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How environmentalists can win over the Supreme Court.

Debate Framers

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With Justice Sandra Day O'Connor off the Supreme Court and Justice Anthony Kennedy now at its fulcrum, lawyers are scrambling to discern what works and what doesn't in seeking his vote. Arguments in *Massachusetts* v. *EPA*, the global warming case the Court heard this week, may provide an important clue: Don't focus on what will happen tomorrow; focus more on what happened in 1789.

At oral argument Wednesday, the Supreme Court appeared unanimous in its scorn for EPA's central argument for doing nothing as the planet warms--the assertion that greenhouse gases are not pollutants within the meaning of the federal Clean Air Act. (It is difficult to make that assertion with a straight face, but, if the Court accepts it, the EPA has no power to tackle global warming.)

But the Court was deeply divided on the threshold question of whether it had authority to decide the case to begin with. The Court's conservatives appeared deeply skeptical about whether any party could bring a suit. The Court's liberals appeared persuaded that all of the two dozen or so state, local, and environmental petitioners had standing to challenge federal inaction. Justice Kennedy asked a different question: Are states different?

But Kennedy wasn't asking, so much as answering. After the lawyer for Massachusetts appeared to be stumped by Kennedy's request for a Supreme Court case that demonstrates that Massachusetts has "some special standing as a state," Kennedy chimed in, "*Georgia* v. *Tennessee Copper* ... That seems to me your best case." Not a single brief in the case cited *Tennessee Copper*, making it clear that Kennedy had done his homework and was approaching the standing issue from a unique perspective. With that perspective likely to control the outcome of one of the most important environmental controversies ever to reach the Court, it seems worthwhile to revisit its lessons.

Written in 1907 by Justice Oliver Wendell Holmes, *Tennessee Copper* seems, in one respect, decades ahead of its time. The case is a paean to environmentalism, proclaiming the right of a state to ensure that mountains are not "stripped of their forests" and that "its inhabitants shall breathe pure air." To protect Georgia from sulfur dioxide fumes emitted from a copper smelter in Tennessee, the Court ordered Tennessee Copper to shut down or

modify its operations "to stop the fumes."

While Holmes's environmental sensitivity seems rooted in twenty-first-century environmental values, his argument for hearing Georgia's suit is firmly based on the views of our eighteenth-century Founders. As Holmes wrote, "When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court." Indeed, as Holmes indicated, the Constitution allows a case to go directly before the Supreme Court--without clearing hurdles in lower federal courts--whenever "a state shall be a party." Citizens do not have this privilege, and, as Holmes thundered, "The states, by entering the Union, did not sink to the position of private owners, subject to one system of private law."

Subsequent Supreme Court cases have clarified that *Tennessee Copper* doesn't give states a license to sue in federal courts whenever they disagree with the application of federal law. Vermont, for example, can't drag the United States into court simply because it dislikes the federal wiretapping program. But the core of *Tennessee Copper*--the idea that federal courts have a special responsibility to hear claims by states, particularly when the suits involve a state's sovereign interest in "all the earth and air within its domain," is as true today as it was in 1789 and 1907.

That is precisely the type of claim Massachusetts brought here. The state submitted undisputed affidavits from scientific experts showing that, because of global warming, it is losing coastal lands to rising sea levels. It asks the Court only to require that the federal government comply with the plain terms of federal law.

The argument Wednesday yields broader lessons for progressives trying to win cases before an increasingly conservative Supreme Court. Too often, progressives shy from arguments about the Constitution's text and history out of a misguided fear that making such arguments will somehow bolster the version of originalism practiced most prominently by Justice Antonin Scalia.

But text and history support progressive outcomes at least as frequently as they support conservative ones, and these arguments are often the most persuasive available, even to justices that shun the label of originalism. The idea that Massachusetts has more rights in federal environmental cases than the Sierra Club might seem odd to modern ears, but it wouldn't have seemed odd to the Framers.

O'Connor might have responded to the dire warnings of scientists like NASA 's James Hansen. But environmentalists and others seeking Supreme Court victories should take note: To Justice Kennedy, the case seems to turn instead on the political theory of James Madison.

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