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# Is the Supreme Court Irrelevant?

## Reflections on the Judicial Role in Environmental Law

Daniel A. Farber\*

### I. INTRODUCTION

Federal environmental law is over a quarter century old, dating from the passage of the National Environmental Policy Act (NEPA)<sup>1</sup> in 1969 and the Clean Air Act (CAA)<sup>2</sup> in 1970. Since then, the Supreme Court has decided roughly two or three environmental law cases per year—or somewhere between fifty and one hundred cases altogether.<sup>3</sup> To assess the Court's relevance, imagine that all those cases were wiped off the books. If the Court had never granted certiorari in a single environmental case, would the Environmental Protection Agency (EPA) or other federal agencies operate any differently? Would firms be subject to different federal regulations? In short, how different would environmental protection be today?

The answer, according to my thesis, is "not much." During the past twenty years, the Court's decisions have not substan-

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1. 42 U.S.C. § 4321 (1994). The National Environmental Policy Act of 1969 (NEPA) is best known for its mandate for environmental impact statements. See 42 U.S.C. § 4332(2) (1994) (requiring all federal agencies to conduct environmental impact studies under certain circumstances).

2. 42 U.S.C. § 7401 (1994).

3. Given the inherent vagueness of the term "environmental law case," it does not seem worthwhile to make this figure more precise. This essay cites approximately 30 cases, which seems a fair sample size. See also Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 424-31 (1989) (listing 65 environmental law decisions between 1960-1988).

tially affected environmental regulation. In the first few years of the environmental era, the Court did hand down some significant decisions.<sup>4</sup> Since the late 1970s, however, the Court has been largely irrelevant.<sup>5</sup>

If I am correct about the Court's basic irrelevance, then at the very least the Court has been wasting docket space it could have used for some more constructive purpose. More importantly, the Court has failed to take a leadership role in a critical area of federal law. Admittedly, the key policy decisions often belong to Congress or the EPA, but the Court could also play an important and constructive role in environmental law. Ideally, the Court could help provide direction in interpreting environmental statutes, improve the process by which lower courts review agency decisions, integrate innovative environmental statutes into the general body of existing law, and provide leadership in those significant policy areas that Congress has left to the judiciary rather than the EPA. The Court's failure to address these tasks has left environmental policy less coherent, effective, and fair than it might otherwise have been.

Of course, without the ability to rerun history, no definitive way exists to prove how much or how little difference the Court has actually made. Given the general importance of the Supreme Court in American government, surely some effect would occur if the Court completely withdrew from any area of federal law. Still, it turns out to be surprisingly difficult to

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4. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (holding that the Endangered Species Act requires enjoining the completion of the nearly finished Tellico Dam because the Dam would destroy the habitat of an endangered species); *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 127 (1977) (upholding the EPA's authority under the Clean Water Act to limit discharge in existing plants through industry-wide regulations setting forth effluent standards); *Union Elec. Co. v. EPA*, 427 U.S. 246, 257 (1976) (holding that economic and technological infeasibility may not be considered by the EPA Administrator in reviewing a state implementation plan under the Clean Air Act).

Another notable "building block" opinion which underlies much of current administrative law was *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971) (establishing a three-part test for assessing whether an administrator's action was justifiable); see also *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (establishing the basis for the modern law of environmental standing).

5. Shifts in general views about the legal process may help account for the change in the Court's role. See Robert Glicksman & Christopher Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 249 (1991) (arguing that changes in political assumptions parallel the changes in judicial decisions).

identify specific instances in which the Court's decisions have really shaped federal environmental regulation in the past two decades.<sup>6</sup>

To test the irrelevance hypothesis, consider a thought experiment. Suppose the Supreme Court were to embark on a campaign to minimize its own influence on the development of environmental law and policy, while still continuing to hear some environmental cases. What strategies would it use to do so? The following seems a plausible list of strategies:

- Hear a lot of cases with unique or atypical facts, so the holdings will be irrelevant or difficult to apply in more typical cases.
- Refuse to hear cases in some vital areas of environmental law.
- Shunt as many issues as possible away from the judiciary entirely.
- Adopt a strong policy of deferring to administrative agencies on environmental issues.
- When a decision on the legal merits cannot be avoided, base it on an extremely narrow, technical ground having little general significance.

To a remarkable extent, the Supreme Court's actual performance in environmental law since the mid-1970s mirrors these hypothetical strategies.<sup>7</sup> That is, the Court behaves almost as if it had deliberately undertaken to minimize its own influence on environmental law. Constitutional scholar Alexander Bickel wrote of the "passive virtues" that allow the Court to avoid thrusting itself too far into controversial areas of policy. In the Court's environmental law record, however, we find the paradox of hyperactive passivity.

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6. This essay is limited to the subject of environmental regulation by the federal government. The Court's preemption and dormant Commerce Clause opinions have had a greater effect on state and local environmental regulation. See *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973) (holding that federal regulation of aircraft noise preempts state and local airport noise controls); see also *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994) (overturning state and local efforts to regulate interstate transportation of waste). But see *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190 (1983) (upholding the state's power to ban new nuclear plants pending final approval by federal government of permanent nuclear waste disposal plan).

7. It would be interesting to compare the Court's performance in environmental law with other technical areas such as tax or regulation of telecommunications and transportation. Informal remarks by colleagues suggest some strong similarities.

Parts II and III of this essay review how the Court has selected environmental cases and avoided basing its decisions on strong substantive grounds. They provide an impressionistic overview of the ways in which the Court has avoided responsibility for the development of environmental law. Obviously, an institution as important as the Supreme Court cannot avoid issuing significant opinions from time to time, but these decisions are few and far between in environmental law. On the whole, the Court has not played a major role in shaping environmental regulation or liability rules. Part IV considers four alternative roles the Court might play in the future.

## II. THE COURT'S ERRATIC CASE SELECTION

The Supreme Court has limited time and many issues to consider outside environmental law. Yet, it tends to fritter away docket space on oddball environmental cases with little precedential value. In the meantime, large, important areas of environmental law have escaped its attention.

### A. THE LURE OF THE UNIQUE

Too often, the Court has heard cases with quirky, intriguing facts that present no issue of any broad significance.<sup>8</sup> Under NEPA, for example, it chose to hear one case involving Post-Traumatic Stress Syndrome after Three Mile Island,<sup>9</sup> and another involving hypothetical impact statements for "nuclear

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8. A related, but more understandable problem arises when the Court devotes substantial resources to a problem that seems significant but actually has little practical importance. One example is presented by fundamentally different factors (FDF) variances under the Clean Water Act, which were the subject of two full-blown opinions and discussion in a third, but proved nearly so uncommon in reality as to qualify for listing as an endangered species of regulatory instrument. See *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 129 (1985) (upholding EPA's position that toxic chemicals may receive FDF variances); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 84 (1980) (upholding EPA's approach to best practicable technology (BPT) variances); *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 128 (1977) (postponing consideration of FDF variances for BPT and upholding EPA ban on variances for the best available technology (BAT)); see also William Pedersen, *Turning the Tide on Water Quality*, 15 *ECOLOGY L.Q.* 69, 86 & n.81 (1988) (showing how the EPA receives few applications for FDF variances and grants even fewer).

9. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (holding that psychological trauma triggered by reopening of plant is not cognizable under NEPA because it was not proximately caused by a change in the physical environment).

ready" facilities that may or may not contain warheads.<sup>10</sup> Neither issue is likely to recur.

A more serious problem occurs when the Court does address a significant issue, but chooses such an atypical case as a vehicle that lower courts cannot interpret the Court's message. Consider the following three examples.

*Ohio v. Kovacs*<sup>11</sup> involved the important issue of whether environmental clean-up orders are dischargeable in bankruptcy.<sup>12</sup> Typically, the government seeks an injunction or issues an administrative order requiring a firm to clean up a toxic waste site; the firm then seeks to escape the order through bankruptcy.<sup>13</sup> The Court chose to address this issue, however, in a peculiar case in which the cleanup mandate had already been converted to a monetary debt.<sup>14</sup> It held that this debt was discharged, without confronting the more fundamental issue—whether cleanup orders generally are dischargeable in bankruptcy.<sup>15</sup> This holding has provided little guidance to lower courts, which have remained divided on the question.<sup>16</sup> Far from clarifying the law, the Court only muddied the issue further.

*Weinberger v. Romero-Barcelo*<sup>17</sup> involved another recurring issue: whether a court may excuse a polluter from full environmental compliance because of hardship or other equitable considerations. Unfortunately, the Court chose a bizarre case in which to address the issue. The "polluter" in question was the Navy; the "pollution" consisted of bombs and shells that fell into the sea during military exercises.<sup>18</sup> The lower court found that the Navy had actually improved the local environment

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10. *Weinberger v. Catholic Action*, 454 U.S. 139, 144 (1981) (holding that, because presence or absence of nuclear weapons at the facility is classified information, plaintiffs cannot satisfy burden of proof of showing that an environmental impact study (EIS) is required).

11. 469 U.S. 274 (1985).

12. *Id.* at 275.

13. *Id.* at 276-77.

14. *Id.* at 282-83.

15. *Id.* at 283-85.

16. *Compare* *United States v. Whizco, Inc.*, 841 F.2d 147, 150 (6th Cir. 1988) (cleanup obligation dischargeable), *with In re Torwico Elec., Inc.*, 8 F.3d 146, 151 (3d Cir. 1993) (cleanup obligation nondischargeable). *See generally* Kathryn R. Heidt, *The Changing Paradigm of Debt*, 72 WASH. U. L.Q. 1055, 1068-77 (1994) (examining environmental cleanup obligations under the existing bankruptcy system).

17. 456 U.S. 305 (1982).

18. *Id.* at 307.

indirectly, by scaring away fishing vessels and tourists.<sup>19</sup> Not surprisingly, the Court held that the military exercises could continue while the Navy applied for a permit.<sup>20</sup> Also not surprisingly, this decision shed little light on the more typical case of the industrial discharger facing economic hardship.<sup>21</sup>

The final example, and probably the best known of the three cases, is *Lucas v. South Carolina Coastal Council*,<sup>22</sup> a takings case. One of the most difficult takings issues arises when a regulation protecting wetlands or beaches drastically decreases the economic value of the regulated land. The Court chose a case, however, that allegedly involved not a drastic decrease but a total erasure of land value.<sup>23</sup> This is extremely unusual and, as the dissent pointed out, was probably not true even in *Lucas* itself.<sup>24</sup> Nevertheless, the Court devoted great energy to resolving this question (which had largely been settled by dicta in prior cases anyway).<sup>25</sup> En route, it delivered a series of general remarks about the Takings Clause whose relevance, if any, to the more general case of partial diminution of value is entirely unclear.

## B. THE TOXIC BLIND SPOT

While wasting time on oddball cases, the Court has allowed important areas of environmental law to languish in obscurity. Nowhere is this more true than with respect to toxic substances.

One basic issue regarding toxic substances is whether regulation is warranted based on low or unquantifiable evidence of risk. The Court has not given clear leadership on the issue. Its only decision on risk management arose under the Occupational Safety and Health Act (OSHA) rather than an

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19. *Id.* at 310 n.4.

20. *Id.* at 319-20.

21. *See United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1087 (3d Cir. 1987) (analyzing a more typical case involving an industrial discharger facing economic hardship).

22. 505 U.S. 1003 (1992).

23. *Id.* at 1007.

24. *Id.* at 1036 (Blackmun, J., dissenting).

25. *See Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (finding a taking when an owner is denied the economic use of his land); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (finding that once regulation goes beyond a certain level it constitutes a taking).

environmental statute, and the Court split 4-1-4.<sup>26</sup> Even on its own terms, the plurality opinion left key issues unresolved, including the level of risk which can be considered substantial and the amount of supporting evidence required before an agency can act.<sup>27</sup> The Court has never considered the issue in the more frequent context of an "imminent hazard" injunction.<sup>28</sup>

It has also made little contribution in two areas that provide the bulk of litigation in environmental law. The first is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), better known as the Superfund law. While the Court has addressed some peripheral CERCLA issues,<sup>29</sup> it has inexplicably left major issues untouched, such as officer and shareholder liability, dischargeability of future CERCLA claims in bankruptcy, lender liability, and contribution.<sup>30</sup> The second area is toxic tort litigation. Asbestos cases have substantially impacted the federal courts' litigation statistics. Huge sums have changed hands; unprecedented use has been made of bankruptcy and other devices, yet the Court has never addressed these issues. Nor has the Court

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26. *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607 (1980).

27. *Id.* at 652-58. Among other defects, the plurality opinion is quite difficult to square with the plain language of the statute, ignores the caselaw in the lower courts about risk assessment, and seems to misapprehend the level of risk which modern regulatory statutes reach (considering it to be questionable, for example, whether a 1 in 1000 risk is "significant"). See *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 505-06 n.25 (1981) (discussing the issue of risk assessment but adding little substance). The Court, however, has not returned to the issue since. See also Howard A. Latin, *The "Significance" of Toxic Health Risks: An Essay on Legal Decisionmaking Under Uncertainty*, 10 *ECOLOGICAL L.Q.* 339 (1982) (criticizing the Court's approach in determining the burden of proof in the benzene case).

28. See 7 U.S.C. § 136w(d)-(3) (1994) (describing the Administrator's authority with regard to pesticide regulation); 15 U.S.C. § 2606 (1994) (authorizing the Administrator to commence a civil suit for seizure and relief relating to imminently hazardous substances); 42 U.S.C. § 6972(a)(1)(B) (1994) (allowing citizens to file civil actions to obtain injunctions and relief); see also *Meghrig v. KFC Western, Inc.*, 116 S. Ct. 1251, 1255 (1996) (holding that a citizen may not bring a suit to recover costs of toxic clean up if at the time of the suit, the hazard is wholly past and thus cannot be considered "imminent").

29. For example, in its recently overruled opinion in *Union Gas* the Court held that state governments were liable under CERCLA. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 11-13 (1989), *overruled by Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996).

30. For background on these issues, see ROGER FINDLEY & DANIEL FARBER, *ENVIRONMENTAL LAW: CASES AND MATERIALS* 569-602 (4th ed. 1995).



addressed major issues in toxic tort cases like *Agent Orange*,<sup>31</sup> such as proof of causation and novel class action settlements.

The Court has not addressed important criminal enforcement issues that have divided commentators and the lower courts.<sup>32</sup> Nor has it considered the major issues arising under the complex regulatory system governing hazardous waste disposal,<sup>33</sup> or the more general regulatory system for manufacture and use of toxics.<sup>34</sup> In short, it has steered clear of most of the environmental issues of the greatest practical interest to practicing lawyers.

### III. DEFERENCE, TECHNICALITIES, AND OTHER EVASIVE TACTICS

So far, we've been concerned with the Court's selection of cases. When the Court does hear cases posing significant is-

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31. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). The one case that is even close to the causation issue is *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 582 (1993) (alleging birth defects were caused by prenatal ingestion of drug). In *Daubert*, the Court did attempt to clarify the general admissibility of expert testimony, but without addressing the questions regarding epidemiological and clinical data addressed in *Agent Orange*. *Id.* at 2796-98; see also *Allen v. United States*, 588 F. Supp. 247, 404-43 (D. Utah 1984) (providing detailed discussion of what plaintiffs must show to establish a causal connection between Government's open-air atomic testing and plaintiffs' cancer, through support of epidemiological studies and other data), *rev'd on other grounds*, 816 F.2d 1417 (1987), *cert. denied*, 484 U.S. 1004 (1988). On the class action issues, see generally JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995) (proposing methods of restructuring mass tort litigation), reviewed in Charles T. Kimmett, Book Note, *Rethinking Mass Tort Law*, 105 YALE L.J. 1713 (1996); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995) (discussing developments in class action cases and the limits of judicial power to implement tort reform).

32. See Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 868-75 (1994) (describing the poor assimilation of environmental law into criminal law); Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407 (1995) (describing three recent cases, highlighting problems in environmental criminal law, and offering suggestions for reform); Richard J. Lazarus, *The Reality of Environmental Law in the Prosecution of Environmental Crimes: A Reply to the Department of Justice*, 83 GEO. L.J. 2539 (1995) (responding that suggested reforms would not interfere with appropriate criminal prosecution and conviction of environmental crimes).

33. 42 U.S.C. §§ 6921-6939 (1994).

34. 15 U.S.C. §§ 2601-2692 (1994).

sues, it has used other techniques to distance itself from the process of making environmental policy.

#### A. CLOSING THE COURTHOUSE DOOR

Declining to hear appeals is a less effective means of reducing judicial influence on policy than is keeping cases out of federal court entirely. Standing doctrine restricts challenges to administrative decisions and thereby leaves agencies, rather than courts, with the final word on policy issues. Two recent opinions by Justice Scalia are notable because of their effort to restrict environmental standing, and because they expressly do so in the name of shunting issues away from the courts toward other branches of government.

In the first case, *Lujan v. National Wildlife Federation*,<sup>35</sup> the plaintiffs claimed that the government had used illegal procedures to determine future uses of public lands. They based their standing on the use of several specific tracts by their members. Specifically, they alleged that several members used tracts "in the vicinity" of lands covered by two of the government decisions.<sup>36</sup>

Justice Scalia rejected these standing allegations on two grounds. First, even as to the two specific tracts, the claims were insufficient because they alleged only proximity to, rather than actual presence on, the affected tracts.<sup>37</sup> Or, to put it more simply: close only counts in horseshoes. Second, even if the plaintiffs had established standing with respect to a particular tract, their standing would not extend to the agency program as a whole, even if the same illegal procedures were used uniformly. Instead, the plaintiffs were required to use what the Court called a "case-by-case approach"<sup>38</sup> for each tract of land. Justice Scalia observed that this approach might be frustrating, but said that courts were not the place to seek systemic reform. Instead, the plaintiffs should seek such reform within the other branches.<sup>39</sup>

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35. 497 U.S. 871 (1990).

36. *Id.* at 880.

37. The requirements of standing are "assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." *Id.* at 889.

38. *Id.* at 894.

39. *Id.* Inasmuch as the plaintiffs were only seeking to enforce existing

Justice Scalia continued his campaign against environmental standing in *Lujan v. Defenders of Wildlife*.<sup>40</sup> The ultimate issue in *Defenders*, which the Court never reached, was whether the Endangered Species Act<sup>41</sup> applies to U.S. government actions outside the United States. The plaintiffs alleged that they would be harmed in several ways by U.S. funded development projects in various countries, including Egypt and Sri Lanka.<sup>42</sup> The Court held that the plaintiffs lacked standing, in the process striking down the citizen suit provision of the Endangered Species Act.

The plaintiffs alleged several forms of injury. Two members alleged they had visited the relevant areas of Egypt and Sri Lanka in the past and hoped to do so again in the future. Because the projects could lead to increased rates of extinction for endangered and threatened species in the project areas, the plaintiffs could lose the opportunity to observe those species. Justice Scalia rejected the plaintiffs' allegations about future travel as a basis for standing, dismissing them as mere "'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be."<sup>43</sup> Nor was he impressed with what he called the plaintiffs' more "novel" standing theories.<sup>44</sup> ("Novel" obviously is not a compliment in his lexicon.) Under the first theory, called the ecosystem nexus, "any person who uses any part of a 'contiguous ecosystem' adversely affected by [agency action] has standing even if the activity is located a great distance away."<sup>45</sup> Although the Endangered Species Act (ESA) is aimed in part at the protection of ecosystems, Scalia refused to find a cause of action on behalf of people who use parts of the ecosystem not "perceptibly affected" by the government's action.<sup>46</sup> Justice Scalia was equally unimpressed by the plaintiffs' other two theories, which he scathingly rejected.<sup>47</sup>

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statutory requirements, it may be somewhat inaccurate to characterize them as seeking "reform."

40. 504 U.S. 555 (1992).

41. 16 U.S.C. § 1536 (1994).

42. 504 U.S. at 563.

43. *Id.* at 564. The plaintiffs' unspecified future plans failed to give rise to "actual or imminent" harm as required for standing. *Id.*

44. *Id.* at 565.

45. *Id.*

46. *Id.* at 566.

47. One theory, which the plaintiffs called the animal nexus, would have granted standing to anyone who studies or observes an endangered species. The other theory, the vocational nexus, would grant standing to anyone with a

Like *National Wildlife Federation, Defenders* is explicitly based on the premise that certain tasks are better left to other branches of government. Justice Scalia's basic objection to the ESA's citizen-suit provision was that it gave the courts the duty of ensuring that environmental laws are obeyed by the government.<sup>48</sup> Instead, Scalia contended, this is part of the duty to "take Care that the Laws be faithfully executed," which is assigned to the President.<sup>49</sup>

The Court has also restricted judicial power in another respect in the name of deference to other branches of government. Prior to 1981, federal courts had jurisdiction over interstate pollution disputes under the federal common law of nuisance. In *City of Milwaukee v. Illinois and Michigan*,<sup>50</sup> the Court held that Congress had unintentionally preempted this body of law by passing the Clean Water Act. "Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."<sup>51</sup> The motivation for this holding cannot be found in the statute, which reflects a desire to preserve all other legal restraints on water pollution. Rather, it is found earlier in the opinion. There, the Court had declared that fed-

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professional interest in the animal. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992). To say that Justice Scalia was unpersuaded is an understatement. He seemed scandalized that such a theory would even be proposed:

Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary [of Interior] regarding the AID-funded project in Sri Lanka . . . . It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

*Id.* at 566-67 (footnote omitted).

48. *Id.* at 571-77.

49. *Id.* at 577 (quoting U.S. CONST. art. II, § 3). Because of its unusual facts, *Lujan* seems to have had little effect on the more typical uses of citizen suits against polluters. See *NRDC v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 503 (3d Cir. 1993) (providing a generous definition of citizen standing under the Clean Water Act).

50. 451 U.S. 304 (1981).

51. *Id.* at 317.

eral common law involves policymaking of a kind which should be exercised by the federal courts only as a last resort, if there is no viable alternative.<sup>52</sup> As in the standing cases, the Court's overriding goal was to minimize the federal judiciary's role in environmental law.

## B. SUBSTANTIVE DEFERENCE TO AGENCIES

Environmental law has contributed some celebrated cases to the general field of administrative law. Ironically, however, most of these cases are best known for reducing the judiciary's impact on the administrative process. The persistent theme in the Court's environmental decisions of the last twenty years has been deference to administrative agencies. In *Vermont Yankee Nuclear Power Corp. v. NRDC*,<sup>53</sup> the Court ended a string of lower court decisions which had attempted to reshape agency procedures. The rationale for those decisions was that judges, while ill-suited to pass judgment on the merits of agency decisions, have useful expertise about procedural matters. The argument was that the Administrative Procedure Act "merely establishes lower procedural bounds and that a court may routinely require more than the minimum when an agency's proposed rule addresses complex or technical factual issues or 'Issues of Great Public Import.'"<sup>54</sup> The Court viewed this position as a patently unwarranted intrusion on agency discretion.<sup>55</sup> Consequently, it upheld the agency's resort to minimal rule-making procedures in order to avoid having to consider the problem of nuclear waste disposal in depth. "[T]his much is absolutely clear," the Court said, "Absent con-

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52. *Id.* at 312-17.

Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress . . . .

When Congress has not spoken to a particular issue, however, and when there exists a "significant conflict between some federal policy or interest and the use of state law," the Court has found it necessary, in a "few and restricted" instances to develop federal common law.

*Id.* at 312-13 (citations and footnotes omitted).

53. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

54. *Id.* at 545 (quoting Brief for Respondents at 49).

55. *Id.* at 546-48.

stitutional constraints or extremely compelling circumstances . . . agencies 'should be free to fashion their own rules of procedure' and pursue their inquiries in their own way.<sup>56</sup>

At issue in *Vermont Yankee* was the agency's procedural discretion in the absence of explicit statutory requirements. The Court has also been anxious to preserve agency discretion even in the face of explicit congressional commands. One of those commands, embodied in NEPA, requires an environmental impact statement whenever a major federal action has a significant environmental effect.<sup>57</sup> In determining whether an agency has complied with the statutory procedure, however, the Supreme Court has instructed courts to use a deferential standard of review. Failure to prepare an impact statement can be reversed only if the agency was arbitrary and capricious in concluding that environmental impacts were insignificant.<sup>58</sup>

An agency's discretion also extends to the interpretation of the statute governing its own activities. Under the *Chevron* doctrine, first announced in a Clean Air Act case,<sup>59</sup> a court must uphold any reasonable administrative interpretation of a statute unless clearly contrary to legislative text or intent.<sup>60</sup> As the Court explained:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or inten-

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56. *Id.* at 543 (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)).

57. National Environmental Policy Act of 1969 § 102(2)(c), 42 U.S.C. § 4332(2)(C) (1994).

58. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-77 (1989). The Court has also been highly deferential in reviewing the contents of impact statements. See *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-106 (1983) (upholding an EIS which stated an environmental impact as zero though agency lacked basis for this conclusion); *Vermont Yankee Nuclear Power Corp., v. NRDC*, 435 U.S. 519, 549-55 (1978) (holding that energy conservation was not a sufficiently obvious alternative to a nuclear plant for agency to require EIS discussion).

59. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

60. *Id.* at 842-45.

tionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>61</sup>

Indeed, in its anxiety to preserve agency discretion, the Court has sometimes been willing to ignore statutory language expressly limiting that discretion. A recurring issue under NEPA had been whether the statute imposes only a paperwork requirement or whether it actually requires the agency to take environmental factors into account. Relying on dicta in previous cases, the Court held in 1989 that the statute is purely procedural.<sup>62</sup> This holding simply ignored the plain language of the statute. Section 102(1) of NEPA provides as follows: "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this [Act] . . ." <sup>63</sup> Not surprisingly, in the course of holding the statutory policies to be merely "precatory," the Court failed to discuss this section.<sup>64</sup> No doubt judicial review of compliance with NEPA's general policies would have been deferential, but even deferential review was apparently too much, given the Court's desire to remove the judiciary as much as possible from issues of environmental policy.

This urge toward deference does not necessarily translate into anti-environmentalist positions. It depends on the agency to which the Court is deferring.<sup>65</sup> On occasion, deference has

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61. *Id.* at 865-66. For recent discussions of *Chevron*, see WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 192-93 (2d ed. 1994) (noting reasons for the Court's holding and suggesting the test is not determinative); Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (1994) (offering an explanation of why the Court adopted the *Chevron* doctrine); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994) (arguing that the *Chevron* doctrine, as currently applied, focuses on the first step, thereby encouraging political compromise in contravention of public policy, and advocating that the courts focus on the second step and scrutinize the reasonableness of the agency's interpretation).

62. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-53 (1989).

63. 42 U.S.C. § 4332(1) (1994).

64. See *Robertson*, 490 U.S. at 349. For a critique of *Robertson*, see Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENVTL. L. 533, 545-46 (1990).

65. For examples of deference to pro-environmental agency positions, see *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (stating that the EPA interpretation of state drinking water standards in interstate controversy context is entitled to substantial deference); *United States v. Riverside Bayview*

actually undermined the Court's own interpretation of an environmental statute. The Court has conducted an unrelenting campaign against NEPA. Although it has heard more than a dozen cases since the statute's passage, the Court has never once upheld a NEPA claim.<sup>66</sup> But the damage to NEPA has been buffered by another strand of the Court's opinions, mandating deference to interpretations of NEPA by the Council on Environmental Quality (CEQ).<sup>67</sup> Since the CEQ has taken a rather expansive view of NEPA, its views and the Court's have tended to cancel each other out.

### C. THE SEDUCTION OF TECHNICALITIES

When the Court has decided environmental cases on the merits, it has not infrequently resolved them on narrow technical grounds. Not surprisingly, these decisions have had little impact on the development of the law. Two cases involving the Clean Air Act illustrate this point.

*Adamo Wrecking Co. v. United States*<sup>68</sup> involved a constitutional challenge to the statute. Like many other environmental statutes, the Clean Air Act provides that regulations must be challenged in a particular forum within a limited period after they are promulgated.<sup>69</sup> Otherwise, in a later enforcement action, the invalidity of the regulation cannot be raised as a defense.<sup>70</sup> A defendant convicted of a regulatory violation challenged the constitutionality of this limitation on judicial review.<sup>71</sup> Rather than confront the constitutional issue, however, the Court invalidated the regulation on far nar-

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Homes, Inc., 474 U.S. 121, 131 (1985) (stating that Corps of Engineers' reasonable construction of a statute is entitled to deference).

66. See Daniel A. Farber, *Disdain for 17-Year-Old Statute Evident in High Court's Rulings*, NAT'L L.J., May 4, 1987, at 20 (analyzing cases occurring in the first seventeen years of NEPA and noting that the Court, in ten cases at that point, had never upheld a claim); Levy & Glicksman, *supra* note 3, at 416-20 (discussing Court's refusal to implement attorney's fees provisions in NEPA); see also RODGERS, *supra* note 61, at 816 (noting an unbroken string of Supreme Court cases rejecting interpretations of NEPA advanced by environmental groups). But see David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551, 554-65 (1990) (concluding that factors other than hostility explain the Supreme Court's NEPA record).

67. See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (holding that CEQ regulations are entitled to "substantial deference").

68. 434 U.S. 275 (1978).

69. Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1) (1994).

70. *Id.* § 307(b)(2), 42 U.S.C. § 7607(b)(2).

71. *Adamo Wrecking*, 434 U.S. at 277-78.



rower grounds. It held that the Clean Air Act authorized only regulations that specified permissible amounts of air pollution, whereas the regulation before the Court attempted to control air pollution by specifying certain work rules.<sup>72</sup> The constitutional issue was avoided, never to reappear on the Court's docket. Congress amended the statute to authorize work rules as a form of pollution control.<sup>73</sup> The Court's decision vanished without a trace.

A more recent example is *General Motors Corp. v. United States*.<sup>74</sup> The lower courts were divided about whether the EPA could assess "noncompliance penalties" while the EPA's response to a variance request was overdue.<sup>75</sup> The Court ducked the issue by holding that the EPA's action was not subject to any deadline, as both the lower courts and Congress had assumed.<sup>76</sup> Shortly thereafter, Congress revised the deadline provisions in a way that makes their applicability unmistakable, but failed to clarify the issue of noncompliance penalties.<sup>77</sup> Once again, by basing its ruling on an evanescent technicality, the Court guaranteed the ultimate irrelevance of its decision.

These Clean Air Act cases are unusual in that they originally presented broader issues. Quite often, the Court chooses cases that from the beginning present only technical issues, such as the effects of incorrect notice on citizen suits<sup>78</sup> or the burden at different points of the suit to show the likelihood of continuing violations.<sup>79</sup> These are not insignificant issues for public interest litigators in citizen suit cases, but they hardly have a major impact on the path of the law.

#### IV. FOUR FUTURE SCENARIOS

If my thesis is correct, the Supreme Court has failed to play a substantial role in the development of environmental law. Is this a failure we should regret? Or, on the contrary,

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72. *Id.* at 288-89.

73. Clean Air Act § 112(d)(2)(D), 42 U.S.C. § 7412(d)(2)(D).

74. 496 U.S. 530 (1990).

75. *Id.* at 535-36.

76. *Id.* at 538-39.

77. Clean Air Act § 110(k)(1)(B), 42 U.S.C. § 7410(k)(1)(B) (1994).

78. *Hallstrom v. Tillamook County*, 493 U.S. 20, 23 (1989).

79. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987).

has the Court found its appropriate role in the environmental arena—as a spectator rather than a player?

To test the desirability of a more effective judicial role, consider one last thought experiment. Suppose the Justices were now to make a concerted effort to play a more effective role in environmental law. Would the consequences be desirable? Without the benefit of a crystal ball, any prediction is hazardous; but we can at least explore the possibilities. Four possible scenarios present themselves.

### 1. Scenario #1: Continued Irrelevance

One possibility is that, whatever the intentions of the Justices, they would be unable to develop any coherent body of environmental doctrine, and instead would merely flounder. Perhaps the Justices simply lack the individual skills or expertise to make a coherent contribution; for example, it might be impossible for them to identify the right cases to review. Or perhaps the Court would be too fractured to produce anything more than a meandering stream of plurality opinions, which would contribute little to legal development. If so, an effort by the Court to become a “player” in environmental law would be ineffective, but harmless; the Court would remain as irrelevant as it is today.

### 2. Scenario #2: Judicial Activism

Alternatively, the Court might embark on a course of judicial activism, crusading for (or more likely against) environmentalism. Judicial activism of this kind would be highly problematic. Although there is room for disagreement about whether cases like *Chevron* correctly assess the judicial role, those cases do identify important reasons why Congress and the executive agencies should normally lead in making environmental policy. Unlike courts, agencies have the expertise to address complex technical issues. In contrast to the judiciary, moreover, Congress and the agencies can address issues systematically, rather than case-by-case. Finally, both Congress and the agencies are democratically accountable for the decisions they make; judges are not. An effort by the courts to usurp the leadership of the political branches would be at best unproductive and at worst a fiasco. Fortunately, given the current temper of the Court, this form of activism seems improbable, since it would require a conversion from extreme passivity to frenetic activity in the environmental arena.

So far, our thought experiment has produced a null result (no change despite the Justices' intentions) and an unlikely alternative (substantive activism). There are two other possibilities which deserve more careful attention. In the optimistic scenario, the Court takes a creative role in developing policy, though a role subsidiary to Congress and the agencies. In the pessimistic scenario, it dedicates itself to defending the existing legal fabric against innovations.

### 3. Scenario #3: The Legislature's Junior Partner

Because environmental statutes are so complex, and agencies are given so much responsibility for implementing them, courts may seem to have little room for initiative. This perception is incorrect, however. Despite the crucial roles of Congress and the executive branch, areas remain in which the Court could make important contributions. Many critical issues cannot be resolved by agencies. For example, CERCLA cases raise crucial issues about how to allocate responsibility for environmental harms. Similarly, toxic tort cases raise perplexing questions about causation, and "imminent hazard" cases require a court to decide how to respond to very small risks of very serious harm.<sup>80</sup> The Court's role in reviewing agency decisions raises a final, crucial issue: how to structure judicial review so as to foster a high-quality, democratically accountable regulatory process.

Environmental law has contributed some important innovations to the judicial and administrative processes. Among the judicial innovations are the use of fee-shifting, citizen suits, and private enforcement actions to support the role of citizens as "private attorneys general." In the administrative context, innovative agenda-forcing provisions, like those in NEPA and the ESA,<sup>81</sup> force agencies to keep environmental issues on their

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80. Similar kinds of issues come before the Court in reviewing administrative actions, though in these cases, the Court's role will usually be secondary to the agency's. As a court of appeals judge, Justice Breyer thoughtfully addressed some of these issues. See *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 434-38 (1st Cir. 1990) (discussing whether courts must defer to EPA decisions regarding proper injunctive relief); *Sierra Club v. Marsh*, 872 F.2d 497, 501-03 (1st Cir. 1989) (discussing factors courts should consider in determining propriety of injunctive relief).

81. Other innovations include: recognition of preservation and development as basic social values; technology-forcing, risk management, marketable permits and other novel regulatory strategies; and strict, retroactive liability for large-scale injuries to the environment.

agendas. Working out the parameters of such innovations is a challenging task.<sup>82</sup> To do it effectively will require not judicial activism, but rather the quiet judicial creativity of a Harlan or a Cardozo—creativity at the retail rather than wholesale level, so to speak.

Thus, the Court could make important contributions to improving environmental regulation. It could also undertake the critical task of integrating innovative environmental legislation into the existing body of the law. In undertaking these tasks, the Court must be careful to respect the principle of legislative supremacy.<sup>83</sup> It must also recognize the risk of unduly impeding the regulatory process through excessive intervention.<sup>84</sup> Nevertheless, there is genuine room for judicial creativity, even where the Court must operate in Congress's shadow.<sup>85</sup> As Peter Strauss has pointed out, this kind of activity is well within the traditional conception of the judicial role.<sup>86</sup> The proper task for courts is not to lead a crusade for or against environmentalism, but rather to bring intelligent legal analysis to bear on the implementation of the nation's environmental policies.

How likely is this optimistic scenario? The ideal environmental law judge would combine a deep knowledge of environmental policy and the administrative process with a gift for judicial craftsmanship. Such paragons may be rare, if not non-existent. On the current bench, Justice Breyer has the strongest claim to environmental expertise.<sup>87</sup> Justice Ginsburg may

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82. This task involves resolving gaps, ambiguities, and inconsistencies within environmental statutes. It also involves working out how the new features of these statutes relate to existing law in fields ranging from bankruptcy law to class action rules. The challenge is to derive some kind of sensible legal order out of our multiple, sprawling, and complex environmental statutes.

83. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989).

84. Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791, 805-06 (1994).

85. See Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 895-900 (1991) (approving "beneficial cooperation" between legislatures and common law decisionmaking).

86. Peter Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 436-42.

87. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARDS EFFECTIVE RISK REGULATION* (1993) (positing that systematic and careful implementation of risk regulation provides more cost effective protection of social values). See generally William Funk, *Justice Breyer and Environmental Law*, 8 ADMIN. L.J. AM. U. 735, 741-43 (1995) (arguing that Justice Breyer's

also have acquired some expertise on the D.C. Circuit, which has a large environmental law docket. Justices Stevens and Souter seem at this point the closest approximations to Cardozo or Harlan in terms of judicial craftsmanship. The likelihood of the optimistic scenario thus depends on whether these Justices can pool their skills and expertise in a cooperative enterprise, and whether they can pick up support from either Justices O'Connor<sup>88</sup> and Kennedy<sup>89</sup> or from future appointments. The Court's recent opinion in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>90</sup> upholding a regulation classifying habitat modification as an impermissible taking under the Endangered Species Act, illustrates the potential importance of such coalition-building.<sup>91</sup>

#### 4. Scenario #4: The Judiciary as Immune System

In the previous scenario, the Justices took a sympathetic attitude toward the efforts of Congress and the EPA, attempting to fill gaps and make adjustments in related legal doctrines. In a less optimistic scenario, the Justices might view environmental law as a foreign body invading federal law, and seek to limit or isolate the threat of legal change. The goal would not be to eliminate environmental regulation, but to subsume it within the existing legal order, minimizing change beyond what Congress has expressly mandated. In some respects, this scenario is reminiscent of the Blackstonian response to statutes, which attempted to minimize their impact in order to protect the common law from legislative tampering.<sup>92</sup>

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record shows firm commitment to effective environmental law enforcement); Brent L. Hoffman, Comment, *Justice Stephen G. Breyer, Business Friend and Environmental Foe? An Analysis of Justice Breyer's Judicial and Non-Judicial Works Concerning Environmental Regulation*, 100 DICK. L. REV. 211, 212-15 (1995) (discussing Justice Breyer's background and experience in administrative law).

88. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 589 (1992), Justice Blackmun's environmentalist dissent was joined, somewhat surprisingly, by Justice O'Connor.

89. Justice Kennedy's separate opinions in *Defenders* and *Lucas*, for example, indicate some receptivity even in constitutional cases to the public values embodied in environmental statutes. *Defenders*, 504 U.S. at 580-81 (Kennedy, J. concurring); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032-36 (1992) (Kennedy, J., concurring).

90. 115 S. Ct. 2407, 2418 (1995).

91. Of course, coalition-building was probably made easier because the decision involved deference to an agency position. *Id.* at 2416.

92. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*

The Court's response to innovations often has been grudging. Fee-shifting is a good example. After refusing to take the lead in awarding attorney's fees to public interest representatives,<sup>93</sup> the Court has remained unsympathetic to statutory fee-shifting.<sup>94</sup> NEPA has been the subject of particular—and unrelenting—judicial hostility. The Court has attempted to shoehorn NEPA into the general body of administrative law, rather than recognize the need for an accommodation between the new concept of agenda forcing and traditional concepts of agency discretion.<sup>95</sup> To take a final example, when the Court wanted to distinguish permissible from excessive government regulation of land, it reverted to the ancient law of nuisance.<sup>96</sup>

Justice Scalia has been the primary proponent of this Blackstonian approach to environmental law.<sup>97</sup> In *Sweet Home*, for example, his dissent relied strongly on traditional game law, going back to Norman times, in order to resist a broad reading of the Endangered Species Act.<sup>98</sup> The textualist approach that he has championed has tended to frustrate ef-

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tion, 137 U. PA. L. REV. 1007, 1011 (1989) (discussing historical development in statutory interpretation).

93. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263-64 (1975) (rejecting "private attorney general" theory of fee recovery).

94. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 687-92 (1983) (construing statute which deliberately avoided phrase "prevailing party" to allow fee awards only to prevailing parties); see also *Key Tronic Corp. v. United States*, 114 S. Ct. 1960, 1966-67 (1994) (rejecting award of attorney's fees in private response cost recovery actions under CERCLA); *City of Burlington v. Dague*, 505 U.S. 557, 564-67 (1992) (holding award enhancement for contingency fees not allowed under Solid Waste Disposal Act and Clean Water Act); cf. *West Va. Univ. Hosp. v. Casey*, 499 U.S. 83, 88 (1991) (using Toxic Substances Control Act fee-shifting provisions to justify a narrow reading of civil rights statute that also shifts fees).

95. See Farber, *supra* note 66 (arguing that NEPA departs from usual administrative law).

96. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-32 (1992) (denying landowner compensation for right to develop land if state nuisance and property law withheld the right in the original title).

97. Consider his standing opinions, which are most strongly characterized by their opposition to the "private attorney general" concept. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992), he seems to view this concept almost as a violation of the President's prerogatives under Article II.

98. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2422-23 (1995) (Scalia, J., dissenting). For a critique of Scalia's approach, see Daniel A. Farber, *Statutory Interpretation and the Idea of Progress*, 94 MICH. L. REV. 1546, 1551-53 (1996) (reviewing WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994)).

forts at coherent regulatory policy in other fields.<sup>99</sup> This approach is firmly supported by the Chief Justice and Justice Thomas,<sup>100</sup> and has won occasional support from Justices O'Connor and Kennedy.<sup>101</sup>

The future will turn in large part on whether, among the younger Justices, Scalia assumes intellectual leadership of the Court (leading to Scenario #4), or whether Breyer and Souter assume that role (leading to Scenario #3). If neither side is able to cement a working majority, then the most likely result is Scenario #1, in which the Court remains incapable of playing a coherent role in the making of environmental policy. Thus, if the Justices were individually determined to make a stronger contribution to environmental law, the result could be either neutral, beneficial, or harmful. The outcome turns on whether a majority can agree on a specific conception of the judicial role in environmental law, and on what that conception might be.

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99. Melvin A. Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 15-22 (1995) (discussing banking regulation); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 773-75 (1995) (discussing trucking regulations).

100. Justice Thomas has displayed an actively hostile attitude toward environmental protection in at least one opinion. See PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 114 S. Ct. 1900, 1920 (1994) (Thomas, J., dissenting) (characterizing environmental interests as parochial, in contrast with the national interest in generating electricity). Also, see *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (Thomas, J.), in which Justice Thomas took an uncommonly narrow view of the definition of alternatives under NEPA. Judge Buckley, himself a noted conservative jurist, said in dissent that Thomas's opinion would "undermine" NEPA and turn the requirement that an EIS discuss reasonable alternatives into "an empty exercise." *Id.* at 210. For further discussion of this issue, see Peter J. Kirsch & Conrad M. Rippy, *Defining the Scope of Alternatives in an EIS After Citizens Against Burlington*, 21 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,701 (Dec. 1991).

101. Particularly during the Rehnquist Court, the Justices have sometimes seemed "out of sync" with the general public, which has adopted environmentalism as a consensus value. See Glicksman & Schroeder, *supra* note 5, at 272-76 (discussing the ways in which public support of environmental issues has altered policy); Patricia Wald, *Environmental Postcards from the Edge: The Year That Was and the Year That Might Be*, 26 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,182 (Apr. 1996) (discussing the depth of public support for environmental issues). It would be hard to justify greater judicial involvement in environmental law, if that involvement translates into an actively counter-majoritarian role.

## V. CONCLUSION

As we have seen, the Supreme Court has failed for a variety of reasons to play an effective role in environmental law. It has often chosen to hear cases involving insignificant issues or peculiar facts, which therefore have little precedential value. It has reduced the role of the federal judiciary in environmental law by narrowing standing for environmental plaintiffs and by increasing judicial deference toward administrative agencies. Important areas of law, in which the courts rather than the agencies have the primary responsibility for environmental policy, have been left to the lower federal courts, with little or no guidance from the Supreme Court. In short, for the past twenty years or so, the Court has either stayed on the sidelines or participated ineffectually in the making of environmental law.

It is not altogether clear what would happen if the Court were to attempt to play a more effective role. It might simply prove incapable of doing so; it might attempt to play too active a role in making policy; or it might devote its energy to a fruitless campaign in favor of formalism and literal statutory interpretation. Alternatively, it might play a useful and creative role in adjusting the fabric of the law to deal with modern environmental issues.

Whether we should celebrate or mourn the Court's ineffectiveness depends, then, on whether the Justices are prepared to play a constructive supporting role in environmental law. The effective exercise of power is not an end in itself—certainly not for courts. An ineffective court, however, can accomplish nothing, for good or for evil. What we must hope for is a judiciary that is both effective and judicious.



