A few weeks ago, Dan wrote a nice post suggesting that retiring Justice John Paul Stevens has been a principal architect of modern environmental law doctrine. The Deepwater Horizon disaster shows another example of this pattern — although probably not in ways that Stevens' environmentalist admirers (of whom I am one) are very proud of.

How much will British Petroleum have to pay out in damages for the Deepwater Horizon disaster? Perhaps a lot, but in no small part because of Justice Stevens, a lot less than it otherwise would have — even if, *especially if*, a court or jury finds the corporation to have acted with gross negligence or conscious disregard of safety.

Why? The answer can be found in BMW v. Gore, a 1996 case in which the Supreme Court, for the first time, found that excessive punitive damages may violate the Due Process Clause and thus pose a federal legal question. Who wrote that opinion, a 5-4 decision? John Paul Stevens.

Now flash forward to 2003, to State Farm Mutual Automobile Ins. Co. v. Campbell. There, the Court per Justice Kennedy, held that in virtually all circumstances, punitive damages exceeding 9.9 times the compensatory damages will violate the Due Process Clause. And there was Justice Stevens, joining the opinion. If *Gore* established a general principle, and warned that the vast majority of state-court punitive damage judgments would be upheld, *State Farm* obliterated this restraint — with virtually no real precedent for it to anchor on.

Now, even with a 9.9 multiplier, BP might have to pay significantly, but State Farm changes incentives for companies. No one would argue that tort law should be the primary guardian of the environment, but in an era where companies can tie up regulations for a long time and block legislation, it can form an important backstop — as the public nuisance climate change suits have already demonstrated.

If Stevens is the architect of modern environmental law, this is not one of his more successful building projects.

And a final note: the Court's conservatives have a pretty good record on this. Scalia and Thomas often talk about federalism, but only in cases where the result would be what they want; in other cases (***ahem***) their federalism principles go out the window. Not here: they dissented in both State Farm and Gore, even they were probably in ideological sympathy with the defendants. And Richard Posner, in a case involving bedbugs of all things, undermined State Farm before it was even a year old. Good for them.