

of their beloved state. Since I moved back to Florida in the summer of 2003 to accept the Richard E. Nelson Chair, many people have sung the praises of the Nelsons, and I am proud to be associated even in a small way with their fine name.

CHAPTER I

The Nature of Environmental Law and the U.S. Supreme Court

by Richard J. Lazarus

My central thesis is that the vast majority of the U.S. Supreme Court's recent environmental law precedent reflects a lack of appreciation of the special challenges presented by environmental law making. The Court's fundamental failure in this respect has prompted the Court to make a series of mistakes in its rulings both at the jurisdictional stage and on the merits. In deciding whether to accept a case for plenary review, the Court has been too willing to grant petitions filed by parties who claim that environmental protection laws are overreaching, which has led to an unfortunate skewing of the Court's docket. In deciding cases on the merits, the Court has systematically embraced constitutional interpretations and statutory constructions that unduly retard the law's ability to evolve in response to the new information and shifting societal priorities that the nation has embraced in favor of greater environmental protection.

This chapter is divided into three parts. The first part describes the nature of environmental law making and how it unavoidably serves up a pattern of legal issues that reflects dominant features of the ecosystem, the activities regulated by environmental law, and our law making institutions. The second part seeks to support my thesis that the Court has misapprehended the nature and significance of these legal issues by discussing the environmental law cases before the Court during the October Term 2003. Finally, there is a brief conclusion.

I. The Nature of Environmental Law

Environmental law is a surprisingly elusive concept, which is no doubt why the Court has failed to appreciate its true nature. The Justices, like most non-environmental lawyers, treat environmental law as a fairly discrete, bounded area of law. In particular, they tend to define environmental law by exclusive reference to a series of discrete laws pertaining to natural resource management and

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pollution control, such as the Clean Air Act (CAA),¹ the Clean Water Act (CWA),² the Federal Land Policy and Management Act (FLPMA),³ and the Endangered Species Act (ESA).⁴ These and other similar laws embrace literally thousands of pages of detailed federal and state statutory and regulatory provisions steeped in technical complexity. Viewed from this perspective, an environmental lawyer is simply someone who masters all the details of those provisions. There is nothing especially unique or extraordinary about environmental law. It is simply a specialized subset of administrative law that raises a fair number of interesting law and economics questions.

The field of environmental law, however, is better understood as involving far more than the enormous volume of statutory and regulatory provisions in existence at any one time that govern pollution control and natural resource management. Those provisions are simply the most obvious outcroppings of a field of law that is multilayered and constantly evolving. It is, moreover, that very same evolutionary process that generates its own distinct set of legal issues that warrant the "environmental" label because of the particular kinds of challenges presented by the legal process of making environmental law.

There are two distinct types of such environmental law making issues. The first type results during the process of environmental law making because of the tendency of environmental law to promote conflicts between competing law making institutions. The second type arises during the process of environmental law making because of the tendency of environmental law to challenge certain constitutional limits on governmental action and otherwise to prompt reforms in other areas of law with which environmental protection law invariably intersects.

Each of these distinct law making issues occurs as a result of a kind of *legal friction* precipitated by the process of making environmental law. In classic Newtonian mechanics, the term friction refers to a force that resists movement.⁵ It pulls in the direction opposite from that which one tries to move. If one tries to move left, it pulls right; but if one tries to move to the right, it pulls left. The force friction results from the oppositional rubbing of two objects. At least at a microscopic level, any movement will require some rubbing of objects against each other.⁶

An analogous phenomenon results during law making. The legal process depends upon movement, albeit of a different kind than that which occurs in classic mechanics. The translation of an idea into a formal legal rule encompasses a

series of distinct steps involving a host of law making authorities. A legal issue is generated from the friction that inevitably occurs in taking each of these steps. As described above, the friction may be between competing law making authorities because, for instance, of competing and overlapping jurisdictions within any one single branch of government, different branches within the same sovereign, or between different sovereign governments.⁷ Or the legal friction may alternatively occur because the effort to make the new law collides with other preexisting legal doctrine reflecting a distinct set of substantive values, priorities, and assumptions. The new law making proposal, in effect, depends for its realization upon an accommodation and reconciliation with existing substantive law. The unstriking of an existing legal equilibrium, expressed by current law, and the restriking of a new legal equilibrium, responsive to new values, priorities, and information, depend upon legal movement. Such legal movement is what generates legal friction and, in turn, controversial legal issues. As I have explained more fully elsewhere,⁸ modern environmental protection law has had just this effect on other areas of law with which it invariably intersects. Environmentalism and modern environmental law challenged many of the equilibria upon which legal doctrines in a variety of cross-cutting areas rested. Much of our domestic law, ranging from administrative law, bankruptcy law, civil rights law, constitutional law, corporate law, criminal law, and torts has, in effect, been "greened" during the past several decades.

Of course, the generation of such law making issues can occur no matter what the type of law being made, environmental or otherwise. To that extent, perhaps they could often be best perceived as general "legal process" issues, bearing a close relation to the celebrated pedagogical insight proffered by Profs. Henry Hart and Albert Sacks decades ago.⁹ But where, as is true for environmental law, there is something distinctive in the nature of the challenges presented by the process of making environmental law, in particular, a complete understanding of the field of environmental law depends upon appreciation of that additional evolutionary dimension to law making. For, absent such an understanding, one is likely to misperceive as a problem the kind of conflict that naturally and necessarily occurs in environmental law making.

The adverse consequences of such a misperception are twofold. First, in the judicial context, a judge may instinctively react to the circumstances presented and eliminate the apparent conflict by stamping out the intruding and poten-

1. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

2. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

3. 43 U.S.C. §§1701-1785, ELR STAT. FLPMA §§102-603.

4. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

5. See DAVID HALLIDAY ET AL., FUNDAMENTALS OF PHYSICS 99-100 (6th ed. 2000).

6. *Id.*

7. Cf. John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773, 1818 (2003) (referring to "friction" resulting from efforts to overcome obstacles to legislation in legislative process).

8. RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 113-15 (Univ. of Chicago Press 2004).

9. See William N. Eskridge & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987) (describing Professors Hart and Sacks' legal process approach to legislation).

tially destabilizing force. Based on surficial analysis, the judge will perceive both the legal issue and the appropriate legal redress as simple and straightforward. The second, related adverse consequence is the loss of opportunity for the judge to play a constructive, more fully engaged role in the law making process based on a deeper understanding of the legal issues presented. Such a fuller understanding does not, of course, mean that interests either favoring or disfavoring greater environmental protection automatically prevail. Instead, it means merely that the judge faced with a legal issue generated by such a conflict achieves a resolution based on legal analysis that is of a depth commensurate with the legal issue then before the court.

The distinctly *environmental* nature of the legal issues generated by environmental law making originates in the working of the ecosystem itself. Most simply stated, the basic science of cause and effect in the ecosystem has profound and essentially immutable ramifications for the making of most any legal rule related to environmental protection. The ecosystem spreads cause and effect out over time and over space.¹⁰

Actions in one place can affect people and the natural environment in another place, separated by anywhere from feet to thousands of miles.¹¹ Similarly, actions in one time can affect people and the natural environment in a far different time, including hundreds of years in the future. Such spreading is an immutable feature of the ecosystem.¹² It is rooted in the way that air and water flow locally and globally, plants and animals migrate seasonally and over generations, and chemical cycles (such as those involving nitrogen, phosphorous, and carbon) span the globe and link together seemingly disparate parts of the planet and its surrounding atmosphere.¹³ Try as they might, no legislature, agency, or court, can modify the laws of nature by enacting a bill, promulgating a regulation, or issuing a judicial decree.

The upshot for environmental lawmakers is that there is often a mismatch between who is enjoying the benefits of environmental regulation and who may be paying the costs of such regulation. Restrictions are placed on activities occurring in one place and one time for the potential benefit of interests occurring in another place and time. Environmental protection laws, whether green (natural resource management) or brown (pollution control) in character are, for this reason, almost always radically redistributive in nature. They tend to impose costs on some for the benefit of others.¹⁴

10. See LAZARUS, *supra* note 8, at 5-42. For a lengthier, more complete discussion of the challenges of environmental law making as they relate to the physical characteristics of ecological cause and effect and the structure and deliberate biases of U.S. law making institutions, see *id.*

11. *Id.* at 6-15.

12. *Id.*

13. *Id.*

14. *Id.* at 24-28.

One necessary consequence of this mismatch is persistent and pervasive conflict between governmental law making authorities whenever environmental law is being made. For important reasons, rooted in the historic events that precipitated our nation's founding that made us wary of undue centralization of law making authority,¹⁵ we deliberately and systematically fragment law making authority along multiple dimensions, primarily to guard against the undue aggrandizement of such authority in any one place. We fragment law making authority between sovereign authorities, e.g., federal, state, tribal, local; we fragment it between branches of government within any one sovereign authority, e.g., legislative, executive, and judicial; and we further fragment it within any one branch whether legislative (congressional chambers and congressional committees), executive (agencies), or judicial (circuit courts, specialized courts and courts of general jurisdiction).¹⁶

Such fragmentation erects obstacles to environmental law making efforts because there are almost always competing governmental authorities coming at the same issue from opposing policy perspectives. Sometimes this is because the spatial dimensions of ecological cause and effect place some law making authorities on one side of the policy divide and others on the other. One such natural divide occurs between upwind and downwind states, tribes, and local governments, on the one hand, or upstream and downstream states, tribes, and local governments on the other.¹⁷ Activities in upwind and upstream locations tend to be those that are more likely to be the objects of environmental regulation while interests in downwind and downstream locations are more likely to be the beneficiaries of those same environmental regulations. For this reason, law making authorities in downwind or downstream locations are often seeking ways to impose tougher environmental restrictions on activities in upwind or upstream locations. And, conversely, law making authorities in those upwind or upstream locations are often looking for ways to resist or deflect the application of such laws.

These natural divisions between law making authorities occur throughout environmental law and between and within a host of competing law making authorities. Targets of environmental regulation and the beneficiaries of regulation can almost always discover and enlist on their behalf some competing au-

15. See THE FEDERALIST PAPERS NO. 47 (James Madison).

16. LAZARUS, *supra* note 8, at 32-35.

17. See, e.g., *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (nuisance lawsuit based on interstate air pollution); *Missouri v. Illinois*, 200 U.S. 496 (1906) (nuisance lawsuit based on interstate water pollution); *City of Albuquerque v. Browner*, 97 F.3d 415, 27 ELR 20283 (10th Cir. 1996) (tribal assertion of CWA jurisdiction within a state); Andrew C. Revkin, *New York City and 8 States Plan to Sue Power Plants*, N.Y. TIMES, July 21, 2004, at A5 (air pollution lawsuit brought by upwind states against power plants in downwind states); *International Paper Co. v. Ouellette*, 479 U.S. 481, 17 ELR 20327 (1987) (water pollution nuisance lawsuit brought by residents in downstream state against source of pollution located in upstream state).

thority involved in the environmental law making process to champion their interests. Environmental law is, accordingly, constantly marked by such intergovernmental and intragovernmental conflicts *between* competing sovereign authorities as well as *within* a single sovereign authority.

Much of what is dubbed "environmental federalism" is simply an expression of these kinds of law making boundary disputes between sovereign authorities.¹⁸ Environmental controversies during the past several decades have produced a series of conflicts between federal and state governmental authorities concerning their respective spheres of law making authority and autonomy. Obvious examples include claims that states have imposed undue burdens on interstate commerce in violation of the so-called dormant Commerce Clause,¹⁹ claims that the U.S. Congress has exceeded its Commerce Clause authority in enacting a federal environmental law,²⁰ claims that federal law preempts state law whether more or less stringent than federal standards,²¹ and claims the federal statutes transgress Tenth or Eleventh Amendment limits on federal impingements on essential state sovereign prerogatives.²² There are analogous claims that tribal authorities have exceeded their authority in seeking to regulate activities outside their borders affecting environmental quality within tribal borders.²³

There is likewise a host of border disputes triggered by environmental law making efforts *within* a single sovereign authority rooted in separation-of-powers principles. Examples include claims that the executive branch is encroaching on legislative branch authority (nondelegation doctrine),²⁴ the legislative

18. See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); see also Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97 (1996).
19. See, e.g., C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 24 ELR 20815 (1994); Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 22 ELR 20909 (1992); City of Philadelphia v. New Jersey, 437 U.S. 617, 8 ELR 20540 (1978).
20. See, e.g., Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 531 U.S. 159, 31 ELR 20382 (2001); GDF Realty Invs., Ltd. v. Norton, 362 F.3d 286 (5th Cir. 2004); Rancho Viejo, Ltd. Liab. Corp. v. Norton, 323 F.3d 1062, 33 ELR 20163 (D.C. Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483, 30 ELR 20602 (4th Cir. 2000).
21. See, e.g., Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist., 124 S. Ct. 1756, 34 ELR 20028 (2004).
22. See, e.g., New York v. United States, 505 U.S. 144, 22 ELR 21082 (1992); Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 ELR 20974 (1989), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).
23. See, e.g., Wisconsin v. EPA, 266 F.3d 741, 32 ELR 20177 (7th Cir. 2001); City of Albuquerque v. Browner, 97 F.3d 415, 27 ELR 20283 (10th Cir. 1996).
24. See, e.g., Whitman v. American Trucking Ass'n, 531 U.S. 457, 31 ELR 20512 (2001). See generally the scholarship of David Schoenbrod, e.g., *Politics and the*

branch is encroaching on the executive branch,²⁵ the legislative branch is encroaching on judicial branch authority,²⁶ and the judicial branch is improperly invading executive branch authority.²⁷

Finally, an additional impetus rooted in the nature of environmental law for the generation of such interjurisdictional and intrajurisdictional disputes stems from the duality of the government's role in the environmental context. The government tends to be both the *regulator* and the *regulated*. In its sovereign regulatory capacity, the government is often seeking to determine what environmental protection standards should apply to certain privately conducted activities. But other parts of the government are acting primarily in a manner that subjects them to those same laws or at least, like the U.S. Department of Commerce and the Office of Management and Budget, makes them more sympathetic to the concerns of the regulated rather than the regulator side of the government.

Most obviously, governmental entities take actions that cause air and water pollution. The federal government does not just consist of the U.S. Environmental Protection Agency (EPA) and the U.S. Fish and Wildlife Service. It includes agencies, the primary mission of which is not environmental protection but matters such as commerce, national defense, highway construction, and electricity generation. These governmental actors themselves conduct and authorize others to conduct activities that degrade the natural environment and, for that reason, tend to be skeptical of stringent natural resource conservation and pollution control laws. The U.S. Department of Defense and the U.S. Department of Energy, for example, must regularly comply at considerable expense with federal environmental laws and therefore are likely to harbor a very different attitude toward those laws than found at EPA.²⁸ The U.S. Department of the Interior (DOI) and the Federal Energy Regulatory Commission fre-

Principle That Elected Legislators Should Make the Laws, 26 HARV. J.L. & PUB. POL'Y 239 (2002).

25. See, e.g., Morrison v. Olson, 487 U.S. 654 (1988).
26. See, e.g., Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 22 ELR 20663 (1992).
27. See, e.g., Cheney v. U.S. District Court for the Dist. of Columbia, 124 S. Ct. 2576 (2004); Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 30 ELR 20246 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 22 ELR 20913 (1992).
28. See, e.g., Jennifer 8. Lee, *Second Thoughts on a Chemical: In Water, How Much Is Too Much?*, N.Y. TIMES, Mar. 2, 2004, at F1 ("The Defense Department and the Environmental Protection Agency have squared off in a continuing dispute over the danger from a widespread contaminant of groundwater."); David Johnston, *Weapon Plant Dumped Chemicals Into Drinking Water, FBI Says*, N.Y. TIMES, June 10, 1989, at A1; see also, e.g., Department of Energy v. Ohio, 503 U.S. 607, 22 ELR 20804 (1992).

quently are at loggerheads,²⁹ as may be the National Park Service and the Bureau of Reclamation.³⁰ The Tennessee Valley Authority (TVA) (a federal agency) and EPA were recently opponents in federal court litigation based on the TVA's challenge to a CAA administrative compliance order issued by EPA against the TVA.³¹

II. Environmental Law in the Court—October Term 2003

The Court's October Term 2003 is emblematic of the degree to which the current Court misapprehends the nature of environmental law to its substantive detriment. Individual Justices overreact to the legal issues generated by the process of environmental law making. Rather than recognizing these issues as a healthy byproduct of an important evolutionary process of environmental law making that requires accommodation and reconciliation of competing legal doctrine, the Justices perceive environmental law, especially the pressures it places on other intersecting areas of law, as a destabilizing threat that needs to be cabined. In short, the Court sees problems that do not exist and fails to see solutions that do. As a result, the Court is more apt to retard than it is to constructively engage within the necessary evolutionary process being triggered by the demands for environmental law making.

The Court's hair trigger to perceive false problems is evident in its extraordinary willingness to grant review in environmental cases during the October Term 2003 on behalf of the interests of the regulated community. The Court exercised its discretion to grant review and hear oral argument in seven environmental cases last Term.³² That is a remarkable number. It represents almost

29. See, e.g., *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 24 ELR 20945 (1994); *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 14 ELR 20592 (1984); *North Carolina v. Federal Energy Regulatory Comm'n*, 112 F.3d 1175, 27 ELR 20929 (D.C. Cir. 1997); *Department of the Interior v. Federal Energy Regulatory Comm'n*, 952 F.2d 538, 22 ELR 20546 (D.C. Cir. 1992); see also *Justices to Review Use of Race in a Custody Case*, N.Y. TIMES, Oct. 18, 1983, at A18 (noting that "[the DOI] and the Federal Energy Regulatory Commission are diametrically opposed to one another in the [Escondido] case").

30. See, e.g., *Keith Schneider, Utilities to Take Steps to Cut Haze at Grand Canyon*, N.Y. TIMES, Aug. 9, 1991, at A1 (noting that the haze reduction agreement "ends a ticklish battle between two units at the [DOI]").

31. See *Tennessee Valley Auth. v. EPA*, 278 F.3d 1184, 32 ELR 20407 (11th Cir. 2002), cert. denied, *Leavitt v. Tennessee Valley Auth.*, 124 S. Ct. 2096 (2004).

32. See *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983, 34 ELR 20012 (2004); *BedRoc Ltd., Ltd. Liab. Co. v. United States*, 124 S. Ct. 1587 (2004); *Cheney*, 124 S. Ct. at 2576; *Department of Transp. v. Public Citizen*, 124 S. Ct. 2204, 34 ELR 20033 (2004); *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 124 S. Ct. 1756, 34 ELR 20028 (2004); *Norton v. Southern*

10% of the Court's entire docket of cases to be heard on the merits, which numbered fewer than 75. But what is even more remarkable than just the sheer number of cases is their procedural posture. In all seven of those cases, the Court granted review in cases in which the lower courts had ruled in a manner that environmentalists favored. The impression created is that the Court is more attentive to petitions arising out of lower court rulings in favor of environmentalists than the Court is when the environmentalists have lost below. Borrowing the terminology of Emory law Prof. William Buzbee, invoked elsewhere in this volume, the Court is apparently more concerned about the possibility of regulatory overkill than underkill.³³

Rather than a historical anomaly, the Court's current docket seems to be merely the inevitable realization of a long-standing tendency. During the past 20 years, the Court has heard approximately 89 environmental law cases.³⁴ More than three-fourths of those cases reviewed lower court rulings favorable to environmentalists.³⁵ On only two occasions during the past 30 years were environmental public interest organizations (rather than industry or a government agency) the party who succeeded in persuading the Court to grant review. Until the Court granted the petition filed by *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,³⁶ decided in 2000, the Court had not granted a petition at the exclusive request of an environmental organization since *Sierra Club v. Morton*,³⁷ almost 30 years earlier.³⁸

No similar skewing seems evident in other substantive areas. For instance, although the Court has a reputation for being relatively more sympathetic to criminal prosecutors rather than to defendants, the Court's grants of review are far more balanced than they are in environmental cases. During October Terms 2000, 2001, 2002, and 2003, the Court granted review in approximately 41 cases involving death penalty or constitutional criminal procedure issues.³⁹

Utah Wilderness Alliance, 124 S. Ct. 2373, 34 ELR 20034 (2004); *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 34 ELR 20021 (2004).

33. William W. Buzbee, *Regulatory Underkill in an Era of Anti-Environmental Majorities*, *infra* Chapter V.

34. See Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 773 (2000).

35. *Id.*

36. 528 U.S. 167, 30 ELR 20246 (2000).

37. 405 U.S. 727, 2 ELR 20192 (1972).

38. See *infra* note 128.

39. Nine cases in the October 2000 Term: *Indianapolis v. Edmond*, 531 U.S. 32 (2000), ruling 6-3 in favor of respondent, individual; *Arkansas v. Sullivan*, 532 U.S. 769 (2001), ruling 9-0 in favor of petitioner, state; *Atwater v. Lago Vista*, 532 U.S. 318 (2001), ruling 5-4 in favor of respondent, city; *Illinois v. McArthur*, 531 U.S. 326 (2001), ruling 8-1 in favor of petitioner, state; *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), ruling 6-3 in favor of petitioner, individual;

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Nineteen cases in the October 2003 Term include: *United States v. Banks*,⁴⁰ ruling 9-0 in favor of petitioner, state; *Banks v. Dretke*,⁴¹ ruling 9-0 in favor of petitioner, individual; *Beard v. Banks*,⁴² ruling 5-4 in favor of petitioner, state; *Blukely v. Washington*,⁴³ ruling 5-4 in favor of petitioner, individual; *Crawford v. Washington*,⁴⁴ ruling 9-0 in favor of petitioner, individual; *Dretke v. Haley*,⁴⁵ ruling 6-3 in favor of petitioner, state; *Fellers v. United States*,⁴⁶ ruling 9-0 in favor of petitioner, individual; *Groh v. Ramirez*,⁴⁷ ruling 5-4 in favor of respondent, individual; *Hiibel v. Sixth Judicial District Court of Nevada*,⁴⁸ ruling 5-4 in favor of respondent, state; *Illinois v. Lidster*,⁴⁹ ruling 6-3 in favor of petitioner, state; *Iowa v. Tovar*,⁵⁰ ruling 9-0 in favor of petitioner, state; *Maryland v. Pringle*,⁵¹ ruling 9-0 in favor of petitioner, state; *Missouri v. Seibert*,⁵² ruling

Kyllo v. United States, 533 U.S. 27 (2001), ruling 5-4 in favor of petitioner, individual; *Ohio v. Reiner*, 532 U.S. 17 (2001), ruling 9-0 in favor of petitioner, state; *Penry v. Johnson*, 532 U.S. 782 (2001), ruling 6-3 in favor of petitioner, individual; *Shafer v. South Carolina*, 532 U.S. 36 (2001), ruling 7-2 in favor of petitioner, individual. Nine cases in the October 2001 Term: *United States v. Knights*, 534 U.S. 112 (2001), ruling 9-0 in favor of petitioner, United States; *Atkins v. Virginia*, 536 U.S. 304 (2002), ruling 6-3 in favor of petitioner, individual; *Bell v. Cone*, 535 U.S. 685 (2002), ruling 8-1 in favor of petitioner, state; *Board of Ed. of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), ruling 5-4 in favor of petitioner, state; *Kelly v. South Carolina*, 534 U.S. 236 (2002), ruling 5-4 in favor of petitioner, individual; *Mickens v. Taylor*, 535 U.S. 162 (2002), ruling 5-4 in favor of respondent, state; *Ring v. Arizona*, 536 U.S. 584 (2002), ruling 7-2 in favor of petitioner, individual; *United States v. Arvizu*, 534 U.S. 266 (2002), ruling 9-0 in favor of petitioner, United States; *United States v. Drayton*, 536 U.S. 194 (2002), ruling 6-3 in favor of petitioner, United States.

Four cases in the October 2002 Term: *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), ruling 5-4 in favor of respondent, state; *Miller-El v. Cockrell*, 537 U.S. 322 (2003), ruling 8-1 in favor of petitioner, individual; *Wiggins v. Smith*, 539 U.S. 510 (2003), ruling 7-2 in favor of petitioner, individual; *Kaupp v. Texas*, 538 U.S. 626 (2003), ruling 9-0 in favor of petitioner, individual.

40. 124 S. Ct. 521 (2003).
41. 124 S. Ct. 1256 (2004).
42. 124 S. Ct. 2504 (2004).
43. 124 S. Ct. 2531 (2004).
44. 124 S. Ct. 1354 (2004).
45. 124 S. Ct. 1847 (2004).
46. 124 S. Ct. 1019 (2004).
47. 124 S. Ct. 1284 (2004).
48. 124 S. Ct. 2451 (2004).
49. 124 S. Ct. 885 (2004).
50. 124 S. Ct. 1379 (2004).
51. 124 S. Ct. 795 (2004).
52. 124 S. Ct. 2601 (2004).

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5-4 in favor of respondent, individual; *Nelson v. Campbell*,⁵³ ruling 9-0 in favor of petitioner, individual; *Tennard v. Dretke*,⁵⁴ ruling 6-3 in favor of petitioner, individual; *Thornton v. United States*,⁵⁵ ruling 7-2 in favor of respondent, state; *United States v. Flores-Montano*,⁵⁶ ruling 9-0 in favor of petitioner, state; *United States v. Lara*,⁵⁷ ruling 7-2 in favor of petitioner, state; *United States v. Patane*,⁵⁸ ruling 5-4 in favor of petitioner, state; *Yarborough v. Alvarado*,⁵⁹ ruling 5-4 in favor of petitioner, state. Yet, in 21 of those cases, the party seeking review was the individual defendant, and not the government prosecutor.

Closer examination of cases during the October Term 2003 also provides no support for the possibility that there was something especially compelling about those seven cases that prompted the Court to grant so many and from such a skewed perspective. Quite the opposite. As described in more detail below, many of the seven did not seem like likely Court cases. The traditional criteria for Court review were lacking. In some, the Court granted certiorari in the absence of circuit conflicts and where there was no obvious legal issue of transcendent national importance. There was even one case where the statute being construed applied in only 1 state out of the full complement of 50 and the District of Columbia.⁶⁰

Discussed briefly below is each of the seven environmental cases decided by the Court during October Term 2003. No effort is made to summarize all the issues before the Court in these cases or to explain fully the Court's ruling. Each is discussed only to the extent necessary to highlight what they reveal about how the Court or individual Justices misperceive the workings and ultimately the nature of environmental law.

4. Alaska Department of Environmental Conservation v. U.S. Environmental Protection Agency⁶¹

Alaska concerned the authority of EPA to second-guess a determination by a state permitting agency of what constitutes best available control technology (BACT) for the purposes of permitting a major stationary source under the

53. 124 S. Ct. 2117 (2004).
54. 124 S. Ct. 2562 (2004).
55. 124 S. Ct. 2127 (2004).
56. 124 S. Ct. 1582 (2004).
57. 124 S. Ct. 1628 (2004).
58. 124 S. Ct. 2620 (2004).
59. 124 S. Ct. 1240 (2004).
60. See *BedRoc Ltd., Ltd. Liab. Co. v. United States*, 124 S. Ct. 1587 (2004) (interpreting rights to minerals stemming from the Pittman Underground Water Act of 1919, 43 U.S.C. §§351-355 (repealed 1964), applicable only in Nevada).
61. 124 S. Ct. 983, 34 ELR 20012 (2004).

CAA's program for the prevention of significant deterioration (PSD).⁶² The Court affirmed the court of appeals' judgment in favor of EPA, by a five to four vote, with Justice Ruth Bader Ginsburg writing the majority opinion for the Court and Justice Anthony M. Kennedy authoring the dissent.⁶³

The first striking thing about this case is that the Court granted review at all. There was absolutely nothing remotely certworthy about this case. There was no circuit conflict. And the precise legal issue—the competing authorities of EPA and a state permitting agency to determine BACT—is not one of the more pressing legal issues of the day for environmental law, let alone for federal law in general. Indeed, it would be unlikely to be on a list of the top 100 environmental law issues of the moment if one were to poll just the nation's environmental bar. Yet, for at least the four Justices who must have voted in favor of certiorari in the case, this environmental law issue was sufficiently important to be one of only 75 cases the Court decided to hear, out of thousands of requests the Justices turned away, including cases presenting circuit conflicts, millions of dollars in stakes, years of imprisonment, and even the imposition of the death penalty.

Because the Court never formally reports on the reasons for a grant of certiorari, one is normally hard-pressed even to speculate as to why the Justices favored review. In this case, Justice Kennedy's dissenting opinion on the merits, joined by three others,⁶⁴ is strongly suggestive of both the likely identity of the four (at least) Justices favoring review and their reason for doing so. Justice Kennedy's dissent is remarkably strident. It condemns the majority for "a great step backward in Congress' design to grant States a significant stake in developing and enforcing national environmental policy."⁶⁵ It also accuses the Court of embracing an unwarranted "presumption that state agencies are not to be trusted to do their part."⁶⁶ Justice Kennedy's harsh rhetoric is hard to square with the actual stakes of the case: a BACT determination for a single permittee in a PSD area in Alaska. EPA was not seeking to invoke some sweeping federal oversight authority of general applicability. EPA's claimed authority was limited in scope, had been only rarely invoked in the past, and there was nothing in the record to suggest the Agency planned to rely on it more in the future.⁶⁷

But, for that same reason, Justice Kennedy's language is that much more telling. It underscores his and his dissenting brethren's depth of concern about the

62. 42 U.S.C. §7475(a)(4).

63. See *Alaska Dep't of Env'tl. Conservation*, 124 S. Ct. at 989.

64. *Id.* at 1010.

65. *Id.* at 1017.

66. *Id.* at 1012.

67. See Brief for Respondent U.S. Environmental Protection Agency at 30, *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983 (2004) (No. 02-658) ("It has proven to be relatively rare that a state agency has put EPA in the position of having to exercise that authority."); *Id.* at 1003.

potential impact of environmental law making on core federalism values they hold. What Justice Kennedy fails to apprehend, however, is how laws like the CAA are carefully balanced both in their deference to state prerogatives in some respects and their allowing for EPA second-guessing of the states in others. It is neither all one sovereign nor all the other. The Act reflects a fairly creative effort to tap into the relative advantages and opportunities presented by each, while trying to fashion a regulatory approach that accounts for both the federal and state dimensions of the air pollution problem.⁶⁸ There were, moreover, distinct reasons why Congress chose to have a stronger federal role in the formulation of the technology-based pollution control standards, even ones that are more site-specific such as BACT in PSD, in contrast to the kinds of more diffuse controls established by the states within state implementation plans (SIPs).⁶⁹ Congress sought to achieve some minimum uniformity in the realm of technology pollution control standards.⁷⁰

Finally, Justice Kennedy's dissent further reveals his lack of appreciation of the reasons why a law like the CAA provides for such oversight of governmental agencies. The dissent complains that the majority opinion does not express a "trust" of the states.⁷¹ What Justice Kennedy is missing is that the majority's lack of trust is not of its own making, but quite appropriately reflective of Congress' lack of trust. The simple truth is that the CAA, like most federal environmental statutes is deliberately and pervasively riddled with distrust. Its provisions do not fully trust state governments just like they do not fully trust industry or the federal government.

There is, moreover, a reason for such congressional distrust. Congress understood the powerful political and economic pressures that would be placed on agencies to compromise away environmental protection objectives during the implementation of aspirational environmental laws such as the CAA. Congress responded by creating a multiplicity of checks and balances within

68. In its amicus brief, *Environmental Defense et al.* noted "Congress preserved a central role for the states, establishing an intricate partnership," but that "[a] structure combining technology-forcing federal standards and optional state implementation backed by EPA enforcement authority—rather than open-ended state discretion—has been the Act's 'overall approach' for new and modified sources." Brief for Environmental Defense, the National Parks Conservation Ass'n, the Northern Alaska Env'tl. Ctr., and the Alaska Community Action on Toxics as Amici Curiae in Support of Respondents at 15-16, *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983 (2004) (No. 02-658) [hereinafter Brief for Environmental Defense et al.].

69. 42 U.S.C. §7410.

70. Brief for Environmental Defense et al., *supra* note 68, at 9 ("Congress intended BACT to 'force' the adoption of new control technologies, to counter states' tendency to under-protect air quality in order to attract or keep industry, and to preserve air quality in adjacent states and on special federal lands such as National Parks.").

71. See *Alaska Dep't of Env'tl. Conservation*, 124 S. Ct. at 1012.

the statutory scheme. Congress provided for EPA to review and approve state submission of SIPs.⁷² Congress authorized states to sue EPA for failing to abide by the CAA's requirements, including the federal agency's regulation (or lack of regulation) of upstream states.⁷³ And, of course, Congress included powerful citizen suit provisions in the CAA and virtually all of the other federal environmental laws.⁷⁴

Justice Kennedy and his dissenting colleagues, however, simply reacted instinctively to what they saw as a mistaken inroad on federalism. Thus misdirected, they failed to consider more fully how the federal law is in fact more carefully nuanced. And, even more essentially, the Justices failed to account for why Congress had good reason to make inroads on federalism concerns on this occasion. Fortunately, *Alaska* was one of the few instances last Term where a majority of the Justices was not similarly disaffected and EPA's limited authority to oversee the state was upheld. The fact, however, that such a small and simple case could have prompted both a certiorari grant and a loud dissent does not bode well for the future.

*B. South Florida Water Management District v. Miccosukee Tribe of Indians*⁷⁵

Miccosukee raised a legal issue concerning the jurisdictional scope of the CWA. The case originated in a CWA citizen suit filed by the Miccosukee Indian Tribe, alleging that the South Florida Water Management District's (SFWMDS) operation of a pumping station amounted to a discharge of a pollutant, requiring a §402 national pollutant discharge elimination system (NPDES) permit.⁷⁶ The tribe's claim, which was accepted by the district court and court of appeals,⁷⁷ without dissent, was hardly extravagant. The pumping station consists of three pipes, each conveying 960 cubic feet per second of phosphorous-contaminated water from a canal to a relatively pristine water body within the Florida Everglades.⁷⁸ And, pursuant to §502(12) of the CWA, "[t]he term 'discharge of a pollutant' and the term 'discharge of pollutants' each means . . . 'any addition of any pollutant to navigable waters from any point

72. See 42 U.S.C. §§7410(a)(1), 7410(c)(1).

73. See *id.* §§7426, 7604.

74. See, e.g., *id.* §7604; 33 U.S.C. §1365.

75. 124 S. Ct. 1537, 34 ELR 20021 (2004).

76. See *Miccosukee Tribe of Indians of Fla. v. South Fla. Water Management Dist.*, 1999 U.S. Dist. LEXIS 23306 (S.D. Fla. 1999); 33 U.S.C. §§1311, 1342.

77. See *Miccosukee Tribe of Indians of Fla. v. South Fla. Water Management Dist.*, 280 F.3d 1364, 32 ELR 20475 (11th Cir. 2002); *Miccosukee Tribe of Indians of Fla.*, 1999 U.S. Dist. LEXIS 23306.

78. *Miccosukee Tribe of Indians of Fla. v. South Fla. Water Management Dist.*, 1999 U.S. Dist. LEXIS 23306, at *4.

source'⁷⁹ and 'point source' is expressly defined by §502(14) to include a 'pipe.'⁸⁰ In short, the legal argument should have been a total slam-dunk for the Miccosukee Indian Tribe.

For that reason alone, the Court's grant of certiorari was once again remarkable. While at least this time, there was a tangentially related circuit conflict over the meaning of discharge implicated by the court of appeals' ruling,⁸¹ it was not squarely raised by the case. That was why the U.S. Solicitor General, when invited by the Court to advise on the certworthiness of the case, ultimately recommended in favor of denial.⁸² The Court, however, granted review anyway.⁸³

As in *Alaska*, the Court had little trouble subsequently rejecting on the merits the only legal argument raised by petition, which was whether the pipes somehow fell outside the meaning of discharge because they were conveying pollutants not created by the pipes themselves but from runoff flowing into the canal from which the pipes pumped. The Court described petitioner's argument as "untenable"⁸⁴—no doubt because point source is defined to mean a "conveyance"⁸⁵ which is why the petitioner itself actually managed to abandon the argument in both its reply brief⁸⁶ and oral argument.⁸⁷ Here again, however, the Court's ultimate action, while favorable to the environmentalist's legal position, further underscores how quick the Court was to assume at the certiorari stage that there was a problem requiring their extraordinary intervention. The clearly untenable nature of the petitioner's legal argument should have been more than sufficient to prompt a denial of the certiorari petition in the first instance had the Court not been so naturally accepting of the petitioner's allegation of regulatory overreaching.

79. 33 U.S.C. §1362(12).

80. *Id.* §1362(14).

81. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 13 ELR 20015 (D.C. Cir. 1982).

82. See Brief for United States as Amicus Curiae, *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626) (certiorari stage filed at the invitation of the Court).

83. See *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 539 U.S. 957 (2003).

84. See *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 34 ELR 20021 (2004).

85. 33 U.S.C. §1362(14); see *id.* ("A point source is, by definition, a 'discernible, confined, and discrete conveyance.'").

86. See Reply Brief of *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626).

87. See Oral Argument of *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626).

Also troubling was the Court's refusal to address the alternative "unitary waters" legal argument pressed by petitioner.⁸⁸ The gist of the unitary waters argument is that so long as pollutants are being conveyed from one navigable water body to another navigable water body, no matter how geographically and hydrologically distinct the two bodies of water, there is no "addition" to "navigable waters" within the meaning of §502(12).⁸⁹ In other words, once the pollutants are in one navigable water body, they are already in the "navigable waters" of the United States and movement of those pollutants between water bodies does not result in a net addition of pollutants. This argument, introduced into the case for the first time by the amicus brief filed by the Solicitor General on the merits,⁹⁰ has an extraordinarily sweeping reach in terms of its potential to remove CWA jurisdiction over a large number of activities affecting water quality. For that reason, the case prompted a large number of amicus briefs on both sides, with industry and about 12 states in support of the petitioner's argument that §402's permit requirement did not apply, and environmentalists and 13 other states and other governmental organizations filing in opposition to the unitary waters theory.⁹¹

While the Court was certainly procedurally within bounds to decline the invitation, the Court's decision to do so was actually a disappointment to environmentalists. The oral argument in the case left very little doubt where Justice Sandra Day O'Connor stood on the legal issue—she referred to the unitary wa-

88. See Reply Brief at 1, *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626); Oral Argument at 13, *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626).

89. See *South Fla. Water Management Dist.*, 124 S. Ct. at 1544.

90. See Amicus Brief of United States at 15-20, *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626).

91. Amici curiae filing briefs in support of petitioners included Lake Worth Drainage District and Florida Ass'n of Special Districts; Florida Fruit and Vegetable Ass'n; Pacific Legal Foundation; Gov. Dirk Kempthorne (R-Idaho); National League of Cities et al.; City of Weston, Florida; states of Colorado and New Mexico; National Water Resources Ass'n et al.; City of New York et al.; Utility Water Act Group; National Homebuilders Ass'n et al.; and Nationwide Public Projects Coalition et al. Amici curiae filing briefs in support of respondents included the states of Connecticut, Illinois, Kentucky, Maine, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Oklahoma, Vermont and Washington; National Wildlife Federation et al.; commonwealth of Pennsylvania, Department of Environmental Protection; Tongue and Yellowstone River Irrigation District et al.; Coalition of Greater Minnesota Cities and the City of St. Cloud; former EPA Administrator Carol Browner et al.; Florida Wildlife Federation et al.; Association of State Wetland Managers and the Tropical Audubon Society; Trout Unlimited et al. I authored the amicus brief in the case on behalf of former EPA Administrator Carol Browner and other former EPA officials, in support of the respondent Miccosukee Indian Tribe.

ters theory as extreme during oral argument and she pointedly suggested petitioner's counsel move to a backup argument.⁹² And her majority opinion for the Court strongly hinted as much but failed to pull the trigger.⁹³ One can fairly anticipate that at least four other Justices (Justices John Paul Stevens, David H. Souter, Ginsburg, and Stephen G. Breyer) would have joined O'Connor, just as they did in *Alaska*.⁹⁴ For that reason, the majority's decision to allow the unitary waters legal issue to remain open was probably a positive development for industry, which now can hope that the issue may come back to the Court in a few years when there are likely to be some new conservative faces on the Court.

The Court's ultimate disposition of the case also makes one wonder whether the Court would have similarly been reluctant to decide an issue not fairly presented by the certiorari petition had a majority been ready to rule against environmentalists. While declining to address the unitary waters argument, the Court nonetheless decided to remand the case back to district court to allow the petitioner a second chance to persuade the trial judge that the waters in this particular instance were one water body because of the hydrologic connection between the two.⁹⁵ Only Justice Antonin Scalia, dissenting on this single point, was willing to point out the impropriety of such a remand.⁹⁶ The lower courts had already unanimously decided that entirely fact-bound inquiry against the petitioner—finding that they are two distinct waters⁹⁷—and the petitioner had correctly not even deigned in its petition to raise that issue.⁹⁸ The Court's remand was accordingly an extraordinary gratuity to the petitioner.

Finally, Justice Kennedy at oral argument in *Miccosukee* displayed again a lack of appreciation of the challenges of environmental law making and the potential for their fundamental misinterpretation. At argument, Justice Kennedy questioned the tribe counsel's contention that an NPDES permit requirement applied to the movement of contaminated water from one body to another. Justice Kennedy posited that such a legal theory could not be valid given that EPA

92. See Oral Argument at 14, *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626).

93. See *South Fla. Water Management Dist.*, 124 S. Ct. at 1545.

94. Oral argument can, of course, be misleading, but at the argument in *Miccosukee*, which the author attended, Justices Stevens, Souter, Ginsburg, and Breyer each expressed varying degrees of skepticism about the persuasiveness of the unitary waters argument proffered by the United States.

95. See *id.*

96. *Id.* at 1547 ("I see no point in directing the Court of Appeals to consider an argument it has already rejected.").

97. See *Miccosukee Tribe of Indians of Fla. v. South Fla. Water Management Dist.*, 280 F.3d 1364, 1369, 32 ELR 20475 (11th Cir. 2002).

98. Petition for a Writ of Certiorari, *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626).

had never, during more than three decades of CWA implementation, sought to subject that permit requirement to a host of water allocation activities out west that move water that incidentally may include some contaminants. The colloquy with counsel was as follows:

- J. Kennedy: So that States have been violating the Federal law for 30 years and nobody knew about it?
- Counsel for Respondent: Well, in most cases—
- J. Kennedy: That's kind of an extraordinary interpretation.⁹⁹

For those steeped in the history of environmental law, the historical premise presented by Justice Kennedy, even if true (which is debatable),¹⁰⁰ does not support his conclusion that the interpretation of the law must therefore be “extraordinary.” Environmental law is replete with broadly worded provisions that it takes years for an agency such as EPA to implement according to their plain meaning. Federal environmental laws demand a lot, and deliberately so. But there are often high political and practical hurdles to their full implementation that can require years to overcome. The water quality provisions of the CWA, particularly their requirement that effluent limitations derived from technology-based standards be made more stringent as necessary to meet water quality objectives,¹⁰¹ the new source review provisions of the CAA, particularly the provisions that a modification of an existing source, trigger demanding new source technology-based emission limitations,¹⁰² ESA limitations on the destruction of habitat of endangered species,¹⁰³ lay largely dormant for many years before implementation began.

Contrary to Justice Kennedy's threshold assumption, the mere fact of such dormancy does not demonstrate the inapplicability of the plain meaning of the relevant statutory language. It underscores instead how a federal agency often seeks to make seemingly uncompromising statutory language less unsettling by implementing the program over time. Whatever the legality of an administrative agency's unilateral decision to take things more slowly than expressly allowed by the statutory language, the fact that it has done so does not make a statutory construction based on the plain meaning of “extraordinary.” What

99. See Oral Argument at 36, South Fla. Water Management Dist. v. Miccosukee Tribe of Indians, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626).

100. See Brief of Amicus Curiae Former EPA Administrator Carol Browner et al. at 8-14, South Fla. Water Management Dist. v. Miccosukee Tribe of Indians, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626).

101. See 33 U.S.C. §§1313-1314 (2004); see, e.g., Scott v. City of Hammond, 741 F.2d 992, 14 ELR 20631 (7th Cir. 1984).

102. See 42 U.S.C. §§7479(2)(c), 7503(a)(1)(B); see also United States v. Ohio Edison Co., 276 F. Supp. 2d 829, 33 ELR 20253 (S.D. Ohio 2003).

103. See 16 U.S.C. §1538; Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 25 ELR 21194 (1995).

should seem extraordinary is the agency's delay, not what the law requires.¹⁰⁴ And, in all events, the administrative delay, no matter how lengthy, cannot amend what Congress plainly intended based on that language. Nor, even in the face of statutory ambiguity, would such agency inaction provide an occasion for judicial deference to the agency's implicit determination that the statute did not apply to a particular circumstance. Even if an agency's inaction is thought to be suggestive of a particular interpretation of statutory language, it does not constitute an exercise of legislatively delegated law making authority, akin to informal notice-and-comment rulemaking or a formal adjudication, entitled to judicial deference pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁰⁵

C. Engine Manufacturers Ass'n v. South Coast Air Quality Management District¹⁰⁶

The Court decided *Engine Manufacturers* on April 28, 2004. At issue in this CAA preemption case was the validity of the South Coast Air Quality Management District's requirement that operators of “fleets” of vehicles purchase specified percentages of low emission vehicles to the extent such vehicles are otherwise commercially available. The Court ruled, with only Justice Souter dissenting, that §209(a) of the CAA prohibits the regional air quality district from imposing such a purchase requirement.¹⁰⁷ The Court reasoned that there was no basis for distinguishing between a requirement applicable to purchasers of vehicles and an analogous requirement applicable to vehicle manufacturers, which the Court reasoned would plainly be preempted. Each, the Court ruled, is an “emission standard” falling within §209(a)'s prohibition on any state or po-

104. See *Ohio Edison Co.*, 276 F. Supp. 2d at 833. The comments of a federal district court judge in a recent CAA case are more aptly directed:

This case highlights an abysmal breakdown in the administrative process following the passage of the landmark [CAA] in 1970. For thirty-three years, various administrations have wrestled with and, to a great extent, have avoided a fundamental issue addressed in the [CAA], that is, at what point plants built before 1970 must comply with new air pollution standards. The [CAA] requires plants constructed after 1970 to meet stringent air quality standards, but the Act exempts old facilities from compliance with the law, unless such sites undergo what the law identifies as a “modification.” . . . By any standard, the enforcement of the [CAA] with regard to the Sammis Plant has been disastrous. . . . [T]he Court finds that the EPA's failures in enforcement do not absolve Ohio Edison from liability under a law that has always been clear.

105. 467 U.S. 837, 14 ELR 20507 (1984); see *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

106. 124 S. Ct. 1756, 34 ELR 20028 (2004).

107. *Id.* at 1764.

litical subdivision adopting "any standard relating to the control of emissions from new motor vehicles."¹⁰⁸

To a large extent, this is not a remarkable ruling. The plain meaning of the statute provides ample support for the result. A strong automobile emissions standard preemption provision was not an incidental part of the CAA, when enacted in 1970, but instead something that the automobile industry worked hard to get enacted in 1970.¹⁰⁹ Nor given the potential reach of the lower court ruling was the grant of certiorari here as untethered from traditional practices as were the grants of review in both *Alaska* and *Miccosukee*. While there was no square circuit conflict compelling Court review, it was at least a plausible petition, although it was odd that the Court abandoned its normal practice of granting certiorari in this kind of complicated federal preemption case only after first asking the Solicitor General to file a brief on the advisability of the Court's doing so.¹¹⁰

The decision is nonetheless noteworthy for the Court's willingness to treat as so easy what is in fact a preemption issue that if closely examined, does at least possess more shades of gray than suggested by the majority opinion. Had the statute at issue simply mandated a purchase of low emission vehicles, federal preemption under CAA §209(a) could not have been gainsaid.¹¹¹ But the state law took pains to impose no such requirement. Such purchases of low emission vehicles were required under the state law's terms only to the extent that the manufacturers chose to make such vehicles "commercially available."¹¹² The regional air quality control district, accordingly, specifically ensured that the purchasing requirement was not the functional equivalent of a manufacturing requirement.

The Court simply elided this significant discrepancy by way of ipse dixit¹¹³: the prerogative of a majority opinion. The relative ease with which eight (all but Justice Souter) of the Justices disposed of this twist in the case provides an interesting contrast with the way in which the Court sharply divided in the other CAA case, *Alaska*, decided just a few weeks earlier. In particular, neither Justice Kennedy nor any of his three colleagues who joined his *Alaska* dissent seemed to have been concerned at all about the obvious federalism implications of the federal government's preemption argument in *Engine Manufacturers*. The federalism flags, raised and waved so prominently by their *Alaska* dissent, are nowhere to be seen in *Engine Manufacturers*.

In *Alaska*, the four Justices expressed outrage when the Court upheld EPA's prevention of a state from imposing a *reduced* pollution control standard.¹¹⁴

108. *Id.* at 1763.

109. See LAZARUS, *supra* note 8, at 91-92.

110. See, e.g., *Bates v. Dow Agrosiences, Ltd. Liab. Co.*, 540 U.S. 1088 (2003).

111. 42 U.S.C. §7543.

112. *Engine Mfrs.*, 124 S. Ct. at 1767.

113. *Id.* at 1763.

114. See *Alaska Dep't of Env'tl. Conservation*, 124 S. Ct. at 990.

The dissent worked overtime to parse the statutory language to discover sufficient wiggle room to allow the state its untrammelled sovereignty and spoke loudly about the need to trust states and not to worry about "a race to the bottom."¹¹⁵ But in *Engine Manufacturers*, when a state political subdivision was seeking to impose a *more stringent* standard and in effect proving the *Alaska* dissenters' substantive point that a race to the bottom will not necessarily occur, the same Justices quietly joined the preemption bandwagon in order to preclude a race to the top. The "commercial availability" statutory language, available to provide the states and their political subdivision with a modicum of flexibility, was quickly cast aside.

D. *BedRoc Ltd., Ltd. Liability Co. v. United States*¹¹⁶

BedRoc, decided March 31, 2004, concerned the meaning of the Nevada Pittman Underground Water Act,¹¹⁷ which authorizes patents of up to 640 acres of land in Nevada to applicants who successfully developed subterranean water sources, provided that such patents reserved to the United States "all the coal and other valuable minerals."¹¹⁸ The specific question presented was whether the reservation of "valuable minerals" includes all common materials (such as sand and gravel), without regard to whether the materials located on particular lands were valuable minerals at the time of the patent.¹¹⁹ A four-Justice plurality ruled that such a federal reservation did not extend to sand and gravel and distinguished a prior Court ruling under the Stock Homestead Raising Act¹²⁰ on the ground that the latter Act more broadly reserved "minerals" and not just "valuable minerals."¹²¹ Two Justices concurred, arguing that the two statutes could not be fairly distinguished, and that stare decisis justified not overturning the prior Court ruling.¹²² The dissenters concluded that the two laws could not be distinguished and the earlier decision should be controlling in the context of the Nevada Pittman Act as well. The practical effect of the ruling was a victory for private property interests, which are more likely to be interested in exploiting the mineral resource.

Whatever the result in *BedRoc*, the question presented—whether sand and gravel is a valuable mineral in a narrowly drawn federal law—would hardly

115. *Id.* at 1012.

116. 124 S. Ct. 1587 (2004).

117. Ch. 77, 41 Stat. 293 (1919).

118. *Id.* §8, 41 Stat. at 205.

119. 124 S. Ct. at 1590.

120. See 43 U.S.C. §§291 et seq.; *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 13 ELR 20849 (1983).

121. 124 S. Ct. at 1595.

122. *Id.* at 1596.

seem to be the kind of legal issue warranting the Court's attention. The environmental law question at issue in *Alaska* may not have been in the top 100 for just the environmental law field, but the issue in *BedRoc* would not likely be in the top 100,000. The federal statute in question applies in only one state—and not even a very populated one at that. Nor was there an existing circuit conflict or even a realistic possibility of a future conflict developing (given that the state of Nevada is located within one federal circuit). Finally, the lower court ruling was not in tension with any existing Court precedent. Quite the opposite. Those seeking Court review were arguing in favor of an overruling of Court precedent.¹²³

Yet, notwithstanding all of these compelling reasons for denying certiorari, the Court granted review, and *BedRoc* became 1 of only about 75 cases the Court heard on the merits out of the thousands of petitions for review filed with the Court. My best guess for the Court's action is that it reflects the importance for several members of the Court of ensuring that public land laws are correctly construed when necessary to place natural resources in private property ownership. Otherwise, it is hard to perceive why this case warranted review. Hence, the smaller one views the significance of the legal issues posed in *BedRoc*—and they are fairly small in the world of Court litigation—the more the Court's decision to hear the case supports the proposition that a basic belief in private property ownership of natural resources is what drove the Court's docket. The Court's final opinion may well be correct on the merits—that is, of course, a good thing—but the Court's remarkable desire to reach out and hear this kind of case speaks volumes about the Court's priorities and thinking about environmental law.

*E. U.S. Department of Transportation v. Public Citizen*¹²⁴ and *Norton v. Southern Utah Wilderness Alliance (SUWA)*¹²⁵

The Court decided *Public Citizen* and *SUWA* near the end of the Term, on June 7 and June 9, 2004 respectively, both unanimously reversing lower court rulings that had been highly favorable to environmental public interest groups that had initiated the litigation.¹²⁶ The two cases also both included National Environmental Policy Act (NEPA)¹²⁷ claims and continued the unbroken string of 14 NEPA losses for environmentalists in the Court. Not only have environmental-

123. See Brief for Petitioners at 48-50, *BedRoc Ltd., Ltd. Liab. Co. v. United States*, 124 S. Ct. 1587 (2004) (advocating overruling of *Watt*, 426 U.S. at 36).

124. 124 S. Ct. 2204, 34 ELR 20033 (2004).

125. 124 S. Ct. 2373, 34 ELR 20034 (2004).

126. See *Public Citizen v. Department of Transp.*, 316 F.3d 1002 (9th Cir. 2003); *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 33 ELR 20025 (10th Cir. 2002).

127. 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209.

ists never won a NEPA case in the Court, but they have not even received a vote of a single Justice on a NEPA issue decided on the merits after full briefing since *Kleppe v. Sierra Club*,¹²⁸ decided in 1976.

No doubt, this remarkable string of losses reflects more than just the Justices' views of NEPA. The Solicitor General is well known to be strategic in selecting cases for Court review. I am personally well aware from having worked in the Solicitor General's office of government decisions not to appeal adverse lower court NEPA rulings to the Court to avoid the possibility of a significant NEPA loss in the High Court. Environmentalists have likely also contributed to the skewed record by unilaterally declining to bring cases to what appears to be an unwelcome forum. To that extent, the pattern is somewhat self-perpetuating.

But it is not just the number of NEPA losses, but their unanimity that is striking. The Court's rulings in each case are not at all unprincipled, but the legal arguments were also not nearly as one-sided as the final votes suggest. The latter strongly suggests that the Justices simply do not care very much about the cases, or at least not enough to bother to tease out the nuances in separate concurring or dissenting opinions. The cases are low priority for the chambers, which is likely why there is so little evidence of meaningful engagement. One Justice is assigned the opinion and the other Justices join, with little effort at fine-tuning.¹²⁹ In the Court, NEPA has remained throughout its existence only a wholly ordinary congressional enactment subject to inherently conservative principles of statutory construction. Entirely divorced from the Court's analysis has been any concerted consideration of NEPA's extraordinary ambition to achieve radical changes in the way government does business and the implications of that congressional ambition to how it might be received in the federal courts.

Compare, for instance, the Court's recent treatment of NEPA to that provided by the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit in the nation's first significant NEPA case, decided back in 1971 soon after NEPA became law. In *Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission*,¹³⁰ the court of appeals considered a NEPA challenge brought by environmentalists against the Atomic Energy Commission (AEC), claiming

128. 427 U.S. 390, 6 ELR 20532 (1976). Justice Thurgood Marshall did file a sole dissent from the Court's per curiam opinion in *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 10 ELR 20079 (1980) but the Court decided that case based exclusively on the jurisdictional pleadings and without the benefit of full briefing on the merits. The Court's willingness to decide that case on the merits in that procedural posture, however, further demonstrates the lack of engagement in the subject matter.

129. This is also my impression based on my recent review of the papers of Justice Harry Blackmun, available to the public at the Library of Congress. In several of the NEPA cases, the initial votes at conference were not unanimous, even though the final opinion voting was.

130. 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 1971).

that the AEC's NEPA regulations failed to satisfy NEPA's demanding requirements for federal agency consideration of the environmental consequences of their actions. In an opinion authored by Judge Skelly Wright, the court upheld the challenge. But it was the truly stirring words of the court's opinion, not its bare holding, that remind one of the possibility of a very different judicial attitude toward NEPA¹³¹:

These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material "progress." But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. . . . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.¹³²

This is an extraordinary statement by any court. But for those who know Judge Wright's judicial opinions, it is an especially striking declaration. Judge Wright was not known for favoring heightened judicial scrutiny of agency action. He was, in fact, well known for advocating judicial deference to agency decisionmaking.¹³³

Environmental law was one of only two areas of law in which Judge Wright departed from his general policy of judicial deference (the other was civil rights law). He did so because he understood the nature of environmental law. He appreciated what makes environmental law, like civil rights law, particularly in need of heightened judicial scrutiny to safeguard the interests of those less politically powerful (whether racial minorities or unborn future generations). Judge Wright intuitively understood the inherent, structural reasons why environmental law is hard to make, maintain, and enforce over time, which is, in turn, what prompted him to insist on such a substantial, engaged, and active judicial role.¹³⁴

The precise language Judge Wright used in *Calvert Cliffs* is especially revealing. He intuitively appreciated the necessity for a "flood of litigation."¹³⁵ He understood why such a flood in this context was not a negative occurrence, as typically presumed in legal rhetoric seeking to avoid the floodgates of litigation. The flood about which Judge Wright wrote was a necessary part of a posi-

131. I recently published an essay, upon which the discussion contained in this part of the chapter is derived, which more fully considers Judge Wright and his insights regarding the nature of environmental law and the role of judges. See Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENVTL. L.J. 201 (2004).

132. 449 F.2d at 1111.

133. ARTHUR SELWYN MILLER, A CAPACITY FOR "OUTRAGE" 89 (Greenwood Pub. 1984).

134. Lazarus, *supra* note 131, at 206-08.

135. 449 F.2d at 1111.

tive legal transformation of the nation's laws. Hence, a "flood" became for Judge Wright a "promise" and not a threat.¹³⁶

Judge Wright's language in *Calvert Cliffs* reflected the remarkable nature of a law like NEPA as well as the necessity of a vigilant judiciary if NEPA's purposes are to be achieved over time. He implicitly understood the substantial political obstacles that invariably stand in the way of congressional enactment of environmental laws, which is why a law like NEPA occurred only at "long last."¹³⁷ Judge Wright understood that the difficulties associated with the creation of environmental law in the first instance do not disappear instantaneously upon their statutory enactment. As I have elsewhere contended,¹³⁸ environmental laws are radical and unsettling in their import. They question traditional notions of "material" progress.¹³⁹ They are inherently redistributive, disrupting settled economic expectations and generating enormous political controversy.¹⁴⁰ Further vigilance, including by the judiciary, is therefore necessary, as Judge Wright stresses in *Calvert Cliffs*, for the "promise" of the statutes to "become[] reality."¹⁴¹ Judge Wright understood the political and economic pressures that would naturally be brought to bear on laws that sought to impose high costs on some for the benefit of others and how easy it is for such laws and policies to be "lost or misdirected in the vast hallways of the federal bureaucracy."¹⁴² Judge Wright defined the judicial role,¹⁴³ in a manner designed to allow federal judges to guard against the possibility of just such a bureaucratic diversion. "Therein lies the judicial role," he proclaimed.¹⁴⁴ "Our duty," he declared.¹⁴⁵

The Court, however, has never perceived environmental law, in general, or NEPA, in particular, in the way articulated by the D.C. Circuit in *Calvert Cliffs*. Compare, for example, Judge Wright's *Calvert Cliffs* opinion to the views of one of the most prominent of the Justices today, Justice Scalia, who wrote the opinion for the unanimous Court in *SUWA*.¹⁴⁶ Here is what Justice Scalia wrote soon before joining the Court in an obvious, yet nominally indirect reference to

136. *Id.*

137. *Id.*

138. Lazarus, *supra* note 131, at 208.

139. 449 F.2d at 1111.

140. LAZARUS, *supra* note 8, at 24-28.

141. 449 F.2d at 1111.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. This discussion of Justice Scalia, in particular, the extent to which it contrasts with that of Judge Wright, is based upon a fuller discussion set forth in Lazarus, *supra* note 131, at 214-15.

Calvert Cliffs. Justice Scalia mocked what he described as the “judiciary’s long love affair with environmental litigation.”¹⁴⁷ He contended that the judiciary had been mistaken in providing broad citizen suit access to trigger judicial oversight of environmental regulatory action. Nor did Justice Scalia shy away from admitting the broader policy implications of his point of view:

Does what I have said mean . . . “important legislative purposes, heralded in the halls of Congress [can be] lost or misdirected in the vast hallways of the federal bureaucracy?” Of course it does, and a good thing, too . . . [L]ots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. Yesterday’s herald is today’s bore.¹⁴⁸

Justice Scalia, like Judge Wright before him, understands the implications of the nation’s environmental laws. But while Judge Wright saw an occasion within environmental law for legal evolution and accommodation, Justice Scalia perceives environmental law as a destabilizing threat to be cabined. Neither Justice Scalia, nor anyone else on the Court who votes in similar fashion, is against environmentalism or environmental protection laws per se. They are reacting not to the social values environmental laws express. They instead are concerned about the kinds of laws and law making institutions that environmentalism inevitably promotes.

By its nature, environmental protection law does in fact tend to redistribute economic value, limit private property rights in natural resources, promote citizen suit access to judicial review of agency action to prevent against the tendency of government agencies to compromise away environmental protections over time, promote centralized authority in federal administrative agencies, and intrude upon the unimpeded operation of free market forces. The Justices are correct about each of these tendencies. What the Court is missing is adequate appreciation of the constructive nature of these tendencies in the fashioning of legal safeguards for effective environmental protection.¹⁴⁹

In *Public Citizen*, this judicial attitude toward environmental law prompted the Court to engage in a fairly perfunctory analysis of NEPA’s language in support of a ready conclusion that the federal agency in question need not prepare a full environmental impact statement because of the limited nature of its regulatory authority over the activities that may in fact have a significant adverse effect on the natural environment. The Court’s analysis, as far as it goes, is straightforward and unremarkable. But what is entirely missing is any appreciation of the potential relevance of what NEPA was seeking to accomplish and how that might bear on the Court’s highly simplistic model of governmental decisionmaking. A central purpose of NEPA was to prevent federal agencies from so easily passing the buck of responsibility for the environmental conse-

147. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983).

148. *Id.* at 884, 897.

149. LAZARUS, *supra* note 8, at 132-37; Lazarus, *supra* note 131, at 215.

quences of their actions by disclaiming any formal legal authority over certain kinds of consequences. Indeed, NEPA was intended to broaden the scope of relevant considerations that federal agencies took to embrace environmental factors that those same agencies and then-existing congressional mandates had historically ignored.

Whether such a broader understanding of NEPA’s role would have caused the Court to reach a different result in *Public Citizen* itself is not clear. The role of the president, who is plainly not a federal “agency” within the meaning of NEPA, provides a strong, narrowing justification for the outcome in that case. But what does seem clear is the potential harm that may be caused by the fairly loose and broadly dismissive language used by the Court in *Public Citizen*, which is not limited to the peculiar role that the president played in this one case. One of NEPA’s early accomplishments was not allowing agencies to elude NEPA planning obligations by simply disclaiming authority to regulate environmental consequences. The *Public Citizen* opinion, however, takes insufficient account of that long-standing judicial precedent or of regulations promulgated by the Council on Environmental Quality expressing NEPA’s breadth.¹⁵⁰ The upshot is that *Public Citizen* may prompt lower courts to overread the Court’s ruling and to limit or even sweep aside important, settled NEPA precedent. Had the Justices, like the court of appeals in *Calvert Cliffs*, possessed broader awareness of challenges presented by environmental law making, they might have taken more care in the writing of the opinion.

While the Court in *SUWA*¹⁵¹ similarly rejected a NEPA claim, the most significant loss for environmentalists during the entire October Term 2003 was the Court’s broad ruling in *SUWA* concerning the nonreviewability of agency inaction affecting the potential wilderness value of public lands. In *SUWA*, the Court unanimously ruled against a grass-roots environmental organization that had won in the lower courts in its effort to obtain judicial oversight of a federal agency’s failure to take adequate measure to guard against degradation of a potential wilderness area caused by significantly increased off-road vehicle (ORV) use. In ruling that the federal courts lacked jurisdiction to entertain such lawsuits, the Court created a potentially insurmountable hurdle to environmental citizen efforts to bring lawsuits designed to make sure that statutory and regulatory environmental protections are not, recalling Judge Wright’s words in *Calvert Cliffs*, “lost or misdirected” in the “vast hallways of the federal bureaucracy.”¹⁵²

In FLPMA, Congress mandated that the DOI ensure that the suitability of wilderness study areas for designation as wilderness areas not be impaired,¹⁵³

150. See, e.g., 40 C.F.R. §§1508.7 (defining cumulative impact), 1508.8 (defining effects).

151. 124 S. Ct. at 2373.

152. 449 F.2d at 1111.

153. 43 U.S.C. §1782(c).

yet the Court held in *SUWA* that environmentalists could not obtain review where the DOI failed to abide by that mandate based on agency neglect through inaction rather than by "discrete agency action."¹⁵⁴ The wasting away of resources through neglect, of course, is one of the leading threats to resource conservation and protection values. Formal discrete agency action need not occur before great, irreparable environmental harm results. As demonstrated by the facts of *SUWA* itself, such adverse consequences can result from the government's failing to prevent the actions of others, including thousands of persons driving their ORVs on public lands. The Court's rigidly formalistic approach to administrative law, however, ignores the practical realities of environmental protection planning.

The Court in *SUWA* further ruled that the comprehensive land use plans for the management of these same public lands, hammered out after years of public hearings and input by affected stakeholders and state governments, do not amount to binding commitments enforceable in federal court.¹⁵⁵ The Court was unmoved by the federalism claims of state governments that, complaining that they had been relying on the enforceability of these plans to safeguard their sovereign interests, found no sympathetic judicial audience in *SUWA*.¹⁵⁶ The outrage expressed by Justice Kennedy's *Alaska* dissent at the plight of the states was not evident when the states were championing the concerns of environmentalists rather than the complaints of regulated industry.¹⁵⁷

Entirely absent from the Court's analysis in *SUWA* was any appreciation of the reasons why the federal courts, including the Court itself, had reformed modern administrative law decades earlier to make it easier for the intended beneficiaries of regulatory programs, such as environmentalists, to enlist the federal judiciary to guard against the tendency of federal agencies to fail to comply with congressional mandates. The diffuse, noneconomic interests of the environmental beneficiaries of congressional environmental protection programs were paradigmatic examples of the kinds of concerns that justified the federal court's earlier lowering of the hurdles to obtaining judicial review of claims that the executive branch was failing to heed congressional mandates. If,

154. 124 S. Ct. at 2380-81.

155. *Id.* at 2381-84.

156. See Brief of Amici Curiae of California, Colorado et al. at 4, *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 34 ELR 20034 (2004) (No. 03-101):

Land use plans are the tool Congress has provided not only to manage the public lands, but also to protect the States' interests as neighbors and hosts to the federal lands. Amici States must be able to rely on these commitments when doing their own land use planning and resource allocation. And they must be able to seek the assistance of the federal courts to compel the federal land management agency to carry out the land use plans it has duly adopted.

157. See *supra* notes 64-74 and accompanying text.

however, Prof. Richard Stewart was apt in referring to that prior transformation of American administrative law as a "reformation,"¹⁵⁸ then perhaps the Court's more recent precedent can be fairly characterized as presaging a return to the Dark Ages.

*F. Cheney v. U.S. District Court*¹⁵⁹

Cheney was the Court's final environmental law ruling of October Term 2003, and likely the least obvious *environmental* case of them all. At issue in *Cheney* was whether the Federal Advisory Commission Act¹⁶⁰ could, consistent with separation-of-powers concerns, be construed as authorizing discovery of Vice President Richard Cheney's papers related to the preparation of his national energy plan. The vice president had refused to make public documents that environmentalists alleged would reveal closed-door meetings with industry, including Enron Corporation, in violation of open government laws. The district court allowed some preliminary discovery for the purpose of exploring the merits of the allegations, and the court of appeals refused the vice president's request for mandamus and appellate jurisdiction, relying on the absence of a formal assertion of executive privilege.¹⁶¹

It is precisely because the case is less obviously environmental in nature that it is ultimately one of the more revealing concerning the nature of environmental law. The *Cheney* case exemplifies environmental law's tendency, described at the outset of this chapter, to promote conflicts between competing law making authorities. In this case, the Court sought to reconcile the judiciary's legitimate need for fact-finding and the executive's legitimate need to deliberate in private. It is no happenstance that these kinds of border disputes arise in the environmental context, because of the ability of competing stakeholders to enlist one branch or another, or one sovereign or another, to champion their interests in the policy debates necessary for the making of environmental law. In this case, the conflict presented was between the judicial and executive branches; in *Morrison v. Olson*,¹⁶² it was between the legislative and executive branches; and in *Robertson v. Seattle Audubon Society*,¹⁶³ it was between the legislative and judicial branches.

The Court's decision on the merits of the discovery request is ultimately sufficiently ambiguous to be of no great precedential import. A majority narrowly ruled no more than that the court of appeals concluded too quickly that it lacked

158. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

159. 124 S. Ct. 2576 (2004).

160. 5 U.S.C. app. 1, §§1 et seq.

161. *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003).

162. 487 U.S. 654 (1988).

163. 503 U.S. 429, 22 ELR 20663 (1992).

jurisdiction in the absence of a claim for executive privilege. According to Justice Kennedy's opinion for the Court, the appellate court should instead have given more weight to the executive branch's claim of the burdens such a discovery request would have on its decisionmaking process in considering whether to hear a claim like this one for interlocutory relief. Only two Justices, Scalia and Clarence Thomas, were willing to endorse the vice president's far more sweeping arguments concerning immunity from discovery. But while the Court ultimately made no significant law one way or the other, the vice president did win a significant political victory, which may well have been the only reason the White House had favored Court review at all. The Court's grant of review avoided—by sheer delay alone—the possibility of the vice president's having to release potentially embarrassing documents before the presidential election last November.¹⁶⁴

III. Conclusion

October Term 2003 was an extraordinary year for environmental law in the Court. Notwithstanding the Court's own shrinking docket, the Justices granted review in a remarkably high number of environmental law cases. Even more remarkable, however, was the skewed nature of the Court's environmental law cases. The Court granted review exclusively at the behest of those who claimed that environmental protection laws were too demanding rather than not demanding enough and often without applying the rigorous standards of precedential importance normally required for a grant of certiorari. Even when, moreover, the Court ultimately rejected the more sweeping arguments made by the petitioners in several of those cases, the Court was often strikingly generous (as in *Miccosukee* and *Cheney*) in providing the petitioners with further opportunities for relief on remand. The Court's most significant decisions on the merits, moreover, uniformly favored those who favor less-stringent environmental protection requirements.

Nor, apart from the high number of cases, does October Term 2003 appear aberrational. These same trends are generally evident throughout modern environmental law's past several decades in the Court. The explanation for this trend is, at bottom, however, not rooted in any hostility toward environmentalism or environmental protection law. It is more fundamentally traceable to the Court's general failure—extending from the more liberal to the more conservative ends of the spectrum of Justices currently on the Court—to appreciate the nature of environmental law and the concomitant demands for legal evolution. The result has been the Court's stifling rather than its promoting of constructive legal change in the fashioning of the nation's environmental laws.

164. On remand, the D.C. Circuit ordered the complaints dismissed. The court held that the Federal Advisory Committee Act did not apply. *See In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005).

Several decades ago, Judge Wright boldly declared the "judicial role," "our duty," in the fashioning of a new generation of laws designed to protect the nation's and ultimately the world's natural environment.¹⁶⁵ If the courts have, measured by Judge Wright's aspirational standards, fallen short, legal academics likely bear some responsibility for that result. The Justices are ultimately generalists, not specialists, and the extraordinarily wide-ranging nature of their work denies them the perspective necessary to apprehend the nature of an emerging area of law like environmental law.

Herein must lie the academic's role. Our duty. What environmental law academics and Court advocates must clearly do better in the future is to articulate for the courts, including the Supreme Court, a coherent theory of the nature of environmental law and environmental law making. For, until the Justices perceive environmental law's nature and thus are able to apprehend how the specific legal issues before the Court relate to broader evolutionary trends related to environmental law making, there is little reason for hope that the Court's role in environmental law can become more balanced and less skewed. Given that the Court is likely to have several new members in the next few years, the need for such scholarship and effective advocacy is now more pressing than ever.

165. *Calvert Cliffs Coordinating Comm'n v. Atomic Energy Comm'n*, 449 F.2d 1109, 1111, 1 ELR 20346 (D.C. Cir. 1971).