



“Not a Scientist,” Just a (Likely) Supreme Court Justice: What Amy Coney Barrett’s Confirmation Might Portend for Climate Change and Environmental Regulation

Oct 23, 2020

Reading Time : **4 min**

By: Stacey H. Mitchell

During her confirmation hearings, Judge Barrett responded to questions on climate change from Sens. John Kennedy (R-LA), Kamala Harris (D-CA) and Richard Blumenthal (D-CT) by framing climate change as an issue of policy, not science. Judge Barrett referred to the issue as a “a very contentious matter of public debate” while informing the senators that she is “certainly not a scientist” and has no “firm views” on the issue, echoing statements made by the late Justice Scalia on the same topic.¹ Although Judge Barrett was careful to avoid committing herself to specific rulings (a practice that generally accepted principles of judicial ethics prohibit), has a slim record as a judge on environmental issues and has not ruled on any climate-related issues since her nomination to the U.S. Court of Appeals in 2017, it is widely expected that she would vote with the Court’s other conservatives on cases involving environmental regulation and efforts to combat climate change.

Should a Justice Barrett and the Court’s other conservative justices vote as expected, we are likely to see the Court take a dim view of administrative efforts to use older legislation to regulate new environmental problems. As a self-described textualist, she will assess the validity of a regulation based upon a plain reading of the statute rather than its purpose. Federal agencies like the U.S. Environmental Protection Agency and the Department of the Interior may find that restrictions on emissions of greenhouse gases and other air pollutants, regulation of discharges to waterbodies and wetlands that lack permanence or obvious connections to major waterways, and broader protections for endangered and threatened species would not pass muster if the Court has a say.² Likewise, environmental groups may face an increasingly steep battle even getting into court in their attempts to force the federal

government to more stringently regulate the environment and meet international climate goals.³

So far this term, the Court has granted certiorari to hear a dispute over removal to federal court of a city's action to recover damages against energy companies under state law for alleged harms it will sustain due to climate change.⁴ The Court has pending certiorari petitions relating to Washington's denial of port access to ship Montana and Wyoming coal to foreign markets, and condemnation of state land by companies holding Federal Energy Regulatory Commission-issued certificates of public necessity to build and operate interstate natural gas pipelines.⁵ Judge Barrett's nomination also could help secure President Trump's environmental legacy by upholding challenges to his administration's controversial revocation of a Clean Air Act waiver to the State of California and related replacement of standards governing emissions from light-duty vehicles; rescission and replacement of the Clean Power Plan and the Clean Water Rule; and numerous other rulemakings from the President's first term in office—all of which are in the pipeline to head to the Supreme Court.

Even if President Trump were to lose the 2020 election, a Justice Barrett could stymie attempts by a Biden administration to enact many components of Biden's \$2 trillion climate plan and portions of the Green New Deal that the Democratic presidential nominee has embraced. The constitutionality of many environmental laws is premised on the notion that environmental degradation substantially affects interstate commerce and thus falls within the ambit of Congress's Commerce Clause powers. A Justice Barrett can be expected to circumscribe this power, perhaps to a degree that parallels the restrictive interpretations of the Commerce Clause's reach that Justice Scalia and Justice Thomas have called for in prior opinions.⁶

While we still may see unexpected rulings from the Supreme Court from time to time, a successful Barrett nomination and the Court's most solid conservative majority in decades all but guarantees that the impacts of President Trump's deregulatory environmental agenda will outlast his first term, regardless of the outcome of this year's elections.

¹ *Nomination of the Honorable Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States (Day 3) Before the Sen. Comm. on the Judiciary*, 116th Cong. (2020) (statement of the Hon. Amy Coney Barrett, 7th Cir. Court of Appeals); *see also*

“2012 Commencement Colloquy – Shirley Ann Jackson and Antonin Scalia,” YOUTUBE (Jun. 1, 2019), <https://www.youtube.com/watch?v=Pr40kbqW03k> (statement that Justice Scalia “[doesn’t] do science; [he] does the law”).

² See Mary Haley Ousley, *Precedent, Politics, or Priorities: Are Courts Stepping out of Their Traditional Judicial Bounds when Addressing Climate Change?*, 25 HASTINGS W.-N.W. J. ENV. L. & POL’Y 349, 358 (2019) (describing the potential impact of a conservative Supreme Court on the future of environmental regulation).

³ See Scott W. Stern, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, 30 FORDHAM ENVTL. L. Rev. 21, 26-27 (2019) (connecting conservative legal doctrine to the restrictive nature of environmental standing).

⁴ Petition for Writ of Certiorari, *BP p.l.c. v. Mayor of Balt.*, 2020 U.S. LEXIS 3704 (No. 19-1189) (petition granted Oct. 2, 2020).

⁵ Petition for Writ of Certiorari, *Mont. & Wyo. V. Wash.*, 2020 U.S. LEXIS 4145 (No. 22-0152) (whether Washington’s denial of port access to ship Montana and Wyoming coal to foreign markets violates the commerce clause); *PennEast Pipeline Co. v. New Jersey*, 2020 U.S. LEXIS 3486 (No. 19-1039) (whether companies holding FERC-issued certificates of public necessity to build and operate interstate natural gas pipelines may exercise eminent domain over land in which a state claims an interest).

⁶ See, e.g., *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (opinion of Scalia, J.) (rejecting the Corps’ interpretation of the Clean Water Act phrase “waters of the United States” to the full extent of Congress’s commerce power, and espousing a more limited interpretation of the phrase); *United States v. Lopez*, 115 S. Ct. 1624, 1643 (1995) (Thomas, J., concurring in judgment) (suggesting that Congress’s authority to regulate interstate commerce is limited to the regulation of trade and transportation for the purpose of trade).

Categories

Environmental

Power

North America

© 2025 Akin Gump Strauss Hauer & Feld LLP. All rights reserved. Attorney advertising. This document is distributed for informational use only; it does not constitute legal advice and should not be used as such. Prior results do not guarantee a similar outcome. Akin is the practicing name of Akin Gump LLP, a New York limited liability partnership authorized and regulated by the Solicitors Regulation Authority under number 267321. A list of the partners is available for inspection at Eighth Floor, Ten Bishops Square, London E1 6EG. For more information about Akin Gump LLP, Akin Gump Strauss Hauer & Feld LLP and other associated entities under which the Akin Gump network operates worldwide, please see our Legal Notices page.