Inside a legal doctrine that could silence enviros in court

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The Supreme Court. Francis Chung/E&E News

The biggest obstacle a conservative Supreme Court could pose to the environment may not be rulings against clean air, pure water and a healthy climate.

It may be a refusal to allow environmentalists into the courtroom.

Under the standing doctrine, a court can toss out lawsuits in their early stages if it finds that a legal challenger has not presented a concrete harm that meets the standard of a "case" or "controversy" eligible for judicial review under Article III of the Constitution.

Some conservative jurists may view issues like climate change — which has many contributors and affects every person on the planet — as too diffuse to address in the courts.

"The bigger the harm and the more impacts, the more difficult it is for parties to establish standing. That's a perverse incentive for polluters," said Karen Sokol, a law professor at Loyola University in New Orleans. "If you hurt everyone, you're no longer accountable."

Justice Amy Coney Barrett's approach to standing was top of mind for environmentalists when she was appointed last year to replace the late Justice Ruth Bader Ginsburg. Her addition tipped the bench from a 5-4 to a 6-3 conservative majority.

In her limited record as a judge on the 7th U.S. Circuit Court of Appeals, Barrett had nixed a challenge from a nonprofit park preservation group against the construction of the Obama Presidential Center in Chicago's Jackson Park on standing grounds.

Barrett's potentially narrow views on standing were of particular concern to environmentalists because she was tapped to fill the vacancy left by Ginsburg, who in 2000 steered the nation's highest bench away from a campaign by Justice Antonin Scalia — Ginsburg's ideological opposite and Barrett's professed mentor — to place substantial limits on who can bring a case to federal court.

During her first term on the high court, Barrett did not have an opportunity to show her hand on standing for environmentalists, but Case Western Reserve University law professor Jonathan Adler pointed to recent cases that might indicate where the court is headed on the issue.

Last month, the justices turned away a challenge by Republican-led states in *California v. Texas* against the Affordable Care Act on the basis that the states lacked standing for their claims. The 7-2 decision was led by Justice Stephen Breyer of the court's liberal wing and joined by Barrett.

"You see a broad coalition of justices suggesting they are skeptical of new innovative ways to establish standing," Adler said.

At the same time, he added, the court's six-member conservative block isn't speaking with one voice on the matter of standing.

While Chief Justice John Roberts has espoused a hawkish view on the issue, Justice Clarence Thomas has indicated in recent rulings that he could be an unexpected ally for green groups on standing, Adler said.

"When the court shows that it cares about standing," he said, "folks in environmental law will be paying attention."

'Heads they win, tails we lose'

Standing was a pet issue for Scalia during his three decades on the Supreme Court.

In 1983, while he was still a judge on the U.S. Court of Appeals for the District of Columbia Circuit, Scalia penned a law review article decrying the federal court system's "long love affair with environmental litigation."

He set forth a theory on standing that boiled down to this: An entity that is regulated by the Clean Water Act or some other law will always have a right to bring a claim in federal court, but an organization or individual who alleges a failure by EPA or some other agency to enforce the law should face a higher bar for legal action.

"His theory was heads they win, tails we lose," said John Echeverria, a professor at Vermont Law School. "It's one thing to be defeated on standing, but it's another

thing for your opponent to be consistently invited into court to put forward an opposing view."

By 1986, Scalia was sitting on the Supreme Court, and he was soon leading a series of rulings that significantly restricted standing for environmentalists, formalizing the views that he had shared in his 1983 law review article.

In his 1992 majority opinion in the 6-3 case *Lujan v. Defenders of Wildlife*, Scalia wrote that the environmental group had failed to demonstrate imminent harm from the federal government's determination that Endangered Species Act consultation was not required for U.S. actions abroad. He also found that Defenders of Wildlife had not satisfied the "redressability" requirement, which says a court must be able to offer a solution for an alleged harm.

Perhaps most significantly, Scalia said that Congress should not be allowed to grant parties standing through expansive citizen suit provisions in federal law. Two justices that joined Scalia's majority opinion in *Lujan*, however, filed a separate concurring opinion rejecting that particular notion.

"It is a testament to Justice Scalia's intellectual powers and persuasive skills that he has almost single-handedly transformed the law of citizen standing in environmental cases," Echeverria and his former Georgetown Law Center colleague Jon Zeidler wrote in a 1999 article.

The tides turned for environmentalists in 2000, when Ginsburg helmed the majority opinion in the 7-2 case *Friends of the Earth v. Laidlaw Environmental Services*, which said that an environmental group could sue over Clean Water Act violations in a South Carolina river — even after the pollution had stopped.

"Congress has found that civil penalties in the Clean Water Act cases do more than promote immediate compliance … they also deter future violations," Ginsburg wrote for the court.

Scalia led the minority opinion.

"The undesirable and unconstitutional consequence of today's decision is to place the immense power of suing to enforce the public laws in private hands," he wrote. "I respectfully dissent."

Barrett's influence

During her first term as a justice, Barrett did not get a chance to reveal her views on standing for environmentalists.

But legal experts and green groups have looked to her statements on climate change and her prior jurisprudence as indicators that her approach might be closer to Scalia's than to Ginsburg's.

When asked about climate science during her confirmation hearings, Barrett ducked the question.

"I don't think I am competent to opine on what causes global warming or not," she said at the time. She later added: "I don't think my views on global warming or climate change are relevant to the job I would do as a judge" (*Climatewire*, Oct. 15, 2020).

Legal experts have said they fear Barrett's addition to the court would make it easier for the justices to undermine *Massachusetts v. EPA,* the most significant environmental standing case since *Laidlaw.*

The 2007 case split the justices 5-4 over a ruling that said EPA has authority to regulate greenhouse gases as air pollutants under the Clean Air Act. It also said states have "special solicitude" for standing in court.

In his dissent, Roberts wrote that Massachusetts should not have standing because the alleged harm from climate change is too amorphous.

"Global warming may be a 'crisis,' even 'the most pressing environmental problem of our time.' Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it," Roberts wrote.

"It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change," he continued.

Scalia joined Roberts' dissent, along with Thomas and Justice Samuel Alito.

Scalia died in 2016, but Roberts, Thomas and Alito are still on the Supreme Court. Breyer is the only member of the majority in *Massachusetts v. EPA* who still remains on the bench.

"Environmental advocates have to be very concerned about how the current Supreme Court would resolve a similar case," Echeverria said.

'No recourse'

It's unclear whether the Supreme Court will address standing for environmentalists in the coming term, which begins in early October.

Environmental lawyers had feared that the Supreme Court could revisit its standing finding in *Massachusetts v. EPA* if it had the chance to weigh in on the landmark kids' climate case, *Juliana v. United States*.

After suffering a loss in the 9th U.S. Circuit Court of Appeals, a group of young people seeking federal government action to phase out fossil fuels had appeared poised to bring their case to the high court.

But environmental lawyers had pleaded with the kids' attorneys at the Oregon-based nonprofit Our Children's Trust to avoid taking the case to the current panel of justices.

The *Juliana* challengers have skipped a trip to the Supreme Court — for now — as they explore options to narrow their original complaint and settle the case out of court (*Climatewire*, July 13).

But Sokol of Loyola said it was a shame the young people had received so much pushback, even from sympathetic allies, simply because of the court's current ideological makeup.

"We're in this position where people who are at the front lines fighting for things that really matter have no recourse if they get to the Supreme Court, and that's scary given the crises of democracy we're experiencing elsewhere," she said.

"We don't have that bulwark," she continued, "and that's what the Supreme Court is supposed to be."