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Title
American Idols

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Journal
UCLA School of Law Public Law & Legal Theory Series

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Publication Date
2019-09-23

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PUBLIC LAW & LEGAL THEORY RESEARCH PAPER NO. 19-32

AMERICAN IDOLS

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In THE ENVIRONMENTAL FORUM 40 (May/June 2019)

Electronic copy available at: https://ssrn.com/abstract=3458553

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American Idols

Which are the stars, the most important cases in U.S. environmental jurisprudence? We asked that question in a survey of this magazine's readers and other professionals across all sectors. The results and those from our poll 10 years ago show remarkable durability over time, truly placing these selections in the legal Hall of Fame



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Roger Federer, Pete Sampras, or Rod Laver? Cher, Madonna, or Beyonce? *Chinatown, Star Wars,* or *Citizen Kane*? There are plenty of Greatest of All Time lists for male tennis stars, female divas, and storied motion pictures. So why not for environmental law court cases? And which cases would qualify for entry? *Chevron*'s judicial deference doctrine will surely put it in the balloting mix for entry into environmental jurisprudence's Cooperstown. And *Massachusetts v. EPA* is a cinch for Hall of Fame finalist, given the response to its holding that carbon dioxide can be a pollutant under the Clean Air Act. So one might assume that this pair of cases should be eligible to be listed among history's most consequential — but what about the others?

In 2001, when the Billboard Top Song was "Hanging By A Moment" by Lifehouse, Jim Salzman conducted a survey on the environmental law professor's listserve (*envlawprofs*). He asked members to provide their 10 "Most Excellent" environmental law cases. It proved both fun and illuminating. A number of professors even used the results in subsequent scholarship.

The Top Three cases were two from the U.S. Supreme Court, *TVA v. Hill* (involving an Endangered Species Act "jeopardy" prohibition) and *Chevron v. NRDC*, and one from the D.C. Circuit Court of Appeals, *Ethyl Corp. v. EPA* (requiring deference to agency risk assessments).

In 2009, when the Top Song was "Boom Boom Pow" by Black Eyed Peas, we repeated the survey, this time using a dedicated website and polling both the listserve and members of the ABA Section on Environment, Energy, and Resources. We enjoyed a high level of participation, with hundreds of responses from across the nation and practice groups, from academics and practitioners alike. The Top Three cases were *Massachusetts v. EPA*, *Chevron*, and *Rapanos* (on identifying "Waters of the United States").

Time's winged chariot has flown through another decade and we are excited to share the results from the most recent survey. Once again we have expanded the universe of those polled: the survey was distributed not only to *envlawprofs* and SEER but also to you and the other members of the Environmental Law Institute's Associates Programs. The ELI list includes professionals who are not lawyers and is drawn from all sectors involved in environmental protection, broadening the constituencies who were polled.

We think you'll find the latest results, showing a stability in the top cases, both surprising and instructive.

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The online survey recorded information on field of practice, geographic location, age, length of practice, and sector (government, academia, law firm, corporation, NGO, etc.). We had 221 professionals who participated. The largest responses came from academia as a sector, pollution law as a specialty, and the mid-Atlantic as an area of residence. Based on suggestions from *envlawprofs*, we nominated 30 federal and state cases as eligible for the Hall of Fame. Participants were asked to identify the five "Most Significant" in the field overall. The next question asked them to identify three cases decided in the past 10 years that are the most significant.



The top table on p. 43 compares the overall rankings from 2001, 2009, and 2019. The bottom table shows the 2019 rankings of the newest cases across four different sectors. See the box on page 47 for more information on the cases cited in this article, all of which were decided at the Supreme Court unless noted.

A striking feature of the overall results for the American Idols of environmental jurisprudence is the stability in the rankings. There was no real shift of the most important cases since our last survey. Apart from a minor move up or down one slot, five of the top six cases were unchanged. If we look back to the 2001 survey, there is more variation but there are still four cases that have made Top 10 status in all three surveys across almost two decades: *Chevron*, *TVA v. Hill*, *Sierra Club v. Morton* (establishing standing for aesthetic injury) and *Overton Park* (agencies must provide a record for a decision). With an average vintage of 1976, these have to be recognized as the Four Tops. They are likely to have permanent positions in the environmental canon.

Of course, some cases have not been on the charts for all three surveys because they had yet to be decided, making the stability in the top rankings more amazing. Two cases decided after the 2001 survey, *Massachusetts v. EPA* and *Rapanos*, made Top 10 showings in the two polls since, suggesting they were not just flashes in the pan. Given its role in kick-starting the Clean Air Act's prominence in climate policy, it is hard to imagine *Massachusetts v. EPA* falling out of the top 10 anytime soon. By contrast, we were surprised in 2009 that *Rapanos* was viewed as a Top 10 case so soon after being decided, and even more surprised it has retained its high standing. Perhaps the ongoing high-stakes battle over the Waters of the United States Rule has kept it in the public eye. Its importance could fade if the jurisdictional reach of the Clean Water Act is resolved by statute or a rule with staying power. For now, however, both cases appear to have a lock on Top 10 status.

That puts six cases in what appear to be stable holds on Top 10 status. What about the remaining four slots? Four cases that made Top 10 for 2019 also made the same list in 2001 or 2009. *American Trucking Associations* (no cost consideration for setting health-based air standards), *Penn Central* (establishing a regulatory takings balancing test) and the *Mono Lake* decision (a California Supreme Court case affirming the state's public trust doctrine) made the 2001 and 2019 lists, and *Lujan v. Defenders of Wildlife* (eliminating standing for "procedural injury") made 2009 and 2019. The closest to a contender for this kind of staying power would be *Lucas v. South Carolina Coastal Council*

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(establishing a takings analysis for total elimination of property value), which made the Top 10 in 2001 and took 11th in 2019.

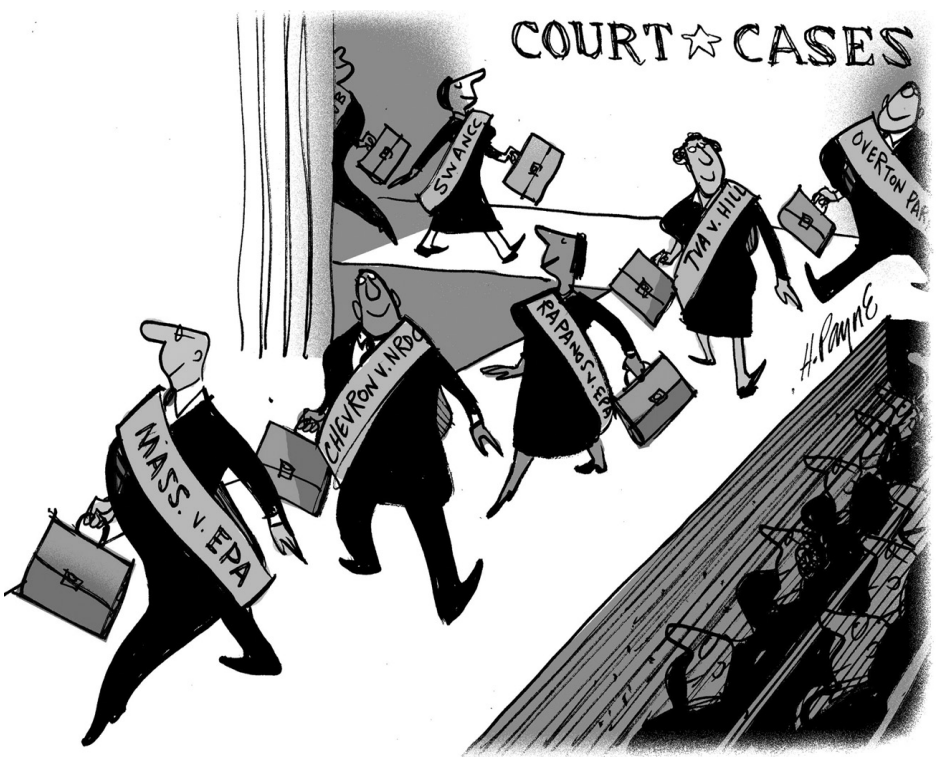
The flip side to this story of canonical cases are the supernova decisions that flashed onto the scene in one survey but have fallen precipitously since. Three cases that made Top 10 in 2001 failed to make it in 2009 and were well behind the pack in 2019: *Calvert Cliffs* (National Environmental Policy Act requirements), a D.C. Circuit decision, fell to number 19 in 2019. *Scenic Hudson* (a conservation group may challenge a project) tumbled to number 24. And *Ethyl Corp.,* another D.C. Circuit decision, is now number 30. Similarly, two cases from the 2009 Top 10 had faded considerably by 2019. These are *SWANCC* (whether isolated wetlands can be jurisdictional), number 18 in 2019, and *Gwaltney* (governing standing for ongoing violations), down to number 25. It seems unlikely we will be seeing any of these on the future lists. *SWANCC*, for example, has been eclipsed in importance by *Rapanos*. *Scenic Hudson*, while associated with opening the era of environmental litigation, has no lasting doctrinal impact compared to its contemporaries such as *Overton Park*, which continues to appear as a principal decision in many environmental law casebooks.

The lock that the 11 stable cases have on the top slots is further revealed by the lackluster performance of the new cases — those decided after the 2009 poll. In the current survey, no cases decided in the past decade came close to the Top Five, or even made the Top 10. A slug of four new cases got within striking distance: *Michigan v. EPA* (cost factors should be included in determinations of "appropriate and necessary") is number 12. *American Electric Power v. Connecticut* (on Clean Air Act displacement of federal common law) is 13. *Burlington Northern* (on Superfund "arranger" liability) is 14. And *UARG v. EPA* (on the agency's Tailoring Rule) is 16. Interestingly, *Burlington Northern,* which was well ahead of *Sackett v. EPA* (on reviewability of compliance orders) on the 2019 full survey was eclipsed by *Sackett* in the new cases category, and also by *EPA v. EME Homer* (governing the Clean Air Act Good Neighbor Rule). One explanation may be that some respondents saw *Burlington Northern* as more important up to the present, but saw *Sackett* and *EME Homer* as rising in importance going forward.

The low rankings for new cases marks a dramatic change from the past. The 2001 survey contained two then-recent cases, *American Trucking* and *Lucas*. The 2009 survey saw even more change from new cases. *Massachusetts v. EPA* vaulted to number 1, *Rapanos* was number 2, and *SWANCC*, which has fallen off

Continued on page 46

Ranking of top cases in 2009 survey as seen by cover artist Henry Payne



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The Greatest of All Time

Comparison of overall case rankings, spread over 18 years

	2001 Survey Results	2009 Survey Results	2019 Survey Results
1	*TVA v. Hill*	*Mass. v. EPA*	*Chevron*
2	*Chevron*	*Chevron*	*Mass. v. EPA*
3	*Ethyl Corp.*	*Rapanos*	*Rapanos*
4	*Sierra Club v. Morton*	*TVA v. Hill*	*TVA v. Hill*
5	*Calvert Cliffs*	*Overton Park*	*Lujan*
6	*Mono Lake*	*SWANCC*	*Overton Park*
7	*Overton Park*	*Sierra Club v. Morton*	*American Trucking*
8	*American Trucking*	*Gwaltney*	*Sierra Club v. Morton*
9	*Georgia v. Tennessee*	*Lujan*	*Penn Central*
10	*Boomer, Laidlaw, Lucas, Penn Central, Scenic Hudson*	*Laidlaw*	*Mono Lake*

2019 ranking of newest cases as seen by four sectors

	Academic	Private	Government	NGO
1	*AEP*	*Sackett*	*Michigan*	*Michigan*
2	*UARG*	*Michigan*	*UARG*	*Sackett/UARG tie*
3	*Michigan*	*AEP*	*Sackett*	
4	*EME Homer*	*Hawkes*	*AEP*	*AEP/EME Homer tie*
5	*Burlington*	*Burlington*	*Burlington*	

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Sidebar

The Supremes of Environmental Law

In their third report surveying professional opinion on the most consequential U.S. environmental court decisions of all time, J. B. Ruhl and Jim Salzman have done a real service to all of us who work in the field. Knowing who are the Supremes of case law is enough to make you hum your own tune — let's see what we can glean further from their study.

There are a handful of differences in the results based upon the respondents' years in practice or practice setting or geographical setting, but in general the professionals polled were pretty consistent in their support for *Chevron v. NRDC*, *Massachusetts v. EPA*, and *Rapanos* as being the three most significant environmental decisions.

According to many commentators, *Chevron,* decided by the Supreme Court in 1984, is the most cited decision in modern case law. The late Justice Antonin Scalia was a strong supporter, believing that if an act is unclear, there needs to be a presumption that that ambiguity should be addressed in the first instance by the relevant agency.

We all know that environmental laws tend to get longer and more detailed with each new statute enacted. Nonetheless, these laws still contain a number of vague and unclear provisions that have to be interpreted and defined to properly implement the act.

That is the job of the regulatory agency, and one which the courts are inclined to uphold so long as the interpretation is reasonable and based upon a permissible construction of the statute. Perhaps we will see more questions about the non-delegation doctrine in future cases, and its impact on the Supreme Court's mandated deference to *Chevron's* holding, but it appears that this case will remain the very bedrock of environmental law.

In 2007, *Massachusetts v. EPA* sent shock waves through the regulated community when the Supreme Court ruled the agency had to make a determination whether greenhouse gases, which in its decision the Court deemed are pollutants under the plain language of the Clean Air Act, can be expected to endanger public health or welfare and therefore must be regulated. The case establishes new rules for governmental actors such as states — they should be given "special solicitude."

The decision is also noteworthy because of its dissent, where the minority argues that the case has nothing to do with Article III standing, since Massachusetts could not demonstrate injury-in-fact, causation, nor redressability. In addition, Scalia persuasively argues why *Chevron* deference, properly applied, should have dictated a completely different result in the case.



Amy L. Edwards

I expect that there will be an effort to push the limits of *Massachusetts v. EPA* further, as we have already seen in the U.S. district court in Oregon, scene of the celebrated "kids climate case," *Juliana v. United States.* In an amicus brief filed on behalf of approximately 32,340 children and other young people, an organization called Zero Hour asks for protection of the fundamental rights of the "posterity" as guaranteed under the Constitution. The brief raises important questions regarding the Public Trust Doctrine. There is the possibility for some groundbreaking environmental case law being established in the suit.

The 2006 *Rapanos* decision rounds out the top three because it highlights a complicated environmental issue where there is little consensus between the legislative, administrative, and judicial branches. Unfortunately, the fractured 4-1-4 decision has contributed to that confusion, muddying the definition of Waters of the United States. That result has roped in all three branches of government through ongoing EPA rulemakings, non-stop litigation, and fruitless efforts in Congress to bring clarity.

Finally, let's not ignore the runners up in the survey, particularly cases responding in part to *Massachusetts v. EPA*. Decisions like *AEP v. Connecticut* (2011) and *UARG v. EPA* (2014) may play a much more prominent role going forward.

AEP addresses whether a federal law speaks directly to the question otherwise addressed by a federal common law claim. The Court confirms that Congress delegated to EPA the decision whether and how to regulate carbon dioxide emissions from power plants and that this delegation displaces federal common law.

In *UARG*, the Court in essence states that EPA overstepped its authority to "tailor" the CAA's unambiguous mandate to accommodate greenhouse gas requirements. Nevertheless, the Court concludes that requiring Best Available Control Technology for greenhouse gas emissions from large stationary sources currently being regulated for discharges of conventional pollutants is a permissible interpretation of the statute, bringing us back full circle to *Chevron*.

Like you, I can't wait to see who turn out to be the Supremes in the 2029 survey!

Amy L. Edwards is co-chair of the environmental team at Holland & Knight and chair of the American Bar Association's Section of Environment, Energy and Resources.

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Sidebar

Talking About a Generational Shift

In reviewing their survey results, J. B. Ruhl and Jim Salzman note that "not a single recent case made the Top 10 list," which marks "a dramatic change" from their past polls. This "important trend indicator" shows that environmental law is now "a mature field." A closer look suggests not maturity but rather a shift in the Supreme Court that is undermining our progress toward environmental quality.

The list of Hall of Fame Nominees on page 47 is in chronological order, so it's easy to see the trend. Of the first 10 cases, 8 either expanded environmental rights or duties (*Tennessee Copper, Scenic Hudson, Sierra Club v. Morton, TVA v. Hill, Mono Lake*) or imposed generally environmentally protective requirements on agency decisionmaking (*Overton Park, Calvert Cliffs, Penn Central*). Two others (*Ethyl, Chevron*) deferred to agencies at a time when they were implementing new statutory mandates and deference was more often in the public's favor.

By contrast, of the more recent 15 cases, at least 11 went for the polluter. Decisions made it harder for citizens to sue to protect the environment (*Gwaltney, Lujan*), easier for polluters to challenge or avoid enforcement efforts (*Sackett, Burlington Northern, AEP, Hawkes*), or limited agency power to protect the environment (*Lucas, SWANCC, Rapanos, Michigan, UARG*). In the nearly two decades since *Laidlaw* and *American Trucking*, there have been only two big Supreme Court wins for the environment, most prominently *Massachusetts v. EPA*.

The sad reality is that the Supreme Court for the last thirty years has largely been a graveyard for public health and environmental protections. It seems too often the political leanings of the Court trump fidelity to Congress's ambitious goals when it enacted our environmental protections.

Consider the Clean Water Act's goal of ensuring fishable and swimmable waters by 1983 or the Clean Air Act's original goal of reaching health standards by 1975. Whereas the Court in the decade in which Congress first enacted these laws read the statutes broadly to enable real progress, the more recent Court has repeatedly sided with polluters. *Chevron* in 1984 mandated deference to the decisionmaking of agencies, which are tasked with statutory protections. Today, challenges under that holding are often brought by polluters, and several justices have expressed interest in watering down *Chevron* deference.



Peter H. Lehner

Even if the Court misses the critical fact that Congress enacted these laws to protect public health and our natural resources, those taking the survey did not. That's why at least 8 of the top 10 in the poll are wins for the public. Of the top 10 only *Lujan* is unabashedly and fully for the polluter. These rankings indicate an almost poignant plea among practitioners for a Supreme Court that at least sometimes rules for the public. As an example, although *Rapanos* did not validate the protective agency action, it left the door open to a rule that follows the science and recognizes that our waters are connected.

Relatedly, the rankings indicate an understanding that for the public voice to be vindicated, the third branch of our government must be brought into the quest for a safe and healthy environment. The need for involvement by the judiciary must surely underlie ranking *Overton Park, Sierra Club v. Morton,* and *Chevron* among the Four Tops in the authors' view. These cases establish the fundamental rules of the road for being able to use the courts to hold everyone, including the government, accountable for following our environmental laws.

As significant as cases like *Massachusetts v. EPA* or *TVA v. Hill* are on climate change or endangered species, those substantive holdings don't matter much if powerful actors don't have to follow the law in the first place. *Overton Park* requires government officials to make coherent, discrete decisions articulated and justified on a record that can be challenged in court. *Morton* allows anyone to sue to enforce the law based on particularized injury, with the scope of cognizable injury defined broadly. *Chevron* lays out the standards for agencies interpreting and applying statutes. These decisions lay out the principles of democratic and legal accountability that are central to protecting the public interest.

I would add a final comment on the poll rankings, colored in part by my career. Without *Scenic Hudson* and *Sierra Club v. Morton,* which opened the courthouse doors to public interest litigation, all environmental law since would have been profoundly different. Moreover, the first helped lead to the creation of NRDC and the second to Earthjustice, both of which have been particularly important in shaping the half century of environmental jurisprudence that followed.

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the 2019 list entirely, was then number 6. In 2019, though, not a single recent case made the Top 10 list. That is an important trend indicator.

Virtually across the board of all demographic categories, three cases appear as everyone's Top Three — *Massachusetts v. EPA* and *Chevron* in a virtual tie, then *Rapanos,* with less than half the number of votes, a distant third. Senior attorneys threw a disproportionate number of votes at *Penn Central, TVA,* and *Mono Lake* — perhaps suggesting they may face some slide in status as the profession ages — whereas *Lujan* is the opposite, with much more support from younger lawyers.

In looking at recent cases, there was considerable consistency over the Top Five except for *Sackett* and *Hawkes* (Corps of Engineers jurisdiction determination is reviewable). Private practice, government, and NGO attorneys ranked *Sackett* as an important recent case. Academics, though, didn't include the decision at all in the Top Five of new cases. Clearly, academics are missing something about *Sackett* that is resonating within other practice settings — possibly it is having more practical than doctrinal impact. Conversely, *EME Homer* made the Top Five lists for NGO and academics but not for private practice and government professionals, suggesting this case may have more doctrinal than practical impact.

Respondents from any practice setting who chose *Rapanos* as one of their Top Five cases on the full survey overwhelmingly went with *Sackett* as the most important new case and ranked *Hawkes* and *Koontz* (applying exactions analysis to permit denial) high as well, suggesting that the wetlands practice field has had a considerable impact on the whole. Geography had even less to say about differences in opinions. Not surprisingly, *Mono Lake* made the Top 10 largely on votes from Californians. That state also boosted *Rapanos*, as did the mid-Atlantic. Beyond that, the only differences across practice groups and geography were relatively minor, and no other strong cross-correlations between cases were evident.

Almost 50 years after the birth of modern environmental law, 11 judicial opinions have secure claims to being within the canon of environmental law: *Chevron, Massachusetts v. EPA, Rapanos, TVA v. Hill, Overton Park, Lujan, American Trucking, Sierra Club v. Morton, Penn Central, Mono Lake,* and *Lucas.* But are any of the six that led the new cases survey — *Michigan v. EPA, UARG v. EPA, AEP v. Connecticut, Sackett, EPA v. EME Homer,* and *Burlington Northern* — destined for greatness in 2029?

We doubt it. *AEP v. Connecticut* may have a chance, if public nuisance climate change claims gain more traction in the lower courts and the precedent is used to stymie them. The others, however, involved narrow questions of statutory interpretation or administrative law with a fairly limited footprint. To be sure, *Burlington Northern*'s effect on CERCLA liability has significant impacts for industry, and *Sackett* opens up to judicial review some agency actions not previously believed to be final. But a *Massachusetts v. EPA* or an *Overton Park* they are not.

What does the 2019 survey say more generally about the state of environmental law? This is now a mature field. It may well be that there are no more canonical issues to be decided because the big questions have been resolved. It's just *Chevron* statutory interpretations on ever-finer details, with really big-impact statutory interpretations few and far between. There may be an occasional case as impactful as *Massachusetts v. EPA*'s opening the Clean Air Act to regulating greenhouse gases or a *Rapanos* determining the reach of the Clean Water Act. But those are increasingly fewer and farther between. Looking ahead to the 2029 survey, perhaps we should expect the next decade's cases to be of only marginal importance as well.

Of course, there is always the unexpected. *Juliana v. United States,* in which youthful plaintiffs hope to assert at trial in district court that the federal government has failed in its duty to protect them from climate change while supporting the polluters who are causing the problem, may defy expectations and ultimately find for the plaintiffs; however, only a few respondents submitted it as a write-in. The replacement of Justice Anthony Kennedy with Justice Brett Kavanaugh could provide the fifth vote for some dramatic decisions. The Supreme Court's new composition seems primed to reconsider *Chevron,* or to bolster *AEP v. Connecticut.* Even so, for a new case to wedge its way into the Top 10 will mean knocking out one of the old guard. That's going to take more than any of the new cases in our 2019 survey could muster. It's going to have to be among the Greatest of All Time. **TEF**

For the data underlying this article and for a complete list of the nominees go to http://tinyurl.com/y4ljzph9

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