In an earlier post, I tried to figure out when the legal academy first discovered climate changes. As it turns out, it was almost a decade later when the federal courts took notice. Those first climate change cases shed light on how new issues get litigated and how courts respond to new science.

My research method was simple. I did a Westlaw search for all cases that used the terms "global climate change," "global warming," "greenhouse effect," or "greenhouse gas." Apart from a couple of earlier cases using the terms in irrelevant contexts — such as discussing actual greenhouses — the first reported opinions were issued in 1990. There were four of these early cases, and each of them sheds interesting light on how courts initially approached the issue.

There were two cases where climate change was a central issue:

City of Los Angeles v. Nat'l Highway Traffic Safety Admin., 912 F.2d 478 (D.C. Cir. 1990). This was a broad challenge by a group of plaintiffs to the government's refusal to prepare an environmental impact statement for a rollback of fuel efficiency standards. The Natural Resource Defense Council (NRDC) specifically raised the issue of climate change. Interestingly, this issue produced a three-way split among the judges. The majority opinion on most issues was written by Judge Douglas Ginsberg, a libertarian. Ginsberg argued that the NRDC lacked standing because it failed to show that a small change in the fuel efficiency standards "would produce any *marginal* effect on the probability, the severity, or the imminence of global warming."

Speaking for herself and dissenting Judge Wald, future Supreme Court Justice Ruth Bader Ginsburg held that the NRDC did have standing.

In dissent, Judge Patricia Wald agreed with Ginsburg about standing Wald described the evidence about global warming in some detail, According to Wald, "no one, including NHTSA, appears to dispute the serious and imminent threat to our environment posed by a continuation of global warming." Her analysis prefigures the standing holding in Justice Stevens's landmark opinion for the Court in *Massachusetts v. EPA*. Wald also concluded that the government had failed to provide a rational justification for considering the impact on climate change insignificant.

Concurring Judge (and future Justice) Ruth Bader Ginsburg split the difference. She agreed with Wald that NRDC had standing. But she "called the close question" of the validity of the agency's decision in favor of the agency, She concluded that the agency had not abused its discretion in considering that the impact of the rollback on global warming was not

significant enough to warrant an environmental impact statement.

Given that two of the three judges in the case ruled in favor standing, you would have expected this case to figure heavily in the arguments about standing in *Massachusetts v. EPA*. There were only a couple of brief mentions of the Los Angeles case in the briefs, however, probably because in the meantime the D.C. Circuit had taken a less favorable approach to standing in another case.

Found. on Econ. Trends v. Watkins, 731 F. Supp. 530, 530 (D.D.C. 1990). This case also involved standing. The Foundation on Economic Trends is a vehicle used by Jeremy Rivkin to promote his views. The Foundation sued James Watkins, who was then Secretary of Energy, demanding environmental impact statements for any actions that contribute to the greenhouse effect. In particular, the Foundation challenged the Department's Coal Management Program. The District Judge rejected the government's claim that the case was not ripe for litigation and that the Foundation lacked standing. In another ruling two years later, however, the same judge reconsidered the standing issue on a fuller record and denied standing based on an intervening ruling by the DC Circuit.

There were also two cases where climate change was mentioned but wasn't a focal point. The first was Rhode Island Cogeneration Assocs. v. City of E. Providence, 728 F. Supp. 828, 829 (D.R.I. 1990). The City of East Providence attempted to block the construction of a coal-fired cogeneration facility (one generating power as well as serving an industrial function). Climate change is mentioned only a footnote. The court ruled that the local ordinance banning coal was preempted by state laws governing air pollution. Though climate change was not a focus of the case, the issue of state preemption of local efforts continues to be a life issue in states with Republican governments and Democratic cities.

The second of those cases was Gladfelter v. Fairleigh Dickinson Univ., 25 V.I. 91, 94 (Terr. V.I. Sept. 12, 1990), which involved the termination of a tropical lab by Dickinson University. The decision was issued by the Territorial Court of the Virgin Islands, Division of St. Croix,at Kingshill. One of the arguments for an injunction against closing the lab was that the Plaintiffs claim that if FDU is allowed to shut down the WIL facility they closing the lab would leave the plaintiffs "unable to complete their research projects and as a result scientific studies which will provide significant information to the global research concerns of global climate change and biodiversity, will be irreparably damaged by being discontinued." Judge Cabret ruled in favor of the plaintiffs. Sadly, the lab was apparently damaged by Hurricane Hugo just days after the court's ruling and was never reopened.

The *Los Angeles* case was clearly the most important of these cases. It's puzzling that the

majority vote in favor of climate standing never got much attention. The other striking thing about the case is how much Judge Wald was ahead of her time, both in recognizing the seriousness of the issue and in her analysis of the legal issues. That's a contribution that seems to have been largely forgotten but deserves recognition today.