Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 43 *A Symposium on the United States Supreme Court's "Environmental Term" (1991-1992)*

January 1993

Foreword—The United States Supreme Court's "Environmental Term" (1991-1992)

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FOREWORD

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This symposium collects, analyzes, and comments on the environmental law decisions of the 1991-92 term of the Supreme Court. By its nature, it is a miscellany on a variety of substantive and procedural subjects having in common only that they are decisions by the highest court of the land and that they deal with "environmental" subjects. But in spite of their diversity, the cases analyzed tell us a good deal about the current state of environmental law, as well as the current attitude of the Court on this subject.

The field of environmental law is of relatively recent origin. Although the law of conservation of natural resources finds its origin in the period of President Theodore Roosevelt,[1] the modern field of environmental law probably begins in the early or middle 1960s. Some

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1. The nation's system of National Forests, established under President Theodore Roosevelt in 1905, provided the land for a number of national parks. For a brief account of the development of the national park and national forest system, see COUNCIL ON ENVIRONMENTAL QUALITY, THIRD ANNUAL REPORT 323-25 (1972). President Theodore Roosevelt had a lasting impact on the conservation movement and on the development of the public lands. He appointed conservationist Gifford Pinchot as Chief of Forest Reserves who, under presidential auspices, managed to build up the reserves from 40 million to 190 million acres. It is noted that "the conservation movement, one of the parents of environmentalism, originated around timbering." The forest reserves, established in 1891, expanded significantly during Theodore Roosevelt's presidency and were renamed National Forests in 1907. COUNCIL ON ENVIRONMENTAL QUALITY, SIXTH ANNUAL REPORT 220 (1975). President Theodore Roosevelt also assisted in establishing the National Wildlife Sanctuaries, designating the first such sanctuary, Pelican Island, Florida, in 1903. *Id.* at 258. For a discussion of early developments of National Forests and National Parks, see FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 12.01[3], at 12-14 to 12-18, § 12.03[1], at 12-59 to 12-83 (1992).

place its beginning precisely on May 1, 1970, when the first Earth Day was celebrated in a circus atmosphere. Others find its genesis in the February 10, 1970 Presidential Message on the Environment or the August 1970 Report of the Council on Environmental Quality.[2] Interest in environmental protection, however, clearly began earlier. In 1962, Rachel Carson published the book, *Silent Spring*. In 1965, the Second Circuit decided the *Scenic Hudson*[3] case, which first established standing for persons with environmental, noneconomic interests. Several other decisions in the 1960s protected scenic and aesthetic interests.[4] In addition, a number of early federal and state laws protected against water and air pollution,[5] though these earlier laws were somewhat rudimentary and lacked firm enforcement provisions. The first environmental law courses in American law schools appeared around 1969.

Although the development of environmental law owes a great deal to the earlier environmental movement, it did not become a major part of the nation's political agenda until the 1970s. Important early federal legislation included the 1970 Clean Air Act,[6] the National Environmental Policy Act, which became effective in 1970,[7] and the Federal Water Pollution Control Act Amendments of 1972.[8] This sketchy account of the history of the development of environmental law and the

2. COUNCIL ON ENVIRONMENTAL QUALITY, FIRST ANNUAL REPORT 254-71 (1970). Following Earth Day 1970, new courses and new environmental careers developed at campuses across the country. COUNCIL ON ENVIRONMENTAL QUALITY, THIRD ANNUAL REPORT 337 (1972).

3. Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 616 (2nd Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

4. For early environmental law cases, see Frank P. Grad & Laurie R. Rockett, *Environmental Litigation — Where the Action Is?* 10 NAT. RESOURCES J. 742 (1970). The 1970 article states that real advances in environmental law must await the passage of legislation that will provide an adequate basis for the protection of the environment through litigation.

5. FRANK P. GRAD, ENVIRONMENTAL CONTROL, PRIORITIES, POLICIES AND THE LAW, 49-65, 117-27 (1971).

6. Pub. L. No. 91-604, 84 Stat. 1676 (1970). The Act was named Clean Air Amendments of 1970, amending the 1963 Clean Air Act. For a discussion of early developments, see GRAD, *supra* note 1, at 2-64 to 2-76.

7. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).

8. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended in scattered sections of 33 U.S.C.). For references to earlier federal water legislation, see GRAD, *supra* note 1, § 3.03[1][a], at 3-71 to 3-87.

following references to some of its features may help place the work of the current Supreme Court in its proper light.

Environmental law reflects the confluence of two developments. One is the legislative support for the conservation of natural resources, including our natural heritage, scenic values, and other aspects of our "quality of life." The other is the support for public health legislation aimed at protecting against water and air pollution and the consequences of the careless dissemination of hazardous substances and hazardous waste. Both of these concerns, one focused on the protection of the great outdoors, the other on city and industrial problems, have considerable political support and provide an active political agenda for the nation.

Because environmental concerns are general concepts not limited to specific parts of the population, standing to raise environmental issues was an early part of the law's development, and continues to be a litigable issue because it still controls environmentalists' access to the courts.[9]

Environmental legislation pioneered the development of the citizen suit, which has since become a feature of other significant fields, including the field of civil liberties. Congress granted concerned citizens the right to vindicate public interests in the environment by facilitating citizen suits against the head of agencies to compel them to carry out nondiscretionary duties under the law. Congress considered citizen assistance to public enforcement so important that in every citizen suit authorization it also added an authorization for the recovery of attorney fees and expert witness fees.[10]

Other aspects of environmental legislation addressed ever present is-

9. *See, e.g.*, Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978); Sierra Club v. Morton, 405 U.S. 727 (1972); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1965). For discussion of standing in NEPA cases, see GRAD, *supra* note 1, § 9.04[2][a] at 9-236 to 9-244.

10. GRAD, *supra* note 1, § 14.02, at 14-4 n.5, § 14.02, at 14-5 to 14-16. The author's discussion of citizen suits lists 17 environmental statutes that contain authorizations of attorney fees and expert witness fees. The account also refers to the legislative history of some of this legislation. The Senate Report discussing the 1971 Clean Air Act, for instance, stated that "courts should recognize that in bringing legitimate actions under this section, citizens will be performing a public service and in such instances the court should award costs of litigation to such party." S. REP. No. 1196, 91st Cong., 2d Sess. 38 (1970). Similar purposes were expressed in the legislative history of the Equal Access to Justice Act. H.R. REP. No. 120, 99th Cong., 1st Sess. 4, *reprinted in* 1985 U.S.C.C.A.N. 132, 132-33.

sues of an intergovernmental nature. Because pollution is a national problem and not defined by local or state boundaries, legislation must address a variety of intergovernmental problems[11] and compliance issues.[12] Both national and state regulations are likely to be involved in environmental regulation, and thus issues of preemption[13] — as well as issues of sovereign immunity[14] — assume particular importance.

In the early development of environmental law, the courts in general, and the Supreme Court in particular, followed Congress' lead by exercising their powers so as to protect environmental interests against abuses by the executive department and its agencies. The environmental movement had long regarded the administrative agencies as being co-opted by developmental interests; that is, by the very interests they were supposed to regulate.[15] Thus, the early efforts of environmental lawyers focused on resolving environmental problems and protecting the environment in the courts, rather than in administrative agencies.[16]

The array of recent Supreme Court cases is an indication of the recent changes in the field. The environmental law has matured, and it is unlikely that recent reversals of environmental protection in the Supreme Court are likely to last for long. Yet, these "reverses" indicate a new low in the development of environmental protections. This symposium discusses in detail nine decisions. While one must guard against easy result-oriented judgments, it is impossible to ignore that in this entire array of cases there is not a single decision that protects the environment.

The Court does not favor citizen suits and citizen intervention. It

11. *E.g.*, Federal Water Pollution Control Act, § 401, 33 U.S.C. § 1341 (1972) (discussing the impact of federal permits and construction on state water quality); *id.* § 1312 (adjusting the federal effluent limitations to meet state water quality standards); 42 U.S.C. § 7410 (1970) (stipulating state implementation plans to meet national ambient air quality standards); *id.* § 7426 (1977) (discussing interstate pollution abatement).

12. *E.g.*, 42 U.S.C. § 7415 (1976) (discussing impact of U.S. pollution on public health in foreign countries). *See generally* GRAD, *supra* note 1, § 2.05, at 2-556 to 2-576.

13. *See, e.g.*, City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981) (holding that Federal Water Pollution Control Act of 1972 preempted federal common law nuisance); Clean Air Act, 42 U.S.C. § 7521 (preempting new motor vehicle emission standards).

14. *See, e.g.*, 42 U.S.C. § 7418 (detailing enforcement of pollution control requirements on federal facilities).

15. JOSEPH L. SAW, DEFENDING THE ENVIRONMENT 63-107 (1971).

16. *Id.* at 108-124; David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Environmental Law*, 70 COLUM. L. REV. 612, 614 (1970).

has limited earlier standing rules,[17] making it more difficult for environmentalists to take their cases to court. The Court has also discouraged citizen suits by limiting the legal fees which may be recovered by successful environmental litigants.[18] It has also limited the application of federal legislation geographically, so as to limit the impact of such legislation as the Endangered Species Act (ESA) and of the National Environmental Policy Act (NEPA), disallowing their extraterritorial impact.[19]

Except for the application of its "clear statement rule,"[20] this Court holds no brief for legislative supremacy. In the interpretation of legislation, it prefers deference to the administrative agencies — to the executive branch. It also prefers deference to the work of examining congressional intent.[21] This preference for executive rather than legislative choices is demonstrated in decisions protecting sovereign immunity in violation of the clear congressional mandate.[22]

The Court no longer holds the doctrine of separation of powers in high regard. In addition to cases that show a clear preference for executive rather than legislative policy judgment,[23] the Court currently approves and whitewashes congressional interference with judicial procedures by way of an appropriation rider, undoing decisions supporting natural resources and the environment in favor of the special interests of the timber lobby.[24]

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17. *See infra* pp. 13-18, for a discussion of Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992); George C. Coggins & John W. Head, *Beyond Defenders: Future Problems of Extraterritoriality and Superterritoriality for the Endangered Species Act*, *infra* pp. 59-84.

18. *See infra* pp. 29-30, for a discussion of City of Burlington v. Dague, 112 S. Ct. 2638 (1992); Michael D. Axline, *Decreasing Incentives to Enforce Environmental Laws:* City of Burlington v. Dague, *infra* pp. 257-74.

19. *See supra* note 12.

20. *See, e.g.*, Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980); Note, *Intent, Clear Statement, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 910 (1982).

21. *See infra* pp. 21-23, for a discussion of Arkansas v. Oklahoma, 112 S. Ct. 1046 (1992); Robert L. Glicksman, *Watching the River Flow: The Prospects for Improved Interstate Water Pollution Control*, *infra* pp. 119-76.

22. *See infra* pp. 26-28, for a discussion of U.S. Dep't of Energy v. Ohio, 112 S. Ct. 1627 (1992); Robert V. Percival, *Overcoming Interpretative Formalism: Legislative Reversals of Judicial Constructions of Sovereign Immunity Waivers in the Environmental Statutes*, *infra* pp. 221-56.

23. *See supra* notes 21 and 22.

24. *See infra* pp. 12-13, for a discussion of Seattle Audubon Soc'y v. Robertson, 112

The Court's view of the unimportance of environmental protections is also demonstrated in its preemption decisions, where federal preemption works to defeat state environmental initiatives and protects developmental or property interests,[25] or to use protective legislation to block rather than to advance litigation that seeks damages for the very harms the law seeks to prevent.[26] Preemption cases indicate a preference for the use of federal power particularly where the exercise of the state's police power would provide greater environmental protection at the expense of property interests.[27] Similar results occur when the Court disregards precedent and labels the exercise of state police power to protect the environment, public health, and safety as a regulatory taking.[28]

A recurring aspect of last term's environmental output by the Supreme Court is its pedestrian and dispassionate quality. The opinions of the Court should be nonpartisan, but they need not be dull and uninspired. Their tone and their content evidence judicial languor and a desire to avoid hard and searching inquiry. Again and again, the Court chose easy, superficial, mechanical responses over searching and analytical ones. This symposium shows the analytical and creative work the Court could have done had it not taken the easy road, and had it chosen to involve itself more intensely and in a less predictable

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S. Ct. 1407 (1992); Michael C. Blumm, *Ancient Forests and the Supreme Court: Issuing a Blank Check for Appropriation Riders, infra* pp. 35-58.

25. *See* Gade, Director of Illinois Envtl. Protection Agency v. National Solid Waste Management Ass'n, 112 S. Ct. 2374, 2381-88 (1992) (holding that the OSHA preempts a state licensing act which regulates occupational health and safety); Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2012-17 (1992) (holding that the State's additional fee requirement to dispose of hazardous waste generated in other states violates the Commerce Clause); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2023-28 (1992) (holding the State's differential treatment for health purposes of solid waste generated outside of the disposal site's county violated the Commerce Clause); *see also infra* pp. 177-220, Michael P. Healy, *The Preemption of State Hazardous and Solid Waste Regulations: The Dormant Commerce Clause Awakens Once More*. *See also* Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2137-46 (1992) (holding there was no standing for petitioners to challenge the scope of ESA to protect endangered species threatened by U.S. funded projects abroad).

26. *See* Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2616-21 (1992); *see also* Allan Kanner, *Federal Tort Law in the Regulatory Age, infra* pp. 275-98.

27. *See supra* note 25.

28. *See* Yee v. City of Escondido, 112 S. Ct. 1522, 1528-31 (1992); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2892-95 (1992); *see also* Richard M. Frank, *Inverse Condemnation Litigation in the 1990s — the Uncertain Legacy of the Supreme Court's* Lucas *and* Yee *Decisions, infra* at 85-118.

fashion. As this symposium shows, a great deal of the Court's past work will have to be redone, perhaps sooner rather than later.

THE PREEMPTION OF STATE ENVIRONMENTAL AND OCCUPATIONAL PROTECTIONS BY THE FEDERAL OCCUPATIONAL SAFETY AND HEALTH ACT

In *Gade, Director Illinois Environmental Protection Agency v. National Solid Waste Management Ass'n*,[29] a trade association representing all major hazardous waste disposers brought an action for declaratory judgment and to enjoin the Illinois Environmental Protection Agency from enforcing two Illinois laws that provide for the licensing of hazardous waste site workers. As a condition for the state license, the Illinois laws required employees to undergo training and proficiency testing and to have extended work experience. The question before the Court was whether the federal Occupational Safety and Health Act (OSHA) preempted the Illinois statutes. The district court held that it did not. The court of appeals affirmed in part, vacated in part, and remanded. On certiorari, the Supreme Court, in a plurality opinion by Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Scalia, with Justice Kennedy concurring in result, found that OSHA preempted the state law. The plurality rejected the argument that the State's statutes should be upheld because they addressed not only workplace safety but also general public protection.

The plurality opinion found neither field preemption nor specific conflict with federal law. However, it did find implied preemption after considering whether a state law that merely sought to supplement the federal act could be preempted by it. In Justice O'Connor's view, the law allowed state action legislation on subjects covered by OSHA only with the approval of the Secretary pursuant to section 18(b) of the Act. Because the state had not sought such approval, the supplemental state law was preempted, though no showing had been made of any direct conflict with the federal law.

The Court also held that the Illinois legislation violated federal preemption because Illinois cannot regulate worker health and safety under the guise of environmental regulation. The Court noted that the requirement of 4,000 hours of experience could not survive preemption simply because the rule might also enhance public health and safety.

29. 112 S. Ct. 2374 (1992).

The Court failed to explain why a sound rule of occupational health and safety, if not preempted, may not also protect public health.

The dissent, Justice Souter, joined by Justices Blackmun, Stevens and Thomas, relied heavily on the presumption against preemption, and, after examining the legislative history, concluded that OSHA contained no express intention to preempt state law. Indeed, the Act anticipated supplementary state regulation. The very requirement of approval of state legislation on occupational safety and health by the Secretary indicates that Congress did not intend to preempt the field, nor did Congress refuse to accept state provisions that did not conflict with supplemented OSHA requirements. The dissent avoided the preemption issue by relying on OSHA section 18(a), which allows state law jurisdiction over occupational safety or health issues in the absence of an applicable federal standard under section 655. Indeed, there is nothing in section 18(a) that is inconsistent with the conclusion that as long as compliance with both the federal standard and the state regulation is not physically impossible, each of these standards is enforceable. This conclusion is supported by the normal presumption against preemption and by earlier decisions.[30] By its own terms, the only effect of the provision authorizing the Secretary to approve state law provisions is to prevent the Secretary from approving provisions that would unduly burden interstate commerce. The dissenters disagreed with the majority in its contention that the Illinois law was an effort to enact occupational safety and health requirements under the guise of enacting environmental law.

The uncertain resolution of the preemption issue is illustrated in Justice Scalia's concurrence, which disagreed with the plurality and found that OSHA is expressly preemptive of state law.

The Court's preemption decisions indicate a clear preference for federal power, particularly when the exercise of the state's police power provides greater environmental protection at the expense of property interests. Prior to *Gade*, the Court upheld two cases involving a state ban on the disposal of out-of-state waste. The first case involved a state law that clearly imposed a discriminatory exaction on out-of-state com-

30. United Steelworkers of Amer., AFL-CIO-CLC v. Auchter, 763 F.2d 728, 733-36 (3rd Cir. 1985). In *Auchter*, the court granted protection to more stringent state regulation against preemption by imposing less effective federal requirements. The decision reflects the accepted view of the occupational safety and health field up until the *Gade* opinion.

merce.[31] In a subsequent decision, the Court held that a regulatory scheme that only incidentally affected out-of-state waste disposers burdened interstate commerce. Both hazardous waste disposal decisions resulted in the protection of the interests of major disposers in search of disposal sites.[32]

In the instant federal-state situation, in the *Gade* case in which preemption was hardly clear, the outcome again adversely affects environmental protection, as well as interests in occupational safety and health. In the hazardous waste disposal cases, the decisions resulted in the protection of interests of major disposers in search of disposal sites. In *Gade* the decision resulted in the protection of major commercial waste disposal interests against substantial cost increases which would have resulted from the application of the Illinois legislation. The legislation was police power regulation, designed like OSHA and CERCLA to protect the public health.[33]

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31. Chemical Waste Management v. Hunt, 112 S. Ct. at 2011-12.

32. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. at 2027-28.

33. The primary public health emphasis of CERCLA as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 11001-50, is evident from the high priority given to response actions to protect drinking water supplies. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9618 (1986). This emphasis on public health protection is also reflected in the amendment to CERCLA § 104(i) requiring the completion of treatment necessary to restore ground and surface water quality to a level that assures protection of human health and the environment. Similar public health emphasis is evident in the expansion of the authority and functions of the Agency for Toxic Substance and Disease Registry (ATSDR). ATSDR administrators collect toxicological information to determine specific impacts of toxicity on different aspects of human health. ATSDR also performs far-reaching public health assessments to determine the appropriate action to protect the exposed population. The entire effort to clean up hazardous waste sites and to expend billions of dollars for this purpose is justified on public health grounds. Indeed, CERCLA itself, as amended by SARA in § 104(a)(1), adds a broad directive to give primary attention to those releases that the President deems may present a public health threat.

The Occupational Safety and Health Act of 1970 (OSHA), Pub. L. No. 91-596, 84 Stat. 5090 (codified as amended in scattered sections of 29 U.S.C.), contains the following congressional findings and purposes:

> (a) Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon and are a hindrance to interstate commerce in terms of lost production, wage loss, medical expenses and disability compensation payments.
>
> (b) Congress declares it to be its purpose and policy, through the exercise of its power to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve

THE NATIONAL FOREST MANAGEMENT ACT, THE PROTECTION OF OLD GROWTH FORESTS, AND THE REVERSAL OF COURT DECISIONS BY APPROPRIATION RIDER

In *Ancient Forests and the Supreme Court: Issuing a Blank Check for Appropriation Riders*, Michael C. Blumm addresses the Court's whitewash of the reversals of specific cases protecting old growth forests by a major appropriation rider. A unanimous Court joined in the first opinion written by Justice Thomas. Upholding the appropriation rider, dubbed the Northwest Timber Compromise, was a decision that was wrong and contrary to sound precedent on the amendment of substantive law by such riders. It also upheld a breach of the separation of powers principle and sanctified the efforts of the timber lobby to advance the cutting of old growth timber at the expense of endangered species protection.

The Northwest Timber Compromise represents an unusual kind of legislative action. The Congress used an appropriation rider and language that would not withstand analytical muster to allow the Forest Service to yield to special interest pressure. Blumm's article makes a significant contribution by considering the real history of the case, rather than adhering to Justice Thomas' "sanitized" account. Blumm's analysis is also important in showing that the Supreme Court was dealing with a measure of very temporary effect and narrow application. There was no overwhelming need for the Supreme Court to intervene, except to point the way for future congressional interference in the decision of pending cases. In view of the limited impact of the narrow decision in *Seattle Audubon Society v. Robertson*[34] and the question of why the court granted certiorari, one surmises that the opinion was assigned to Justice Thomas because this was a situation in which he could do relatively little harm.

While the impact of the decision is shortlived, its implication with respect to interference with the normal management of public lands and growing timber is potentially far reaching. Timber from public lands accounts for about one-fourth of all timber produced in the United States.[35] Sale of this timber is controlled principally by the Na-

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our human resources [to undertake a variety of measures to protect the safety and health of workers in the workplace].

Id.

34. 112 S. Ct. 1407 (1992).

35. CARL MCFARLAND, ADMINISTRATIVE PROCEDURES AND THE PUBLIC LAND 86 (1969). *See also* COUNCIL ON ENVIRONMENTAL QUALITY, SIXTH ANNUAL RE-

tional Forest Service of the Department of Agriculture, the agency that administers the National Forests. The Department of the Interior also oversees timber sales through the Bureau of Land Management (BLM).[36] The National Forest Management Act[37] restricts both the scope and method of sale. The cutting must be consistent with forest management plans based on multiple use, sustained yield principles, taking into account outdoor recreation, open range, timber, watershed, fish and wildlife, and wilderness values.[38] Decisions prior to *Robertson* carried out longstanding protective principles reflected by the National Forest Management Act, and in particular, the protective principles relating to wildlife protection. The *Robertson* decision disregarded this tradition, at the expense of the protection of the Northern Spotted Owl.

The language of the Northwest Timber Compromise is largely doubletalk, particularly the statement that the "management of the areas according to subsections (b)(3) and (b)(5) of this section [which undo earlier law] . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases" listed by their specific case captions. The only part which is clear is that the earlier decisions interpreting established law are set aside, a breach of separation of powers clearly explained in Michael Blumm's article.

STANDING TO ASSERT THE EXTRATERRITORIAL APPLICATION OF THE ENDANGERED SPECIES ACT

In *Lujan v. Defenders of Wildlife*,[39] the Supreme Court in a plurality opinion by Justice Scalia managed to inflict significant, though not fatal, damage to standing rules in environmental cases. The opinion also limits the prospects for the extraterritorial application of the Endangered Species Act (ESA). In *Beyond 'Defenders': Future Problems of Extraterritoriality and Superterritoriality for the Endangered Species Act*, George Cameron Coggins and John W. Head focus their attention

PORT 226 (1975) (noting that the United States holds approximately 44% of the growing stock of timber and 30% of the commercially useful timberland area).

36. BANZHAF & CO., STUDY OF PUBLIC LAND TIMBER POLICY 3-6 (Vol. 1 1969) (on file with the author). The Forest Service sells timber pursuant to 16 U.S.C. § 1611. The BLM sells timber pursuant to the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act, 43 U.S.C. § 1181a (1988).

37. 16 U.S.C. §§ 1600-14 (1976).

38. 16 U.S.C. § 1604(e).

39. 112 S. Ct. 2130 (1992).

primarily on the latter issue. They do not agree with Justice Blackmun's dissent, which accused the majority of a "slash and burn expedition through the law of environmental standing."[40] The case involves a challenge by citizens with a special interest in protecting endangered species threatened by construction on the Aswan Dam in Egypt and in the Sri Lankan Mahaweli Project. The United States Agency for International Development, USAID, participated in the funding of both of these projects. During the Carter administration, the Secretaries of Interior and Commerce, pursuant to the ESA, promulgated a joint regulation providing that the obligation imposed by ESA section 7(a)(2) should also apply to actions taken by U.S. agencies in foreign nations. ESA section 7(a)(2) requires agencies to consult with the Secretary if they undertake an action that may endanger or threaten a species. After a change in administration, the regulation was amended so that such consultation was necessary only for actions taken in the United States or on the high seas. Defenders challenged the amended regulation, asserting their interest in the protection of the endangered species in foreign countries. They sought a judgment declaring the new regulation in error as to geographic scope and an injunction to compel the Secretary to promulgate a new regulation reflecting the earlier interpretation of ESA. Plaintiffs in the case often traveled to the countries involved and maintained a continuing interest in the protection of the particular species, including the Nile crocodile and the Asian elephant. The citizen parties asserted in their affidavits that they planned to revisit the area to pursue their continuing interest in the species involved.

On its face, the affidavits reflected the well accepted grounds for standing established in 1972 in *Sierra Club v. Morton*.[41] The Court, however, found that the basis for standing was inadequate, because there was no "immediate" damage to plaintiffs' interests by the proposed construction. It seems that an immediate interest would have been easier to demonstrate if plaintiffs had plane tickets in their possession for the return to the area.

Other grounds for rejection of standing include the failure to show the necessary injury in fact to be actual and imminent and the failure of redressability. The Court held that there was not a sufficient showing that the issuance of an order to the Secretary would directly affect the activities of USAID in providing support for the construction in the foreign countries. The Court also noted that USAID only supplied a

40. *Id.* at 2160.

41. 405 U.S. 727 (1972).

fraction of the funding for the foreign projects. Moreover, the Court rejected the "ecosystem nexus," an earlier acceptable grounds for standing. Because the Supreme Court accepted the case on a motion for summary judgment, the Court said that it was necessary for plaintiffs to meet a higher burden of proof on the standing issues than would have been necessary on a preliminary motion on the pleadings. Finally, the Court rejected plaintiffs' claim for standing based on a "procedural injury," a basis for standing recognized in a number of NEPA cases.

Justice Scalia took the occasion to analyze standing as based on separation of powers grounds. Going beyond the usual basis for standing, the case or controversy requirement, Justice Scalia asserted that the concrete injury requirement has a separation of powers significance. "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, 'to take care that the laws be faithfully executed.' "[42] Justice Scalia supports his doctrine with a series of decisions decided well before the congressional authorization of citizen suits and the common acceptance of the vindication of environmental rights by citizen plaintiffs. The logical extension of Justice Scalia's notion is to undercut the enforcement of environmental law by citizen suits of any kind, because all of them necessarily intrude upon the carrying out of executive functions, an intrusion which Justice Scalia would prefer to prevent. Chief Justice Rehnquist and Justices White and Thomas joined in Justice Scalia's opinion.

Justice Souter joined Justice Kennedy and concurred in part and concurred in the judgment. Justice Kennedy's opinion agrees that plaintiffs failed to show sufficient injury to support a standing claim, but indicates that he is not willing to foreclose the possibility that in different circumstances the nexus theory might support a claim to standing. In light of plaintiffs' failure to show injury, Kennedy would not reach the issue of redressability. He also indicates his disagreement with the majority's analysis of the basis for standing. Though he finds that the citizen suit provision of the ESA does not establish an adequate chain of consequences required to provide standing in this situation, he clearly does not want to limit Congress' power to authorize

42. 112 S. Ct. at 2145.

citizen suits where the action is brought to preserve an actual stake in the outcome.

Justice Stevens concurred in the judgment because he was not persuaded that Congress intended the consultation requirement in section 7(a)(2) of the ESA to apply to activities in foreign countries. He did not agree, however, with the Court's conclusion that plaintiffs lacked standing because the threatened injury to their interest in protecting the environment and studying endangered species is not "imminent." Moreover, Justice Stevens disagrees with the plurality's conclusion that the injury is not "redressable" in this litigation. Instead, he concludes that plaintiffs met the usual requirements to support standing. Stevens argues, however, that the plaintiffs would lose on the merits since he failed to find any specific support for the extraterritorial application of the consultation mandate.

The dissent by Justice Blackmun, joined by Justice O'Connor, takes issue with virtually all of the plurality's conclusions, particularly the Court's requirement that the immediacy of harm be demonstrated by providing detailed descriptions of future conduct. Justice Blackmun's position challenges the plurality's assertion that the harm to the plaintiff is not immediate because they are not about to return to Egypt or Sri Lanka in the near future. The rejection of the "ecosystem nexus" is also scored with Justice Blackmun's reference to the earlier *Lujan v. National Wildlife Federation*[43] decision, in which the Court required a showing of specific geographic proximity when the harm alleged is the visual enjoyment of nature. The dissent asserts that injury does not depend on a litigant's failure to use the exact site where the challenged harm, i.e., the slaughter of the animals, occurs.[44] Justice Blackmun also finds redressability because an order to the Secretary is likely to result in compliance by other agencies such as USAID, unless it is assumed that such agencies will be intentionally nonlaw-abiding.

The dissent is particularly critical of the plurality's rejection of standing based on procedural rights. The dissent notes that failure to enforce such rights will ultimately result in an accretion of power in the hands of the executive at the expense of Congress, from which the power originates. Justice Blackmun rejects the plurality's view as unduly formalistic in its reliance on inappropriate and outmoded precedents.

43. 497 U.S. 871 (1990).

44. 112 S. Ct. at 2154.

The opinions in *Lujan v. Defenders of Wildlife* are noteworthy for their unusually nasty and meanspirited tone. The very sharpness of the division between the plurality, the dissent, and the concurrences is troublesome. Such a sharp and acrimonious division indicates a strong desire to limit plaintiffs' rights in environmental law suits, reversing the direction of the past twenty years.

In their article, Coggins and Head highlight the change of direction in standing law following *Lujan v. National Wildlife Federation*.[45] The Court failed to find standing even though plaintiffs had met all of the prior applicable tests in their affidavit. The authors note Justice Scalia's hostility to all public interest litigation, as reflected in some of his earlier writings. They also call attention to Justice Scalia's clear purpose to elevate the power of the executive over that of Congress. The *Defenders of Wildlife* case clearly evidences Justice Scalia's predilections. However, these are difficult to understand in light of his former service as Solicitor General, where he contributed to revision of the Administrative Procedure Act, allowing aggrieved parties to challenge administrative actions and determinations, largely waiving the routinely-used sovereign immunity defense against such actions.[46]

The decision on standing relieved the Court from addressing the issues of territoriality and superterritoriality of the Endangered Species Act, which forms the major topic of the article by Professors Coggins and Head. Making short shrift of the assertion that such extraterritoriality improperly interferes with the sovereignty of other nations, they indicate that the United States has regularly done so when sufficiently important interests were involved. The United States has indeed conditioned developmental support to grantee states on their adoption of certain requirements and laws relating to family planning, security law, export controls, protection of competition, and control of corrupt business practices. Though there may be a presumption against the extraterritoriality of U.S. law, this presumption is easily overcome by evidence of congressional intent.

In their paper, Coggins and Head do the job the Supreme Court avoided, showing the manner in which ESA could be expanded to apply extraterritorially in bilateral development situations, and to apply

45. *National Wildlife Fed'n*, 112 S. Ct. at 2142-46.

46. REPORT OF THE HOUSE JUDICIARY COMMITTEE, H.R. DOC. NO. 1656, 94th Cong., 2d Sess. 25 (1976). *See also* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970).

superterritorially, which would be involved in multilateral development assistance. Using World Bank activities as the primary example, the authors show that even though the World Bank is not a federal agency or instrumentality, an imaginative interpretation of section 7 of ESA can apply to U.S. participation in the multilateral development banks. The authors show that if Congress chooses to extend the scope of ESA, it can do so without encountering any legal barriers. As examples they note other conditionalities imposed in the U.S. assistance programs, based on acceptable policies with respect to abortion, human rights, and freedom of the press. Conditionalities involving the expansion of ESA are fully justified by such international declarations as the Stockholm Declarations and other international expressions in favor of environmental and species protection.

REGULATORY TAKINGS

In *Inverse Condemnation Litigation in the 1990s — The Uncertain Legacy of the Supreme Court's* Lucas *and* Yee *Decisions*, Richard M. Frank places the two most recent inverse condemnation cases decided by the Supreme Court into the sequence of the Court's 1990 decisions.[47] His insightful analysis of the field, from physical takings to regulatory takings, raises the same questions asked in the field of takings law but left unanswered by the Court. A unanimous Court decided *Yee v. City of Escondido*.[48] Plaintiff, a mobile home park owner, asserted that a mobile home rent control ordinance and California's mobile home residency law, two measures that limit a mobile home owner from terminating or assigning the leasehold interest, amount to a physical taking of his property. The Supreme Court unanimously rejected the plaintiff's argument. In so doing, the Court rejected previous appellate decisions holding that certain rent controls did indeed amount to a physical taking. The Court concluded that the challenged ordinances were police power regulations of property rather than a taking.

Not to anybody's surprise, the Court had greater difficulties with *Lucas v. South Carolina Coastal Council*.[49] In 1988, South Carolina

47. *E.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); First Evangelical Lutheran Church of Glendale v. City of Los Angeles, 482 U.S. 304 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). *See* GRAD, *supra* note 1, § 10.01[4][d], at 10-38 to 10-38.4 nn.77.1 to .9.

48. 112 S. Ct. 1522 (1992).

49. 112 S. Ct. 2886 (1992).

enacted a Beachfront Management Act, declaring that the coastal dune and beach system of South Carolina serves a number of important public purposes, including (1) the protection of life and property by acting as a storm barrier; (2) the establishment of a habitat for wildlife and endangered species; and (3) the improvement of the tourism industry of the State. The Act declared that the South Carolina beaches were critically eroding and that certain types of construction endangered the dune system and created ecological damage that threatened the public purposes sought to be protected by the Act. The Act established certain setback requirements, prohibiting reconstruction of dwellings seaward of the setback lines, particularly following natural disasters. The plaintiff owned two vacant oceanfront lots, both seaward of the statutorily prescribed lines. The only permanent structures capable of being erected on the lots were a small deck or walkway. The trial court found that the plaintiff had suffered an unconstitutional, uncompensated taking and awarded Lucas $1,232,387.50. The South Carolina Supreme Court reversed, finding that the Beachfront Management Act came within the nuisance exception to the compensation requirement. The exception provides that no taking occurs and no need to pay compensation arises when the government acts to prevent use of property that creates a public harm. As Richard Frank properly notes, the dissent in the lower court adopts the position of Chief Justice Rehnquist in his dissenting opinion in *Keystone Bituminous Coal Association*:[50] regardless of the public harm prevented, an owner is entitled to compensation when he is deprived of all economic uses of his property.

The majority opinion, written by Justice Scalia and joined by Chief Justice Rehnquist and Justices White, O'Connor, and Thomas, held that the South Carolina Supreme Court applied an erroneous standard in finding for the state of South Carolina. It reversed and remanded for a state court determination whether, on the facts, an unconstitutional taking had occurred. In reaching its decision, the Court noted that the situations where government regulations result in the total loss of economic value are relatively rare, but then restated an earlier rule in even more strident fashion. "When the owner of real property has been called upon to sacrifice *all* economically beneficial use in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[51] As Richard Frank notes, calling attention to

50. 480 U.S. 470, 506 (1987).

51. 112 S. Ct. at 2895.

the dissent offered by Justice Stevens, earlier cases had never gone that far.

In addition to its overbroad statement on regulatory takings, the majority limits the application of the usage exception to recognized categories of nuisances under preexisting state property law. Justices Blackmun and Stevens submitted dissenting opinions, challenging both the majority's conclusion and its reading of earlier takings cases. Justice Kennedy's concurrence focuses on the majority's comments on the nuisance exception. Justice Souter's separate statement argues that certiorari was improvidently granted because South Carolina had enacted an amendment to the Act immediately following the court's initial decision.

Though both *Yee* and *Lucas* resulted in remand, the impact of *Lucas* on future developments in the taking doctrine are both ominous and unpredictable. Richard Frank's analysis of the "denominator" issue, which addresses what constitutes a taking when the owner holds multiple parcels, is particularly appropriate in the *Lucas* case where the parties allege a total loss of value. The author also addresses the significant issue of the meaning of "economic use" and the question of what precisely the plaintiff is deprived — a right or a privilege.

The earlier requirement of balancing of public purposes against private interests in takings cases seems to have been lost, and the Court barely mentions that South Carolina has both economic and safety grounds for the regulation of beachfront development. The impact on private property appears to be the primary concern, rather than the sound regulatory purpose of legislation based on the traditional exercise police power. Richard Frank's prediction that the court's decision will lead to more regulatory taking litigation and that such litigation will be even less predictable in its outcome is well founded.[52]

This observer concludes that the entire regulatory taking doctrine was a mistake from its very beginning in *Pennsylvania Coal Co. v. Mahon*.[53] That case created the doctrine in Holmes' usual epigrammatic style that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[54] As usual, Oliver Wendall Holmes' language and his epigrammatic conclusions

52. *Cf.* First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); GRAD, *supra* note 1, § 10.01[4][d].

53. 260 U.S. 393 (1922).

54. *Id.* at 415.

sound more persuasive than is warranted by their sense.[55] The decision in *Pennsylvania Coal* was probably wrong and created a problem for the sound exercise of the police power for the next seventy years. The seventy-year-old error is likely to be compounded by the current Supreme Court.

Keystone Bituminous Coal Association v. DeBenedictis,[56] a five-to-four decision, cast doubt on the continuing force of the *Pennsylvania Coal* decision by upholding modern legislation which largely paralleled the law that Justice Holmes held to have resulted in a taking. Justice Stevens wrote the majority opinion which severely criticized Holmes' language, as well as his holding in *Pennsylvania Coal*. Justice Stevens emphasized the aspects of the law that protected "the public interest in health, the environment, and the fiscal integrity of the area. That private individuals erred in taking a risk cannot estop the Commonwealth from exercising its police power to abate activity akin to a public nuisance."[57] In *Keystone Bituminous Coal Association*, Chief Justice Rehnquist joined by Justices Powell, O'Connor, and Scalia, dissented, asserting that there was a taking. In *Lucas*, Justice Scalia, Chief Justice Rehnquist, and Justice O'Connor, the dissenters in *Keystone Bituminous Coal Association*, together with Justices White and Thomas, comprise the majority, marking a significant, sixty-five year backward move in the application of the regulatory taking doctrine. The Court's decision advances private property interests at the expense of sound police power protections of public health, public safety, the environment, and public economic interests.

NPDES Permits and the Protection of Downstream "Affected" States

In *Watching the River Flow: The Prospects for Improved Interstate Water Pollution Control*, Robert L. Glicksman deals with the recurring experience that rivers flow downstream and in so doing cross state lines. Thus, pollution moves from a source state to an affected state, as was the case in *Arkansas v. Oklahoma*.[58] Having obtained an NPDES permit, the City of Fayetteville, Arkansas built a new municipal wastewater treatment plant which ultimately emptied its effluent into a

55. For an example of Holmes' language and "epigrammatic conclusions" see Buck v. Bell, 274 U.S. 200, 207 (1927) ("Three generations of idiots are enough.").

56. 480 U.S. 470 (1987).

57. *Id.* at 488.

58. 112 S. Ct. 1046 (1992).

scenic river in downstream Oklahoma. The Court addressed EPA's finding that discharges from Arkansas' treatment plant would not cause a detectable violation of Oklahoma's water quality standards. A unanimous Court found that EPA satisfied the agency's duty to protect the interests of the downstream state.

The parties argued three issues: First, whether the Federal Water Pollution Control Act (FWPCA) requires application of the water quality standards of a downstream state when EPA issues a permit; second, if the FWPCA does not require the application of the downstream affected state's standards, does the statute authorize EPA to require such compliance; and third, whether the Court should uphold the Tenth Circuit's finding that the FWPCA prohibits the discharge of additional effluents into a body of water that already fails to meet the water quality standard. The Court held that the Tenth Circuit's determination of the third issue was incorrect, and that EPA had the power to construe the Act so as to mandate Arkansas' compliance with the downstream state's standards. The Court upheld EPA's interpretation relying once again on *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[59] deferring to an agency's interpretation of a statute because the law itself was unclear and the agency's interpretation not unreasonable.

The Court's affirmance of EPA on the second issue had the great advantage of relieving the Court from having to answer the first issue, as to whether the FWPCA obligates EPA to apply the water quality standards of the downstream state in issuing an NPDES permit.

It is the answer to this first issue that forms the substance of Robert Glicksman's article. His painstaking analysis of available choices and of the means available to resolve the issue concludes that the FWPCA does require the source state to consider the downstream state's water quality in deciding whether to issue a permit. Glicksman's article also analyzes judicial, administrative, and legislative methods of accomplishing that result and shows the unfortunate consequences of having the source state's standards control the impact of pollutants on the entire river downstream. Further, the article, through its careful and extended analysis, exposes the Supreme Court's superficial disposition of the case.

Like skilled escape artists, the Court took the easy route. The interpretational ploy used by Justice Stevens, who is usually a careful crafts-

59. 467 U.S. 837 (1984).

man, was to apply the *Chevron* rule of deference without analysis and without questioning the appropriateness of its application in this instance. Having found that the statute itself gave no precise guidance on the second issue, whether EPA had the power to require Arkansas to comply with Oklahoma standards, the Court held that the text was in doubt and that consequently it could follow the agency's lead if the agency's determination was not unreasonable. In so doing, the Court did not searchingly examine the statute, nor did it explore the precise situation presented. The Court failed to note that in answering the question, EPA determined and expanded its own jurisdiction. One of the rule's closest analysts criticized this use of *Chevron* as an unacceptable application of the deference rule.[60] It is evident that deference saves the Court time and allows it to forego difficult tasks of statutory interpretation.[61] The Court avoids a difficult question despite the importance of the issue. It refers to its own decision in *International Paper Co. v. Ouellette*,[62] which involved a private claim for the damages caused by source state pollution in an affected state. There, the Court held that the only state law applicable to an interstate discharge is the law of the state in which the point source is located. There, the Court expressly added that the downstream affected state does not have the authority to block the issuance of the NPDES permit. The Court's distinction of *Ouellette* in *Arkansas v. Oklahoma* is neither clear nor convincing, and the disposition by reference to *Chevron* deference seems particularly inappropriate.

THE COMMERCE CLAUSE, PREEMPTION, AND THE DISPOSAL OF HAZARDOUS WASTE

In *The Preemption of State Hazardous and Solid Waste Regulations: The Dormant Commerce Clause Awakens Once More*, Michael P. Healy analyzes the decisions in *Chemical Waste Management, Inc. v. Hunt*[63] and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*.[64] In *Chemical Waste Management, Inc.*,

60. *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2099-2100 (1990).

61. *See* Peter L. Strauss, *150 Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117-29 (1987).

62. 479 U.S. 481 (1987).

63. 112 S. Ct. 2009 (1992).

64. 112 S. Ct. 2019 (1992).

Justice White, writing for the entire Court except Chief Justice Rehnquist, invalidated an Alabama statute that imposed a special additional fee on the operator of the Emelle, Alabama hazardous waste disposal facility for each ton of hazardous waste deposited at the facility "generated outside of Alabama." The operator of the facility sued, challenging the constitutionality of the fee as applied to out-of-state waste. The facts of the case disclose that the fee was of great importance to Alabama because Emelle, one of the few facilities receiving hazardous waste in that region, received substantial amounts of out-of-state waste, thus subjecting Alabama to a significant regulatory burden. The Court invalidated the fee, applying a per se rule against state regulation that discriminates against out of state commerce. The Court relied on *Philadelphia v. New Jersey*,[65] which found that waste is an article of commerce subject to the Commerce Clause, and that hazardous waste is simply a more dangerous classification of that article of commerce. The burden was on Alabama to justify the special fee, both in terms of the local benefits and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest.[66] Alabama's attempt to justify the fee on the grounds of protection of health and safety of Alabama citizens failed because similar considerations applied to local as well as out-of-state hazardous waste. As Chief Justice Rehnquist noted in dissent, the Court's decision means that the state must either prohibit all landfill operations or it must accept waste from every portion of the United States. Rehnquist scorned the "perverse regulatory incentives" created by the majority opinion. Michael Healy properly concludes that in spite of Chief Justice Rehnquist's cavils, the additional fee was impermissible protectionist legislation. Professor Healy provides a more persuasive and rational basis for the Court's decision.

The other case analyzed by Professor Healy, *Fort Gratiot*, focused on several different factors. The *Fort Gratiot* decision concerned a comprehensive state program for waste disposal known as the Michigan Solid Waste Management Act. The Act was amended to establish waste import restrictions, preventing a waste disposal facility from accepting waste not generated in the county in which the disposal area is located, unless the disposal is explicitly authorized in the county solid waste management plan. Both the district court and the Sixth Circuit rejected the assertion that the Michigan Solid Waste Management Act imposed undue burdens on interstate commerce, because the burdens

65. 437 U.S. 617 (1978).

66. *Chemical Waste Management, Inc.*, 112 S. Ct. at 2014.

imposed on out-of-state waste were no different than the burden imposed on in-state waste.

Reversing the court below, Justice Stevens, writing for seven members of the Court, with a dissent by Chief Justice Rehnquist joined by Justice Blackmun, found that the Michigan Act was protectionist and required proof that the restrictions on the import of waste furthered health and safety concerns that could not be adequately served by nondiscriminatory alternatives. The dissent viewed the statute as a law that appropriately responded to local concerns with only incidental effects on interstate commerce.

The Court's opinion asserts that the statute afforded local waste producers protection from competition from out-of-state producers. Chief Justice Rehnquist rebutted this position, arguing that the regulation actually increased the cost of disposal to local waste generators who will not realize the economies of scale that the added disposal of out-of-county waste would bring.

Michael Healy appropriately analyzes the statute from the point of view of its contribution to the resolution of the problem of sufficient landfill capacity. His analysis of the Michigan statute shows that Michigan did not deprive out-of-staters of disposal space because Michigan itself created that space through its own legislative efforts. Neither the majority nor the dissent noted the element of responsibility incorporated in the Michigan legislation, concluding that those responsible for a problem are responsible for its resolution and may make far-reaching regulations so long as it does not go beyond the needs of the problem's resolution.

Analyzing the range of the state's choices in the Michigan situation, and analyzing aspects of state economic policy that must be brought to bear on their resolution, Michael Healy properly characterizes the Court's reactive and almost mechanical response in dormant commerce clause cases. He argues that neither the Court's resolution in *Fort Gratiot* nor the application of the *Pike* balancing test[67] resolves what is an inherently national problem. He suggests, for instance, that a state which has created excess landfill capacity by its own efforts at

67. The *Pike* test provides:

> [W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Pike v. Bruce Church Inc., 397 U.S. 137, 142 (1970).

source reduction and recycling could well restrict its availability to other states that have not practiced similar thrift. The problem with the decision in *Fort Gratiot* is that it reflects the Court's failure to perform the necessary work suggested by Healy's comment. Instead, we have another Pavlovian response to the dormant commerce clause stimulus.

COMPELLING THE GOVERNMENT TO CLEAN UP ITS ENVIRONMENTAL MESSES — THE RECALCITRANT HISTORY OF SOVEREIGN IMMUNITY WAIVERS

There are some 80,000 federal facilities in the United States, some owned and some leased by the United States. These facilities range from small buildings, parking lots, and rural and urban post offices to sizeable office buildings, huge army posts and naval installations, including huge federal installations for the production of nuclear armaments and the disposal of radioactive waste. Federal installations, similar to other public and private installations, generate substantial amounts of waste. Because normally federal agencies do not impose legal requirements on each other, federal installations operate with few effective controls and sanctions and thus have managed to accumulate superdimensional and hazardous messes. There are some exceptions, however, because most federal buildings are located within cities and use city services to remove their waste; such buildings even comply with municipal requirements, although it may be difficult to find sanctions to compel compliance.

The federal facilities' failure to comply creates peculiar anomalies. Under the Federal Water Pollution Control Act, for instance, states are responsible for attaining and maintaining water quality standards.[68] States are also charged with the responsibility of adopting state implementation plans to attain the federally promulgated National Ambient Air Quality Standards.[69] A federal facility that refuses to comply with state emission limitations or fails to comply with water quality standards may make it impossible for the state to comply with federal requirements. Although federal law provides few effective remedies against non-complying states,[70] the achievement and mainte-

68. 33 U.S.C. § 1313.

69. 42 U.S.C. § 7410.

70. *See, e.g.*, EPA v. Brown, 431 U.S. 99 (1977), *reversing* Brown v. EPA, 521 F.2d 827 (9th Cir. 1975). The 1990 Clean Air Act Amendments, as a sole sanction, deprive noncomplying states of certain highway and other government funds. 42 U.S.C. § 7509.

nance of healthful, ambient air and water quality standards is a matter of overwhelming national importance. Compliance by federal facilities is ultimately necessary to achieve the goals of environmental legislation.

In *Overcoming Interpretative Formalism: Legislative Reversals of Judicial Constructions of Sovereign Immunity Waivers in the Environmental Statutes*, Robert V. Percival recalls the sad history of the past fifteen years' efforts by Congress to waive sovereign immunity and to compel federal facilities to comply with state and local environmental requirements. The last chapter in this sorry cat and mouse game played between the U.S. Congress and the Supreme Court was *U.S. Department of Energy v. Ohio*[71] in which the Court held that sovereign immunity bars the states from collecting civil penalties from federal facilities which violate the Resource Conservation and Recovery Act (RCRA) or the Federal Water Pollution Control Act (FWPCA). Despite clearly expressed congressional intent, short of saying "We really mean it," the Court again relied on the oft repeated rule that waivers of sovereign immunity must be unequivocal and must be construed strictly in favor of the sovereign. Though the Court found that states are persons authorized to sue federal facilities under the citizen suit provision, it held that Congress did not waive sovereign immunity with respect to civil penalties. The dissenters, Justice White joined by Blackmun and Stevens, stated that a clearer statement of federal intent was not possible. The majority differentiated the federal facilities provision of the Clean Water Act from those of RCRA, finding that the Clean Water Act is substantially less effective in its waiver of sovereign immunity because it does not make any specific reference to sanctions to enforce injunctive relief. The analysis of the FWPCA provisions is even more abstruse and contrived than the Court's analysis of the RCRA waiver.

As in past instances of Supreme Court misinterpretation of the sovereign immunity waiver provisions, an effort at a legislative fix was not long in coming. On October 6, President Bush signed the Federal Facility Compliance Act of 1992, which sought to undo the damage caused by the Court's enforcement of the law against federal facilities under RCRA. The correction of the Court's destruction of the FWPCA waiver provision, however, will have to await the next round of revision and reauthorization of the Federal Water Pollution Control

See also Delaware Valley Citizens Council for Clean Air v. Pennsylvania, 533 F. Supp. 869, 881 (E.D. Penn. 1982).

71. 112 S. Ct. 1627 (1992).

Act. As Robert Percival indicates, the Federal Facility Compliance Act of 1992 reflects a number of legislative compromises. In his detailed analysis of the Act, the author cautiously refrains from speculating on the outcome of the inevitable next round when the clarity of the waiver of sovereign immunity provision reaches the Supreme Court.[72]

The emphasis in the Court's opinion on technical aspects of sovereign immunity fails to explicate the significance of the case and its aspect of major public danger. For several years, the Department of Energy operated its uranium processing plant in Fernald, Ohio for the production of warheads. It was not a fastidious operation, and nuclear waste materials polluted the surrounding waterways and soil. In 1986, the surrounding neighborhood and the state demanded a cleanup. The State of Ohio sued the Department of Energy for violations of state and federal pollution laws, including the CWA and RCRA. The State of Ohio sought to compel a multimillion dollar cleanup.

LEGAL FEES IN CITIZEN SUITS: SHORTCHANGING THE COMMITTED

In *Decreasing Incentives To Enforce Environmental Laws*: City of Burlington v. Dague,[73] Michael Axline analyzed the decision to prohibit courts from applying an enhancement factor in fee awards to prevailing plaintiffs in environmental citizen suits. Such fee awards are authorized by statute indicating the congressional policy to encourage citizen participation in the enforcement of environmental laws. Such fee awards are counter to the well-established American rule that each party pays its own legal fees. Conservative courts prefer to adhere to the old, common law rule, but Congress clearly indicated its policy intentions by including citizen suit and fee award provisions in virtually every piece of environmental legislation, as well as by its enactment of the Equal Access to Justice Act. Michael Axline, who co-directs one of the nation's most successful environmental litigation clinics at the University of Oregon Law School, is thoroughly familiar with the importance of the provision of fee awards to environmental litigators. His own experience demonstrates that citizen enforcement efforts depend on the availability of such awards.

The question in *Dague* was not the award of the fee itself, but its

72. For earlier efforts to waive sovereign immunity, see GRAD, *supra* note 1, §§ 2.05[4], 3.03[7][f].

73. City of Burlington v. Dauge, 112 S. Ct. 2638 (1992).

enhancement to compensate the attorney for the contingent nature of the recovery of such fees. The amount of the fees is not fixed in the citizen suit provisions but must be set by the court to determine the successful attorney's proper hourly rate. The recovery of such a fee is therefore entirely contingent on success in the litigation. Unless the contingent nature of the fee is recognized in the amount of the award, it is less probable that attorneys will bring citizen suits.

In rejecting fee enhancements to account for the contingent nature of the recovery, the Court refused to follow the rationale of five Justices in *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air (II)*.[74] In *Delaware Valley II*, Justices White, Powell, and Scalia and Chief Justice Rehnquist held that enhancement of the lodestar fee (i.e., the reasonable hourly rate times the number of hours spent) is never proper under section 304(d) of the Clean Air Act because it compensates attorneys not for success in one case but for failure in others. Justices Blackmun, Brennan, Marshall, and Stevens, however, argued that fee enhancement was required to ensure a reasonable fee for prevailing plaintiffs' attorneys. Justice O'Connor joined the plurality in the result and denied enhancement of the fee, holding that the upward adjustment was not warranted in that case. O'Connor asserted, however, that enhancement for contingency is not foreclosed under either section 304(d) of the Clean Air Act or other fee shifting statutes. Instead, she would impose restraints on courts' discretion in setting attorneys fees and would regard as controlling the manner in which the market compensates for contingency. Hence, Justice O'Connor would require the fee applicant to bear the burden of proving the degree to which the relevant market compensates for contingent fee arrangements, basing the enhancement on the situation of the market, precluding enhancement based on factors peculiar to the case. Thus, though the attorney in *Delaware II* was not awarded an enhancement, five out of the nine Justices in the case found that a fee enhancement reflecting the contingent nature of the case was available and should be considered. The purpose of the enhancement is to ensure that plaintiffs will find counsel. Five years later in *Dague*, however, the alinement shifted and Justice Scalia, in an opinion joined by Chief Justice Rehnquist and Justices White, Souter, Kennedy, and Thomas, held enhancement to be improper. The dissent by Justice Blackmun was joined by Justice Stevens; Justice O'Connor filed a separate dissent.

Michael Axline's analysis indicates the Court's error in defining the

74. 483 U.S. 711 (1987).

nature of the contingency that the contingency award is designed to recognize. The Court's opinion mistakenly suggests that contingency enhancement encourages the bringing of nonmeritorious cases. Moreover, the Scalia opinion entirely misses the purpose of contingency enhancements. The purpose is not to compensate plaintiffs' attorneys for cases previously lost, but rather to serve as an incentive for attorneys to accept the risk of cases where payment will occur only if they prevail. Because risk of loss is only one of the contingencies an environmental lawyer faces, the second risk, namely the amount of the award, is of great significance in whether or not citizen enforcement — a congressional policy — will happen at all. Environmental law has long had a "movement" character, with idealistic, committed lawyers undertaking the assertion of environmental rights when there is relatively little assurance of reward. The Supreme Court's position on the issue of contingency enhancements runs contrary to clear congressional policy and to the best interests of law enforcement. By all accounts, the recoveries under citizen suit provisions in environmental litigation have been very modest in comparison to the fees in civil litigation of similar difficulty. The majority of the Court condemns environmental attorneys in citizen suits to second class status.

Federal Preemption as a Barrier to State Common Law Claims for Injuries from Cigarette Smoking

In *Cipollone v. Liggett Group, Inc.*,[75] the Supreme Court turned back an effort by defendant cigarette manufacturers to use the Cigarette Labeling Act as a shield against a damage action for injury suffered as a result of lifetime cigarette smoking. The claim brought in federal court under diversity jurisdiction alleged a number of common law causes of action. It alleged that defendants failed to inform the consumers adequately of the health risks of smoking and sought to neutralize the effect of federally mandated health warning through their advertising and public relations campaigns. In addition, the claim asserted that defendants knowingly misrepresented the health hazards of smoking, withholding medical and scientific evidence of smoking hazards from the public. The defendant cigarette companies relied on the Federal Labeling Act's preemption provision as a defense to all of the plaintiff's claims arising after the 1965 effective date of the Labeling Act. Although the Supreme Court found that reliance on preemption did

75. 112 S. Ct. 2608 (1991).

not fully protect the defendants, it also held that the plaintiff is not entirely free to assert common law claims. The Court held that the Act clearly preempted state and federal rulemaking authorities from mandating particular cautionary statements. The Court, however, did not conclude that all common law actions arising out of injuries or relating to injuries from cigarette smoking were free of preemption. A plurality of the Court, including Justice Stevens, the writer of the Courts' opinion, Chief Justice Rehnquist, and Justices White and O'Connor, concluded that section 5(b) of the Public Health Cigarette Smoking Act of 1969 extends the section's preemptive reach beyond state enactments of cautionary statements to include some common law damage actions. The language of the statute extends to "requirement or prohibition[s]" "imposed under state law"; such language appears to contemplate common law as well as statutes and regulations. Accordingly, on remand, the precise language of section 5(b) must be narrowly construed in light of the presumption against preemption, and the plaintiff's common law claims must be examined to determine whether or not they are in fact preempted.

Petitioner's causes of action, relying on failure to warn, require a showing that defendants' post-1969 advertising or promotions should have included additional or more clearly stated warnings. Thus, if these claims rely on a state law "requirement or prohibition . . . with respect to . . . advertising or promotion," within the meaning of section 5(b), they are preempted. On the other hand, a viable claim for breach of express warranty is not preempted simply because it depends on the contractual terms of the warranty rather than any state law requirement.

Section 5(b) preempts state "prohibitions" as well as "requirements." Thus, the plaintiff's fraudulent misrepresentation claim, based on state law prohibition against advertising and promotional statements tending to minimize smoking health hazards, is preempted. However, plaintiff's claims of intentional fraud by false representation and concealment of material fact are not preempted because they do not depend on advertising and promotion covered by the Act. Moreover, plaintiff's claim alleging a conspiracy among defendants to misrepresent or conceal material facts concerning smoking health hazards is also not preempted because the duty to abstain from conspiracy to commit fraud is not a prohibition "based on smoking and health" within the meaning of the phrase in section 5(b).

Justice Scalia joined by Justice Thomas concluded that all of petitioner's common law claims are preempted by the 1969 Act. Justice

Blackmun, joined by Justice Kennedy and Justice Souter concluded that none of the plaintiff's common law actions are barred. The effect of the Court's determination raised considerable doubt whether any common law action relating to injuries arising out of cigarette smoking could reasonably succeed. In spite of the narrow construction of preemptive language, the true result of the Supreme Court's decision is to ensure that very few common law actions ever make it into court. Shortly after the decision by the Supreme Court, the news media reported that the plaintiff in *Cipollone* had withdrawn the case.

In his analysis, Allan Kanner in *Tort Law in the Regulatory Age* uses the case as the basis for a broad analysis of the use of federal statutes to preempt state common law tort claims. Kanner attempts to compare the use of federal statutes to preempt state common law tort claims to cases challenging the constitutionality of punitive damages in civil cases. The power of punitive damages has been the target of the purported "tort law reform" efforts of the past twelve years aimed at protecting industry through legislation that prevents certain damage issues from reaching the jury or by placing caps on recoveries for pain and suffering or for punitive damages. In *Cipollone* and similar cases, the effort was to prevent the damage issue from reaching the jury by using defendant's compliance with the labeling requirements of the federal law as a barrier to state tort claims. In this case, more a case in product liability than environmental protection, the court gave such an excessive reading to federal preemption in the Public Health Cigarette Smoking Act of 1969 as to place all common law remedies in doubt. In effect, federal legislation to protect the public health is successfully used as a barrier to asserting private claims for health injuries. The decision limits plaintiffs' access to the courts, constituting a substantial victory for the cigarette manufacturers. As Kanner points out, the court could have minimized its job by simply relying on *Silkwood v. Kerr-McGee Corp.*[76]

CONCLUSION

The 1991-92 term of the Supreme Court was an environmental disaster that may take years of environmental lawyers' efforts to undo. The articles that follow should be used as the beginning of an undertaking to turn around the Court's hostility to citizen suits; the Court's preference for executive power to defeat legislative protections of the envi-

76. 464 U.S. 238 (1984).

ronment; the Court's use of federal preemption to thwart sound exercises of state police power; the Court's use of commerce power to favor the interest of major waste disposal businesses against state efforts to protect both the environment and health and safety in the workplace; the Court's narrow view of standing, preventing sound cases from ever being heard; and to turn around the Court's attenuated view of sovereign immunity waivers reflecting intentional obtuseness to block the recognition of clear congressional intent to allow the full enforcement of environmental law even against the federal government itself.

This foreward is a pleading. The proof — and the beginning of the work that must again be done — is in the articles that follow.