Who's Number One?

What are the greatest hits in environmental jurisprudence? Our latest survey of the profession produced some surprises, from the most recent cases to the golden oldies

James Salzman
J. B. Ruhl

James Salzman is Samuel F. Mordecai Professor of Law, Nicholas Institute Professor of Environmental Policy, Duke University. **J. B. Ruhl** is Matthews & Hawkins Professor of Property, Florida State University College of Law. The authors are grateful for the number-crunching and analysis of Nicholas Hurwit, for members of the envlawprofs listserve, and for the leadership and members of the ABA Section on Environment, Energy, and Resources.

We live in an era of rankings — whether Billboard singles, *U.S. News & World Report*'s grad school listings, or *American Lawyer*'s most profitable firms — and it's high time environmental law got in the game! We may think we know the top contenders for the most significant environmental cases. *Chevron v. Natural Resources Defense Council* has to be there somewhere. *Tennessee Valley Authority v. Hill* is surely in the mix. What about that newcomer, *Massachusetts v. EPA*? And are there some dark horses that will surprise us all?

In 2001, Jim Salzman tried his hand at answering these questions, conducting a survey of the environmental law professors listserve (*envlawprofs*). He asked for the listserve members' judgment of the "most excellent" environmental law cases in the field — whether from federal courts or state courts — tabulating the top cases for professors and for practicing attorneys. It proved an illuminating exercise, and a number of academics used the results in subsequent scholarship. The 2001 survey results are shown in Table 1.

Given the significant decisions over the past decade, we thought it would be useful to conduct the survey again, this time using a dedicated website and surveying both the *envlawprofs* listserve and members of the American Bar Association's Section on Environment, Energy, and Resources. We enjoyed a high level of participation, with over 400 responses from across the nation and all professional groups, from academics and practitioners alike. (See sidebar on page 41 for summaries of the cases mentioned in this article.)

In 2001, *TVA*, *Chevron,* and *Sierra Club v. Morton* were in the top four for both groups, the professors and practitioners. The most interesting difference was the academics' choice of *Ethyl Corp. v. EPA* as the third most popular case, while practitioners had it tied for eighth; and a virtual reversal, with practitioners selecting *Citizens to Preserve Overton Park v. Volpe* as the second most popular case and academics placing it at number seven. How have views changed since 2001?

The latest online survey recorded information on participants' field of practice, geographic location, age, length of practice, and type of practice (i.e., government, academia, in-house counsel, etc.). We enjoyed a strong response rate across all categories, with the largest respondent categories drawn from (depending on the category) private practice, pollution law, the mid-Atlantic, practice experience of 16–25 years, and age 46–55 years old.

Based on suggestions from the *envlawprofs* listserve, we listed 30 cases. We divided the ranking into two steps. The first question asked participants to identify the three "most significant" cases (i.e., the most important cases in all of environmental law), but without ranking them. The next question asked them to identify up to seven additional significant cases, also without ranking them. The aggregate results for survey respondents are shown in Figure 1. The "Top Three Votes" shows the results when participants were asked to identify only three cases. The "Combined Votes" shows when the participants' total votes were included (i.e., their top three cases and up to seven more).

The first trend that pops off the page when looking at the 2009 results is the dominance of the three cases at the top: *Mass. v. EPA*, *Chevron*, and *Rapanos v. United States*, in that order. Not only did they rank gold, silver, and bronze in the two aggregate rankings, they held strong across every demographic category. Indeed, these cases ranked among the top four cases for every category irrespective of practice years, region, field, employer, or age categories, and were the top three in the vast majority. It is also remarkable that for both aggregate rankings (Top Three and Combined), these three cases were head and shoulders ahead of the rest of the pack, leaving *TVA v. Hill*, *Overton Park*, *Sierra Club v. Morton*, and others from the old guard of environmental cases in the dust. What happened?

It was no surprise to find *Chevron* retaining its star status. Less an environmental case than an administrative law icon, environmental law nonetheless was at the heart of the controversy, and the Court's ultimate endorsement of the Clean Air Act's "bubble" policy paved the way for a wave of innovation in environmental regulation. It is cited in judicial opinions more than any other environmental case, endlessly re-examined in law review articles, and of vital importance in any heavily regulated field requiring agency interpretation of statutes. It would likely rank high in any such field's most important cases survey, not just environmental law.

The surprise about the big three cases, therefore, is not *Chevron*, but *Mass. v. EPA* and *Rapanos.* Both involved relatively narrow questions of statutory interpretation. Unlike *Chevron*, neither established important general doctrines of administrative law — it is too early to tell if the "special solicitude" *Mass. v. EPA* gives to states in matters of standing will have the kind of sweeping effect *Chevron* has had in transforming environmental practice. And speaking of too early, most remarkably the two cases have been on the books less than four years! So, what is it about young upstarts *Mass. v. EPA* and *Rapanos* that merits their standing shoulder-to-shoulder with *Chevron* and leapfrogging such stalwarts as *TVA v. Hill* and *Overton Park*? As we did not ask respondents to explain their picks, we can only speculate.

The New Number One

No matter how you slice the data, the new heavyweight champion of environmental law cases is *Mass. v. EPA*. With rare exception, it was the top case across all the demographic categories. It was even ranked number one by biodiversity conservation lawyers, for whom one might have thought *TVA v. Hill* would reign supreme, and business transaction lawyers, whose world is dominated more by cases such as *United States v. Bestfoods* and other CERCLA-liability decisions.

The most revealing trend, however, comes from the years-of-experience breakdown. *Mass. v. EPA* was ranked first across the spectrum of practice years, but its dominance rises markedly with experience. This is clear in Figure 2, which breaks down the cases' popularity by respondents' length of practice, dividing them into two broad categories, 1–15 years in the field and 16 years or more

Respondents with 1–6 and 7–15 years of experience ranked *Mass. v. EPA* just a hair ahead of *Chevron*, which are both well ahead of *Rapanos*. Lawyers with more practice experience also placed *Mass. v. EPA* and *Chevron* well ahead of *Rapanos*, but there is now a quantum gap, with *Mass. v. EPA* well ahead of *Chevron*. The lawyers who have been most around the block, in other words, see something in *Mass. v. EPA* that spells big potential.

Our speculation is that these trends can be explained by an overriding sense of transformation. In its narrowest legal application, *Mass. v. EPA* may be about no more than a short provision of the Clean Air Act, but consider its broader practical effects. The majority's no-nonsense acknowledgement of the science of climate change has put global warming on the legal map in no uncertain terms. And the box into which the decision paints EPA — making it all but impossible for the agency not to regulate — sends a message to all agencies that they, too, need to deal with climate change under their existing authorities. Thus practitioners from all fields, in all regions, and of all ages may sense that their *Mass. v. EPA* is just around the corner.

The respondents seem to have pegged it as a turn-

TABLE 1 **2001 Survey Results**

	ACADEMICS	PRACTITIONERS
1	*TVA v. Hill*	*Chevron*
2	*Chevron*	*Overton Park*
3	*Ethyl Corp.*	*Sierra Club v. Morton*
4	*Sierra Club v. Morton*	*TVA v. Hill*
5	*Calvert Cliffs*	*Laidlaw*
6	*Mono Lake*	*Scenic Hudson*
7	*Overton Park*	*American Trucking*
8	*American Trucking*	*Calvert Cliffs, Penn Central, Ethyl Corp.* (tied)
9	*Georgia v. Tennessee*	
10	*Boomer, Laidlaw, Lucas, Penn Central, Scenic Hudson* (tied)	

FIGURE 1 **2009 Aggregate Results**

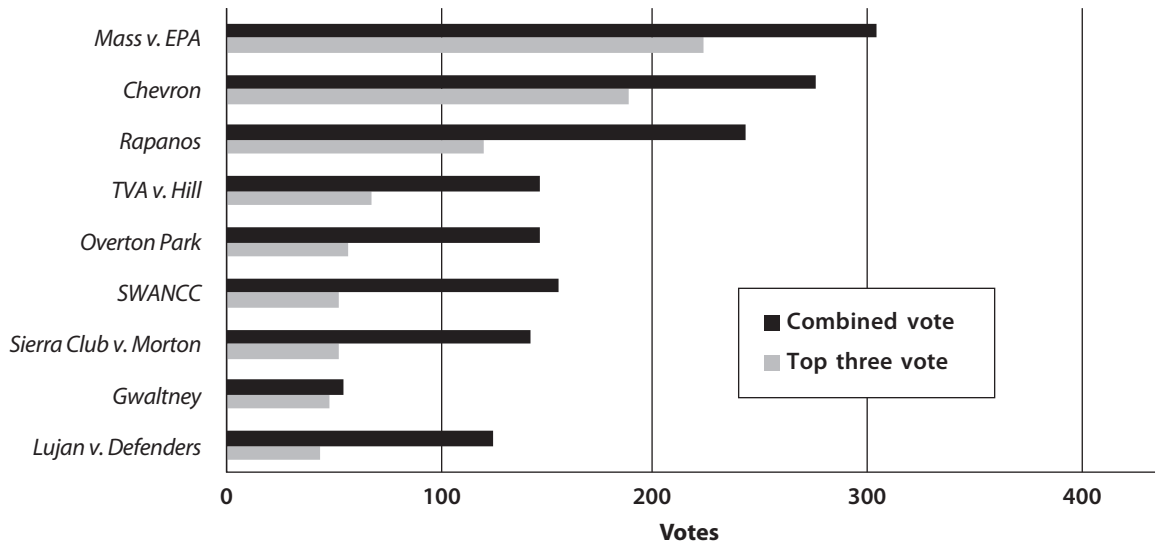
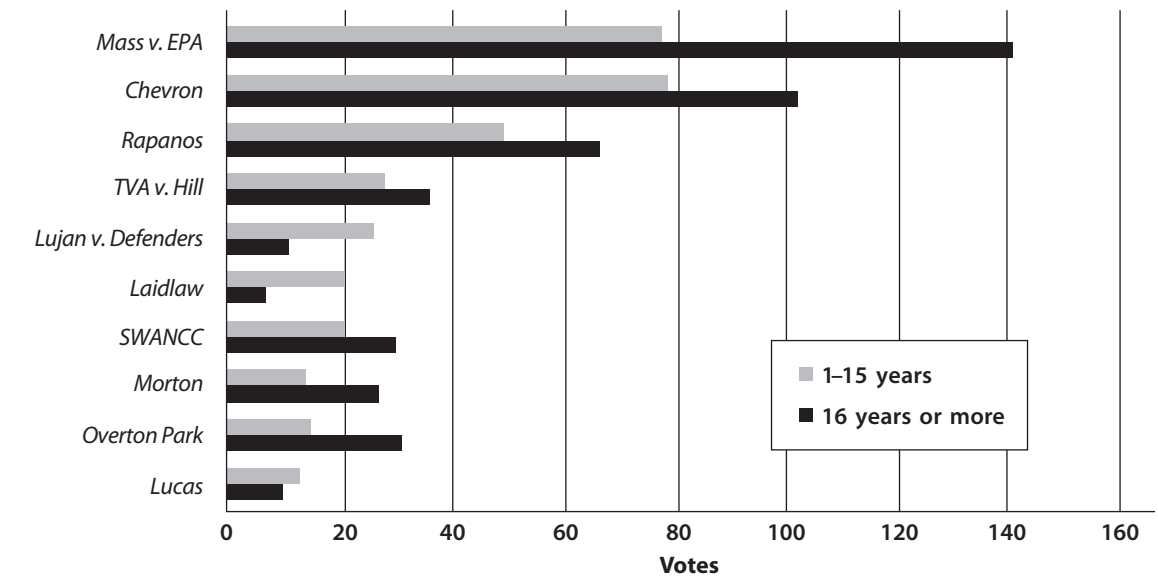


FIGURE 2 **2009 Results by Length of Practice**



ing point in U.S. environmental law. Its holding may have limited legal import, but its potential broader significance is huge. Before *Mass. v. EPA*, climate change was discussed but for the most part extraneous to our legal system. After that case, by contrast, talking about a "law of climate change" doesn't seem like a crazy idea. Perhaps University of Virginia law professor Jonathan Cannon got it right, therefore, when he predicted the case could become environmental law's *Brown v. Board of Education.*

Why *Rapanos*?

It is much harder for us to explain why *Rapanos* — a decision just three years old, deciding a statutory interpretation question limited to the Clean Water Act, establishing no general doctrinal principles, and decided by a bizarre 4-1-4 split — has vaulted to marquee status among environmental cases. Sure, the case is of tremendous importance in defining the scope of Clean Water Act jurisdiction in the field, but even there it operates at the physical edges of the statute's reach. It is not as if the CWA's National Pollutant Discharge Elimination System and Section 404 programs have been shut down. Indeed, the 1985 *United States v. Riverside Bayview Homes* decision, which locked in wetlands adjacent to navigable waters as being within the scope of Section 404, was more important to maintaining the integrity of the program, yet it does not even register in the rankings.

It is also difficult to think of *Rapanos* as signifying a momentous turning point in environmental law. The case conceivably might prompt Congress into amending the CWA's jurisdictional provisions, which could lead eventually to a constitutional showdown between the Court and Congress. Perhaps its 4-1-4 outcome more than any other case reveals the fractures on the Supreme Court on questions of the environment. Another explanation may be that the case reveals a chasm between the Court and Congress on matters of environmental law, but there are dozens of cases that do so.

So what makes *Rapanos* so special to lawyers across the nation, of all ages, in all fields, and in all employment settings? Something about Section 404 seems to have attracted the attention of our respondents, in particular cases in which the Court scales back the reach of the program. For example, the 2001 *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* decision, which cut off Section 404 jurisdiction over isolated wetlands and in which the Court issued its warning to Congress on its constitutional scope of authority, ranks in the top 10 in both aggregated rankings and ranks high in many of the categorical rankings. Perhaps the cherished status of Section 404 in environmental law was infectious in our survey. Still, we're left searching for a stronger explanation for *Rapanos*'s dominant showing.

TVA v. Hill Hangs in There

The number four case in Figure 1 and Figure 2, *TVA v. Hill*, is also an interesting story. Its high ranking is due primarily to academics. Having picked it as their number one case in the 2001 survey, it was still their number two case in 2009 — well behind *Mass. v. EPA*, but in a dead heat with *Chevron*, and well ahead of *Rapanos*. Had it not been for that extra push, *TVA v. Hill* would have faded, as respondents in the other practice categories ranked it sixth or lower. Being academics ourselves, we appreciate that *TVA v. Hill* carries much symbolic gravitas and represented a critical point in the history of the Endangered Species Act. Since then, however, much of the action has moved from the ESA's Section 7 (which restricts federal actions) toward Section 9 (which also restricts private actions). Respondents in most categories seemed to sense this loss of practical influence, whereas for academics the case still retains tremendous symbolic value.

A last trend worth delving into is how the second tier of cases shakes out once one looks more closely at the demographic breakdowns. The aggregated rankings still feature familiar cases such as *Sierra Club v. Morton, Lujan v. Defenders of Wildlife*, and *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*. But when one looks at the top 10 cases for each demographic category, it becomes clear that many practice fields, regions, and employment categories have their own "key" cases. For the Top Three rankings, for example, biodiversity conservation lawyers ranked *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* third and land use lawyers ranked *Lucas v. South Carolina Coastal Council* and *Penn Central Transportation Co. v. New York City* tied for fourth, far different from the overall results. Similarly, government lawyers ranked *Lujan* third, lawyers from the Southeast ranked the 1907 case *Georgia v. Tennessee Copper* fourth, and both business transaction lawyers and lawyers from the Northeast ranked *United States v. Exxon* high. The most experienced attorneys — those with over 25 years of practice — ranked the 1972 cases *Scenic Hudson Preservation Conference v. Federal Power Commission* and *Just v. Marinette County* fourth.

Even more telling is the variety of cases as one moves farther down each category's rankings. Cases nowhere near the overall top 10 status nonetheless show up here and there throughout the categories. *Kleppe v. Sierra Club*, for example, is a top 10 pick for lawyers in the Mountain States and for lawyers who practice bio-

diversity conservation. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* is in the top 10 only for mining lawyers, academics, and lawyers from the Mid-Atlantic.

This strikes us as a testament to the richness and variety of environmental law. We all seem to agree on the Big Three and, beyond them, for the most part, *TVA v. Hill, Sierra Club v. Morton, Overton Park*, and *SWANCC*. These seven cases appear consistently throughout most categories. After that, however, the votes go all over the board, reflecting regional contexts, lawyers' experiences, and the importance of particular cases to certain fields of practice.

A Glance Back to 2001

The 2001 survey produced two lists — top 10 for academics and top 10 for private practitioners — and had no demographic breakdowns, so it is difficult to go very deep with comparisons to the recent survey results. Yet just looking at top 10 rankings reveals that significant reshuffling has taken place.

Consider, for example, *Ethyl Corp.,* which was ranked second among academics in 2001 and in the top 10 for private practitioners. It has basically disappeared in the rankings by 2009. Indeed, it made the top 10 ranking in only a few demographic categories — in-house counsel, pollution lawyers, lawyers from the Northeast and Canada, lawyers with 7–15 years of experience, and lawyers 46–55 years old. In none of the dozens of other categories does it show up. And *Ethyl Corp*. is not alone in this respect. Like it, six other cases that made it to top 10 status in one or both lists in 2001 failed to make either the top three or combined rankings in 2009: *Calvert Cliffs, Mono Lake, Georgia v. Tennessee Copper, Scenic Hudson, Penn Central*, and *Boomer***.** And they weren't even close contenders.

What happened in a decade to sweep these cases out of "most excellent" status and replace them with the likes of *Rapanos, SWANCC, Lujan,* and *Gwaltney*? Is *Rapanos* really more important than *Boomer* to the fabric and history of environmental law? Of course, it is if lawyers think it is, but why do they think it is?

We believe this reshuffling is evidence of two attributes of environmental law. The first is its dynamic character. The importance of a case over time for lawyers is very much a "what have you done for me today?" evaluation. *Mass. v. EPA* has rocked the climate change law world, and *Rapanos* threatens CWA jurisdiction, so they are the important cases of the day. *Chevron* has lasting power because it remains quite relevant to day-to-day practice. *Boomer*, on the other hand, doesn't really play into that calculus. It may signify a turning point — the transformation of environmental law from common law to regulatory — but that turning point is long past. It is not a "significant" case for those practicing today.

The second attribute that may account for the overhaul of top 10 cases is that Congress has been functionally inert in environmental law for well over a decade, meaning new Supreme Court cases are simply more important than they might otherwise be. Indeed, both *Mass. v. EPA* and *Rapanos* may contribute to forcing Congress finally to take action, and for that reason may have struck respondents as having a special role to play.

But still, the striking differences in the 2001 and 2009 lists do make environmental lawyers seem a bit fickle, and it is sad to see old friends fade away.

A Look Ahead to 2019

The reshuffling of the top 10 between 2001 and 2009 makes us wonder what the 2019 list will look like. Will the two towering youngsters, *Mass. v. EPA* and *Rapanos*, have staying power? If there is a national and state network of greenhouse gas emission programs in place, will *Mass. v. EPA* still be foremost among the minds of environmental lawyers, or will it fade the way *Boomer* did? *Rapanos* and *SWANCC* in particular could easily vanish from the top 10, particularly if Congress legislates the cases away through statutory amendments to the Clean Water Act. And if the Supreme Court then slaps down what Congress does on Commerce Clause grounds, surely that case will be near the top of any new list.

Then there are the cases with staying power, those that made it on the list in 2001 and 2009. Will they remain vital? It is hard to think of a scenario in which *Chevron* would not, but some of the others are getting long in the tooth and have very little practical day-to-day impact on environmental lawyers even today. *TVA v. Hill* may become increasingly just a symbolic event in environmental law, and its love affair with academics may not be able to keep it high on the list. *Sierra Club v. Morton* and *Overton Park* are also unquestionably important in the development of environmental law, but if *Boomer, Scenic Hudson*, and *Penn Central* can fade away, any case can.

Still, turning on the FM dial proves that there's always a place for Golden Oldies. It remains to be seen which of the cases in the 2009 list will have the staying power of "Stairway to Heaven." •

For those who wish to work with the raw data for their own research or see the survey, please go to www.law.duke.edu/fac/salzman/survey