**THE REHNQUIST COURT AND THE POLLUTION CONTROL CASES: ANTI-ENVIRONMENTAL AND PRO-BUSINESS?**

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The nearly physical revulsion many conservatives feel for environmental groups and values, and their reflex action to protect business being encroached upon, threaten to wipe out all the gains that preceded this Court. Raw political partisanship that sees the [Rehnquist] Court side with business interests is most apparent in environmental cases. The courts are in lockstep with the Right's attempts, outside the courts, to weaken the enforcement of environmental laws.

The above quote is but one of many that, with respect to the environment, serve as a damning indictment of the Rehnquist Court as an anti-environmental, pro-business Supreme Court, one that was openly hostile towards environmental statutes and regulations and

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1 Martin Garbus, Courting Disaster: The Supreme Court and the Unmaking of American Law 185 (2002).

2 See Daniel A. Farber, Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law, 81 Minn. L. Rev. 547, 568 n.101 (1997) ("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 also Christine A. Klein, The Environmental Commerce Clause, 27 Harv. Envtl. L. Rev. 1, 4 (2003) (asserting, after an evaluation of natural resources cases, that "the modern Court has been consistently hostile to environmental regulation"); Richard J. Lazarus, Restoring What's Environmental About Environmental Law in the Supreme Court, 47 UCLA L. Rev. 703, 716-17 (2000) ("Chief Justice Rehnquist, for instance, has a reputation in the environmental community for being unsympathetic to environmental protection concerns. There is some basis for that reputation in many of his votes."); Jeffery G. Miller, The Supreme Court's Water Pollution Jurisprudence: Is the Court All Wet?, 24 Va. Envtl. L.J. 125, 125 (2005) (noting, in a critique of the Rehnquist Court's Clean Water Act cases, that "[s]ome of my environmental law colleagues have long lamented that the Supreme Court is anti-environmental").

3 See, e.g., Garbus, supra note 1, at 2 ("The Rehnquist Court elevates the protection of property rights over personal rights to protect big business—the drug, tobacco, and oil companies—at the expense of the environment, the consumer, and the citizens.").

biased against environmental plaintiffs, particularly environmental public interest groups that sought redress by filing citizen suits in federal court.\(^5\) Are such negative assertions about the environmental record of the Rehnquist Court, and the troubling questions they raise concerning fairness by our court of last resort, accurate?

In an effort to answer this important question regarding the Supreme Court’s environmental jurisprudence, this Article examines a substantial segment of the Court’s environmental opinions—specifically, a number of the cases decided by the Court under the “pollution control” statutes during the leadership of William H. Rehnquist as Chief Justice.\(^6\) An assessment of every case decided by the Rehnquist Court under all federal environmental statutes is too much to consider in one article, but the cases decided under the pollution control statutes collectively form a manageable, yet substantial, part of the Supreme Court’s overall historical environmental record, since the Court during the Rehnquist era decided close to twenty-five cases where the underlying issues arose under one or more of these statutes.\(^7\) Thus, the focus of this Article is on the Rehnquist Court’s

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\(^5\) See, e.g., Lisa Kloppenberg, Playing It Safe: How the Supreme Court Sidesteps Hard Cases and Stunts the Development of Law 66 (2001) (criticizing the Rehnquist Court’s decisions in environmental citizen-suit standing cases, concluding that “by skewing Article III in such a backward-looking manner, the Court stifles the evolution of environmental law so that it cannot deal effectively with the magnitude of modern environmental problems”).


decisions arising under the pollution control statutes, including, in particular, those primarily involving challenges by business interests and suits brought by environmental groups. By focusing on these cases, I seek to answer the question that was initially posed: Whether the Rehnquist Court is properly characterized as pro-business and anti-environmental.

My analysis of these key pollution control cases leads to the conclusion that the Rehnquist Court was not anti-environmental or pro-business, nor was the Court during his tenure as Chief Justice, from 1986 to 2005, openly hostile towards environmental plaintiffs or the environmental regulatory structure. Despite assertions to the contrary, the analysis I have conducted of important cases involving the construction and application of the pollution control statutes shows that the Rehnquist Court preserved these statutes against a number of aggressive attacks that, if successful, would have resulted in a significant blow to the very foundation of federal environmental protection. Instead, despite facing a number of challenges on a variety of grounds, it is because of the Rehnquist Court that these statutes remain intact and in full force today as an indispensable component of federal statutory-based environmental protection. As such, the analysis of the cases I present casts serious doubt on the proposition that the Rehnquist Court was clearly anti-environmental and pro-business in resolving cases arising under the pollution control statutes.

No analysis of the Rehnquist Court can ignore the new life that federalism found during Rehnquist’s term as Chief Justice, and indeed federalism has relevancy to the Court’s treatment of cases arising under the pollution control statutes. Not only has federalism been implicated in some of the pollution control cases decided by the Rehnquist Court, but the rebirth of federalism during his tenure as Chief Justice also served to fuel the contention that the Rehnquist

Court was an anti-environmental Court. Thus, Part I of this Article provides an overview of federalism in the Rehnquist Court and the significance of its reemergence to the pollution control cases and statutes. Part II focuses on several of the major pollution control cases decided by the Rehnquist Court, and discusses how the Court's decisions in those cases were influenced by federalism to balance competing federal and state interests in not only pollution control, but also corporate law and land use planning. Part III examines a principle closely tied to federalism, the doctrine of preemption, and analyzes how the Court rejected preemption challenges to state and local pollution control regulations to further maintain the delicate balance that exists between our dual sovereigns, the federal and state governments. Part IV discusses pollution control cases that implicated neither federalism nor preemption, and evaluates how, through its approach to statutory interpretation, the Rehnquist Court preserved critical aspects of pollution control statutes from statutory-construction-based challenges.

INTRODUCTION

A. The Importance of the Rehnquist Court to Federal Environmental Law

William H. Rehnquist served as the sixteenth Chief Justice of the Supreme Court for nineteen of his thirty-three years on the Court, until his death in 2005. Justice Thurgood Marshall, who was in frequent disagreement with Rehnquist in a number of cases heard during the Rehnquist era, nonetheless described him as "a great chief justice." Another of his former law

8 See, e.g., Klein, supra note 2, at 1–2 (noting that the Rehnquist Court's federalism decisions, especially those regarding the Commerce Clause, raised "the fear that federal environmental law may be particularly vulnerable to the Court's shrinking view of commerce clause authority because environmental protection frequently requires the regulation of intrastate, noneconomic activities").
11 Stuart Taylor, Jr., The Rehnquist Court, 37 NAT'L J. 1532, 1533 (2005).
clerks portrayed Chief Justice Rehnquist as a man who "treated everyone alike—the powerful and the ordinary. He knew the name of virtually every Court employee, and when he saw a new employee, he would introduce himself as 'Bill Rehnquist.' He always remembered that person's name."\(^1\)

The era of the Rehnquist Court began on September 26, 1986,\(^1\) when Rehnquist, then an Associate Justice, took the oath to serve as the Chief Justice after the Senate voted 65 to 33\(^15\) to approve his nomination by President Reagan.\(^15\) This new era of the Supreme Court also roughly coincided with Congress's passage of the full spectrum of statutes that serve today as the foundation of federal environmental protection.\(^17\) As a consequence of this confluence of a

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15 See THOMAS R. HENSLEY ET AL., THE REHNQUIST COURT: JUSTICES, RULINGS AND LEGACY 13 (2005) (noting that "[t]his was the closest vote for a chief justice in American history").
16 Originally nominated to the Court by President Nixon, William H. Rehnquist was an Associate Justice for fourteen years prior to becoming Chief Justice. E.g., THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 115 (2004). As has been well documented, Rehnquist's nominations to serve as both Associate and Chief Justice were quite controversial. See generally MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 17–32 (2005) (mentioning accusations by those opposed to Rehnquist's nomination that he was not committed to civil rights). The thirty-three votes opposing his nomination in the Senate were the highest number of negative votes that any successful nominee had ever received, only later to be eclipsed by the forty-eight negative votes Clarence Thomas received in his confirmation process. Id. at 32.
presidential nomination and a period of intense congressional legislative action, the Rehnquist Court, unlike any other in the history of the Supreme Court, was presented with a unique opportunity. From 1986 until 2005, the Court had multiple occasions to shape and guide federal environmental law through its approach to statutory interpretation and application of core constitutional principles to this new body of federal environmental legislation. And the Rehnquist Court did decide a rich diversity of cases under virtually every one of the pollution control statutes, including the Clean Water Act (CWA), the Clean Air Act (CAA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Emergency Planning and Community Right-to-Know Act (EPCRA), and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

True, federal environmental statutes did exist prior to the Rehnquist Court. However, it was only following a focused, intense period of congressional action, spanning two decades, that truly meaningful environmental statutes were enacted at the federal level. This wave of new federal environmental legislation required an independent federal agency to administer the nascent statutory regime through the development and implementation of regulations and policy. This administrative need led to the creation of the Environmental Protection Agency (EPA), where, for the first time, a coordinated regulatory effort targeting environmental protection found a home in a single, stand-alone federal agency within the Executive Branch.

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18 See May & Glicksman, supra note 4, at 10,585 (2006) (noting that "Rehnquist was uniquely situated to have a profound impact on the development of federal environmental law—both because of the overlap of his tenure with the development of the field of environmental law and because of his long tenure on the Court. His appointment corresponds almost exactly with the birth of modern federal environmental law . . . ").

19 See supra note 7.


22 Prior to the establishment of the EPA, to the extent that there were federal regulatory efforts focusing on environmental issues, these efforts were diffuse and spread among a variety of federal agencies. One goal in creating the EPA was to centralize efforts target-
The environmental statutes enacted by Congress were an entirely new and complex corpus of laws, coupled with the equally, if not more so, complex body of regulations promulgated by the EPA. These statutes and regulations provided ample opportunities for tensions to develop between various constituencies subject to the new statutes and regulations, such as public interest groups seeking to broaden the reach of federal environmental protection where it was perceived that Congress or the EPA fell short of adequately protecting the environment. The tensions and competing interests that arose from the novel federal environmental statutes and their implementing regulations often resulted in the initiation of litigation, giving the judiciary an opportunity to clarify and control the direction of environmental law on a scale never seen before in the federal courts. As a result of such litigation under this new body of laws and regulations, a number of these cases eventually found their way to the Supreme Court. And as a result, the Rehnquist Court had before it almost every Term cases involving the meaning of a particular federal environmental statute or questions of whether EPA action or inaction was consistent with congressional intent.

It is also true that the Supreme Court decided a number of historic environmental cases well before the Rehnquist Court, and in fact well before Rehnquist served on the Court as an Associate Justice. Prior to the establishment of the federal statutory-based env-

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23 *See, e.g., E. Donald Elliot et al., Toward a Theory of Statutory Evolution: The Federalization of Environmental Law, 1 J.L. ECON. & ORG. 313, 317 (1985) (recognizing that the “network of national [environmental] statutes—together with a much larger body of implementing regulations promulgated by the Environmental Protection Agency—now constitutes one of the most pervasive systems of national regulation known to American law”).

24 *See generally United States v. Republic Steel Corp., 362 U.S. 482 (1960) (holding that under the Rivers and Harbors Act of 1899, a court was allowed to order injunctive relief against illegal dumping of industrial waste); New Jersey v. City of New York, 284 U.S. 585 (1931) (holding that the City of New York was enjoined from dumping waste off the coast of New Jersey); Wisconsin v. Illinois, 278 U.S. 367 (1929) (holding that Illinois could not divert excess water from Lake Michigan); Nw. Laundry v. City of Des Moines, 239 U.S. 486 (1916) (holding that a local smoke regulation ordinance was enforceable); Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) (upholding a state law banning transportation of water into another state); Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) (ordering an injunction against a copper company for polluting air of another state); Missouri v. Illinois, 200 U.S. 496 (1906) (determining that the drainage of water into Lake Michigan could not be enjoined, absent a showing of deleterious effects of such water).
ronmental protection regime, however, the environmental cases the Court decided were, by and large, federal common-law-based claims and were not grounded in any particular environment-focused statute or regulation. Thus, at no other time in the history of the Court, until the Rehnquist Court, were the Justices regularly considering cases Term after Term that required the need to interpret federal environmental legislation.

Consequently, the Rehnquist Court was the first Supreme Court to consistently confront a variety of issues not only under the pollution control statutes, but also under the entire spectrum of federal environmental laws. Therefore, the Court was placed in the unique position of establishing the foundation for its approach to interpreting this new collective body of federal statutory law that evolved during Rehnquist’s era as Chief Justice. As the first Chief Justice to lead the Court through the cases that arose from the full range of environmental statutes Congress enacted beginning in the 1970s, Chief Justice Rehnquist and his Court, if for no other reason than historic accident, could not help but to have an enduring impact on the area of environmental jurisprudence. It is as a result of this convergence between legislative action and the elevation of William H. Rehnquist to Chief Justice that the Rehnquist Court will continue to influence, for the foreseeable future, the Supreme Court’s approach to environmental cases, and in particular those that arise under the pollution control statutes.

B. The Power to Influence the Direction of the Court

Before delving into the specific key pollution control cases decided by the Rehnquist Court, and analyzing why those cases do not support the claims that the Rehnquist Court was pro-business and anti-environmental, one preliminary question to ask is whether it is even proper to refer to the Supreme Court as the “Rehnquist Court,” or otherwise to denote the Court as being under the influence to any major degree of a particular Chief Justice. After all, the Supreme Court consists of the Chief Justice and eight Associate Justices, and each member has one vote. That is, the Chief Justice’s vote counts for no more than any other member’s vote.\(^\text{25}\) The Associate Justices,

\(^{25}\) See, e.g., Theodore W. Ruger, The Judicial Appointment Power of the Chief Justice, 7 U. PA. J. CONST. L. 341, 349 (2004) (stating that “[t]he standard attitudinal model that has predominated until recently among empirical political scientists who study the Court ascribes no special weight to the Chief Justice’s vote, instead treating it as one of nine equal covariates for modeling purposes”).
moreover, just as the Chief Justice, have been nominated by the President, confirmed by a majority of the Senate, and, perhaps most important in terms of susceptibility to influence, "shall hold their Offices during good Behaviour" and essentially serve lifetime appointments in their positions as Justices. Thus, the ability of the Chief Justice to sway the other members of the Court to a particular point of view may appear quite limited.

The ability of the Chief Justice to influence the direction and decision making of the Supreme Court, however, should not be underestimated, despite the fact that the Court is composed of eight other independent legal thinkers. The specific powers that William Rehnquist as the Chief Justice would, and did, possess were well summarized during the deliberations in the Senate over his nomination to lead the Court:

- The Chief Justice heads the third branch of our Government. He heads the judicial conference of the United States, composed of all Federal judges. He appoints committees which make policy for our federal courts. He chairs the board of the Federal Judicial Center, which does research, training, and education for our Federal courts. He literally manages the Supreme Court.
- He presides over the Court sessions and decisionmaking meetings of the Court.
- When he is in the majority he assigns opinions to the Justice who is to write them.
- The Chief Justice serves as a symbolic head of the Federal court system. He holds the highest judicial office in our Nation. This is more than another judicial appointment.
- He occupies the pinnacle of judicial power in our country.

There are several ways that the Chief Justice can affect the direction of the Court and influence its members. Not only does the Chief Justice, when in the majority, determine who among his colleagues will author the Court's opinion, but he also "is expected to retain for himself some opinions that he regards as of great significance." Certainly, Chief Justice Rehnquist did pen a number of his era's most

26 U.S. CONST. art. III, § 1.
27 See, e.g., 132 Cong. Rec. 22,795 (1986) (statement of Sen. Biden) (referring to the Chief Justice as "the second most important person in America, heading one of the three co-equal branches of the Government").
28 Id. at 22,805 (statement of Sen. Metzenbaum).
29 See id. at 22,811 (statement of Sen. Metzenbaum) (recognizing that "[t]he role of assigning opinions gives the chief power over the other Justices, whose place in history once they ascend the Court is determined by when and what they write" (quoting Herman Schwartz, Chief Rehnquist?, 243 NATION 236, 236 (1986))).
significant opinions,\textsuperscript{31} or was among the majority in such cases, including a number of important pollution control cases.\textsuperscript{32}

In addition to the varied powers described above,\textsuperscript{35} the Chief Justice also has significant say concerning the very cases that the Court will consider by deciding which, out of the thousands of petitions received by the Court each year, will be the few petitions for certiorari that the Justices discuss at their weekly conferences while the Court is in session.\textsuperscript{34} Those cert petitions that are neither selected nor discussed are consequently denied, thereby upholding the determination by the courts below.\textsuperscript{35} Lastly, the Chief Justice holds a uniquely important symbolic position in our nation as well:

The Chief Justice not only serves longer than any President, but he and his colleagues exercise power limited only by their consciences and principles. The Chief stands as a metaphor for justice in our society more than any other individual, including the President of the United States of America.


\textsuperscript{32} See generally, e.g., Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (ruling that the EPA may only consider public health and safety in setting ambient air quality standards and not use a cost-benefit analysis); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) (holding that plaintiffs had standing to sue, merely by alleging harm to the "aesthetic and recreational values of the area"); United States v. Bestfoods, 524 U.S. 51 (1998) (providing a framework for limiting the responsibility of a corporate parent for damages incurred by a polluting subsidiary); PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700 (1994) (authorizing states to impose conditions on water quality certifications under the CWA); City of Chicago v. Envtl. Def. Fund, 511 U.S. 328 (1994) (overruling the EPA's interpretation of the RCRA and holding that the ash resulting from the incineration of municipal waste, if itself characteristically hazardous, must also be treated as hazardous waste); Arkansas v. Oklahoma, 505 U.S. 91 (1992) (ruling that the water quality laws of the downstream state must be met by the upstream state at the state line). He wrote the majority opinion in Solid Waste Agency of North Cook County v. United States Army Corps of Engineers (SWANCC), 531 U.S. 159 (2001), discussed in Part II.A infra. In SWANCC, the Court discussed the extent of federal jurisdiction under section 404(a) of the CWA.

\textsuperscript{33} See, e.g., Ruger, supra note 25, at 350 ("[T]he Supreme Court's adjudicative function does not capture exclusively, or even primarily, the full extent of the modern Chief Justice's power. Much of the Chief's unique authority is administrative and bureaucratic, and includes the particular appointment power discussed here as well as other important roles, such as presiding over the Federal Judicial Conference.").

\textsuperscript{34} REHNQUIST, supra note 30, at 253–54. After reviewing the list of petitions for certiorari that the Chief Justice has selected, the Associate Justices may also have other petitions added for consideration at conference. Id. at 265.

\textsuperscript{35} Id.
America, or any U.S. Senator or Congressman. The Chief symbolizes the guarantee of equal protection under law, "equal justice under the law," for all Americans. And that is not just an arcane legalism. It is the embodiment of the fundamental purpose of our entire judicial system.  

The Chief Justice is more than simply the "first among equals" and does wield power over colleagues, the Court's direction and docket, the lower federal courts, and, of course, over Congress and the Executive Branch through the Court's authority to "say what the law is." William H. Rehnquist, by virtue of his position as Chief Justice, if for no other reason than he wielded the power to assign opinions when in the majority and set the agenda for the Court's weekly conferences, undoubtedly had a degree of significant influence over the Court's direction. The influence he wielded over the direction of the Court and his colleagues is, in fact, demonstrably illustrated by the rebirth of federalism that occurred once he became Chief Justice and stands as one of the hallmarks of the Rehnquist Court.  

C. The End of an Era

While the era of the Rehnquist Court ended with Rehnquist's death on September 3, 2005, given the confluence of the federalization of environmental law and his leading the Court for almost twenty years as Chief Justice, the legacy of the Rehnquist Court's impact on environmental law and its development will undoubtedly leave its mark on the Court. The precedent and approach to deciding environmental cases established by the Rehnquist Court will guide and inform the hand of future Supreme Courts, including the John Roberts-led Supreme Court, as it faces the challenges attendant to cases that arise under the various federal environmental statutes, including the pollution control statutes.

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37 Id. at 22,799 (statement of Sen. Biden).
38 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
39 See infra Part I.
40 E.g., Greenhouse, supra note 10, at 38.

A. The Renewal of Federalism

Too little time has passed for scholars and others to fully comprehend the overall historical significance of the Rehnquist Court, but decisions including United States v. Morrison, Printz v. United States, Seminole Tribe of Florida v. Florida, United States v. Lopez, and New York v. United States demonstrate that federalism, after an absence of several decades, reemerged as a powerful constitutional doctrine in the Court during Rehnquist’s tenure as Chief Justice. By providing federalism with a new life under his leadership, the Rehnquist-led Court established that there were indeed several near-forgotten constitutional limitations on the legislative power of Congress.

Once William H. Rehnquist ascended to Chief Justice, the new vigor that federalism enjoyed was perhaps predictable, if one looked to his dissent as an Associate Justice in Garcia v. San Antonio Metropolitan Transit Authority. He asserted his strongly held federalism beliefs

42 529 U.S. 598 (2000).
47 The term “federalism” is not capable of precise summary, but suffice it to say that federalism essentially involves the balance of power between the federal and state governments. See, e.g., Larry Kramer, Understanding Federalism, 47 VAND. L. REv. 1485, 1488 n.5 (1994) (describing federalism as the division of power “between central and subordinate authorities”).
48 See Erwin Chemerinsky, The Rehnquist Revolution, 2 PIERCE L. REv. 1, 1 (2004) (“When historians look back at the Rehnquist Court, without a doubt they will say that its greatest changes in constitutional law were in the area of federalism.”); see also Scott Fruehwald, The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism, 81 DENV. U. L. REv. 289, 290 (2003) (“Vertical federalism has been a major concern of the Rehnquist Court. In a series of cases, the Court has protected states’ rights from imposition by the federal government.”); Thomas W. Merrill, The Making of the Second Rehnquist Court: A Preliminary Analysis, 47 ST. LOUIS U. L.J. 569, 570 (2003) (noting that the “second” Rehnquist Court focused increasingly on federalism issues beginning in the October 2004 Term); Rena I. Steinzor, Unfunded Environmental Mandates and the “New (New) Federalism”: Devolution, Revolution, or Reform?, 81 MINN. L. REv. 97, 154 (1996) (“Conservatives on the Court, led by Justices Rehnquist and O’Connor, have excoriated their brethren to protect state and local governments against excessive intrusions by a federal government ineffectively constrained via the political process.”). For a harsh critique of the Rehnquist Court, suggesting that the rebirth of federalism was nothing more than “camouflage for states stepping on people’s rights,” see GARBUS, supra note 1, at 121.
in *Garcia*, while vehemently disagreeing with the majority for overruling *National League of Cities v. Usery*,[50] which only a few years earlier had held that the enforcement against the states of the minimum wage and overtime provisions of the Fair Labor and Standards Act "in areas of traditional governmental functions" was beyond the scope of powers granted to Congress under the Commerce Clause.[51] Demonstrating the utmost self-assurance in his federalism convictions, as well as predicting the not-too-distant future direction of the Court, Rehnquist wrote:

*National League of Cities* . . . recognized that Congress could not act under its commerce power to infringe on certain fundamental aspects of state sovereignty . . . . I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.[52] He thus foreshadowed in his dissent what would become a hallmark of the Court under his guidance as Chief Justice—namely, that the Court would not hesitate to assert its constitutional authority as a co-equal branch of government readily standing by to serve as a check on the power Congress asserted against the states and their citizens.[53]

In his other writings, too, Chief Justice Rehnquist certainly recognized the role of the federal courts and their place in our tripartite system of federal government as a powerful check on the actions of Congress. In discussing the lack of power that the courts in Britain had at the time our republic was founded, he noted:

But the framers of the United States Constitution quite clearly had in mind something different from the British system: They wanted the judges to be independent of the president and of Congress, but in all probability they also wanted the federal courts to be able to pass on whether or not legislation enacted by Congress was consistent with the limitations of the United States Constitution.[54]

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[51] *Id.* at 852.
[52] *Garcia*, 469 U.S. at 579–80 (Rehnquist, J., dissenting). In another dissent written while an Associate Justice, Rehnquist also made plain his belief in federalism and the role of the federal courts as a limit on national power. *See Fry v. United States*, 421 U.S. 542, 553 (1975) (Rehnquist, J., dissenting) ("In this case . . . the State is not simply asserting an absence of congressional legislative authority, but rather is asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority.").
[53] *See, e.g.*, Erwin Chemerinsky, *The Constitutional Jurisprudence of the Rehnquist Court*, in *THE REHNQUIST COURT: A RETROSPECTIVE* 197 (Martin H. Belsky ed., 2002) ("The most dramatic area of change in the law during the Rehnquist Court has been in the protection of federalism. Indeed, the Court has shown little deference to Congress in matters of federalism and has aggressively protected the states from perceived federal encroachment.").
He further wrote that:

The framers of our system of government may indeed have built perhaps better than they knew. They wanted a Constitution that would check the excesses of majority rule, and they created an institution to enforce the commands of the Constitution. . . . Two hundred years of experience now tell us that they succeeded to an extraordinary degree in accomplishing their purpose. We cannot know for certain the sort of issues with which the Court will grapple in the third century of its existence. But there is no reason to doubt that it will continue as a vital and uniquely American institutional participant in the everlasting search of civilized society for the proper balance between liberty and authority, between the state and the individual.55

Having expressed these views in his book The Supreme Court: How It Was, How It Is, which was published shortly after he became Chief Justice, the role Rehnquist recognized for a proactive Judicial Branch, which decided "whether or not legislation enacted by Congress was consistent with the limitations of the United States Constitution," was a role pursued by the Rehnquist Court with a new vigor unseen for decades in the Supreme Court.56

B. An Overview of the Rehnquist Court's Federalism and the Implications for the Pollution Control Statutes

The revitalization of federalism by the Rehnquist Court, although perhaps predictable, was nonetheless surprising because the concept that there were truly enforceable constitutional limits on congressional power with respect to economic regulation was widely viewed as having been resolved many decades ago by the Supreme Court during the period of New Deal legislation.57 As a result of the evolution of cases challenging Depression-era congressional action taken in the pursuit of President Franklin Roosevelt's legislative agenda, it was long accepted constitutional doctrine that there were in effect

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55 Id. at 319.
56 See, e.g., KECK, supra note 16, at 2 (noting that the "Rehnquist Court has been the least deferential of any in the history of the U.S. Supreme Court, striking down thirty provisions of federal law from 1995 to 2001," concluding that these statutes "just ten years ago, would have been deemed perfectly constitutional without any serious question").
57 See generally, e.g., Wickard v. Filburn, 317 U.S. 111 (1942) (upholding application of the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat neither sold nor purchased in interstate commerce); United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act under the Commerce Clause); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (affirming Congress's Commerce Clause power to authorize the NLRB to enjoin unfair labor practices); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wages for women and children against a due process challenge).
few, if any, actual limits on congressional action involving economic regulation, so long as such action rested upon a rational basis. Through its revitalization of federalism as a viable constitutional doctrine, the Rehnquist Court challenged this many-decades-old, conventionally accepted wisdom.

The constitutional sources of the limitations on congressional power recognized by the rebirth of federalism in the Rehnquist Court included the Commerce Clause, Tenth Amendment, and Eleventh Amendment. The Court’s newfound appreciation of federalism through each of these constitutional sources raised questions about the direction of the Court and, of particular relevance to this Article, concerns about the impact the reemergence of federalism could have on the validity of the pollution control statutes enacted by Congress.

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58 See, e.g., Hodel v. Indiana, 452 U.S. 314, 323–24 (1981) ("A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends" (citing Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc., 452 U.S. 264, 276 (1981), Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964), and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258, 262 (1964)).

59 See, e.g., Percival, supra note 17, at 1165 (explaining that the Rehnquist Court is "rethinking basic principles of federalism, which ultimately could limit federal authority to protect the environment"); Revesz, supra note 17, at 558 (noting that the "Supreme Court's recent federalism jurisprudence is likely to constrain the federal government's regulatory authority"); Jamie Y. Tanabe, The Commerce Clause Pendulum: Will Federal Environmental Law Survive in the Post-SWANCC Epoch of "New Federalism"?, 31 ENVTL. L. 1051, 1053 (2001) ("In the past decade, however, the Supreme Court has taken a closer look at Congress's exercise of its Commerce Clause power and has invalidated several federal laws for violating basic principles of federalism.").

60 See, e.g., Vicki C. Jackson, Federalism and the Uses and Limits of Law: Printz and Principle?, 111 HARV. L. REV. 2180, 2205 (1998) (noting that the effect of the Printz decision on the validity of a range of statutes, including several environmental statutes, was unclear).

61 The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity... against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

62 See, e.g., Michael S. Greve, Friends of Earth, Foes of Federalism, 12 DUKE ENVTL. L. & POL’Y F. 167, 182 (2001) ("[E]nvironmental regulation may no longer be immune from the sweep of the Supreme Court's jurisprudence... ."); Richard J. Lazarus, Essay, Judging Environmental Law, 18 TUL. ENVTL. L.J. 201, 214 (2004) (noting that the Court's recent Commerce Clause jurisprudence is "casting doubt on a broad reading of the jurisdictional reach of federal environmental statutes such as the CWA and, for some lower court judges, on the ESA as well" (footnote omitted)).
1. The Commerce Clause

It took barely a decade for the shift to occur that then-Associate Justice Rehnquist predicted in his Garcia dissent, and for a majority of the Court to join his view that there were indeed enforceable limits beyond the rational basis test for congressional power under the Commerce Clause. With the Court's decision in United States v. Lopez, Rehnquist's dissent in Garcia proved prescient. Assuming the responsibility for drafting the majority opinion in Lopez, Chief Justice Rehnquist considered the Gun-Free School Zones Act of 1990, in which "Congress made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" The Court held that this Act was beyond the scope of powers provided to Congress under the Commerce Clause. Lopez was a remarkable decision because the last time the Supreme Court used the Commerce Clause to invalidate an act of Congress was 1936.

Chief Justice Rehnquist quickly established the foundation for his Commerce Clause position in Lopez by quoting James Madison from The Federalist: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Rehnquist then went on to examine the nature of the power historically delegated to Congress under the Commerce Clause, and he found that Congress could regulate three types of activities: "First... the use of the channels of interstate commerce.... Second... the instrumentalities of interstate commerce, or persons or things in interstate commerce.... Finally... those activities having a substantial relation to interstate commerce...."

64 Id. at 551 (quoting 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988)).
65 Id. at 561.
66 See, e.g., DAVID L. HUDSON, JR., THE REHNQUIST COURT: UNDERSTANDING ITS IMPACT AND LEGACY 60 (2007) ("The Lopez decision was a watershed as it was the first time in more than 60 years that the Court had invalidated a federal law as exceeding Congress's commerce clause powers."); Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 SUP. CT. REV. 125, 128 n.9 (noting that, prior to Lopez, the last time the Court had struck down an act of Congress under the Commerce Clause was in Carter v. Carter Coal Co., 298 U.S. 238, 297-310 (1936), where the Court invalidated a statute regulating unfair labor practices in the coal industry).
67 Lopez, 514 U.S. at 552 (internal quotation marks omitted) (quoting THE FEDERALIST NO. 23, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)).
68 Id. at 558–59 (citations omitted).
In light of those three categories of economic activities that Congress could regulate under the Commerce Clause, Chief Justice Rehnquist concluded that the Gun-Free School Zones Act of 1990 was an effort by Congress to regulate within the third category.\(^69\) Then, in considering the merits of the statute, the majority, by a vote of five to four, found that the statute was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," and for the first time since the New Deal the Supreme Court held that a statute was beyond the Commerce Clause powers granted to Congress.\(^70\)

*Lopez* caused immediate concern regarding the scope of its holding.\(^71\) With respect to the pollution control statutes in particular, questions arose as to whether Congress had the constitutional basis to establish and impose upon the states a federal environmental protection program, given Congress could not enact legislation to address situations where:

> [F]our percent of American high school students (and six percent of inner-city high school students) carry a gun to school at least occasionally... 12 percent of urban high school students have had guns fired at them... 20 percent of those students have been threatened with guns, and... in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools.\(^72\)

Thus, concerns were heightened following *Lopez* that the entire infrastructure of federal environmental protection was vulnerable to Commerce Clause challenges, since Congress was powerless under the Commerce Clause to regulate guns near schools, despite the abundant evidence of the prevalence of guns and gun violence at or near schools.\(^73\)

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\(^{69}\) See id. at 559.

\(^{70}\) Id. at 561.

\(^{71}\) Id. at 630 (Breyer, J., dissenting) (arguing that one of the problems with the majority's holding "is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled").

\(^{72}\) Id. at 619 (citations omitted).

\(^{73}\) See, e.g., Michel C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161, 2184 (2001) (finding that the decisions in *Lopez* and *Morrison* "threaten[ ] federal regulatory competence in areas of clear national importance—such as environmental protection").
2. The Tenth Amendment

The Rehnquist-led Court also expanded the reach of federalism through the use of the Tenth Amendment as another means to establish that the Court was poised to assert its authority to protect states from what it believed were unwarranted intrusions by Congress upon the states as separate sovereigns. *Printz v. United States* illustrates this aspect of the Rehnquist Court’s newfound federalism, where local law enforcement officials claimed that certain Brady Handgun Violence Protection Act provisions violated the Tenth Amendment. Writing for the majority, Justice Scalia held that the statute “purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.” As such, he concluded that the challenged provisions of the Brady Act were an unconstitutional “[f]ederal commandeering” that violated the Tenth Amendment by requiring state officials to implement a federal program. Paying special reverence to the sovereignty of the states, Justice Scalia recognized:

> It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be ‘dragooned’ . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

Although *Printz* struck down a law not even remotely related to the pollution control statutes, a discussion of particular importance to

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74 The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.
77 *Printz*, 521 U.S. at 904. For a critique of Justice Scalia’s approach in *Printz*, see Jackson, *supra* note 59, at 2181 (arguing in part that the *Printz* holding has little support as a matter of constitutional history).
78 *Printz*, 521 U.S. at 925. In finding a constitutional violation, the Court relied heavily on *New York v. United States*, 505 U.S. 144 (1992), which invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required states to either adopt legislation regulating the disposal of radioactive waste generated within a state, or, in the absence of state regulations, to take title to the radioactive waste, holding that such a provision was an attempt to “compel the States to enact or administer a federal regulatory program.” *Id.* at 188.
79 *Id.* at 928 (citations omitted).
the federal environmental regulatory scheme was included in the majority opinion where Justice Scalia observed that:

Federal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until the 1970's, when the Environmental Protection Agency promulgated regulations requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes. The Courts of Appeals for the Fourth and Ninth Circuits invalidated the regulations on statutory grounds in order to avoid what they perceived to be grave constitutional issues; and the District of Columbia Circuit invalidated the regulations on both constitutional and statutory grounds. After we granted certiorari to review the statutory and constitutional validity of the regulations, the Government declined even to defend them, and instead rescinded some and conceded the invalidity of those that remained... [L]ater opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.

Following so closely on the heels of Lopez, Justice Scalia's discussion in Printz of the early constitutional challenges faced by certain post-CAA regulations adopted by the EPA raised additional concerns about the viability of at least some of the pollution control statutes under the Court's expanding federalism jurisprudence. After Printz, were there valid arguments under the Tenth Amendment that part or all of the pollution control statutes, with their heavy reliance on cooperative federalism, amounted to a prohibited commandeering of the states to implement a federal environmental regulatory program? By specifically referring to the prior constitutional threats to EPA air pollution control regulations, was Justice Scalia signaling that the Court might provide a receptive audience to renewed challenges to certain environmental statutes or regulations based on Printz? Just how far would the Court go if presented with an argument that particular environmental statutes violated the Tenth Amendment? Given such uncertainties attendant to the revitalization of federalism, Printz served to further heighten concerns that federalism under the Rehnquist Court was growing in scope and might serve as the basis to attack at least portions of the federal environmental regulatory scheme.

80 Id. at 925 (citations omitted).
81 See id. at 960–61 (Stevens, J., dissenting) (questioning whether the majority opinion could lead to the invalidation of pollution control statutes, including the CWA and RCRA).
3. The Eleventh Amendment

The emergence of federalism under the Rehnquist Court was also given sustenance under the Eleventh Amendment as seen in *Seminole Tribe of Florida v. Florida.* Here, the statute in question was a provision of the Indian Gaming Regulatory Act of 1988, which expressly authorized tribes to file suit in federal court if a tribe believed that a state was not negotiating in good faith toward the formation of a compact allowing gaming on Indian lands. The Seminole Tribe filed such a suit against Florida, and the Eleventh Circuit determined that the tribe’s suit was barred by the Eleventh Amendment’s grant of sovereign immunity to the states, notwithstanding the express abrogation of state sovereign immunity by Congress in the statute.

Chief Justice Rehnquist, writing yet again for the majority in a sharply divided Court on another important federalism question, affirmed that the Eleventh Amendment served to bar the Seminole Tribe’s suit. In strong terms, he made it plain that “[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area”—here the regulation of commerce with Indian tribes under the Indian Commerce Clause—“the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”

As a result of the decisions by the Rehnquist Court in cases including *Lopez, Printz,* and *Seminole Tribe,* growing unease surrounded the breadth of the Rehnquist Court’s federalism, including what it could mean for the pollution control statutes and the other federal statutes geared towards protecting the environment. Undoubtedly, this apprehension concerning how far the Rehnquist Court would extend its

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84 *Seminole Tribe of Fla. v. Florida,* 11 F.3d 1016, 1019 (11th Cir. 1994).
85 *Seminole Tribe,* 517 U.S. at 72. The Court also found that the doctrine allowing suits in federal court against state officials to enjoin further violations of federal law espoused in *Ex parte Young,* 209 U.S. 123 (1908), did not provide an alternate basis to support the Seminole Tribe’s suit. See id. at 73–76.
86 One aspect important in terms of the pollution control statutes is that *Seminole Tribe* expressly overruled *Pennsylvania v. Union Gas,* 491 U.S. 1 (1989), where only five years previously, the Court had found that private parties could sue states under CERCLA, as Congress had validly abrogated state sovereign immunity under its Commerce Clause power. *Seminole Tribe,* 517 U.S. at 66. This aspect of the *Seminole Tribe* decision is discussed in Part II.C, infra.
87 See supra note 59.
newfound federalism lent support to the proposition that the Court during this time was anti-environmental and pro-business.\footnote{The politics in existence during the Rehnquist era no doubt added to the perception that the Rehnquist Court was part of a federal government that had turned anti-environmental and pro-business. William Rehnquist was initially nominated to the Court by Republican President Richard Nixon, and was nominated for Chief Justice by yet another Republican President, Ronald Reagan. Rehnquist had served as Chief Justice for several years when the Republicans ultimately won majorities in both houses of Congress and proposed the party's "Contract with America," which, among other government reforms, focused on reducing regulations that were perceived as making businesses less competitive and more costly. See John H. Cushman Jr., Republicans Plan Sweeping Barriers to New U.S. Rules, N.Y. TIMES, Dec. 25, 1994, at 1 (reporting that pursuant to the Contract with America, the newly elected Republican House majority planned to adopt legislation that would dramatically reduce the costs to business of complying with federal regulations). This directly implicated federal environmental regulatory programs, raising concerns that the Republican-led Congress would roll back decades of environmental protection. See id. (noting that action taken to further the goals of the Contract with America "would fundamentally alter the workings of agencies like the Environmental Protection Agency"). It was also during the era of the Rehnquist Court that another Republican was elected President, George W. Bush, with the Supreme Court's decision in Bush v. Gore, 531 U.S. 98 (2000), contributing to his election. The second President Bush almost instantaneously achieved a reputation as leading a pro-business, anti-environmental administration. See, e.g., Patrick Parenteau, Anything Industry Wants: Environmental Policy Under Bush II, 14 DUKE ENVTL. L. & POL'Y F. 363, 363 (2004) ("My view is that this administration has compiled the worst environmental record of any administration in history."); John Bacon & Traci Watson, Report: EPA Plans to Ease Pollution Limits, U.S.A. TODAY, Dec. 21, 2001, at A3 ("The Environmental Protection Agency is close to allowing scores of the nation's oldest power plants and oil refineries to emit more air pollution . . . . The Bush Administration claim[s] the regulation prevents refineries and power plants from doing routine maintenance."); Bruce Barcott, Changing All the Rules: How the Bush Administration Quietly—and Radically—Transformed the Nation's Clean-Air Policy, N.Y. TIMES, Apr. 4, 2004, §6 (Magazine), at 38, 40 (asserting that while the Bush Administration redefined federal environmental laws, "[o]verturning new-source review . . . represents the most sweeping change, and among the least noticed"); David L. Greene, Bush Expected to Weaken Portions of Clean Air Act: Issue Revisited Amid High Approval Rating, BALT. SUN, Dec. 23, 2001, at 1A ("President Bush has argued that some Clean Air Act rules stifle energy output and do little to protect the environment"); David E. Sanger, Bush Will Continue to Oppose Kyoto Pact on Global Warming, N.Y. TIMES, Jun. 12, 2001, at A1 (reporting that President Bush "tacitly acknowledged that the United States' rejection of the Kyoto accord had estranged the United States from many nations with which it has good relations generally"); Katharine Q. Seelye, Bush Team Is Reversing Environmental Policies, N.Y. TIMES, Nov. 18, 2001, at A20 (noting that the "Bush Administration has proceeded with several regulations, legal settlements and legislative measures intended to reverse Clinton-era environmental policies").}

II. FEDERALISM AND THE POLLUTION CONTROL CASES

Given that one of the hallmarks of the Rehnquist Court was the revitalization of federalism as a means to limit congressional action and to allocate power between the federal government and the states,
how did this feature of the Rehnquist Court affect its decision making in the pollution control cases? If the Court under Chief Justice Rehnquist was plainly anti-environmental and pro-business, as a number of commentators have concluded,\(^9\) then we should expect to find cases where the Court used federalism to invalidate pollution control statutes or regulations of the EPA. After all, the Rehnquist Court's decision in *Lopez* "ushered in a new era in which federal statutes fell at an amazing rate."\(^9\) It turns out, however, that instead of using federalism to strike down provisions of the pollution control statutes or EPA regulatory efforts, as some feared would occur with the revitalization of federalism, not a single provision of a pollution control statute or regulation was struck down on federalism grounds by the Rehnquist Court.\(^9\)

A. SWANCC

The clearest example where a pollution control statute survived a federalism challenge, specifically a Commerce Clause challenge, is seen in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*,\(^92\) where the Court considered whether the so-called Migratory Bird Rule\(^93\) allowed the Army Corps of Engineers ("the Corps") to assert jurisdiction under section 404(a) of the CWA\(^94\) over wetlands that were located wholly intrastate or isolated from interstate waters.\(^95\) The wetlands in dispute were located at a former sand and gravel pit that the Solid Waste Agency of Northern Cook County (SWANCC) had acquired for a regional nonhazardous

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89. See supra note 2.

90. HUDSON, supra note 66, at 60.

91. Admittedly, the Rehnquist Court did strike down on federalism grounds portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 in *New York v. United States*, 505 U.S. 144 (1992), as incompatible with the Tenth Amendment. The statute at issue in that case, however, is not one of the traditional pollution control statutes. As such, the decision in *New York v. United States* has been inconsequential in terms of traditional environmental regulation. Robert V. Percival, "Greening" the Constitution—Harmonizing Environmental and Constitutional Values, 32 ENVT L. 809, 841 (2002).


93. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). In sum, the Migratory Bird Rule provides that the jurisdiction of the Corps extends to intrastate waters which, among other things, (1) "would be used as habitat by birds protected by Migratory Bird Treaties," or (2) "would be used as habitat by other migratory birds which cross state lines . . . ." See *SWANCC*, 531 U.S. at 164 (quoting 51 Fed. Reg. at 41,217).

94. 33 U.S.C. § 1344(a) (2000). Section 404(a) authorizes the Corps to issue permits before the dredging or filling of a wetland can occur.

95. *SWANCC*, 531 U.S. at 162.
solid waste landfill. After initially declining to assert jurisdiction, the Corps reconsidered and ultimately claimed jurisdiction. The Corps refused to issue the section 404(a) permit required for the landfill project, despite the fact that it had been fully approved and permitted by state and local agencies, including the Illinois Environmental Protection Agency, the Illinois Department of Conservation, Cook County, and the Cook County Zoning Board of Appeals.97

Indeed, the State of Illinois in its Solid Waste Management Act recognized that landfills "continue to be necessary," that "landfill capacity is decreasing," and that addressing this dwindling capacity was "very difficult due to the public concern and competition with other land uses."98 Yet, despite this express recognition of competing land uses as a concern to Illinois and its desire to address the projected diminishing landfill capacity with projects such as the one at issue in SWANCC, the federal government did not oblige; instead, the Corps relied on the Migratory Bird Rule to prohibit a local agency representing twenty-three suburban municipalities from developing a landfill responsive to the solid waste disposal needs of 700,000 local citizens within those municipalities.99 Chief Justice Rehnquist, however, writing for the majority in SWANCC, held that the Migratory Bird Rule was not entitled to Chevron deference,100 and was beyond the grant of authority conferred to the Corps by Congress under section 404(a) of the CWA.101

Important to the reasoning of Chief Justice Rehnquist in finding that the Corps lacked jurisdiction was the fact that, in his view, to ex-

96 Id. at 162–63.
97 Id. at 164–65. In denying the permit, the Corps found the following: (1) SWANCC failed to demonstrate that the proposed use was the "least environmentally damaging, most practicable alternative"; (2) the project presented a risk to drinking water supplies; and (3) the project's impact on local wildlife was not subject to mitigation because the landfill could not later be developed into a forested habitat. Id. at 165 (citation omitted) (internal quotation marks omitted). It should also be pointed out that SWANCC was well aware of the impact that the project could have on the wildlife that inhabited the abandoned sand and gravel quarry. In an effort to mitigate the impact, the agency had agreed to expend more than $17 million to, among other things, create 17.6 acres of replacement wetlands, relocate a heron rookery, phase all construction over a fifteen-year period to minimize impact, and acquire 258 acres adjacent to the site for a forested habitat. Id. at 165; Brief for the Petitioner at 5, SWANCC, 531 U.S. 159 (No. 99-1178), 2000 WL 1041190.
98 Brief for the Petitioner, supra note 97, at 3 n.2 (internal quotations omitted) (quoting Illinois Solid Waste Management Act, 415 ILL. COMP. STAT. 20/2-2(a)(2), (3), (10)(b) (1998)).
99 Brief for the Petitioner, supra note 97, at 2–3; see also SWANCC, 531 U.S. at 162–65.
101 SWANCC, 531 U.S. at 172, 174.
tend the Corps jurisdiction to isolated, wholly intrastate wetlands through the Migratory Bird Rule "would result in a significant impairment of the States' traditional and primary power over land and water use." Chief Justice Rehnquist found that in enacting the CWA, Congress did not choose to readjust the traditional federal-state balance, where matters are left to state regulation; instead, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources . . .'" The attempt by the Corps to claim jurisdiction over a wholly intrastate wetlands site was, according to Rehnquist, simply inconsistent with this express congressional recognition in the CWA.

The SWANCC decision was assailed by many as reflective of the anti-environmental nature of the Rehnquist Court because the opinion was viewed as significantly lessening the protections afforded to wetlands, since the majority opinion by Rehnquist struck down the Migratory Bird Rule and thereby served to limit the jurisdiction of the Corps. One commentator stated, for example, that "[e]nvironmentalists are no strangers to disappointment in the U.S. Supreme Court, but [SWANCC] is particularly disappointing. First, it might be said that the impact of the opinion . . . may be the most devastating judicial opinion affecting the environment ever."

To reach the conclusion, though, that SWANCC demonstrates that the Court under Rehnquist's leadership was anti-environmental sim-

102 Id. at 174.
103 Id. at 166–67 (quoting 33 U.S.C. § 1251(b)). In ruling against the Corps, Chief Justice Rehnquist also considered the fact that the Corps's assertion of expansive jurisdiction was inconsistent with its previous interpretations after the CWA's enactment. Initially, the Corps recognized that a "water body's capability of use by the public for purposes of transportation or commerce" was "the determinative factor" in establishing jurisdiction under section 404(a) of the Clean Water Act. Id. at 168 (quoting 33 C.F.R. § 209.260(e)(1) (1974)). In SWANCC, the wetlands located at the isolated, abandoned sand-and-gravel quarry were not capable of public use for transportation or commerce, and there was "no persuasive evidence that the Corps mistook Congress' intent in 1974." Id. at 168.


ply misses the mark for at least two reasons. One reason why the SWANCC opinion does not serve to establish that the Rehnquist Court was an anti-environmental Court is because of the action that the Court did not take in deciding the case. Since SWANCC was pending before the Court well after the groundbreaking Commerce Clause Lopez and Morrison cases had been decided, the petitioner was certainly well aware of the renewed vigor federalism enjoyed under the Rehnquist Court and its use on multiple occasions to curb what was viewed as overreaching by the federal government. In recognition of the Court's newfound federalism, the petitioner in SWANCC asserted in its opening brief that:

The question in this case is whether the U.S. Army Corps of Engineers exceeded the bounds of its authority under the Clean Water Act or the Commerce Clause when it asserted jurisdiction over isolated, intrastate, water-filled trenches and depressions on SWANCC's land solely because those waters were habitat for migratory birds.\(^\text{106}\)

The petitioner was even more pointed in its reply brief on the Commerce Clause issue:

By claiming to have jurisdiction over isolated, mainly seasonal ponds on SWANCC's land because migratory birds use them, the Corps obliterates the distinction between what is national and what is local. If federal authority reaches all water and wetlands used by Canada geese, mallard ducks, and other migratory birds, there is nothing to prevent the federal government from regulating every tree in which migratory birds roost and every lawn on which they feed. . . . On the Corps' theory of the commerce power, no non-commercial activity is beyond federal authority, for nothing is so far removed from interstate commerce that it cannot be linked to it in some fashion.\(^\text{107}\)

The Commerce Clause argument presented by the petitioner in SWANCC certainly could have found a sympathetic majority in light of the Rehnquist Court's decisions in Lopez and Morrison, and Chief Justice Rehnquist did recognize in SWANCC that the petitioner's argument raised "significant constitutional and federalism questions."\(^\text{108}\) But the Chief Justice, while recognizing the importance of the Commerce Clause issues presented in SWANCC, ultimately concluded that the statute did not provide the Corps with jurisdiction over the isolated wetlands in question, and thus exercised judicial restraint to avoid deciding the merits of the Commerce Clause argument out of

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\(^{106}\) Brief for the Petitioner, \textit{supra} note 97, at 11 (emphasis added).


\(^{108}\) \textit{SWANCC}, 531 U.S. at 174.
the Court's "prudential desire not to needlessly reach constitutional issues." 109

If the Rehnquist Court were truly an anti-environmental court and hostile to environmental causes, one would think that it would have accepted the express invitation by the petitioner in SWANCC to rule on the Commerce Clause question. The Court could have used the case to broaden once again the reach of the Court's federalism jurisprudence by holding that the assertion of jurisdiction by the Corps, or perhaps even section 404(a) itself, was invalid under the Commerce Clause. This result would have called into question not just section 404(a), but other sections of the statute as well, and conceivably the entire federal regime of environmental protection. By exercising judicial restraint, however, Chief Justice Rehnquist instead declined to accept the invitation to rule on the Commerce Clause question, and thus did not utilize SWANCC as an opportunity to expand the Court's federalism jurisprudence by using the Commerce Clause as a restraint on federal authority under the CWA. With the exception of the Migratory Bird Rule, the Court's decision in SWANCC left the extensive reach of the Corps' jurisdiction over navigable waters intact, which is far from the act of an anti-environmental Supreme Court.

Pointing to SWANCC as evidence of the Rehnquist Court's anti-environmental persuasion also fails for a second reason: such a viewpoint misapprehends section 404(a) as conferring substantial federal protection over wetlands. That is in fact not what section 404(a) achieves. Section 404 of the CWA is ascribed too much weight as an environmental protection provision. Instead, it is more accurately described as an environmental permitting provision, which allows applicants to obtain individual permits. Once issued, these permits allow the filling of the wetland described in the permit applications, or, alternatively, authorize, under a nationwide permitting system, the filling of wetlands associated with a wide range of specified, commonly encountered development-related activities. 110 Certainly, the

109 Id. at 172.
110 33 U.S.C. § 1344 (2000). Section 404(a) authorizes the issuance of permits to "discharge of dredged or fill material into the navigable waters at specified disposal sites." Id. § 1344(a). In addition to individual permits, the Corps is also authorized to issue nationwide permits as a matter of administrative convenience, which allows the filling of wetlands in association with certain commonly encountered activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." Id. § 1344(e)(1). A number of activities are covered by nationwide permits and, to name but a few, include the placement of navigation aids, outfall construction and maintenance, construction and repair of utility lines and associated structures, bank stabilization projects, and the construction
Corps can deny the sought-after individual permit, as it did in SWANCC, or the EPA may object to the issuance of a permit by the Corps authorizing the filling of wetlands, but permit denials by the Corps or permit objections by the EPA are, by far, the exception rather than the rule. Those who point to SWANCC as a decision that resulted in substantial environmental harm by excluding wholly intrastate wetlands from federal protection ignore that, in practice, and by an overwhelming margin, the Corps regularly authorizes under section 404(a) the filling of wetlands. The undeniable fact is that the Corps routinely grants individual permits to discharge dredged or fill material into wetlands, which calls into question any increased adverse environmental impact arising from the Supreme Court’s opinion in SWANCC, along with the very premise of section 404(a) as providing any significant, meaningful level of federal protection for wetlands beyond requiring permits prior to dredging or filling.

What the Court’s opinion in SWANCC did accomplish was to preserve section 404(a) from an attack on Commerce Clause grounds and to protect the balance between federal regulation of interstate wetlands and state control over wholly intrastate wetlands. It does not follow, though, that because wholly intrastate wetlands are no longer subject to federal jurisdiction, they are completely devoid of environmental regulation. What SWANCC, in essence, concluded was

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111 See 33 U.S.C. § 1344(c) (allowing the EPA to object to the “specification . . . of any defined area as a disposal site” for dredged or fill material).


113 In fact, it is arguable whether the federal government programs administered through the Corps are more effective at the preservation and protection of wetlands than were previously existing state or local regulatory programs. See Jonathan H. Adler, Swamp Rules: The End of Federal Wetland Regulation?, REC., Summer 1999, at 11, 13-14, available at http://www.cato.org/pubs/ regulation/regv22n2/swamprules.pdf (noting that well before the federal government’s regulatory intervention through section 404, a number of states were regulating and conserving wetlands). Professor Adler also contends that the quality and importance of wetlands varies greatly within a region, and that as a result, “[w]hich wetlands are vital to protect in a given area is information that is more readily available at the state and local level.” Id. at 14; see also Paul S. Weiland, Federal and State Preemption of Environmental Law: A Critical Analysis, 24 HARV. ENVTL. L. REV. 237, 244-46 (2000) (recognizing that the four benefits of state and local environmental regulation compared with federal regulation include (1) more effective solutions to “place-specific” environmental problems, (2) increased flexibility, (3) greater innovation, and (4) increased responsiveness between state and local governments and their citizens).
that wholly intrastate wetlands were not subject to federal-agency permitting prior to the discharge of dredged or fill material, but are subject to the level of regulation deemed appropriate by state and local governments. That is, the Court found that wetlands located wholly intrastate were not subject to regulation under the Migratory Bird Rule by a federal agency, but left the regulatory decision in the hands of state and local governments, which as a matter of tradition have always assumed responsibility within their borders for land use regulation, planning, and development.114 This result is consistent with the statutory scheme Congress established under the CWA as reflected in SWANCC.115 This result is, of course, also entirely consistent with the delicate balance of power between the federal and state governments that underlies federalism, and, in particular, the cooperative federalism of environmental protection.116

B. Bestfoods

Although not expressly involving a federalism challenge, another example of the Rehnquist Court's willingness in a pollution control case to protect states from federal intrusion in areas that are traditionally matters of state law is provided by United States v. Bestfoods,117 where the EPA sought to recover response costs incurred in the cleanup of a former chemical production facility under CERCLA. Due to the insolvency of the subsidiary that once owned and operated the site, the EPA included among the defendants the one-time parent corporation of the polluting subsidiary as a party to the CERCLA cost recovery action. The competing issue of state and federal law that arose was whether the traditional state law area of corporations served to protect a parent corporation from the reach of CERCLA's onerous strict liability scheme.118

114 SWANCC, 531 U.S. at 174.
115 Id.; see also 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.").
116 For a discussion of the local politics involved in the SWANCC case, see generally Thomas W. Merrill, The Story of SWANCC: Federalism and the Politics of Locally Unwanted Land Uses, in ENVIRONMENTAL LAW STORIES 283-319 (Richard J. Lazarus & Oliver A. Houck eds., 2005). Ironically, after many years of litigation that ultimately secured the ability to construct the landfill on the site, the property was sold to the State of Illinois and private developers for residential and industrial uses. Id. at 312-16.
118 Id. at 55, 60.
Writing for a unanimous court, Justice Souter took note of the fact that "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." He went on to write that "nothing in CERCLA purports to reject this bedrock principle, and ... the congressional silence is audible." The Court consequently found that a parent corporation was not automatically subject to CERCLA liability by virtue of the acts of its subsidiary.

Does not the fact that the Court in Bestfoods construed CERCLA in a manner that limited the ability of the EPA and the Department of Justice to pursue parent corporations in cost recovery actions serve to establish the anti-environmental, pro-business nature of the Rehnquist Court? Indeed, one might argue that, by limiting the ability of the government to recover against the former parents of polluting subsidiaries, the substantial costs to remediate the contaminated sites would fall upon the taxpayers, which is exactly the result one would predict from a pro-business, anti-environmental Court.

Justice Souter, however, did not end his opinion for the Court merely by finding that CERCLA could not impinge upon the traditional state corporate law doctrine of limited shareholder liability. If he had done so, the case rightfully might be subject to criticism that it was an anti-environmental, pro-business decision, leaving taxpayers responsible for the substantial cleanup costs associated with contaminated property, while absolving parent corporations of any liability under CERCLA. Importantly, despite the limited liability attendant to shareholder status, Justice Souter proceeded to provide a blueprint for how the EPA and the Department of Justice still could construct a CERCLA case against a parent corporation to recoup the costs associated with contamination caused by a subsidiary's operations. It is because of this liability blueprint offered by the Court that Bestfoods is not a decision by a Supreme Court that is anti-environmental and pro-business, but reflects a Court that in Bestfoods essentially sought to apply the "polluter pays" principle, while still protecting long-

119 Id. at 61 (quoting William O. Douglas & Carrol M. Shanks, Insulation from Liability Through Subsidiary Corporations, 39 YALE L.J. 193, 193 (1929)).
120 Id. at 62. This is a reflection of the long-recognized principle of shareholder limited liability that is elementary to traditional corporate law. E.g., 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 14 (rev. ed. 2006) ("[T]he shareholders of a corporation are ordinarily not liable for the corporation's obligations, liabilities, or debits.").
121 Bestfoods, 524 U.S. at 61–64.
established state corporate law from intrusion by Congress through CERCLA.

In particular, Justice Souter pointed out, for the convenience of the EPA and the Department of Justice, that a parent corporation could be liable under CERCLA for the costs to remediate contamination caused by a subsidiary under two situations. First, a parent could incur CERCLA liability under the state corporate law doctrine of piercing the corporate veil, since "[n]othing in CERCLA purports to rewrite this well-settled rule, either." Second, as an alternative liability theory for the EPA and the Department of Justice to pursue against parent corporations, the Court also pointed out that "[u]nder the plain language of the statute, any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution. This is so regardless of whether that person is the facility's owner, the owner's parent corporation or business partner ...." While not deciding the ultimate question of the parent corporation's responsibility under the liability blueprint set out in Bestfoods, the Court's opinion nevertheless did note that, based upon the facts in the record, the parent corporation very well may have been liable for the EPA's remediation costs, as an operator of the subsidiary's chemical manufacturing plant.

One would simply not expect a Supreme Court that was purportedly, with respect to environmental cases, pro-business and anti-environment, to provide in a unanimous opinion what amounted to a litigation strategy for how the EPA and the Department of Justice could recover the government's cleanup costs under section 107 of CERCLA against parent corporation defendants. One would also certainly not expect the opinion to conclude that the record before the Court strongly suggested parent corporation liability. To the contrary, the decision one would expect in Bestfoods from a Court that was truly hostile toward the environment and demonstrably pro-business in its approach to environmental cases would be nothing

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122 Whether to pierce the corporate veil and hold shareholders liable for what otherwise would be corporate obligations is a matter of state law, and the courts consider a number of factors in reaching this determination, including "fraud, illegality, contravention of contract, public wrong, inequity, and whether the corporation was formed to defeat public convenience." FLETCHER ET AL., supra note 121, § 41 (citation omitted).

123 Bestfoods, 524 U.S. at 63.

124 Id. at 65 (citation omitted).

125 See id. at 72–73 (identifying findings that an employee of the parent corporation was actively involved in environmental matters at the subsidiary's chemical plant as sufficient to raise a question on remand as to whether the parent could be held liable for the EPA's response costs as an operator under section 107 of CERCLA).
short of a pronouncement that CERCLA did not under any circumstances provide a cause of action to seek costs from parent corporations for the hazardous substance sins of their subsidiary corporations.

C. Seminole Tribe Revisited

The rebirth of federalism did result in the Court overruling Pennsylvania v. Union Gas Co.,126 which had held that private parties could use CERCLA to seek response costs from states if a state agency caused or contributed to a release of hazardous substances.127 Since the Seminole Tribe decision did not, however, invalidate a single provision of CERCLA,128 one of the key pollution control statutes used to compel the remediation of sites with contaminated soil and groundwater, it is not a federalism-based decision that is suggestive at all of an anti-environmental attitude by the Rehnquist Court. In overruling Union Gas, the Court did not find difficulty with the cost recovery scheme established by Congress under section 107(a) of CERCLA. Rather, what the Court found problematic was that the plurality decision in Union Gas had “created confusion among the lower courts that have sought to understand and apply the deeply fractured decision.”129 Thus, Union Gas, in practice, because of its inconsistent and opaque plurality decision, proved difficult for the lower courts to make sense of and apply, as well as for litigants to follow.

Admittedly, Seminole Tribe foreclosed, based upon Eleventh Amendment sovereign immunity, the ability of private parties to bring suit against states under the cost-recovery provisions of CERCLA. But it must be pointed out that, to the extent a state is deemed a potentially responsible party under CERCLA’s liability provisions, the statute still exists as a robust enforcement tool; the EPA, which is the lead agency at the vast majority of so-called “Superfund” sites, may still include the state as a defendant in a cost-recovery action or otherwise compel the state to take appropriate action to address the release or threatened release of hazardous substances.130

127 Id. at 22–23.
129 Id. at 64.
III. PREEMPTION: FURTHER DEFINING THE ENVIRONMENTAL REGULATORY ROLES OF THE FEDERAL, STATE, AND LOCAL GOVERNMENTS

A. Summary of the Federal Preemption Doctrine

Doctrinally, preemption is closely tied to federalism, and preemption was raised by litigants as a basis to challenge state and local regulatory efforts in several of the pollution control cases heard by the Rehnquist Court.\(^{131}\) As a constitutional doctrine, preemption is rooted in the Supremacy Clause, which provides in part that

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.\(^{132}\)

Under the Supremacy Clause, since *McCulloch v. Maryland*,\(^ {133}\) "it has been settled that state law that conflicts with federal law is 'without effect.'"\(^ {134}\)

It follows, therefore, that preemption challenges in pollution control cases arose before the Rehnquist Court when the federal government had enacted a comprehensive regulatory program in an area later subjected to further state or local regulation. The presence of such dual regulation alone is insufficient to always find preemption of state or local pollution control efforts. In fact, the Court has been hesitant to find preemption of state and local pollution control regulations, because there is a presumption against preemption of

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\(^{131}\) To the extent that preemption serves to allocate legislative power between the federal and state governments, perhaps it is rightfully another aspect of the Rehnquist Court's revitalization of federalism. *See, e.g.,* Ernst A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 3–4 (2004) (broadening the analysis of Rehnquist Court federalism to include preemption cases).

\(^{132}\) U.S. CONST. art. VI, cl. 2; *see also* Gade v. Nat'l Solid Wastes Ass'n, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" (quoting Felder v. Casey, 437 U.S. 131, 138 (1988))).

\(^{133}\) 17 U.S. (4 Wheat.) 316 (1819).

laws and regulations enacted pursuant to the police powers of the states.\textsuperscript{135}

To determine whether a particular state or local law survives a preemption challenge, the Court first and foremost looks to the intent of Congress,\textsuperscript{136} and if it is the "clear and manifest purpose of Congress"\textsuperscript{137} in enacting a federal statute that it preempts state or local law, then the state or local statute should have no effect as a result of the express intent of Congress. Express preemption is not the only way that a state or local regulatory effort may be found ineffective, since preemption may implicitly occur when a federal statute "so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the states to supplement it.'"\textsuperscript{138} A state or local statute may also be subject to preemption if necessary to avoid a conflict with federal law.\textsuperscript{139}

\textbf{B. Preemption Challenges and the Pollution Control Statutes}

Rather than using preemption to diminish the states and local governments' ability to enhance environmental protection—as one would anticipate from an anti-environmental, pro-business Court—what the pollution control cases decided by the Rehnquist Court illustrate is a rejection, with one notable exception, of preemption as a means of challenging either citizen action or state and local governmental efforts to regulate pollution. The pollution control cases involving preemption challenges show a Court that routinely rejected such challenges in an effort to maintain the delicate balance between the competing roles of the federal, state, and local efforts that underlie the cooperative federalism addressing pollution control. In doing so, the Court by and large left states, local governments, and their citizens with the ability to craft tailored responses to uniquely local

\textsuperscript{135} See id. at 518 ("[W]e must construe . . . provisions in light of the presumption against the pre-emption of state police power regulations.").

\textsuperscript{136} See id. at 516 ("The purpose of Congress is the ultimate touchstone of pre-emption analysis." (brackets and internal quotation marks omitted) (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)).

\textsuperscript{137} Id. (internal quotation marks omitted).

\textsuperscript{138} Id. (quoting Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982)).

\textsuperscript{139} See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) ("Absent explicit pre-emptive language, we have recognized . . . conflict pre-emption, where 'compliance with both federal and state regulations is a physical impossibility' . . ." (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963)); Weiland, supra note 113, at 252 ("The Supreme Court has developed a tripartite typology of preemption: express preemption, field preemption, and conflict preemption.").
environmental concerns, notwithstanding the existence of pervasive federal pollution control legislation.

1. International Paper v. Ouellette

In one of the first pollution control cases encountered by the Court with Rehnquist as its Chief Justice, the International Paper Company defended a nuisance action brought by Vermont residents against a facility located on the New York side of Lake Champlain by arguing that the claim based on Vermont common law was preempted by the comprehensive nature of the CWA. Recognizing that Congress plainly intended to occupy the field of water pollution control, the Court did find that the CWA "precludes a court from applying the law of an affected State against an out-of-state source," which, in turn, prohibited application of Vermont common law as a means of controlling offensive discharges from the International Paper Company's New York facility. In reaching this conclusion, Justice Powell was mindful of the importance of maintaining a balance between not only the federal government and the states, but between the respective states too:

If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State. . . . If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, at a minimum [International Paper Company] would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability. In suits such as this, an affected-state court also could require the source to cease operations by ordering immediate abatement. Critically, these liabilities would attach even though the source has complied fully with its state and federal permit obligations. The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources.

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140 See Int'l Paper Co. v. Ouellette, 479 U.S. 481, 484 (1987). The specific question before the Court was "whether the [CWA] pre-empts a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York." Id. at 483.

141 See, e.g., City of Milwaukee v. Illinois, 451 U.S. 304, 318 (1981) (finding that when Congress amended the CWA in 1972, it intended to "establish an all-encompassing program of water pollution regulation" that preempted federal common law).

142 Int'l Paper, 479 U.S. at 494.

143 Id. at 495; see also Illinois v. City of Milwaukee, 731 F.2d 403, 414 (7th Cir. 1984) ("It seems implausible that Congress meant to preserve or confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I by applying the statutes or common law of State II. Such a complex scheme of in-
While foreclosing application of the Vermont common law, the Court in *International Paper*, however, did not conclude that the CWA preempted all state-based common law remedies targeting water pollution. The Vermont residents' suit could proceed, so long as the court below applied the common law of the discharger's state, or specifically in *International Paper*, New York common law, instead of Vermont common law. Through this result the Court preserved the permitting scheme established by Congress under the CWA and avoided subjecting dischargers to another state's common law. At the same time, in a balance of competing federal and multi-state interests, the Court fashioned a state-based legal remedy for those who were adversely impacted by discharges occurring in another state.

2. PUD No. 1 of Jefferson County v. Washington Department of Ecology

In considering a challenge to the State of Washington's authority to impose certain requirements protective of its water quality, the Court in *PUD No. 1 of Jefferson County v. Washington Department of Ecology* broadly construed the power of states to impose conditions under the section 401 water quality certification process of the Clean Water Act. The specific condition at issue required a proposed hydroelectric power project to maintain a minimum stream flow that the state mandated to protect aquatic life. One of the arguments rejected by the Court in this challenge to the State's section 401 authority was that the limitation might conflict with the Federal Energy Regulatory Commission (FERC) licensing conditions for the hydroelectric project and thus was preempted. In concluding that neither FERC's licensing authority nor the Federal Power Act limited the State's section 401 authority, the Court broadly construed the

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144 *Int'l Paper*, 479 U.S. at 481.
146 *Id.* at 710-13. Section 401 requires a water quality certification from a state before a federal license or permit is issued for any activity that may result in a discharge into navigable waters and also authorizes a state to impose limitations and monitoring requirements on such discharges to ensure that state water quality standards and effluent limitations are met and maintained. See 33 U.S.C. § 1341(a)(1), (d) (2000).
147 *PUD No. 1 of Jefferson County*, 511 U.S. at 709.
148 *Id.* at 721-23.
149 When the minimum stream flow condition was initially challenged at the administrative level, the Washington Pollution Control Hearings Board initially found that the condition was preempted by the Federal Power Act. This finding was reversed on appeal to the
power of the states to impose a wide range of conditions as part of the CWA's water quality certification process:

No such conflict with any FERC licensing activity is presented here. FERC has not yet acted on petitioners' license application, and it is possible that FERC will eventually deny petitioners' application altogether. Alternatively, it is quite possible, given that FERC is required to give equal consideration to the protection of fish habitat when deciding whether to issue a license, that any FERC license would contain the same conditions as the state § 401 certification.

... [T]he requirement for a state certification applies not only to applications for licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters.150

The Court certainly understood that the states required great leeway and flexibility in order to protect and enhance water quality, which was a responsibility primarily left to the states under the federal CWA:151:

The criteria components of state water quality standards attempt to identify, for all the water bodies in a given class, water quality requirements generally sufficient to protect designated uses. These criteria, however, cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect the State's hundreds of individual water bodies. Requiring the States to enforce only the criteria component of their water quality standards would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the water's designated uses. Given that there is no textual support for imposing this requirement, we are loath to attribute to Congress an intent to impose this heavy regulatory burden on the States.152

Another noteworthy aspect of the Court's opinion in *PUD No. 1 of Jefferson County* is the express affirmation by the Court of the importance of water quality standards under the statute:

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150 *PUD No. 1 of Jefferson County*, 511 U.S. at 722.
151 See 33 U.S.C. § 1251(b) (providing in part that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution").
152 *PUD No. 1 of Jefferson County*, 511 U.S. at 717–18.
Petitioners also assert more generally that the Clean Water Act is only concerned with water "quality" and does not allow the regulation of water "quantity." This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution.\textsuperscript{153}

The broad powers of the states recognized under the CWA, coupled with a clear rejection of the preemption challenge and the recognition of the central importance of water quality standards under the CWA, are not conclusions that one would expect to read in an opinion from a Court that was purportedly overtly hostile toward environmental matters. Despite the preemption challenge to state authority to impose conditions protective of water quality, the Rehnquist Court affirmed the authority of the states to impose a range of conditions through the section 401 water quality certification process, as dictated by the water body use designation established by each state.

\textbf{3. Wisconsin Public Intervenor v. Mortier}

One can see a further balancing of competing regulatory interests through the rejection of other preemption challenges in later pollution control cases when the Rehnquist Court considered attacks against state and local regulation of pesticides under FIFRA.\textsuperscript{154} In the

\textsuperscript{153} Id. at 719. This observation in the majority opinion by Justice O'Connor was in response to an alternative argument raised by petitioners attacking the limitation on stream flow. This alternative argument was that the CWA only allowed the regulation of water quality and not water quantity. Id. In addition to this argument and the one based on preemption by the FERC licensing process, the petitioners also argued that the effort by the State of Washington to regulate under section 401 was invalid because (1) the water quality use designation was too vague, and the CWA only authorized the enforcement of specific and objective water quality criteria; and (2) enforcement of water quality use designations rendered the criteria component of water quality standards superfluous. Id. at 715-17. The Court also rejected these arguments in upholding the ability of the states to impose conditions protective of water quality standards as part of the section 401 water quality certification process. Id. Justice Thomas, joined by Justice Scalia, dissented and would have found in part that the Federal Power Act preempted the ability of states to also impose minimum stream limits on FERC licensed hydroelectric projects. See id. at 734 (Thomas, J., dissenting) ("Today, the Court gives the States precisely the veto power over hydroelectric projects that we determined in [prior cases] they did not possess.").

\textsuperscript{154} Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (2000). As its title suggests, FIFRA establishes a comprehensive regulatory program administered by the EPA governing the registration, labeling, and use of pesticides, which are defined as any
first of two such cases that appeared before the Rehnquist Court, Wisconsin Public Intervenor v. Mortier, a local ordinance imposed a permit requirement as a precondition to the application of pesticides on certain properties.

In a unanimous decision reversing the Wisconsin Supreme Court's conclusion that FIFRA preempted the local pesticide-permitting ordinance, the Court noted that "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Finding no support in the text of FIFRA for the position that Congress had expressly preempted local regulation of pesticides, coupled with insufficient evidence of implied or field preemption, the Court upheld the local permitting ordinance regulating pesticide use.

The Court found that, unlike the CWA's far-reaching statutory scheme that was at issue in City of Milwaukee and International Paper, FIFRA was not "a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the States." Thus, the states and local units of government were left free to impose additional regulatory requirements beyond those established by FIFRA.

The preemption cases serve to further belie the argument that the Rehnquist Court represented an era when the Supreme Court was especially unsympathetic towards environmental litigants. Instead of an anti-environmental Court, we see in the preemption cases a Court wrestling with complex issues of competing federal, state, and local regulatory interests in the pollution control arena. In response to this struggle, the Court fashioned opinions in the preemption area that preserved the rights of citizens to assert state common-law-based claims in response to offensive discharges. The Rehnquist Court's substance or mixture of substances intended "for preventing, destroying, repelling, or mitigating any pest," id. § 136(u)(1), or "for use as a plant regulator, defoliants, or desiccant," id. § 136(u)(2), or "any nitrogen stabilizer," id. § 136(u)(3).

In Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005), the Rehnquist Court heard a subsequent FIFRA preemption challenge. Bates involved a suit by farmers against an herbicide manufacturer, alleging that the herbicide's harm to crops supported state law product liability, breach of warranty, and deceptive trade practices claims. See generally id. at 435-36. This preemption claim was also rejected by the Court, for reasons similar to those articulated in Mortier, preserving state law claims despite a broad federal regulatory program enacted under FIFRA. See id. at 442-52.
preemption cases arising under the pollution control statutes also maintained the ability of states and municipalities to impose regulations to address unique local environmental concerns, be it flow quantities in a river sufficient to protect aquatic life, or additional regulations deemed necessary by local authorities to ensure proper application of pesticides.

The preemption cases also serve to undermine the view that the Rehnquist Court was pro-business in deciding pollution control cases. A genuinely pro-business Rehnquist Supreme Court would not have allowed the residents of Vermont to proceed even using New York nuisance law, the law of the so-called source state. Instead, a pro-business Court would have used *International Paper* as an opportunity to limit all state-based common law claims against industrial dischargers by conveniently holding that the CWA, due to its comprehensive nature, preempted not only federal common law claims, but also all state common law remedies as well.\(^6\) Further, if the Rehnquist Court were indeed a pro-business Court, it would have construed FIFRA to preempt local and state efforts to impose additional pesticide regulations, and limit the ability to hold pesticide manufacturers responsible under liability theories grounded in state law. Such a move would have reduced the regulatory burdens and potential liabilities faced by businesses. The Court, however, rejected preemption challenges in the two FIFRA cases heard during the Rehnquist era, and the holdings of the Court in these cases further erodes the notion of the Rehnquist Supreme Court as one that was blatantly pro-business in deciding environmental cases and, in particular, pollution control cases.

4. Engine Manufacturers Ass’n v. South Coast Air Quality Management District

In response to the argument that the Rehnquist Court rejected preemption challenges targeting state and local pollution control efforts, one might argue that the Court’s decision in *Engine Manufacturers Ass’n v. South Coast Air Quality Management District*\(^{161}\) undercuts the position that the Rehnquist Court’s use of the preemption doctrine was hospitable towards state and local pollution control regulation.

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After all, as pointed out in the lone dissent by Justice Souter, the majority in *Engine Manufacturers Ass'n* used the preemption doctrine to forbid "one of the most polluted regions in the United States from requiring private fleet operators to buy clean engines that are readily available on the commercial market." 162

The local pollution control regulations that were at issue in *Engine Manufacturers Ass'n* were the so-called "Fleet Rules" enacted by the South Coast Air Quality Management District (SCAQMD) to decrease the emissions of ozone forming compounds in Southern California.163 The Fleet Rules required the operators of certain commercial motor vehicle fleets to purchase or lease only alternative fuel vehicles or vehicles that met stringent emissions limitations.164 A coalition of automobile and engine manufacturers asserted that the Fleet Rules were preempted by section 209(a) of the CAA, which provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, vehicle engine, or equipment.

According to the logic of the district court, the vehicle purchase restrictions imposed by SCAQMD were not preempted by section 209(a) for two reasons. First, they were not preempted because "[t]he Rules regulate the purchasing and leasing, not the sale, of vehicles by fleet operators."165 Second, preemption was inapplicable since "the Fleet Rules do not set a 'standard relating to the control of emissions.'"166 In a short, two paragraph order, the Ninth Circuit af-

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162 *Id.* at 259 (Souter, J., dissenting) (footnote omitted).

163 The six Fleet Rules were adopted as one of the measures to improve air quality in the only region of the country designated as an extreme nonattainment area by the EPA under the CAA. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 158 F. Supp. 2d 1107, 1109 (C.D. Cal. 2001). In addition to targeting emissions of ozone precursors from motor vehicle exhaust, the rules also sought to address emissions of particulate matter associated with diesel engines. *Id.* at 1109. The rules covered practically every type of vehicle that a fleet could operate, including street sweepers, passenger cars, public transit vehicles and urban buses, light duty trucks, medium duty vehicles, garbage trucks, airport passenger transportation vehicles (shuttles and taxi cabs), and heavy duty on-road vehicles. *Engine Mfrs. Ass'n*, 541 U.S. at 249.


167 *Id.*
firmed the district court "for the reasons stated in its well-reasoned opinion."\(^{168}\)

In an eight-to-one vote reversing the Ninth Circuit, the Supreme Court held that "treating sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense. The manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them."\(^{169}\) Importantly, the Court did not find that the application of the Fleet Rules was preempted under all circumstances. In another effort to maintain a semblance of balance between the federal government and state governments in the environmental regulatory arena, Justice Scalia wrote for the majority that "[i]t does not necessarily follow, however, that the Fleet Rules are pre-empted in toto."\(^{170}\) The case was accordingly remanded for a determination as to whether, among other issues, the Fleet Rules were valid if construed as imposing restrictions only on state purchase decisions and not those of private fleet operators.\(^{171}\)

An argument that the *Engine Manufacturers Ass'n* decision was anti-environmental and pro-business—because the Court used preemption to negate the ability of SCAQMD to regulate the types of vehicles that fleet operators could purchase—is misdirected as aimed at the Rehnquist Court.\(^{172}\) The Court's holding is simply too well-grounded in the plain language of section 209(a) of the CAA for such criticisms to have merit.\(^{173}\) Given that provision, which expressly preempted states from regulating emissions from automobiles and engines, the Court had little choice but to respect the unambiguous language of the statute and conclude that the SCAQMD Fleet Rules were preempted. To hold otherwise would have required the Court to completely ignore the clear statutory language in section 209(a) prohibit-

168 Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 309 F.3d 550, 551 (9th Cir. 2002).
170 *Id.* at 258.
171 *Id.* at 258–59.
172 *See*, e.g., Rebecca Noblin, Comment, Engine Manufacturers Association, et al. v. South Coast Air Quality Management District, et al., 28 HARV. L. REV. 571, 575 (2004) (asserting that the Court's analysis of the preemptive effect of section 209(a) was "textually weak and runs contrary to both legislative intent and prior EPA interpretation").
173 Even Professor Lazarus, who is generally critical of the Supreme Court's rulings in environmental cases, found that the statute supported the Court's decision in *Engine Manufacturers Association*. *See* Richard J. Lazarus, *The Nature of Environmental Law and the U.S. Supreme Court*, [2005] 35 Envtl. L. Rep. (Envtl. Law Inst.) 10,503, 10,511 (concluding, after an analysis of the *Engine Manufacturers Association* decision, among other environmental cases heard during the Court's October 2003 Term, that "[t]he plain meaning of the statute provides ample support for the result").
ing any efforts by the states to impose emission standards or to require any other approval relating to vehicle or engine emissions as a condition of sale.

Furthermore, the Court's decision in *Engine Manufacturers Ass'n* is abundantly supported by strong public policy concerns regarding what level of government is best situated to regulate emissions associated with mobile sources such as automobiles, trucks, and buses. In considering these public policy concerns, there are overwhelming reasons for concluding that the effort to regulate tailpipe emissions from mobile sources is, with limited exception, appropriately a solely federal function. That is, section 209(a) was enacted as a means of protecting not only manufacturers, but also consumers from legitimate concerns about the difficulties that compliance with multi-jurisdictional vehicle emissions standards would present, unless expressly prohibited by Congress:

The reasons given for the enactment of the pre-emption provision can be summarized as follows: to protect the manufacturer against having to build engines which would comply with a multiplicity of standards (Senator Muskie); to protect the vehicle owner from having to deal with different standards in each state in which he drives (Undersecretary Coston); to avoid the unnecessary duplication of federal standards; to avoid 'unnecessary expense' to the owner (the Senate Public Works Committee); and generally to avoid 'chaos' and 'confusion.' (Thomas Mann, Undersecretary Coston, and the Senate Public Works Committee).

Had the *Engine Manufacturers Ass'n* decision affirmed the ability of SCAQMD to impose the challenged vehicle purchase restrictions, undoubtedly a number of states would have followed California's lead and adopted a similar regulatory approach, and manufacturers and consumers conceivably would have faced countless, but potentially dissimilar, emissions-related standards to consider in the manufacture, sale, and purchase of vehicles. This scenario would have presented owners of multi-jurisdictional fleets and automotive and engine manufacturers with a difficult regulatory quandary, as they attempted to purchase and manufacture compliant vehicles and engines. Highly mobile consumers, too, likely would have confronted

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174 Because California adopted automobile emissions limits well before Congress did so, the CAA does provide a waiver to section 209(a) preemption for (1) California mobile emissions standards that were in effect at the time of the adoption of the federal standards, and (2) those states that adopt existing California mobile source emission limits. 42 U.S.C. §§ 7507, 7543(b) (2000).

compliance issues as they traveled or relocated from one state to another. Regulators would have faced difficult enforcement issues as they sought to determine whether, for example, an automobile purchased in Illinois met the emissions requirements of its owner's new state of residence. The decision in *Engine Manufacturers Ass'n* rightfully avoided these practical difficulties. The decision also respected the express will of Congress that the efforts to regulate mobile source emissions properly lie with the federal government, and not with state or local units of government, for sound public policy reasons.

IV. STATUTORY CONSTRUCTION AND THE POLLUTION CONTROL CASES

There are several pollution control cases decided by the Rehnquist Court that implicated neither of the constitutional-based doctrines of federalism or preemption. This line of cases required the Court to apply principles of statutory construction to particular provisions of the pollution control statutes. Of course, the Supreme Court has interpreted statutes throughout its history. One of the notable aspects of the Rehnquist Court that is relevant to this Article, however, is that the pollution control cases that raise issues of pure statutory interpretation—even more so than those where constitutional issues such as federalism or preemption arose—unmistakably demonstrate that the Rehnquist Court was not anti-environmental or pro-business. In part, this is because one of the most significant challenges to a pollution control statute occurred during the Rehnquist era; specifically, the threat to certain provisions of the CAA presented in *Whitman v. American Trucking Ass'ns*, brought by powerful business interests, was such that, if the challenge had been successful on the merits, it would have been perhaps the most significant victory for business interests before the Court in the history of environmental law. The Court rejected this challenge and protected the CAA from this serious assault by business. To side against the arguments raised by such powerful interests is not the expected outcome from a Court that supposedly sided with commerce over regulatory efforts to protect the environment.

In addition to the *American Trucking Ass'ns* case brought on behalf of influential business interests, two of the cases raising issues of pure
statutory construction were brought by well-recognized public interest environmental groups. If the Rehnquist Court were so clearly predisposed to exhibit hostility against environmentalists, the Court should have ruled against the environmental plaintiffs. But that was not the outcome in either City of Chicago v. Environmental Defense Fund or Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc. By ruling in favor of the environmental groups in both these cases the Rehnquist Court once again defied the stereotype that it was overtly anti-environmental.

A. The Rehnquist Court's Methodology of Statutory Interpretation

The Rehnquist Court's approach to interpretation of the pollution control statutes reflects one of the other guiding principles that, in addition to the federalism revolution, emerged during Rehnquist's reign as Chief Justice. This guiding principle is the controversial position that legislative history should be completely ignored as one of the tools that the Court should consider in its efforts to decipher what Congress intended by its use of a particular word, phrase, or provision in a statute. Justice Scalia, without a doubt, has been the primary proponent of this negative view of legislative history in the context of statutory construction. His position that the Court should not look to legislative history as an aid in statutory analysis arises from a belief that it is only legitimate for the Court to examine the text of the statute in question, with perhaps at most a reference to a dictionary to divine the plain meaning of the words used by Congress. The refusal by Justice Scalia to rely upon any aspect of a stat-

180 See, e.g., Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (concluding that Title VII of the Civil Rights Act of 1964 also encompassed same-sex sexual harassment, noting that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 616-23 (1991) (Scalia, J., concurring in judgment) (expressing the view that as a statutory interpretation tool, congressional committee reports are unreliable "not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction").
181 See, e.g., Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court, 39 AM. U. L. REV. 277, 281 (1990) (noting that the use of legislative history was under assault from within the Supreme Court and that the "movement's spiritual leader is Justice Scalia").
182 See, e.g., Thomas W. Merrill, Chief Justice Rehnquist, Pluralistic Theory, and the Interpretation of Statutes, 25 RUTGERS L.J. 621, 660 (1994) (remarking about Justice Scalia’s approach to statutory interpretation that "[m]ost importantly, all forms of legislative history are out of bounds, in part because of the danger of manipulation . . . . In contrast, other interpre-
ute's legislative history is premised, in part, upon a skepticism that congressional committee reports and other traditional sources of legislative history have any value in determining the meaning of statutes and that such extra-statutory sources may indeed mislead the Court.\[^{183}\]

Not all members of the Court during Rehnquist's tenure as Chief Justice agreed with the view that legislative history has no place in statutory interpretation.\[^{184}\] While still the Chief Judge of the First Circuit, Justice Breyer wrote:

[O]ne should recall that legislative history is a judicial tool, one judges use to resolve difficult problems of judicial interpretation. It can be justified, at least in part, by its ability to help judges interpret statutes, in a manner that makes sense and that will produce a workable set of laws. If judicial use of legislative history achieves this kind of result, courts might use it as part of their overarching interpretive task of producing a coherent and relatively consistent body of statutory law, even were the 'rational member of Congress' a pure fiction, made up out of whole cloth.\[^{185}\]

The approach of the Court and its position on the use of legislative history as a statutory interpretive tool did evolve as the composition of the Court changed while Rehnquist was Chief Justice. Consider, for example, one of the first pollution control cases decided during the Rehnquist era, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay*
where, in writing the majority opinion, Justice Marshall relied heavily on legislative history to support the conclusion that section 505 of the CWA did not confer upon citizen plaintiffs the right to seek redress for wholly past violations. In contrast, moving forward near the end of the Rehnquist era, we see the influence of Justice Scalia’s position concerning the inappropriateness of looking to legislative history as a guide in interpreting statutes. In \textit{Whitman v. American Trucking Ass’ns}, decided almost fifteen years after \textit{Gwaltney of Smithfield}, there is absolutely no mention of legislative history in the majority opinion as a means of either determining congressional intent or in supporting the Court’s holding. A starkly different approach to Justice Scalia’s negative view of the validity of legislative history as a tool of statutory interpretation is Justice Breyer’s concurrence in \textit{Whitman v. American Trucking Ass'ns}, which is grounded almost in its entirety upon the legislative history of the Clean Air Act.

Although not accepted by every Justice, over time Justice Scalia’s view that legislative history was not a reliable tool for use in the construction of statutes gained wide support in the Court during the Rehnquist era, and is reflected in the Court’s approach to interpreting pollution control statutes during this period. The disdain for legislative history influenced the Rehnquist Court’s later decisions in several pollution control cases where the majority made no mention or use of the legislative history materials readily available and relevant to the statute in question. Nonetheless, this controversial approach to statutory construction did not result in any interpretive missteps in the pollution control cases and lends no support to the view that the Rehnquist Court interpreted pollution statutes in a manner inconsistent with their ultimate goal of environmental protection.

187 \textit{See} 33 U.S.C. § 1365 (authorizing citizen suits against any person in violation of the CWA or against the EPA for the failure of the administrator to undertake any nondiscretionary duty required by the statute).
188 \textit{See} \textit{Gwaltney of Smithfield}, 484 U.S. at 61–63.
190 \textit{Id.} at 462–86.
191 \textit{Id.} at 490–96 (Breyer, J., concurring in part and concurring in the judgment).
192 \textit{See}, e.g., Cooper Indus., Inc. v. Aviall Serv’s, Inc., 543 U.S. 157 (2004); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004); Meghrig v. KFC W., Inc., 516 U.S. 479 (1996); Key Tronic Corp. v. United States, 511 U.S. 809 (1994). In none of these cases did the Court look to legislative history materials for guidance in reaching a decision.
B. Rejection of Statutory Interpretation-Based Challenges to the Applicability of Pollution Control Statutes

1. Whitman v. American Trucking Ass’ns

The Rehnquist Court was presented in *Whitman v. American Trucking Ass’ns*\(^{193}\) with a challenge concerning the process used by the EPA to establish national ambient air quality standards (NAAQS) under the CAA.\(^{194}\) The challenge arose when the EPA promulgated revised NAAQS for ozone and particulate matter\(^{195}\) because new scientific data showed that the existing standards were not protective of human health, lacking an adequate margin of safety, as mandated by Congress in section 109 of the CAA.

This challenge in *American Trucking Ass’ns* was undoubtedly an uphill struggle for the coalition of powerful business interests that filed suit seeking to invalidate the newly promulgated NAAQS for ozone and particulate matter, since one of the central issues presented—whether the EPA was required to consider costs when it established or modified NAAQS\(^{196}\)—had long ago been raised before; the Court of Appeals for the District of Columbia considered and rejected this suggestion in *Lead Industries Association, Inc. v. EPA.*\(^{197}\) The

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193 531 U.S. 457 (2001). The specific issues before the Court in *American Trucking Ass’ns* included: (1) whether by enacting section 109(b)(1) of the CAA, which requires the EPA to set national ambient air quality standards (NAAQS), Congress improperly delegated a legislative power to the agency; (2) whether the EPA was required to conduct a cost-benefit analysis when setting NAAQS under section 109; (3) whether the court of appeals had jurisdiction to review the EPA’s position regarding the need to revise the NAAQS for ozone; and (4) whether the EPA’s interpretation concerning its statutory authority to establish revised NAAQS was permissible. *Id.* at 462.

194 The NAAQS are one of the central components of the CAA regulatory regime for stationary sources and establish a minimal baseline for air quality throughout the country. See 42 U.S.C. § 7409 (2000). This Section requires the EPA to enact primary NAAQS that are protective of human health and the environment, and secondary NAAQS that are protective of the public welfare. Through the NAAQS, the EPA determines permissible national levels for certain pollutants, and then the states establish how the NAAQS will be met through regulation of stationary sources. *Id.* §§ 7408–7410. Under section 109(d), the EPA must review and, if deemed necessary, revise the NAAQS every five years. *Id.* § 7409(d).


196 Reflecting the cumbersome NAAQS process, the EPA has set NAAQS for only a handful of pollutants, sulfur oxides, nitrogen oxides, carbon monoxide, lead, ozone, and particulate matter. 40 C.F.R. § 50.4–50.12 (2006).

197 647 F.2d 1130 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 1049 (1980). In *American Trucking Ass’ns,* the challengers argued that the *Lead Industries Ass’n* case was wrongly decided for two reasons. First, it was asserted that the express language of section 109, which re-
renewed attack on the NAAQS process in *American Trucking Ass'ns* was of particular importance, nonetheless, because it questioned for the first time before the Supreme Court one of the central underpinnings of the CAA: the ability of the EPA to establish ambient air quality standards uniformly applicable throughout the country without requiring consideration by the agency of the costs that such standards would impose on regulated entities. Put another way, the challengers in *American Trucking Ass'ns* sought to impose a cost-benefit analysis obligation upon the NAAQS-setting aspect of the EPA's regulatory authority under the CAA. 198

Success before the Court by industry in its efforts to require the EPA to justify the NAAQS on the basis of a cost-benefit analysis would have had profound implications for the fundamental regulatory scheme that underlies the CAA. If the interpretation of section 109 of the CAA offered by business interests were accepted by the Court in *American Trucking Ass'ns*, it would have subjected the NAAQS process to endless rounds of litigation featuring battling economists and other financial experts opining on the costs of complying with the standards compared to the benefits, or lack thereof, that the standards provided. Based upon such a cost-benefit analysis requirement, given the unpredictable nature of litigation, it is conceivable that a

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198 See id. at 28–30 (asserting that there were three alternatives under which the EPA could set NAAQS, and that the third alternative required a cost-benefit analysis which was “precluded by *Lead Industries*”). The challengers added that

[o]nly the third of these options—a systematic weighing of pros and cons based upon rejection of *Lead Industries*—can be squared with this Court's precedents.... As this Court has noted, it is generally “unreasonable to assume that Congress intended to give [an agency] the unprecedented power over American Industry” to

“impose enormous costs that might produce little, if any, benefit.” *Id.* at 30–31 (alteration in original); see also Schroeder, *supra* note 177, at 331–40 (pointing out the importance to industry of imposing a cost-benefit analysis requirement on the EPA in setting NAAQS and noting that given the significant costs associated with CAA compliance, “the benefit-cost principle is the Holy Grail of the regulatory reform for business and industry”).
court might have invalidated certain NAAQS. The result of requiring the consideration of costs and benefits in the NAAQS calculus also would have served to increase the administrative burden the agency would face in the development or modification of the NAAQS, an already cumbersome regulatory process, since newfound economic expertise would have to play a key role in NAAQS development. Lastly, a ruling in favor of industry in *American Trucking Ass'ns* would have made other pollution control statutes vulnerable to claims, either in court or before Congress, that the costs associated with compliance far exceeded the benefits, thus potentially calling into question significant portions of the federal environmental regulatory apparatus.

However, concerning the argument that the EPA was required to account for the costs imposed on businesses and industries when issuing new or revised NAAQS, Justice Scalia turned to the express command of Congress in section 109(b) that required the EPA to establish NAAQS which "are requisite to protect the public health" with "an adequate margin of safety." And, recognizing that costs were not mentioned as a factor for the EPA to weigh under the statute, Justice Scalia concluded that "[w]ere it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards." Justice Scalia rightfully found that "the text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost consideration from the NAAQS-setting process," and thus the Court overwhelmingly rejected the challenge by

199 Sections 108 and 109 of the CAA, 42 U.S.C. §§ 7408, 7409, set out the statutory requirements for the EPA to adopt NAAQS. The detailed regulations that the EPA follows in establishing these standards are found at 40 C.F.R. § 50.

200 See Schroeder, supra note 177, at 322–23 ("[I]f the regulated community could succeed here, the same legal theories would almost certainly ripple outwards to impact other aspects of national environmental law and policy as well. Thus there was a tremendous amount at stake in *American Trucking.*"); see also Cass R. Sunstein, *Is the Clean Air Act Constitutional?*, 98 Mich. L. Rev. 903, 910 (1999) (commenting on the D.C. Circuit's decision in *American Trucking Ass'ns* and noting that "[o]n its face, the *American Trucking* decision would seem to draw into serious constitutional question not only EPA's ozone and particulates regulations, but also ... a wide range of decisions by many other agencies involved in the protection of health and welfare").

201 *Am. Trucking Ass'ns*, 531 U.S. at 465 (internal quotation marks omitted) (quoting 42 U.S.C. § 7409(b)(1)).

202 Id. at 465.

203 Id. at 471 (emphasis added).
industry. In doing so, the Court reaffirmed the D.C. Circuit’s much earlier groundbreaking decision in *Lead Industries Ass’n v. EPA.*

In the end, the NAAQS process established by section 109 of the CAA survived the industry challenge when the Rehnquist Court rejected, without a single dissent, both the nondelegation argument, and the position that *Lead Industries Ass’n* was wrongly decided more than twenty years before *American Trucking Ass’ns*. The Court interpreted the CAA so that the costs associated with compliance continue to play no role in the NAAQS-setting efforts of EPA. Once a pollutant is listed under section 108 by the administrator, the obligation to establish a NAAQS specific to that pollutant at a level that is “req-

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204 647 F.2d 1130, 1148 (D.C. Cir. 1980) (holding that “economic considerations play no part in the promulgation of ambient air quality standards under Section 109”).

205 The challengers also raised a constitutional argument in their vigorous assault upon section 109 of the CAA. While the D.C. Circuit in *American Trucking Ass’ns* rejected the argument that the EPA was required to consider costs in setting the NAAQS, the lower court surprisingly did agree with the industry challengers that the EPA’s interpretation of its section 109 authority to set NAAQS violated the rarely invoked nondelegation doctrine. Am. Trucking Ass’n v. Whitman, 175 F.3d 1027, 1034 (D.C. Cir. 1999). The nondelegation doctrine derives from Article I of the Constitution, which provides in part that “[a]ll legislative Powers herein shall be vested in a Congress of the United States,” U.S. CONST. art. I, § 1, and “is rooted in the principle of separation of powers,” Mistretta v. United States, 488 U.S. 361, 371 (1989). “The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity.” Loving v. United States, 517 U.S. 748, 758 (1996) (citation omitted). Nevertheless, it is recognized that Congress’s ability to govern effectively requires delegation of certain actions to the numerous agencies that administer the federal government’s programs. To do so, however, the Supreme Court has consistently held that Congress must “lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.” See *Am. Trucking Ass’ns,* 531 U.S. at 472 (alteration in original) (internal quotation marks omitted) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). The D.C. Circuit’s acceptance of the nondelegation challenge was particularly unexpected, since the Supreme Court has only invalidated congressional action twice under the doctrine. See, e.g., *id.* at 473–74 (“In the history of the Court we have found the requisite ‘intelligible principle’ lacking in only two statutes . . . .”). Not surprisingly, the Supreme Court reversed the D.C. Circuit’s nondelegation holding, finding that the EPA’s application of section 109 was entirely consistent with the nondelegation doctrine. *Id.* at 474. The discretion provided to the EPA in setting NAAQS was “in fact well within the outer limits of our nondelegation precedents.” *Id.* For a critique of the Court’s historic approach to nondelegation cases, see generally David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985).

206 See 42 U.S.C. § 7408 (setting forth the requirements for when the EPA Administrator shall list pollutants). Once listed under section 108, the obligation to establish a NAAQS for the listed pollutant is mandatory. See, e.g., Natural Res. Def. Council, Inc. v. Train, 411 F. Supp. 864, 867 (S.D.N.Y. 1976) (“[W]e have determined that the statutory scheme contemplates a mandatory duty on the part of the Administrator.”), aff’d, 545 F.2d 320 (2d Cir. 1976).
uit to protect the public health,"²⁰⁷ and that provides "an adequate margin of safety"²⁰⁸ are the criteria that guide the EPA's decision; the costs that are imposed on industry to achieve those goals are not a determinative factor. As a result of the Court's decision, other pollution control statutes were also spared from similar arguments that would have been made in an effort to derail their regulatory impact by asserting that the costs simply outweighed the benefits, had industry prevailed in *American Trucking Ass'ns*.

2. City of Chicago v. Environmental Defense Fund

Another pollution control decision contrary to the assertions of the Rehnquist Court's abundant anti-environmentalism is *City of Chicago v. Environmental Defense Fund*.²⁰⁹ There, the Court agreed with the statutory interpretation offered by several prominent environmental groups that the subtitle C hazardous waste requirements of the Resource Conservation and Recovery Act (RCRA)²¹⁰ applied to the more-than-100,000 tons of waste ash that were generated annually by a municipal household waste-to-energy facility operated by the City of Chicago. The City asserted that the waste ash was not subject to RCRA regulation as a hazardous waste because of a provision expressly exempting waste-to-energy facilities or "resource recovery" facilities from RCRA subtitle C regulation so long as such facilities only incinerated non-hazardous wastes.²¹¹

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²⁰⁸ *Id.*
²¹⁰ RCRA subtitle C, 42 U.S.C. §§ 6921-6939e, imposes stringent requirements on the generation, treatment, storage, and disposal of hazardous wastes. "Hazardous wastes" as used in RCRA and its implementing regulations is a term of art and encompasses wastes that have been specifically designated or listed as hazardous wastes by the EPA, see, e.g., 40 C.F.R. §§ 261.11, 261.30-.35 (2006), or wastes that exhibit one or more of the four defined RCRA hazardous characteristics including ignitability, corrosivity, reactivity, or toxicity, *Id.* §§ 261.20-.24.
²¹¹ *Envtl. Def. Fund*, 511 U.S. at 334. The particular exemption relied upon by the City of Chicago for its position that the ash was beyond the purview of the RCRA hazardous waste regulations provides in part that:

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes... if—(1) such facility—(A) receives and burns only—(i) household waste..., and (ii) solid waste from commercial or industrial sources that does not contain hazardous waste..., and (B) does not accept hazardous wastes... and (2) the owner or operator of such facility has established contractual requirements or other... procedures to assure that hazardous wastes are not received and burned at or burned in such facility.

42 U.S.C. § 6921(i).
The Environmental Defense Fund argued that the exemption did not apply to the ash generated by the combustion of such wastes if the ash otherwise qualified as an RCRA-regulated hazardous waste due to its toxicity. In agreeing with the Environmental Defense Fund and its construction of the RCRA exemption, Justice Scalia recognized the potential negative implications for the environment if the Court allowed the disposal of toxic ash to escape RCRA subtitle C regulation. He wrote the following, which one might mistake as an excerpt from the Environmental Defense Fund’s brief submitted to the Court:

[RCRA] does not explicitly exempt [ash] generated by a resource recovery facility from regulation as a hazardous waste. In light of that difference, and given the statute’s express declaration of national policy that “[w]aste that is . . . generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment,” we cannot interpret the statute to permit [ash] sufficiently toxic to qualify as hazardous to be disposed of in ordinary landfills.

Thus, RCRA was construed by the Court to impose upon the City of Chicago, and similarly situated municipalities operating waste-to-energy or resource recovery facilities, the obligation to dispose of the resulting ash as hazardous waste at dramatically higher costs than if it were exempted from RCRA hazardous waste regulation. This is another result that is inconsistent with the purported anti-environmental leanings of the Rehnquist Court, and is also an example where the Rehnquist-led Supreme Court interpreted a pollution control statute in a manner that resulted in providing greater environmental protection and rejected an interpretation that would have resulted in less protection for the environment. Importantly, in reaching this conclusion, the Court sided with one of the country’s most visible pro-environment groups, the Environmental Defense Fund, which is entirely inconsistent with the view that the Rehnquist Court was openly hostile to environmental groups.

212 *Envtl. Def. Fund*, 511 U.S. at 330. Toxicity is one of the four defined characteristics of a hazardous waste. See supra note 210. Under the EPA’s regulatory approach to determining toxicity, a waste material is toxic, and hence a hazardous waste, if the level of one or more specified constituents meets or exceeds regulatory limits as determined through an analytical test referred to in the RCRA regulations as the “Toxicity Characteristic Leaching Procedure.” 40 C.F.R. § 261.24. (2006).

213 *Envtl. Def. Fund*, 511 U.S. at 335 (citation omitted) (alteration in original).

214 The Environmental Defense Fund was founded in 1967 after a group of scientists prevailed in obtaining a ban on the use of the pesticide DDT. Environmental Defense Fund, Origin and History, http://www.environmentaldefense.org/aboutus.cfm?tagID=362 (last visited Oct. 4, 2007). According to the Environmental Defense Fund, its efforts to ban the use of DDT resulted in “the birth of modern environmental law.” *Id.* It further
3. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.

In yet one more pollution control case running counter to the assertion that the Rehnquist Court was anti-environment and pro-business, Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc. asked whether environmental groups could file suit under the citizen suit provision of the CWA against an industrial discharger for longstanding permit violations. The Fourth Circuit Court of Appeals had determined that the suit became moot when, following initiation of litigation, the defendant arguably achieved compliance with its National Pollutant Discharge Elimination System (NPDES) permit limits. Consequently, the Fourth Circuit vacated the district court's order assessing a $405,800 penalty.

Prior to the Court's decision in this case, if one accepted the position that the Rehnquist Court was anti-environment and pro-business, it would have followed that the decision of the appeals court below would have been overwhelmingly affirmed, given the Rehnquist Court's supposed bias towards business interests over those who promote environmental causes. Any such prediction, however, that the case would result in a ruling exonerating the industrial defendant from culpability for violating the CWA would have widely missed the mark. In a 7 to 2 decision, joined by Chief Justice Rehnquist, the Court ruled in favor of the environmental groups, and the Fourth Circuit's decision mooting the citizen's enforcement action was reversed.

The industrial challenger, of course, urged the Court to affirm the court below. It argued that the environmental groups lacked standing, which had presented a significant hurdle that citizen plaintiffs in environmental cases were finding increasingly difficult to clear, but boasts that it is "one of America's most influential environmental advocacy groups, now with over 500,000 members and more Ph.D. scientists and economists on staff than any similar organization." Id.
the standing argument was quickly dispensed with by the Court. In perhaps the most important aspect of the Court's decision, the majority expressly rejected the proposition that plaintiffs in citizen suit proceedings had to present evidence of cognizable environmental harm to have standing; rather, the majority found that injury to the plaintiff would suffice to meet the standing requirements of injury in fact, as articulated by the Court in prior cases. In so doing, the Court explicitly recognized the deterrent effect of civil penalties obtained through successful citizen suit litigation, and thus realized the important contribution such suits provide as a critical aspect of environmental enforcement. The Court's holding in Friends of the Earth concerning standing was even more significant because it reaffirmed the ability of environmental groups to file suit not only under the CWA, but also pursuant to the citizen suit provisions of other fed-

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220 Friends of the Earth, 528 U.S. at 188. As an alternative procedural argument to its standing challenge, the defendant asserted that because: (1) it had achieved compliance with the terms of its NPDES permit limits; and (2) after the successful appeal to the Fourth Circuit, the facility at which the NPDES violations occurred had been closed, the citizens suit was moot instead. Id. at 189. On this point, the majority found that the mootness doctrine would only serve to bar the plaintiffs action if it was "absolutely clear" that the violations could "not reasonably be expected to recur." Id. at 193. Since this raised a disputed factual issue that was properly within the purview of the district court, the case was remanded for further proceedings consistent with the Court's decision. Id. at 193-95.

221 See id. at 189 (distinguishing standing from mootness). The standing doctrine arises from the Article III limitation of the exercise of federal judicial power to cases and controversies. U.S. CONST. art. III, § 2, cl. 1. In order to satisfy the standing requirement of Article III, a plaintiff must show: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) that the injury is fairly traceable to the actions of the defendant; and (3) that it is likely, and not speculative, that the injury will be redressed by a favorable decision of the court. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62 (1992).

222 See Friends of the Earth, 528 U.S. at 187 (highlighting the challenge of successfully effectuating policy through legislation).

223 See e.g., Hudson P. Henry, Note, A Shift in Citizen Suit Standing Doctrine: Friends of the Earth, Inc. v. Laidlaw Environmental Services, 28 ECOLOGY L.Q. 233, 234 (2001) (recognizing that the decision in Friends of the Earth increases access to courts for citizen suit plaintiffs); Kristen M. Shults, Comment, Friends of the Earth v. Laidlaw Environmental Services: A Resounding Victory for Environmentalists, Its Implications on Future Justiciability Decisions, and Resolution of Issues on Remand, 89 GEO. L.J. 1001, 1003 (2001) (commenting on the decision's significance, especially in the environmental law context where most environmental statutes contain a citizen suit provision); Kelly D. Spragins, Note, Rekindling an Old Flame: The Supreme Court Revives Its "Love Affair With Environmental Litigation" in Friends of the Earth v. Laidlaw Environmental Services, 37 HOUS. L. REV. 955, 956 (2000) ('For over a decade, the United States Supreme Court has misdirected the will of Congress by seriously impairing citizens' standing to sue suspected polluters. That trend, however, appears to be changing with the Court's decision in Friends of the Earth v. Laidlaw Environmental Services, Inc." (footnotes omitted)).
eral environmental laws. Many had believed that as a result of the Rehnquist Court's earlier environmental standing jurisprudence, namely the decisions in *Lujan v. National Wildlife Federation* and *Lujan v. Defenders of Wildlife*, the ability of citizens to bring suits had been severely eroded, if not functionally eliminated.

The retreat from the *Lujan* decisions by the Rehnquist Court in *Friends of the Earth* is significant because Justice Scalia's views as expressed in the two *Lujan* cases concerning what was required for standing in citizen suit litigation reflected a complete lack of understanding about the type of harm that noncompliance with the pollution control statutes can cause. The nature of the violations alleged in the typical citizen suit—the discharge of pollutants in excess of a few milligrams more than allowed in an NPDES permit issued under the CWA; emissions greater than a few thousand pounds per day over permitted limits in a CAA Title V permit; or the failure to re-

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227 *See, e.g.*, Richard Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742-43 (1999) (arguing that in light of the Court's standing cases, including *Lujan v. Defenders of Wildlife*, personal politics play a key role in determining who has access to the courts more than any truly cognizable doctrine); *Cass R. Sunstein, What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165-66 (1992) (criticizing *Lujan v. Defenders of Wildlife* as having no basis in Article III and contending that the decision's requirement of injury in fact fundamentally invalidated virtually all citizen suit provisions present in environmental statutes).

228 Justice Scalia, who wrote both *Lujan* opinions, joined by Justice Thomas, did author a biting dissent in *Friends of the Earth*. While agreeing with the majority's conclusion on the mootness issue, Justice Scalia predictably and vehemently opposed the majority's determination that the plaintiffs had standing. Justice Scalia stood by his position as articulated in the *Lujan* decisions and made it plain that, absent a showing of actual harm to the environment, the plaintiffs failed to meet the injury in fact element required for standing. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 199 (2000) (Scalia, J., dissenting) (stating that "[t]ypically, an environmental plaintiff claiming injury due to discharges in violation of the Clean Water Act argues that the discharges harm the environment, and that the harm to the environment injures him. This route to injury is barred in the present case, however, since the District Court concluded after considering all the evidence that there had been 'no demonstrated proof of harm to the environment.'” (quoting Baggs v. City of South Pasadena, 956 F. Supp. 588, 602 (D.S.C. 1997)); *see also Garbus, supra note 1, at 185* (“Scalia and Thomas... first argued there was no proof that the illegal release of mercury and other pollutants into the waterway actually harmed the environment. They also claimed that citizen suits should not be allowed at all, that only the individuals damaged could bring suit.”).


port chemical releases at or above the reportable quantity threshold as required by CERCLA\textsuperscript{251} and the EPCRA\textsuperscript{252}—rarely, if ever, cause demonstrable, concrete environmental harm. If Justice Scalia’s position on what was required for environmental plaintiffs to meet the injury in fact requirement of standing prevailed in \textit{Friends of the Earth}, it would mean that, absent a fish kill arising from a discharge of excessive pollutants or a Bhopal-type of environmental disaster, citizen suits under the various environmental statutes simply could never proceed, since the plaintiffs would usually lack the injury in fact element required for standing. The virtually-impossible-to-meet and impractical element of citizen standing as expressed by Justice Scalia in the \textit{Lujan} opinions and in his \textit{Friends of the Earth} dissent, of course, is not at all surprising in light of his well-documented and overtly negative view towards standing in citizen suits.\textsuperscript{253}

The rejection of Justice Scalia’s restrictive views on standing in citizen suits in \textit{Friends of the Earth}, however, preserves the vitality of citizen suits as a valuable enforcement tool under the federal environmental laws, for Congress has clearly deemed citizens suit provisions an important component of environmental protection, since virtually every pollution control statute contains a citizens suit provision.\textsuperscript{254} Without diligent state or federal enforcement and a clear showing that violations could not recur, after \textit{Friends of the Earth} those who refuse to or cannot comply with federal environmental statutes and regulations remain subject to enforcement actions brought by environmental groups acting as private attorneys general, even if violators achieve compliance after suits are initiated.\textsuperscript{255}

\textbf{C. Countervailing Cases: Gwaltney and Steel Company?}

One might assert that even with the \textit{Friends of the Earth} decision and its rejection of standing as defined in the \textit{Lujan} line of cases, the Rehnquist Court still had a negative impact on citizen suit enforcement as a result of its construction of the pollution control statutes. Those taking such a position could readily point to the Rehnquist

\textsuperscript{251} Id. § 9603.

\textsuperscript{252} Id. § 11004.

\textsuperscript{253} See, e.g., Antonin Scalia, \textit{The Doctrine of Standing as an Essential Element of the Separation of Powers}, 17 \textit{SUFFOLK U. L. REV.} 881, 881 (1983) (positing that courts must scrutinize more heavily the requirement that plaintiffs allege specific, not generalized, injuries).

\textsuperscript{254} See statutes cited supra note 224.

\textsuperscript{255} See Gene R. Nichol, Jr., \textit{Justice Scalia, Standing, and Public Law Litigation}, 42 \textit{DUKE L.J.} 1141, 1142 (1993) (critiquing Justice Scalia’s opinion in \textit{Lujan v. Defenders of Wildlife}, arguing that “[t]he decision is difficult to square with the language and history of Article III”).
Court decisions in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation* and *Steel Company v. Citizens for a Better Environment.*

Without dissent, Justice Marshall, writing for the Court in *Gwaltney of Smithfield,* found that the natural reading of the "to be in violation" language of the citizens suit provision of the CWA imposed a requirement that plaintiffs must allege "a state of either continuous or intermittent violation" in order to proceed. Thus, after the *Gwaltney of Smithfield* decision, CWA citizen suits were expressly limited to instances where violations were ongoing, and consequently, citizen suits were no longer an available remedy to enforce wholly past violations of the statute. After *Gwaltney of Smithfield,* if a violator of the CWA achieved compliance before the citizen suit was filed, then the prior violations are deemed wholly past violations and a citizen plaintiffs' suit is foreclosed.

Similarly, in the *Steel Company* decision, the Court faced the question of whether a citizen suit under the EPCRA could proceed to enforce wholly past violations arising from the failure to file certain required annual reports detailing the presence and release of specified hazardous chemicals. Writing for the Court, Justice Scalia found that the plaintiff failed to meet the redressability requirement of Article III standing because the alleged violations had been corrected prior to the filing of the suit. As a result, the declaratory judgment sought from the district court—that the defendant had indeed violated the EPCRA—was "not only worthless to the respondent,


240 *Gwaltney of Smithfield,* 484 U.S. at 57.

241 While pre-litigation compliance may foreclose a citizen suit from proceeding based on *Gwaltney of Smithfield,* the violator is still open to potential enforcement by the federal or state environmental regulatory authorities for wholly past violations. See id. at 58; see also 33 U.S.C. § 1319(a) (confering upon the EPA the authority to bring enforcement actions for wholly past violations).

242 42 U.S.C. §§ 11001-11050 (2000). Among its provisions, the EPCRA establishes a network of state, regional, and local agencies that serve as repositories of information concerning a wide range of facilities that store specified "toxic chemicals," and that can provide emergency response in the event of a release of toxic chemicals above certain threshold levels. See, e.g., 42 U.S.C. §§ 11001-11003, 11021-11023.

243 Under section 313 of the EPCRA, industries within certain SIC Codes are required to annually submit "Form Rs" that detail the manufacture, use, or processing of a wide range of "toxic" chemicals above designated threshold amounts. 42 U.S.C. § 11023.

244 *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 104-09 (1997).
it is seemingly worthless to all the world.  

Likewise, none of the other relief sought by the respondent provided any remedy targeted at any other alleged injury required for standing.

The difficulty with reliance on Gwaltney of Smithfield as a basis to claim that the Rehnquist Court was pro-business and adverse towards environmental groups is that the statutory language more than supports the Court's conclusion that citizen suits under the CWA are limited to remedy ongoing violations and not wholly past violations. Under the plain language of the statute, citizen suits under the CWA are authorized by Congress against those "alleged to be in violation" of the statute and not authorized against dischargers who were in violation. As pointed out in Gwaltney by Justice Marshall, the use of the phrase "to be in violation" means that Congress intended only to subject those who were currently in violation, and not those who previously may have committed violations, to enforcement under the express language of the citizen suit provision. This conclusion also is supported by the legislative history of the CWA where, in committee reports, Congress referred to the citizen suit provision as an abatement or injunctive measure. Thus, once compliance is achieved there is simply no longer any violation to abate or enjoin.

Therefore, with respect to Gwaltney of Smithfield, the proper contention is not that the Rehnquist Court's decision is anti-citizen suit and hence anti-environmental protection and pro-business, but that Congress decided not to authorize citizen suits under the CWA solely on the basis of wholly past violations. Under the express language of the statute, the citizen suit was set out as an alternative enforcement mechanism for ongoing violations that were not subject to diligent enforcement by federal or state environmental agencies. For reasons that are not entirely clear, Congress did not see fit to extend the

245 Id. at 106. Justices Stevens, Souter, and Ginsberg concurred in the judgment of the Court but would have avoided the constitutional question altogether by following Gwaltney of Smithfield to find that a citizen's suit under the EPCRA was unavailable as an enforcement mechanism for wholly past violations. See id. at 112–34 (Stevens, J., concurring in the judgment).

246 See id. at 109–10 (majority opinion) (delaying an answer to the EPCRA question in light of the constitutional limits placed upon the Court).


249 See id. at 61–62 ("[T]he legislative history of the Act provides additional support for our reading of § 505. Members of Congress frequently characterized the citizen suit provisions as 'abatement' provisions or as injunctive measures.").

250 As mentioned earlier, the Gwaltney of Smithfield decision does not entirely foreclose enforcement for wholly past violations. Federal and state enforcement remains a distinct possibility for wholly past violations. See supra note 241.
ability of citizens to sue for ongoing violations of the CWA to wholly past violations.

The *Steel Company* decision also is problematic as a basis to support an argument that it demonstrates the pro-business attitude of the Rehnquist Court over environmental interests. One must be mindful of the fact that the *Steel Company* case was decided by the Court several years before what is perhaps the most significant environmental citizens suit case decided by the Rehnquist Court, *Friends of the Earth*.\(^{251}\) In defending against the citizen suit in *Friends of the Earth*, the defendant also asserted that the reasoning in *Steel Company* precluded suit due to a lack of standing, but the Court rejected that position and refused to extend *Steel Company* to the situation where compliance is achieved only after suit is filed.\(^{252}\) If the Rehnquist Court were clearly pro-business and clearly biased against environmental interests, the Court should have been responsive to the opportunity in *Friends of the Earth* to apply its *Steel Company* holding to also foreclose citizen suits, even if compliance was achieved after initiation of litigation, but the Court did not do so. In fact, quite to the contrary, the Court used the *Friends of the Earth* decision to draw back from the near-impossible standing requirements plaintiffs in environmental citizen suits faced after the *Lujan* decisions.

**CONCLUSION**

At the outset of this Article, I asked whether the frequently asserted depiction of the Rehnquist Court as an anti-environment, pro-business Court was an accurate characterization. It is my conclusion that such assertions are not an accurate reflection of the Rehnquist Court's environmental jurisprudence.

My analysis of the significant pollution control cases decided during the era of William H. Rehnquist as the sixteenth Chief Justice of the United States Supreme Court finds little, if any, support for the proposition that the Rehnquist Court represented a period in the Court's history where it was overtly inhospitable towards environmental groups and clearly favored business interests over environmental protection efforts. The pollution control cases analyzed in

\(^{251}\) *See supra* Part IV.B.3 (discussing *Friends of the Earth*).

\(^{252}\) *See Friends of the Earth, Inc. v. Laidlaw Envl. Servs. (TOC)*, Inc., 528 U.S. 167, 188 ("In short, *Steel Co.* held that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations, but our decision in that case did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred.").
this Article demonstrate no such unmistakable bias in favor of business interests to the detriment of the pollution control statutes enacted by Congress, the associated implementing regulations adopted by the EPA, or the citizen suits brought by environmental groups to require compliance.

Surely, if the Rehnquist Court were an anti-environment and pro-business Court, we should see within the significant body of pollution control cases decided by the Court abundant evidence in the Court's decisions clearly reflecting this favoritism. If the claims concerning the anti-environmental, pro-business nature of the Rehnquist Court were indeed correct, then one would expect to find multiple cases where the Court reached decisions favorable to business interests and inapposite to the positions of both the EPA and environmentalists. The pollution control cases do not demonstrate any such stark bias. What the opinions do show, to the contrary, is a Court that on a number of instances accepted the litigation positions offered by the EPA or citizens and environmental groups in their labors to further environmental protection, and rejected arguments brought by business interests challenging key aspects of pollution control statutes.

As historians and scholars continue to contemplate the Rehnquist Court and its place in history, part of its overall legacy will no doubt include the renewed vigor federalism suddenly enjoyed during the Rehnquist era, after many decades of absence from the Court, with its attendant limitations on congressional power and recognition of the states as clearly distinct sovereigns. Rehnquist's legacy should not include, however, the view that he led an anti-environment and pro-business Court. There is simply little foundation for such assertions based upon the cases arising under the pollution control statutes during the close to twenty years that William H. Rehnquist served as the sixteenth Chief Justice of the Supreme Court.