of limiting environmental regulation.<sup>124</sup>

Kenigsberg notes that by the end of the earlier period of Scalia's environmental opinions, he was already considered the worst Justice in terms of his record on the environment.<sup>125</sup> In the last two decades of his time on the Court, however, Scalia's record on the environment worsened (i.e., from a pro-environmental standpoint).<sup>126</sup> Scalia became increasingly vocal in his opposition to environmental regulation, and openly called into question the reality of climate change as a mere opinion of the Environmental Protection Agency, while characterizing the U.S. Army Corps of Engineers as an enlightened despot for their interpretation of the Clean Water Act.<sup>127</sup> The irony of this is that Scalia, the champion of textualism, found it convenient to abandon textualism when his policy views were sufficiently strong and a departure from textualist principles would aid those views.<sup>128</sup> This, of course, is unsurprising in light of our earlier

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<sup>120</sup> See Snyder, *supra* note 24, at 413 and accompanying text.

<sup>121</sup> See Noah Feldman, *The Battle Over Scalia's Legacy*, N.Y. REV. (Dec. 17, 2020), <https://www.nybooks.com/articles/2020/12/17/the-battle-over-scalias-legacy/> [<https://perma.cc/S85M-ZK64>].

<sup>122</sup> See Rachel Kenigsberg, *Convenient Textualism: Justice Scalia's Legacy in Environmental Law*, 17 VT. J. ENV'T. L. 418, 418–19 (2016).

<sup>123</sup> *Id.* at 419.

<sup>124</sup> *Id.* at 441.

<sup>125</sup> *Id.* at 422.

<sup>126</sup> *Id.* at 430.

<sup>127</sup> *Id.*

<sup>128</sup> Kenigsberg, *supra* note 122, at 430.

critiques of textualism. For all Scalia's championing of textualism as a method of judicial restraint, textualism itself is only as good as its practitioners; it is inherently powerless to constrain judges from inserting their own views or even abandoning the method when it is convenient.

If Scalia's record on the environment left much to be desired by environmental advocates, Scalia's ideological protégés on the Court do not inspire great confidence. Gorsuch, who sat on the Tenth Circuit Court of Appeals, did not have an extensive record on the environment before his appointment to the Supreme Court.<sup>129</sup> Looking at the few environmental cases available, Dan Farber concluded that the best news about Gorsuch for environmental advocates is that Gorsuch appears to not have a strong anti-environmental agenda.<sup>130</sup> However, environmental groups were worried by Gorsuch's previous rulings that set a high bar for standing for environmental groups, as well as Gorsuch's opposition to *Chevron* deference.<sup>131</sup> If Gorsuch's record was somewhat mixed, Kavanaugh, who replaced former Justice Kennedy on the Court,<sup>132</sup> evinced a strong opposition to governmental regulation and specifically Obama-era environmental regulations.<sup>133</sup> Under a Kavanaugh court, that is, a court in which Kavanaugh's vote would be decisive, the Environmental Protection Agency would be "badly cramped," unable to pursue bold action on climate change.<sup>134</sup> Barrett's confirmation simply solidified these anti-regulation trends on the Supreme Court by bringing the conservative majority up to six.<sup>135</sup> According to a study by Adam Feldman, Barrett, who sat on the Seventh Circuit Court of Appeals before her nomination to the Supreme Court, only heard three environmental cases in her tenure.<sup>136</sup> Nevertheless, Barrett's overall

<sup>129</sup> Zoe Loftus-Farren, *Judge Neil Gorsuch: Friend or Foe of the Environment?*, EARTH ISLAND J. (Mar. 30, 2017), [https://www.earthisland.org/journal/index.php/articles/entry/judge\\_gorsuch\\_friend\\_or\\_foe\\_of\\_the\\_environment/](https://www.earthisland.org/journal/index.php/articles/entry/judge_gorsuch_friend_or_foe_of_the_environment/) [https://perma.cc/Y48A-ZD2S].

<sup>130</sup> Dan Farber, *Gorsuch and the Environment: A Closer Look*, LEGALPLANET (Mar. 20, 2017), <https://legal-planet.org/2017/03/20/gorsuch-and-the-environment-a-deeper-dive/> [https://perma.cc/F7YZ-LBY5].

<sup>131</sup> See Loftus-Farren, *supra* note 129.

<sup>132</sup> Dylan Matthews, *America Under Brett Kavanaugh*, VOX (Oct. 5, 2018, 3:50 PM), <https://www.vox.com/2018/7/11/17555974/brett-kavanaugh-anthony-kennedy-supreme-court-transform> [https://perma.cc/9ZMN-UDKR].

<sup>133</sup> Dan Farber, *The Kavanaugh Court and the Environment*, LEGALPLANET (Sept. 19, 2020), <https://legal-planet.org/2020/09/19/the-kavanaugh-court-and-the-environment/> [https://perma.cc/7BYS-JZPX].

<sup>134</sup> *Id.*

<sup>135</sup> See Wu & Hayes, *supra* note 76.

<sup>136</sup> See Beth Gardiner, *With Justice Barrett, a Tectonic Court Shift on the Environment*, YALE ENV'T 360 (Oct. 26, 2020), <https://e360.yale.edu/features/with-justice-barrett-a-tectonic-court-shift-on-the-environment> [https://perma.cc/ST3Z-TTYK].

philosophy was clear: “[Barrett is] consistently pro—big business, whether it’s corporate cases or liability cases or discrimination cases.”<sup>137</sup> As seen above,<sup>138</sup> an anti-regulatory, business-friendly stance was central to President Trump’s nominations. Given her views about regulation, Barrett’s nomination was in line this goal.<sup>139</sup> The uphill battle for environmental advocates described in this Note applies not only in the lower federal courts, but especially in the current Supreme Court.

#### CONCLUSION: THE USES OF TEXTUALISM

This Note started with a consideration of the current judicial landscape, as dramatically reshaped by former President Trump’s record number of appointments to the federal judiciary. Environmental legal advocates looked for effective ways to advocate in this new conservative judicial landscape. One such strategy was the use of textualist arguments, which, as the opinion in *Bostock* demonstrated, had the potential to bring about victory for causes generally disfavored by conservatives. This Note critiqued that strategy by looking at the history of textualism within the modern conservative legal movement. Even though textualism is not inherently conservative, and though it might be combined with liberal politics, it has historically become influential within modern conservatism and has been connected with broader conservative commitments and values. Even though textualism is championed as a method of judicial restraint and fidelity to the rule of law, there is nothing within textualism to bar ideological inputs in the act of interpreting legal texts—notably, the ideological inputs of anti-regulation and environmental skepticism. Hence, Kagan’s declaration that “[w]e’re all textualists now” does not have the same optimistic ring for environmental advocates post-*Bostock* as some commentators suggested.

The larger lesson here might be that reliance on methods of statutory or constitutional interpretation to sway ideologically opposed judges to one’s side is fundamentally flawed.<sup>140</sup> Practically speaking, the best thing to say might be that it can’t do any harm to use textualist arguments—or,

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<sup>137</sup> *Id.*

<sup>138</sup> See *supra* notes 115–19 and accompanying text.

<sup>139</sup> Gardiner, *supra* note 136.

<sup>140</sup> See, e.g., SAMUEL MOYN & AARON BELKIN, TAKE BACK THE COURT, THE ROBERTS COURT WOULD LIKELY STRIKE DOWN CLIMATE CHANGE LEGISLATION 2 (2019), <https://static1.squarespace.com/static/5ce33e8da6bbec0001ea9543/t/5d7d429025734e4ae9c92070/1568490130130/Supreme+Court+Will+Overturn+Climate+Legislation+FINAL.pdf> [https://perma.cc/LX7Y-H26S].

as one commentator has put it, when in “Textualism Land,” do as the textualists do.<sup>141</sup> But even if there is a good pro-environmental textualist argument and an environmental advocate uses such an argument,<sup>142</sup> there is no guarantee that the advocate’s cause will be favored by conservative judges. Conservative judges may be receptive to textualist arguments because of textualism’s conservative credentials, but by the same token, other conservative commitments that appeal to a judge might override textualism and cut against an environmental advocate.

Hence, this Note represents a word of caution, but not pessimism. It is not sanguine about the prospects of textualist-based victory for environmentalism, but it is not despairing. Textualism should be used in the arsenal of legal arguments to persuade judges. However, a path to sweeping legal victories for environmental causes likely does not lie within weaponizing textualism. If the focus is on winning victories from judges, the best strategy is to appoint environmentally friendly judges rather than to rely on textualism within a hostile judiciary.<sup>143</sup> Easier said than done, one might object. And that is true; nevertheless, the best path forward would be to take a page out of the Trumpian playbook and remake the judicial landscape rather than toil within it as is.<sup>144</sup>

Just as increasing numbers of Trump-era environmental protection rollbacks have come under review and face being undone by the Biden administration,<sup>145</sup> the Biden administration also has the opportunity to aggressively appoint new judges to the federal judiciary.<sup>146</sup> President Biden has acknowledged the importance of the judiciary.<sup>147</sup> Following the death of Justice Ruth Bader Ginsburg and the rapid confirmation of Amy

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<sup>141</sup> Dan Farber, *Taming Textualism: A Guide for Environmental Lawyers*, LEGALPLANET (Oct. 21, 2020), <https://legal-planet.org/2020/10/21/textualist-environmentalism/> [<https://perma.cc/H968-9R4S>].

<sup>142</sup> For an example, see, e.g., Carlson, *supra* note 18.

<sup>143</sup> Brian Fallon & Christopher Kang, *Biden Must Prioritize the Courts if Elected*, DATA FOR PROGRESS (July 30, 2020), <https://www.dataforprogress.org/blog/biden-must-prioritize-the-courts-if-elected> [<https://perma.cc/M68M-D2V7>].

<sup>144</sup> *Id.*

<sup>145</sup> Juliet Eilperin et al., *Tracking Biden’s Environmental Actions*, WASH. POST (Jan. 14, 2022, 10:13 PM), <https://www.washingtonpost.com/graphics/2021/climate-environment/biden-climate-environment-actions/> [<https://perma.cc/6WW2-LRFM>].

<sup>146</sup> Ann E. Marimow & Matt Viser, *Biden Moves Quickly to Make His Mark on Federal Courts After Trump’s Record Judicial Nominations*, WASH. POST (Feb. 3, 2021, 7:00 AM), [https://www.washingtonpost.com/local/legal-issues/biden-judge-nominations/2021/02/02/e9932f3a-6189-11eb-9430-e7c77b5b0297\\_story.html](https://www.washingtonpost.com/local/legal-issues/biden-judge-nominations/2021/02/02/e9932f3a-6189-11eb-9430-e7c77b5b0297_story.html) [<https://perma.cc/EKP3-87HT>].

<sup>147</sup> See Ariane de Vogue, *Get Ready for a Raft of Biden Court Nominees*, CNN (Mar. 11, 2021, 5:01 AM), <https://www.cnn.com/2021/03/11/politics/courts-biden-nominees/index.html> [<https://perma.cc/72ZF-ZTG9>].

Coney Barrett to replace Ginsburg, many outraged liberals demanded Court reform and expansion.<sup>148</sup> In response to these calls, President Biden signaled the creation of a bipartisan commission to review and propose court reform options.<sup>149</sup> This commission ultimately expressed support for the imposition of term limits on Supreme Court Justices, but was deeply divided over court expansion proposals.<sup>150</sup> Regardless of which of the bipartisan commission's proposals are acted upon (if any), the swift Barrett confirmation and other hardball tactics certainly raised the importance of the Court in the awareness of the new administration.<sup>151</sup> In addition to calls for expanding the Court, Democrats have signaled a more general recognition of the importance of the judiciary.<sup>152</sup> Demonstrating this newfound urgency, in 2021, President Biden confirmed forty federal judges (including eleven appellate judges)—the most judges confirmed in any first-year presidency since Ronald Reagan.<sup>153</sup> Alongside this heightened awareness of the importance of the judiciary, President Biden has signaled a stronger pro-environment stance than his predecessor.<sup>154</sup> One way for President Biden to have a lasting beneficial impact on environmental causes is to appoint judges who are committed to environmental protection.<sup>155</sup> It will be important for environmental advocates to continue exerting pressure on the Biden administration to appoint environment-friendly judges. If this happens, there can be another tectonic shift in the federal judiciary, one that is friendly to our environment.

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<sup>148</sup> Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html> [https://perma.cc/NLU2-ATV3].

<sup>149</sup> *Id.*

<sup>150</sup> Ann E. Marimow, *Biden's Supreme Court Commission Endorses Final Report Noting Bipartisan Public Support for Term Limits*, WASH. POST (Dec. 7, 2021, 7:00 PM), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-commission-term-limits/2021/12/07/eb0ef982-5767-11ec-9a18-a506cf3aa31d\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-commission-term-limits/2021/12/07/eb0ef982-5767-11ec-9a18-a506cf3aa31d_story.html) [https://perma.cc/2JUC-4TBS].

<sup>151</sup> Herndon & Astor, *supra* note 148.

<sup>152</sup> Ian Millhiser, *A New Poll Shows Rank-and-File Democrats Finally Realize the Supreme Court Is Important*, VOX (Sept. 1, 2020, 8:30 AM), <https://www.vox.com/2020/9/1/21408512/poll-supreme-court-democrats-republicans-gap-merrick-garland> [https://perma.cc/6LN9-WJK2].

<sup>153</sup> Nate Raymond, *Biden Finishes 2021 with Most Confirmed Judicial Picks Since Reagan*, REUTERS (Dec. 28, 2021, 1:39 PM), <https://www.reuters.com/legal/government/biden-finishes-2021-with-most-confirmed-judicial-picks-since-reagan-2021-12-28/> [https://perma.cc/ZTG7-SEXF].

<sup>154</sup> Leah C. Stokes, *Biden Has a Climate Mandate*, BOSTON GLOBE (Nov. 8, 2020, 8:00 AM), <https://www.bostonglobe.com/2020/11/08/opinion/biden-has-climate-mandate/> [https://perma.cc/SPU6-V2FS].

<sup>155</sup> See Marimow & Viser, *supra* note 146.