LEGAL ANALYSIS

A Review of Judge Brett Kavanaugh’s Environmental Jurisprudence

Abrams Environmental Law Clinic
University of Chicago Law School

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The Abrams Environmental Law Clinic would appreciate any comments or questions that you have about this effort or other work of the clinic. To learn more about the clinic, please visit www.law.uchicago.edu/clinics/environmental.

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Executive Summary

Judge Brett Kavanaugh's record in environmental and related cases should raise serious questions as the U.S. Senate considers his nomination to the U.S. Supreme Court. As a judge on the U.S. Circuit Court of Appeals for the District of Columbia, he has ruled consistently against environmental protections and federal regulation in general, even when reaching such positions requires him to apply the kinds of reasoning he has criticized in other instances. Far from demonstrating a consistent textualist or originalist approach, Judge Kavanaugh's record is anti-regulatory, even when those regulations protect vital interests such as public health, the environment, and workers' rights. Illustrative of his anti-regulatory predisposition is the fact that, in more than a decade on the bench, though he dissented frequently, he never once dissented in favor of a more environmentally protective outcome.

Our review of Judge Kavanaugh's jurisprudence raises several serious questions around issues relevant to environmental law and policy, which is the focus of the Abrams Environmental Law Clinic at the University of Chicago Law School. Our report groups these issues into three categories:

1. Access to the Courts—In his opinions, Judge Kavanaugh has limited the access of non-profit organizations and injured individuals, while supporting expanding access of corporations seeking to challenge regulations.

2. Deference to Agencies—With regard to agency expertise in administrative law, Judge Kavanaugh has inconsistently applied judicial rules related to deferring to agencies, disregarding such rules when agency positions are protective of the environment and invoking deference when reviewing anti-environmental regulatory decisions. When interpreting statutes, Judge Kavanaugh’s record appears not to be that of a consistent “textualist,” but rather that of an instrumentalist, meaning that he appears to deploy reasoning to reach particular, substantive outcomes.

3. Benefits of Regulation—While Judge Kavanaugh has espoused passionate concern for the costs of regulation, he deploys a selective approach to recognizing benefits and co-benefits in order to support restricting or removing regulations even when they are demonstrably beneficial and efficient.
Judge Kavanaugh’s record strongly suggests that a Justice Kavanaugh would rule consistently against federal environmental and public health protections, with little consideration, if any, for their legal and scientific bases. As a result, industry would be able to shift costs to individual members of society and society as a whole that industry efficiently and rightfully should bear.

In addition to the potential negative impacts on the environment and public health, such an outcome is likely to increase regulatory uncertainty and to produce a balkanized regulatory landscape with some states and localities supplying their own more protective standards in the absence of federal regulation. While some entities in particularly dirty industries may benefit in the short term from Judge Kavanaugh’s anti-regulatory approach, regulatory uncertainty and litigation costs may impose more cost on industry in the end.

The most consistent themes in Judge Kavanaugh’s decisions and dissents are reliable support for polluters, regular opposition to victims of environmental and industrial harm, and an embrace of ideas that could unsettle decades of established law. For those reasons, we have strong and deep reservations about the U.S. Senate confirming Judge Kavanaugh to the position of Associate Justice of the U.S. Supreme Court.
Introduction

Judge Kavanaugh’s nomination to the U.S. Supreme Court has precipitated a wide-ranging assessment of his record. This report provides an overview of his record on environmental issues and other issues that closely relate to the practice of environmental law. This report is not intended to be exhaustive; it draws conclusions based on emblematic cases within selected topics of importance.

Students and faculty in the Abrams Environmental Law Clinic at the University of Chicago Law School developed this report. The Clinic challenges those who pollute illegally, fights for stricter permits, advocates for changes to regulations and laws, holds environmental agencies accountable, and develops innovative approaches for improving the environment. More information about the clinic is available at //www.law.uchicago.edu/clinics/environmental. As a law school clinic, we approached this assessment from both academic and practical points of view, focusing on what Judge Kavanaugh’s potential confirmation may mean for access to courts, statutory interpretation, agency independence, and the fate of environmentally protective regulation more broadly. These topics are immensely important areas of intellectual debate in the legal academy and have tremendous real-world impacts on the ability of governmental agencies, environmental organizations, and individuals to protect vulnerable people from pollution, to fight climate change, and to ensure access to clean air, water, and soil.

Since Judge Kavanaugh’s nomination, we have combed through his decisions as a judge on the U.S. Court of Appeals for the D.C. Circuit and many of his other writings and public remarks. Our project was to assess carefully his jurisprudence on environmental and related issues and his likely impact on decisions made by the U.S. Supreme Court as an Associate Justice. This report consists of our overall assessment of Judge Kavanaugh’s environmental and related jurisprudence and is organized under three topics examining aspects of his record: Access to Courts, Deference to Agencies, and Benefits of Regulation.

In many clear-cut situations, ideologically and methodologically diverse judges are likely to rule similarly. One can see a judge’s more idiosyncratic leanings by examining those cases in which she or he overturns precedent, overrules the decision of a lower court or an
Based on a thorough review of Judge Kavanaugh’s record, this report finds that one could expect a Justice Kavanaugh to side regularly against governmental agencies, environmental organizations, and individuals that work to protect the environment and public health. These are the organizations and individuals that we in the Abrams Clinic work with or represent regularly and that we as a society depend on to protect these common, vital interests. The most consistent themes in Judge Kavanaugh’s decisions and dissents are reliable support for polluters, regular opposition to victims of environmental and industrial harm, and an embrace of ideas that could unsettle decades of established law. For those reasons, we have strong and deep reservations about the U.S. Senate confirming Judge Kavanaugh to the position of Associate Justice of the U.S. Supreme Court.
Analysis

Access to Courts

A critical component of access to justice is meaningful access to the courts. In order to bring suit in federal courts, environmental plaintiffs must show that they have standing—that is, there must be a “case” or “controversy” within the meaning of Article III of the U.S. Constitution as interpreted by the U.S. Supreme Court. Under doctrine that has developed during the past four decades, to establish standing, a party must show it has suffered an injury-in-fact that is fairly traceable to the defendant’s conduct and that the relief it seeks from the court may redress that injury. An injury-in-fact is “an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” If a plaintiff cannot meet those requirements, then the court cannot reach the merits of the case because standing is a necessary prerequisite for the court’s jurisdiction.

Judge Kavanaugh has been skeptical of standing for plaintiffs and petitioners seeking to protect their interests from environmental harms. For example, in Citizens for a Better Environment v. EPA, Judge Kavanaugh, writing for the court, decided that the pro-environmental petitioners did not have standing. He rejected their argument that the failure of the U.S. Environmental Protection Agency (EPA) to set a secondary standard for carbon monoxide regulation harmed the petitioners because failing to set that standard would “worsen global warming and in turn displace birds.” In that case, the court had evidence that carbon monoxide interacts with greenhouse gases to intensify climate-change effects.

2. 748 F.3d 333 (D.C. Cir. 2014).
3. Id. at 338.
climate change displaces birds, and that the organization’s members observed these kinds of birds. The petitioners argued that setting a secondary standard would help control carbon monoxide emissions and that, as the U.S. Supreme Court held in *Massachusetts v. EPA*, standing exists to challenge agency inaction related to climate change even if the agency action would only reduce risk but not eliminate it. Nevertheless, Judge Kavanaugh concluded for the court that petitioners had adduced neither enough evidence of a causal link between the agency inaction and the harm alleged, nor enough evidence that the agency setting a standard would redress the harm.

Judge Kavanaugh has also attempted to stop a court from hearing claims of plaintiffs challenging an environmentally-harmful agency decision by characterizing the group’s claims as insufficiently ripe. “Ripeness” is a legal doctrine related to standing in that it bars plaintiffs from seeking judicial review of an agency action until that action is “final” as determined by judicial rules applying the Administrative Procedures Act. In *American Bird Conservancy v. F.C.C.*, Judge Kavanaugh would have applied the ripeness doctrine to block a suit by a pair of conservation groups that challenged an administrative order the groups believed would lead to negative environmental consequences. Although he admitted that the order challenged was technically final, Judge Kavanaugh argued that a pending agency decision in a related but distinct matter meant the court should dismiss the complaint as unripe. Judge Kavanaugh’s seemingly novel application of the ripeness doctrine did not carry the day, however, and he presented this reasoning in a dissent. As the majority noted in allowing the plaintiffs to proceed, “agencies cannot avoid judicial review of their final actions merely because they have opened another docket that may address some related matters.”

Beyond the environmental law arena, Judge Kavanaugh’s dissents in two cases that involved different issues in the same litigation, *Doe v. Exxon Mobil Corp.*, and *Doe VIII v. Exxon Mobil Corp.*, found him applying the political question doctrine broadly to preclude judicial review in the first case and then arguing, in the second case, that corporations were

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5. See Pet’rs Reply Brief, at *68 (citing Audubon, Birds and Climate Change: Ecological Disruption in Motion (Feb. 2009)).
7. 5 U.S.C. § 704 (allowing judicial review of “final agency action”).
8. 516 F. 3d 1027 (D.C. Cir. 2008).
9. Id. at 1031.
10. 473 F.3d 345 (D.C. Cir. 2007).
11. 654 F.3d 11 (D.C. Cir. 2011) (judgement later vacated because of changes in controlling law).
immune from liability under the Alien Tort Claims Act, a law which allows foreign citizens to seek relief in U.S. courts for human rights violations. In those cases, the plaintiffs alleged in detail that security personnel at an Exxon facility in Indonesia tortured, murdered, sexually assaulted, and falsely imprisoned them and other locals. While these cases primarily concerned international human rights considerations, the issues arose in the context of natural resource extraction and the policies, practices and impacts of one of the largest energy companies in the world. The legal concepts at issue, particularly the political question doctrine, also arise in environmental cases, especially with regard to climate-change related claims.

In the *Doe v. ExxonMobil Corp.*, Judge Kavanaugh invoked the political question doctrine, a legal rule that bars plaintiffs from bringing cases that ask courts to decide questions that the Constitution allocates exclusively to the legislative or executive branches.\(^{12}\) In dissent, Judge Kavanaugh applied the political question doctrine broadly and would have precluded any judicial review of Exxon’s actions in Indonesia. Judge Kavanaugh cited the U.S. State Department’s concern that the lawsuit might damage U.S.-Indonesian relations as the basis for his position that the plaintiffs’ claims should have been dismissed entirely. The majority instead crafted a careful compromise that limited discovery in light of the U.S. State Department’s perspective but would not let diplomatic considerations remove all potential liability for Exxon’s alleged abuses.

In the latter case, *Doe VIII v. ExxonMobil Corp.*, the first paragraph of Judge Kavanaugh’s dissent implicitly attacked the plaintiffs’ credibility by highlighting the fact that they chose to sue Exxon rather than the local Indonesian security provider with whom Exxon had contracted.\(^{13}\) Indeed, nothing in the Alien Tort Claims Act creates a legal distinction between the two, suggesting that Judge Kavanaugh would deny plaintiffs access to the courts based on a belief that plaintiffs should have brought the claim in Indonesia, notwithstanding that the statute provided a basis for the plaintiffs to bring legitimate claims in the United States.\(^{14}\)

\(^{12}\) 473 F.3d at 369 ("I would … order dismissal of the complaint as a non-justiciable political question.").

\(^{13}\) 654 F.3d at 71.

\(^{14}\) The U.S. Supreme Court ultimately adopted reasoning in *Kiobel v. Royal Dutch Petroleum Co.*, that was similar to Part I of Judge Kavanaugh’s dissent, which argued that the Alien Tort Claims Act does not apply outside the U.S. See 569 U.S. 108, 124 (2013) ("We therefore conclude that the presumption against extraterritoriality applies to claims under the [Alien Tort Claims Act], and that nothing in the statute rebuts that presumption."). The U.S. Supreme Court did not answer the original question on which it granted certiorari—whether the Alien Tort Claims Act allows corporate liability—a question Judge Kavanaugh had earlier answered in the negative by reasoning that because the Alien Tort Claims Act turns on customary international law and “customary international law does not extend liability
While some judges may have consistent views about these doctrines that lead them to limit access to the courts across the board, Judge Kavanaugh has been willing to stretch standing doctrine beyond its usual bounds to allow a plaintiff organization to proceed with its case—notably, when that plaintiff organization was an industry group seeking to undo an environmentally-beneficial agency decision. In *Grocery Manufacturers Association v. EPA*, Judge Kavanaugh dissented from a majority opinion that concluded that a group of petroleum industry interests lacked standing to challenge an EPA decision allowing fuel blends with higher concentrations of ethanol to enter the market. The case presented a mirror-image of the *Citizens for a Better Environment* case described above. In *Grocery Manufacturers Association*, the majority found that the industry group could not demonstrate a causal link between the action—EPA’s decision to allow fuel mixtures with higher concentrations of ethanol—and the harm to the group’s members. In dissent, Judge Kavanaugh argued that EPA’s decision to allow fuels with higher ethanol concentrations on the market effectively forced petroleum interests to adopt these costlier ethanol fuel mixes. But, as the majority observed, EPA’s decision to allow such fuel blends did not actually require any specific action by the petitioners and would not itself impose direct compliance costs, which is why the petitioners did not suffer an injury-in-fact traceable to EPA’s conduct. Judge Kavanaugh dissented again when the D.C. Circuit denied rehearing of *Grocery Manufacturers Association v. EPA*, arguing that the order allowed “erroneous standing law” to remain in force. Judge Kavanaugh dissented alone, suggesting no other judges on the D.C. Circuit shared his broad willingness to find standing for industrial entities that neither must comply with a rule nor will directly bear any costs from it. The U.S. Supreme Court denied three separate requests for review. In other words, it appears that Judge Kavanaugh alone would allow standing for business plaintiffs who were not directly harmed by the agency decision at issue.

Because cases raising standing and other doctrines related to access to the courts often turn on specific facts as well as broad jurisprudential rules, one must be careful in drawing general conclusions about a particular judge’s view on standing from a few cases. That said, the contrast between Judge Kavanaugh’s dissent in *Grocery Manufacturers Association* and his opinion in *Citizens for a Better Environment* is stark. That Judge Kavanaugh alone found standing for petroleum interests when an EPA regulation did not impose affirmative

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15. 693 F.3d 169 (D.C. Cir. 2012).
requirements on the industry, while failing to find standing for pro-environmental interests which asserted injuries based on the effects of government regulation, is concerning to those who seek to protect the environment and public health.

**Deference to Agencies**

The rulemaking and enforcement functions of administrative agencies are at the core of modern environmental policy in the United States. Judicial review of such agency actions is, as such, perhaps the most important area in American environmental law. In many contexts, courts recognize the institutional competency of agencies, which draw on technical expertise, implementation experience, and public input to develop regulations and enforcement policies within the confines of statutory mandates. However, courts will occasionally overturn agency rules and decisions to ensure agencies act within their delegated authority and with a sound basis in fact. The U.S. Supreme Court has developed rules for this judicial review that instruct courts to reverse agency rules or decisions that lack a reasonable basis, are inconsistent with the unambiguous language of a statute, or were promulgated through a flawed process. Judicial oversight through the even-handed application of these doctrines is a crucially important accountability mechanism. These rules require a reviewing court to scrutinize an agency’s process and to ensure the agency decision comports with the factual record, without regard for the specific subject or object of the agency action.

The D.C. Circuit Court of Appeals hears more administrative review cases than any other court, and in his decade on that court, Judge Kavanaugh has shown selective deference to agency expertise that appears explainable primarily by looking at the kind of entities that benefit from the agency decision at hand. Inconsistently applying the judicial review doctrines, Judge Kavanaugh has deferred to pro-polluter agency decisions consistently while overturning pro-environmental outcomes. Indeed, POLITICO recently reported on a Trump administration memorandum to business interests touting that Judge Kavanaugh “has overruled federal regulators 75 times on cases involving clean air, consumer protection, net neutrality and other issues.”

Approach to Agency Expertise in Administrative Law

Judge Kavanaugh’s inconsistent record with regard to deference to agency expertise in administrative law raises significant questions because such agency expertise is often the foundation of federal rules that protect the environment and public health.

Judge Kavanaugh has repeatedly shown skepticism of agencies’ assessment of facts. For example, in *Otay Mesa Property v. Department of the Interior*, Judge Kavanaugh reversed an agency decision because he disagreed with its assessment of the facts in the record. At issue in that case was whether the U.S. Fish and Wildlife Service (USFWS) had properly designated certain property as “critical habitat” for endangered San Diego fairy shrimp. Judge Kavanaugh, writing for the court, held that USFWS had improperly designated the land as critical habitat because, in his view, the record did not show that the shrimp actually inhabited the property. Shrimp had been observed on the property, but subsequent attempts to find them were unsuccessful. Given the rarity of the species, USFWS found the single confirmed sighting to be sufficient evidence for its final “critical habitat designation,” but Judge Kavanaugh found the record insufficient to sustain such a designation. While scrutiny of an agency record is an important judicial function to ensure that an agency has a factual basis for making its decision, in this case, Judge Kavanaugh substituted his view in place of experts’ determination as to what facts would provide a reasonable basis for deciding about the habitat of an endangered species.

Though not an environmental case, *Island Architectural Woodwork v. NLRB* is another prime example of Judge Kavanaugh rejecting expert agency judgment in favor of his assessment of the facts. In that case, Island Architectural Work, a unionized company, spun off one of its units as Verde, a separate, non-unionized company. The daughter of Island’s owner owned Verde, and employees at Verde continued to do the same work as those at Island, worked in the same building, and built a product solely for Island’s use. In light of these facts, the National Labor Relations Board (NLRB), a federal agency, found Verde to be functionally under Island’s control, meaning that Verde employees were effectively Island employees. The court agreed that the record supported NLRB’s factual determinations and noted that, as a court reviewing agency findings of fact, “[w]here the record supports the National Labor Relations Board’s view of the evidence … we must defer to the Board.”

18. 646 F.3d 914 (D.C. Cir. 2011).
20. Id. at 370 (emphasis added).
In dissent, however, Judge Kavanaugh argued that the NLRB was wrong to treat the two companies as effectively a single employer. Judge Kavanaugh viewed the facts differently; his position was that the formation of a distinct corporate entity should be the only relevant fact. This position is difficult to defend—the law is clear that distinct corporate entities can, for the purpose of the National Labor Relations Act, operate as a single employer—and the NLRB’s factual findings were plainly supported by a thorough record. In any case, to reach a result that would deny rights to workers, Judge Kavanaugh would have ignored the expertise of the NLRB and the agency’s observation of the plain facts that these entities that were separate on paper actually operated as a single employer in practice. Judge Kavanaugh’s disregard of the agency’s expertise is especially notable because, as the majority noted, whether Verde and Island were separate entities was a question of fact, and, when reviewing NLRB’s determination of facts, courts are to apply the “highly deferential” substantial evidence standard. In other words, to support a legally justifiable ruling against the agency, it was not enough for Judge Kavanaugh to have disagreed merely with its interpretation of facts; he would have had to find that there was no substantial evidence whatsoever that supported the agency, a highly deferential and well-settled standard.

However, Judge Kavanaugh has relied on deference to an agency when the evidence showed that the agency decision might seriously harm the environment. In *Hoopa Valley Indian Tribe v. FERC*, Judge Kavanaugh allowed the Federal Energy Regulatory Commission (FERC) to issue a license for a hydropower project over objections that the project threatened fisheries that were key to a Native American tribe’s way of life. Judge Kavanaugh acknowledged that the case presented a “factual dispute” over whether and to what extent the environment was threatened and decided that “there was evidence on both sides; we thus have no basis to overturn the Commission’s resolution of this debate.” In so deciding, he explicitly acknowledged his reliance on the agency’s expertise, but it is notable that he did that when the result was to defer to an agency decision that favored a private energy company and impacted the environment and a Native American tribe negatively.

**Approach to Statutory Interpretation in Administrative Law**

While overturning a discrete agency decision is one thing, overruling an agency’s interpretation of a statute it implements can have far broader import. Regulators draw from extensive institutional experience and expertise when interpreting statutory mandates and

21. 629 F.3d 209 (D.C. Cir. 2010).
22. *Id.* at 213.
are sometimes even involved in Congress’s legislative process. Judge Kavanaugh, however, often refuses to defer to agency interpretations that protect the environment, public health and workers’ rights, and, in so doing, he has barred regulatory approaches that promote protection and has created uncertainty for regulated industries.

A core role of the American judiciary is its responsibility to interpret laws passed by Congress, and every federal jurist would agree that the courts’ obligation to understand and to apply the meaning of legislative text begins with the text itself. When reading statutes implemented by an administrative agency, however, courts generally defer to such an agency’s interpretation of ambiguous statutory language under the U.S. Supreme Court case *Chevron USA v. Natural Resources Defense Council.*

The *Chevron* doctrine instructs that when the law’s text is ambiguous, a court must defer to an expert agency’s reading so long as the agency’s reading is reasonable and regardless of how the particular judge might read the language in the absence of an agency interpretation. So, as the U.S. Supreme Court has described, the *Chevron* analysis proceeds in two steps. Step one asks if “Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If the statute is silent or ambiguous with respect to the specific issue,” the court proceeds to step two. In step two, the court must determine “whether the agency’s answer is based on a permissible construction of the statute.” In other words, step two requires the court to defer to the formal agency interpretation so long as the agency’s interpretation is within the bounds of reason.

When interpreting regulatory statutes, one of Judge Kavanaugh’s favorite rhetorical tropes is to proclaim that *his* interpretation of a statute is a straightforward reading of the text. By painting opposing interpretations as inconceivable, Judge Kavanaugh claims he adheres to the precedent of *Chevron* by ruling under its first step, while in fact he undercuts its central tenet of deference to agency interpretations when there is ambiguity in the statute with respect to the specific issue. If the statute can be read only in a single way—as Judge Kavanaugh claims in these cases—then there is no ambiguity and no compulsion to move to step two of the *Chevron* analysis, which requires courts to defer to a reasonable agency interpretation. As a result, Judge Kavanaugh often undercuts agencies because he thinks a “straightforward reading” of a statute exists, and his “straightforward reading” diverges from

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24. *Id.* at 842-43.
25. *Id.* at 843.
the agency’s interpretation. His “straightforward reading” have not been protective of the environment, public health, or workers’ rights.

Take, for example, *Howmet Corporation v. EPA*, a case in which Judge Kavanaugh read the law to exempt toxic industrial byproducts from regulation as hazardous waste if there was any chance the byproducts could be used for another purpose later. In *Howmet Corporation*, the issue was the interpretation of the term “spent material.” Defining that term turned on defining the phrase “the purpose for which it was produced.” Howmet used a chemical, KOH, as a cleaning agent. After KOH was used and no longer viable as a cleaning agent, Howmet sold the KOH for use in fertilizers. EPA argued that this meant the KOH was “spent material” because it was no longer useful in its primary purpose—“the purpose for which it was produced.” Howmet argued that “spent” means that material is no longer useful for any purpose, so its KOH was not “spent” if it could be later used in fertilizer. The majority held that there is no obviously correct interpretation of the terms at issue. Because EPA’s reading was not unreasonable, *Chevron* commanded deference to the agency.

Although the other judges hearing the case both agreed that EPA’s interpretation of the statute was reasonable, Judge Kavanaugh claimed that the agency’s reading “mangled the language” of the statute and that his interpretation was unambiguously correct “as a matter of plain English.” Despite Judge Kavanaugh’s characterization of the agency’s interpretation, it was not so outlandish as to be unreasonable—after all, two of his fellow D.C. Circuit judges endorsed that reading, and, regardless of possible recycling, hazardous chemicals that have been used can quite rationally be characterized as “spent.” This is not to say that disagreement with other judges automatically renders Judge Kavanaugh’s interpretation substantively incorrect. Rather, *Chevron* deference turns on statutory ambiguity and reasonable interpretation by the agency. In this case, Judge Kavanaugh argued that the statute was unambiguous and that the agency had mangled it, when in fact the statute was far from clear because everyday usage of the relevant terms did not give much analytical traction for the technically complex matters at hand, as the other judges properly recognized.

In *Mexichem Fluor v. EPA*, Judge Kavanaugh wrote for a divided court that vacated a 2015 EPA rule phasing out the use of hydrofluorocarbons (HFCs)—which cause climate change—as a replacement for ozone-depleting substances in common items like refrigerators

and air conditioners. EPA had interpreted the Clean Air Act’s mandate to determine which substances may “replace” ozone-depleting substances as authorizing it to require manufacturers that had previously switched to HFCs to switch again and find a non-greenhouse gas alternative. Judge Kavanaugh concluded that “replace” unambiguously forbids EPA from requiring manufacturers to find non-HFC alternatives for ozone-depleting substances. His reasoning hinged on dictionary definitions of “replace” and legislative history purporting to show that Congress did not intend EPA to have such authority. As the dissent pointed out, however, Judge Kavanaugh ignored other dictionary definitions of “replace,” relied upon legislative history that did not actually address the issue, and did not consider aspects of the statutory structure that indicated Congress’s intent to grant EPA broad authority to regulate replacement of ozone-depleting substances. By dismissing such uncertainties, Judge Kavanaugh side-stepped the command of Chevron that he must defer to the agency in cases where the statute is not clear.

Similarly, Judge Kavanaugh dissented from a denial of rehearing en banc after a D.C. Circuit panel concluded that the Clean Air Act’s Prevention of Significant Deterioration (PSD) program—in which Congress used the term “any air pollutant”—included authority for EPA to regulate carbon dioxide. Taken with the U.S. Supreme Court’s holding in Massachusetts v. EPA, which held that carbon dioxide is an “air pollutant” under a different Clean Air Act provision, the panel concluded that interpreting the statute was relatively straightforward. Judge Kavanaugh, however, disagreed with other judges of the D.C. Circuit, stating that the statutory structure of the Clean Air Act meant that “air pollutant” has a different meaning in different provisions. In doing so, he ignored the counterargument that this “air pollutant” clearly did include carbon dioxide, as the Supreme Court held in Massachusetts, or was at least ambiguous so as to compel deference to EPA’s interpretation. Although the U.S. Supreme Court ultimately adopted Judge Kavanaugh’s reasoning on appeal, the decision was split along partisan lines, with the five conservative-leaning justices (Scalia, Kennedy, Alito, Thomas, Roberts) agreeing. The four dissenting justices noted that “read[ing] greenhouse gases out of the PSD program drains the [Clean Air] Act of its flexibility and chips away at... Massachusetts.” This suggests that a Justice Kavanaugh would likely strengthen the resolve of those Justices on U.S. Supreme Court who are against deferring to EPA’s attempts to regulate greenhouse gases. Judge Kavanaugh’s reasoning in this case is another example of

his announcing with certainty his statutory interpretation—even in the face of patent or plausible uncertainty—with the effect of avoiding deferring to agencies.

There are some in the judiciary and legal academia who argue that the U.S. Supreme Court should overturn *Chevron* because judges should not delegate to executive agencies their obligation to give a statutory text its best possible reading. Judge Kavanaugh’s record, however, reveals that he is not the sort of jurist who believes that a court must read a statutory text narrowly in all cases. In fact, Judge Kavanaugh has repeatedly cited *Chevron* as a reason to give agencies deference when they advanced deregulatory or industry-friendly interpretations. For example, in *NRDC v. EPA*, Judge Kavanaugh explicitly appealed to *Chevron* to explain why it would be inappropriate for the court to side with an environmental group and to reject a pro-industry interpretation of a section of the Clean Air Act.

Further, Judge Kavanaugh has not proven to be a consistent textualist. He has shown a willingness to look beyond the four corners of a statute to find mandates that comport with his views, if not with the letter of the law. In *Mingo Logan Coal Company v. EPA*, Judge Kavanaugh again would have rejected an agency interpretation, creating instead an atextual requirement that permitting agencies set discharge limits only after balancing the economic costs of compliance with the benefits of water protection in the context of an individual permitting decision. Neither any court nor EPA has ever read the Clean Water Act that way during more than four decades of implementation. Not only would Judge Kavanaugh’s new requirement make regulation costlier and more administratively complex, it would also completely subvert the structure of the Clean Water Act. The act expressly sets forth a default rule that it is illegal to discharge any pollutants without a permit, but that EPA or state agencies may allow pollutants to be discharged into waterways as long as such discharges are done in compliance with permit limits established to prevent damage to human and environmental health. Judge Kavanaugh, with no express textual support, would have flipped the Clean Water Act on its head and imposed a novel requirement on regulators that they could limit dumping only after they proved that the economic costs to the public from the pollution were greater than the cost of compliance for the individual polluter. As explored in the following section, the *Mingo Logan* case is an apt illustration of Judge Kavanaugh imposing his personal policy priority to reduce compliance costs by supporting agency efforts that systematically undercut, undermine, or under-represent the benefits of environmental and public health regulation.

31. 829 F.3d 710 (D.C. Cir. 2015).

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31. 829 F.3d 710 (D.C. Cir. 2015).
Benefits of Regulation

The following examples show how Judge Kavanaugh’s deregulatory zeal leads him to take positions that give short shrift to the benefits of regulation, while unsettling law, causing regulatory uncertainty, and harming laborers and consumers as well.

In his dissent in SeaWorld of Florida v. Perez, Judge Kavanaugh philosophized about when it is appropriate to require safety measures for willing participants in dangerous activities, e.g., laborers in dangerous jobs. The case involved the death of a worker whom an orca whale dragged into the water and drowned during a public performance. The Department of Labor found—and the majority in the case confirmed—that the employer knew that the whales posed risks to laborers and that SeaWorld had feasible ways to abate those risks; thus SeaWorld was in violation of labor laws relating to worker safety. Expressing concern about “paternalistic” regulation and repeatedly drawing analogies to professional sports, Judge Kavanaugh ignored any consideration of the problems posed by unequal bargaining power between employers and employees and the attendant likelihood of exploitation. Instead, he invoked the rhetoric of the Lochner-era as he opined that “industries regulate themselves.” Essentially, Judge Kavanaugh would have exempted the entire entertainment industry from major parts of existing federal labor law, while recognizing state legislators and regulators could develop their own solutions. Such an invitation to replace existing federal labor law with inconsistent state and local laws would likely lead to a regulatory patchwork and a ‘race-to-the-bottom’ in which businesses move to locales with less-protective laws.

32. 748 F.3d 1202 (2014).
33. The Lochner era was a time of extreme judicial hostility to economic regulation due to prevailing freedom-of-contract norms, e.g. that we should not have laws against child labor because such laws diminish children’s freedom to enter contracts with corporations. Pro-Lochner legal theorists—of whom there are very, very few at present—often assert that governmental regulation is unnecessary because the private sector will regulate itself now to avoid future liability. In the environmental context, there is often no contract or even the possibility of contract between the polluter and the persons who are harmed; tort laws and the legal system do not address well diffuse latent harms for which specific causality is difficult and expensive to prove. Indeed, most scholars believe that it often is more economically efficient to regulate pollution prospectively because mitigating the harms is often cheaper to society (after accounting for harms from pollution like healthcare costs, losses to economic productivity, etc.) than hoping the possibility of future liability for a tort suit will cause polluters to take sufficient preventive measures.
34. Id. at 1217.
Judge Kavanaugh also showed his willingness to deregulate at the expense of stability or continuity in *Cablevisions Systems Corp. v. F.C.C.* 35 That case involved concerns about the concentration of power by cable providers and a rule that prohibited certain anti-competitive behavior, specifically certain exclusive dealings between cable operators and their programming affiliates. The majority in *Cablevisions* upheld the regulation of the Federal Communications Commission (FCC) as having a reasonable basis. In dissent, Judge Kavanaugh—in another example of substituting his evaluation of the facts for that of an expert agency—claimed that changed circumstances after the rule’s original promulgation rendered it no longer necessary. Essentially Judge Kavanaugh would have invalidated an agency’s rule for being effective: since the rule or anticipation of it prevented the market manipulation at issue, he would have found that there was no current need for the rule. In an environmental context, this would be like saying that because no company is currently using a carcinogenic pesticide that EPA banned, we should revoke the rule banning it, even though removing the restriction would allow companies to return the harmful pesticide to use.

Though a changed interpretation of a law or regulation by a court may benefit one or more businesses, such a practice can have wider negative economic consequences. Those companies that relied on judicially-negated regulations—such by developing or investing in compliant equipment or by producing compliant products—would be disadvantaged in comparison to those that chose to violate those rules or who enter the market after the regulation has been removed. The general increase in regulatory uncertainty will make planning and capital investment more difficult. Stable regulations arrived at through consensus-building processes and the balancing of various interests based on facts can protect the public good without harming businesses, whereas scattershot judicial deregulation is likely to have uneven and unintended consequences.

Judge Kavanaugh’s anti-regulatory jurisprudence may also, perversely, lead to less efficient regulation. Generally speaking, federal executive orders require federal agencies to estimate costs and benefits when the agencies propose to create or to modify regulations. These analyses are often central to judicial review of agency decision-making because they enable courts to assess whether the agency has acted in accordance with its statutory authority and rendered a reasonable decision.

35. 597 F.3d 1306 (D.C. Cir. 2010).
One hotly-contested aspect of cost-benefit analysis is whether agencies should include what are called “ancillary” or “co-benefits” to regulatory decisions.36 An ancillary benefit is a “favorable impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking.”37 From an economic efficiency standpoint, whether a regulatory decision is cost-benefit justified is indifferent to the statutory basis of the rule. In other words, benefits are benefits and should be counted as such, even if achieving the specific benefit is not the specific impetus for the rule. Indeed, in the environmental arena, EPA has for decades included the co-benefits of reducing other forms of pollution in its cost-benefit analyses of particular rules.38

Judge Kavanaugh, at oral argument, described Chief Justice Roberts’ concern that co-benefits may be “an end-run and bootstrapping and disproportionate.”39 He did so on remand in Michigan v. EPA,40 a U.S. Supreme Court case regarding cost-benefit analysis for an EPA rule regulating mercury emissions from power plants, a circumstance in which there are significant co-benefits because power plants would reduce other air pollution when they reduced mercury emissions. While the D.C. Circuit ultimately remanded the rule to EPA without vacating it,41 Judge Kavanaugh predicted that co-benefits would be a key subject of contention before the courts in the near future. The concern that Judge Kavanaugh and others have articulated is that including ancillary benefits could justify regulations by


41. White Stallion Energy Center, LLP, v. Environmental Protection Agency, 2015 WL 11051103 (D.C. Cir. 2015). Judge Kavanaugh also implicitly criticized co-benefits in his opinion concurring in part and dissenting in part in White Stallion Energy Center, LLC v. Environmental Protection Agency, 748 F.3d 1222, 1263 (D.C. Cir. 2014) (“For its part, EPA says it would estimate the benefits at $37 to $90 billion dollars based on what it says are the indirect benefits of reducing PM2.5, a type of fine particulate matter that is not itself regulated as a hazardous air pollutant.”).
counting benefits that are beyond the scope of what the legislature specifically intended to regulate.

Given Judge Kavanaugh’s general concern with imposing costs on industry, it would be unsurprising to see him attack the legal basis for considering co-benefits if elevated to the country’s highest court. Chief Justice Roberts has indicated discomfort with agencies including co-benefits in their analyses, so a Justice Kavanaugh might join Chief Justice Roberts in questioning the bases for including co-benefits. Indeed, given Judge Kavanaugh’s proclaimed textualism, he may well conclude that consideration of co-benefits violates statutorily-required analyses unless Congress has declared otherwise explicitly.

Further, Judge Kavanaugh’s record shows that he is willing to strike down regulations even when they are likely to be the most efficient way to address a widely-recognized problem. *EME Homer City Generation, LP v. EPA* is a particularly instructive example of a deregulatory predisposition causing regulatory and economic inefficiency. In that case, Judge Kavanaugh invalidated an EPA rule that controlled the spread of air pollution across state lines. The rule would have ameliorated an interstate air quality problem by developing a unified regulatory approach to regional sources of pollution to meet air quality targets efficiently. Instead, Judge Kavanaugh refused to defer to EPA and held that EPA had to rework the rule significantly so that the rule operated solely on a state-by-state basis, making the regulation both less effective and more costly to implement. Although the U.S. Supreme Court reversed Judge Kavanaugh’s *EME Homer* decision in significant part, he, as an Associate Justice, would obviously have voted differently there and likely would have imposed his deregulatory tendencies by voting to overturn precedent calling for deference to agencies’ problem-solving regulations.

43. 696 F.3d 7 (D.C. Cir. 2012).
Conclusion

Judge Kavanaugh’s record shows a pattern of anti-environmental and pro-corporate decisions. During more than a decade on the federal bench, Judge Kavanaugh never once dissented on behalf of the party seeking to protect the environment. Our review of his opinions did not examine closely all of his non-environmental cases, but of the cases we looked at that had possible relevance to environmental law, we also did not encounter a single Judge Kavanaugh dissent on behalf of ordinary people, workers, or agencies seeking to enforce more protective rules. Every single dissent we examined had deregulatory, pro-corporate, and anti-protective effects. This is not the voting record of an ideologically neutral umpire who simply applies the law.

Judge Kavanaugh’s majority decisions, concurrences, other writings, and public remarks also paint the picture of a deregulatory fundamentalist. If widely adopted, his jurisprudence would cause regulatory uncertainty and disjunction and could lead to economic and ecological disruptions. His prior rulings suggest that he would limit access to the courts for injured people and those governments and groups seeking to protect environmental and public health, while opening the courtroom doors for polluting companies to challenge regulations more. His past opinions and dissents show a willingness to constrain a court’s focus to narrow calculations of harms and benefits as viewed from the regulated industry’s perspective rather than with broader perspective of society as a whole.

Because his judicial record demonstrates a consistent pattern of ruling against environmental protection and creating regulatory instability, the U.S. Senate should not quickly elevate Judge Kavanaugh to the U.S. Supreme Court. During his confirmation hearings, he should have to answer serious questions about his consistently one-sided jurisprudence. Why should the public trust him to honor settled law when he has so often rejected established regulations? Why would he expand court access to the oil industry (as in Grocery Manufacturers Association) while trying on multiple occasions to limit access to plaintiffs with environmental, public health and related concerns (as in American Bird Conservancy v. F.C.C.)? Who benefits when courts foreclose efficient regional solutions to regional problems (as in EME Homer)? Who is advantaged when courts prohibit agencies from considering the full set of benefits that result from their actions? If he cannot answer
adequately these and other related questions, the U.S. Senate should withhold its consent to Judge Kavanaugh’s nomination.