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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 de-
ciding whether to accept a case for plenary review, the Court has been too
willing to grant petitions filed by parties who claim that environmental pro-
tection 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 un-
duly 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 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 signi-
ficance 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 nonen-
vironmental lawyers, treat environmental law as a fairly discrete, bounded area
of law. In particular, they tend to define environmental law by exclusive refer-
cence 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 stomping out the intrinsic and poten-

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6. Id.
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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.

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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).
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authority 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. 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, claims that the U.S. Congress has exceeded its Commerce Clause authority in enacting a federal environmental law, claims that federal law preempts state law whether more or less stringent than federal standards, and claims the federal statutes transcend Tenth or Eleventh Amendment limits on federal impingements on essential state sovereign prerogatives. 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.

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), the legislative branch is encroaching on executive branch authority, the legislative branch is encroaching on judicial branch authority, and the judicial branch is improperly invading executive branch authority.

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. The U.S. Department of the Interior (DOI) and the Federal Energy RegulATORY Commission fre-


23. See, e.g., Wisconsin v. EPA, 266 F.3d 741, 32 ERL 20177 (7th Cir. 2001); City of Albuquerque v. Browner, 97 F.3d 415, 27 ERL 20283 (10th Cir. 1996).


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 Consequently are at loggerheads, as may be the National Park Service and the Bureau of Reclamation. 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.

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 cabin’d. 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 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. That is a remarkable number. It represents almost 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 Emery law Prof. William Buzbee, invoked elsewhere in this volume, the Court is apparently more concerned about the possibility of regulatory overkill than underkill.

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. More than three-fourths of those cases reviewed lower court rulings favorable to environmentalists. 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. in 2000, the Court had not granted a petition at the exclusive request of an environmental organization since Sierra Club v. Morton, almost 30 years earlier.

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.


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 [DOE].”)


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


Id.


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

See infra note 128.

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Nineteen cases in the October 2003 Term include: United States v. Banks,\textsuperscript{40} ruling 9-0 in favor of petitioner, state; Banks v. Dreke,\textsuperscript{41} ruling 9-0 in favor of petitioner, individual; Beard v. Banks,\textsuperscript{42} ruling 5-4 in favor of petitioner, state; Blakely v. Washington,\textsuperscript{43} ruling 5-4 in favor of petitioner, individual; Crawford v. Washington,\textsuperscript{44} ruling 9-0 in favor of petitioner, individual; Dreke v. Hale,\textsuperscript{45} ruling 6-3 in favor of petitioner, state; Fellers v. United States,\textsuperscript{46} ruling 9-0 in favor of petitioner, individual; Grov v. Ramirez,\textsuperscript{47} ruling 5-4 in favor of respondent, individual; Hibel v. Sixth Judicial District Court of Nevada,\textsuperscript{48} ruling 5-4 in favor of respondent, state; Illinois v. Lidster,\textsuperscript{49} ruling 6-3 in favor of petitioner, state; Iowa v. Tovar,\textsuperscript{50} ruling 9-0 in favor of petitioner, state; Maryland v. Pringle,\textsuperscript{51} ruling 9-0 in favor of petitioner, state; Missouri v. Seibert,\textsuperscript{52} ruling 5-4 in favor of respondent, individual; Nelson v. Campbell,\textsuperscript{53} ruling 9-0 in favor of petitioner, individual; Tennard v. Dretke,\textsuperscript{54} ruling 6-3 in favor of petitioner, individual; Thornton v. United States,\textsuperscript{55} ruling 7-2 in favor of respondent, state; United States v. Flores-Montano,\textsuperscript{56} ruling 9-0 in favor of petitioner, state; United States v. Lara,\textsuperscript{57} ruling 7-2 in favor of petitioner, state; United States v. Patane,\textsuperscript{58} ruling 5-4 in favor of petitioner, state; Yarborough v. Alvarado,\textsuperscript{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.\textsuperscript{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.

A. Alaska Department of Environmental Conservation v. U.S. Environmental Protection Agency\textsuperscript{61}

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

\textsuperscript{40} 124 S. Ct. 521 (2003).
\textsuperscript{41} 124 S. Ct. 1256 (2004).
\textsuperscript{42} 124 S. Ct. 2504 (2004).
\textsuperscript{43} 124 S. Ct. 2531 (2004).
\textsuperscript{44} 124 S. Ct. 1354 (2004).
\textsuperscript{45} 124 S. Ct. 1847 (2004).
\textsuperscript{46} 124 S. Ct. 1019 (2004).
\textsuperscript{47} 124 S. Ct. 1284 (2004).
\textsuperscript{48} 124 S. Ct. 2451 (2004).
\textsuperscript{49} 124 S. Ct. 885 (2004).
\textsuperscript{50} 124 S. Ct. 1379 (2004).
\textsuperscript{51} 124 S. Ct. 795 (2004).
\textsuperscript{52} 124 S. Ct. 2601 (2004).
\textsuperscript{53} 124 S. Ct. 2117 (2004).
\textsuperscript{54} 124 S. Ct. 2562 (2004).
\textsuperscript{55} 124 S. Ct. 2127 (2004).
\textsuperscript{56} 124 S. Ct. 1582 (2004).
\textsuperscript{57} 124 S. Ct. 1628 (2004).
\textsuperscript{58} 124 S. Ct. 2620 (2004).
\textsuperscript{59} 124 S. Ct. 1240 (2004).
\textsuperscript{61} 124 S. Ct. 983, 34 E.L.R. 20012 (2004).
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CAA’s program for the prevention of significant deterioration (PSD). 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. 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, 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 state in developing and enforcing national environmental policy.” It also accuses the Court of embracing an unwarranted “presumption that state agencies are not to be trusted to do their part.” 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.

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

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 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. 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). Congress sought to achieve some minimum uniformity in the realm of technology pollution control standards.

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. 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

63. See Alaska Dep’t of Envtl. 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 Envtl. 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.
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 Envtl. Ctr., and the Alaska Community Action on Toxics as Amici Curiae in Support of Respondents at 15-16. Alaska Dep’t of Envtl. Conservation v. EPA, 124 S. Ct. 983 (2004) (No. 02-658) [hereinafter Brief for Environmental Defense et al.].
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 Envtl. Conservation, 124 S. Ct. at 1012.
the statutory scheme, Congress provided for EPA to review and approve state submission of SIPS. 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. And, of course, Congress included powerful citizen suit provisions in the CAA and virtually all of the other federal environmental laws.

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

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 (SFWMD’s) operation of a pumping station amounted to a discharge of a pollutant, requiring a §402 national pollutant discharge elimination system (NPDES) permit. The tribe’s claim, which was accepted by the district court and court of appeals, 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. 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

source" and ‘point source’ is expressly defined by §502(14) to include a ‘pipe,’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 court conflict over the meaning of discharge implicated by the court of appeals’ ruling, 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. The Court, however, granted review anyway.

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”—no doubt because point source is defined to mean a “conveyance”—which is why the petitioner itself actually managed to abandon the argument in both its reply brief and oral argument. Here again, however, the Court’s ultimate action, while favorable to the environmentalist’s legal position, further underscores how quickly 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.

80. Id. §1362(14).
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).
85. 33 U.S.C. §1362(14); see id. (“A point source is, by definition, a ‘discernible, confined, and discrete conveyance.’”).
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Also troubling was the Court's refusal to address the alternative "unitary waters" legal argument pressed by petitioner. 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). 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, 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.

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 waters theory.


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


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 Muccosukee Indian Tribe.

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ters theory as extreme during oral argument and she pointedly suggested peti- tioner's counsel move to a backup argument. And her majority opinion for the Court strongly hinted as much but failed to pull the trigger. 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. 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. Only Justice Antonin Scalia, dissenting on this single point, was willing to point out the impropriety of such a remand. The lower courts had already unanimously decided that entirely fact-bound inquiry against the petitioner—finding that they are two distinct waters—and the petitioner had correctly not even deigned in its petition to raise that issue. The Court's remand was accordingly an extraordinary gratuity to the petitioner.

Finally, Justice Kennedy at oral argument in Muccosukee 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


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

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

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).

The Court decided Engine Manufacturers Ass'n v. South Coast Air Quality Management District 104 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 "fl eets" 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. 105 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.

107. Id. at 1764.
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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. 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 Miscooskie. 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.

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. 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.” 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 dixit; 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.

The dissent worked overtime to parse the statutory language to discover sufficient wiggle room to allow the state its untrammeled sovereignty and spoke loudly about the need to trust states and not to worry about “a race to the bottom.” 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

BedRoc, decided March 31, 2004, concerned the meaning of the Nevada Pittman Underground Water Act, which authorizes patents of up to 640 acres of land in Nevada to applicants who successfully developed subterranean water sources, provided that such patents applied to the United States “all the coal and other valuable minerals.” 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. 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 Act on the ground that the latter Act more broadly reserved “minerals” and not just “valuable minerals.” Two Justices concurred, arguing that the two statutes could not be fairly distinguished, and that stare decisis justified not overturning the prior Court ruling. 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

108. Id. at 1763.
109. See Lazarus, supra note 8, at 91-92.
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’t Conservation, 124 S. Ct. at 990.
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.125

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 Citizen124 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) claims and continued the unbroken string of 14 NEPA losses for environmentalists in the Court. Not only have environmental-

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


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).


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 *Stryker'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 NEPA:

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.

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.

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.

The precise language Judge Wright used in Calvert Cliffs is especially revealing. He intuitively appreciated the necessity for a “flood of litigation.”

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 positive legal transformation of the nation’s laws. Hence, a “flood” became for Judge Wright a “promise” and not a threat.

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.”

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, environmental laws are radical and unsettling in their import. They question traditional notions of “material” progress. They are inherently redistributive, disrupting settled economic expectations and generating enormous political controversy. 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.”

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.” Judge Wright defined the judicial role, 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. “Our duty,” he declared.

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. Here is what Justice Scalia wrote soon before joining the Court in an obvious, yet nominally indirect reference to

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.
134. Lazarus, supra note 131, at 206-08.
135. 449 F.2d at 1111.
136. Id.
137. Id.
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.
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Calvert Cliffs. Justice Scalia mocked what he described as the “judiciary’s long love affair with environmental litigation.” 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.

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 cained. 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.

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-

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. 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 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.”

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

148. Id. at 884, 897.
149. Lazarus, supra note 8, at 132-37; Lazarus, supra note 131, at 215.
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.

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 Act 160 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

160. 5 U.S.C. app. 1, §§1 et seq.
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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.

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 Miecosukee 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).