Environmentalism and the Supreme Court: A Cultural Analysis

Jonathan Cannon

"[T]he views of nature held by any people determine all their institutions."

Ralph Waldo Emerson

Introduction .................................................................................................................. 364
A. Prior Studies ........................................................................................................ 365
B. Culture and Change ............................................................................................. 366
C. The Culture of Environmentalism ....................................................................... 367
   1. Interdependence: The Ecological Paradigm ................................................. 369
   2. Urgency Factor ................................................................................................. 370
   3. Ecocentrism .................................................................................................... 371
D. Dominant Culture ................................................................................................. 372
E. The Court ............................................................................................................. 376
F. The Interpretive Dialectic ..................................................................................... 377
G. Method ................................................................................................................ 378

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1. Ralph Waldo Emerson, English Traits, Representative Men, and Other Essays 24 (1908).
INTRODUCTION

This paper offers a cultural interpretation of the Supreme Court's decisions in environmental cases: it analyzes a number of the Court's major environmental decisions of the last three decades in light of beliefs and values commonly associated with "environmentalism." Other scholars have looked at the interplay of cultural perspectives in particular environmental cases or doctrinal areas, but this is the first attempt at a more comprehensive cultural analysis of the Court's decisions, covering multiple statutes and doctrinal areas. Of the studies of which I am aware, MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICA 2-3, 18-19 (1996), comes the closest to such an analysis. Greve asserts and celebrates the resurrection by the courts, primarily the Supreme Court, of "private, common-law orderings" as against environmentalists' claims. Although his focus is ultimately on legal policy, he identifies the broad implications of the environmentalists' ecological model for the legal order.
The paper views the Court's environmental decisions as depicting a dialectic between the dominant national culture, embodied in law subject to interpretation by the Court, and the claims of the environmental movement, as a distinct cultural perspective seeking institutional recognition. It concludes that the Court's interpretations have worked both to sanction environmentalism and to contain or even marginalize it. In some of its decisions, the Court has unanimously endorsed interpretations urged by environmentalists.4 In other cases, however, the Court has gone so far as to reject interpretations consistent with environmentalist beliefs and values in the face of clear legislative preference,5 and in still others, while purporting to adopt pro-environmentalist interpretations, it has qualified its interpretations with expressions of skepticism or concern.6 It has advanced cultural values, such as personal autonomy and mastery of nature, that while not diametrically opposed to environmentalism, are in significant tension with it. And it has shown particular resistance to environmentalist notions of regard or reverence for the non-human other, a resistance signaling the cultural strangeness of environmentalism compared to other recent social movements. This does not mean, as some have argued, that environmentalism is no longer a force for change within the law, but it does mean that the challenge for environmentalists seeking to transform the legal culture is much more complex and difficult than it may have seemed in the early enthusiasm of the movement.

A. Prior Studies

The analysis is offered against a backdrop of scholarly criticism of the Court's environmental decisions—largely from the pro-environment side. Commentators have accused the Court variously of being anti-environment;7 ignorant about what makes environmental cases special;8 and irrelevant to the development of environmental law.9 In a study of environmental cases decided by the Court from 1960 through 1988, Richard Levy and Robert Glicksman concluded that the decisions after

8. See Lazarus, supra note 7, at 743.
1976 "reflect a trend seemingly at odds with congressional policy, reaching pro-development results far more often than pro-environment results." Richard Lazarus reached a similar conclusion based on his review of one hundred environmental cases decided by the Court through 1998. Classifying the votes of the justices in these cases as in favor of or against an environmentally protective outcome (i.e., pro- or anti-environment), Lazarus found that "the Court as a whole is steadily becoming less responsive to environmental protection." This trend may be softening: in the seven years following Lazarus' study, the Court issued fourteen significant environmental decisions, divided roughly equally between pro- and anti-environment outcomes.

These previous studies offer illuminating insights. This paper builds on them in its attempt to step past the characterization of votes and decisions as pro- or anti-environment and to relate the Court's environmental decisions to environmentalism as a social movement that is opposed to the dominant culture in important ways. Although in many of the cases, as Lazarus observes, the environment provides little more than a factual setting, in a number of others discussed here the Court is clearly responding to environmentalist precepts and their implications for basic institutional orderings. These cases document the tension between environmentalist claims and legal-institutional arrangements that reflect a dominant set of beliefs and values.

B. Culture and Change

This paper draws on concepts from the fields of anthropology, sociology, and psychology for its interpretive enterprise. To the extent necessary for the analysis, I lay out the relevant ideas in the following sections.

Among American cultural anthropologists, culture is "essentially a matter of ideas and values, a collective cast of mind. The ideas and
values, the cosmology, morality, and aesthetics, are expressed in symbols, and so... culture could be described as a symbolic system."¹³ This definition suggests the centrality of interpretation. Social institutions and cultural practices are for "making, reproducing and contesting... communal meaning."¹⁴ In this formulation, law as an aspect of culture is both a product of society's meaning-making process and a venue for its continuation.

As legal scholar Anthony Amsterdam and psychologist Jerome Bruner observe, however, law is not merely an interpretive construct; it also has objective status because it is coercive.¹⁵ Amsterdam and Bruner posit a dialectical relationship between such institutions ("[t]he statutes and conventions and orthodoxies of a culture"), on the one hand, and what they term "noetic space" ("contrarian myths, dissenting fictions, and... the restless powers of the human imagination"), on the other.¹⁶ In their view, this "dialectical clash" has the capacity, at least in some circumstances, to produce a new institutionalized norm.¹⁷ I use this dialectical model to frame my account of the interplay between the established law culture and environmentalism, a still only partially institutionalized cultural perspective. The model anticipates not only that the Court's pronouncements may affect the realization of environmentalist beliefs and values but also that environmentalism may influence the authority-wielding, meaning-making practices of the Court in the creation of a new synthesis.

In the sections below I define in more detail the elements of this dialectic—environmentalism, the dominant culture, and the Court in its deliberative and interpretive roles.

C. The Culture of Environmentalism

The task here is to identify the basic set of tenets that characterize environmentalism, acknowledging from the outset that those calling themselves environmentalists hold divergent beliefs and values. In Environmental Values in American Culture, three anthropologists—Willett Kempton, James S. Boster, and Jennifer A. Hartley (collectively

16. Id. at 232.
17. Id. at 228 (describing role of the southern "honor code" in overcoming racism in southern culture).
“Kempton”)—distilled an interconnected set of values and beliefs identified with “American environmentalism.” These include beliefs that nature is a limited resource on which humans depend; that human-nature systems are interdependent, complex, and balanced; and that nature is to be valued for its own sake. In a separate study, sociologists Riley E. Dunlap and Kent D. Van Liere derived elements of an emerging “world view”—the “new environmental paradigm” (NEP). The major dimensions of their NEP—recognizing the “limits to growth,” preserving the “balance of nature,” and rejecting “the anthropocentric notion that nature exists solely for human use”—were very similar to Kempton’s findings. Recently Dunlap and Van Liere have added two additional elements to their NEP: rejection of human “exemptionalism” (that humans are not subject to natural constraints) and the potential for catastrophic environmental change or “ecocrisis.” The NEP strongly differentiates known environmentalists from the general public and is now the most widely used measure of environmental concern, although Dunlap has acknowledged that it “does not fully tap the richness of the construct [of environmentalism].”

In the discussion below I draw on the Kempton and Dunlap and Van Liere studies and other sources to elaborate aspects of environmentalism that have entered the Court’s deliberations. I group these into three broad categories: the interdependence model, the urgency factor, and

18. Willott Kempton, James S. Boster & Jennifer A. Hartley, Environmental Values in American Culture (1995). Kempton used “semistructured” interviews and form surveys of randomly selected “laypeople,” such as workers at sawmills and dry cleaners, and “specialists” whose work or interests relate to the environment, such as Sierra Club members. Id. at 2.


20. Riley E. Dunlap & Kent D. Van Liere, The New Environmental Paradigm, 9 J. Envtl. Educ. 10 (Summer 1978). The authors conducted surveys from two samples of Washington state residents in the summer of 1976. One group was based on names drawn from telephone directories across the state, and the other was based on names drawn from the mailing list of a statewide environmental organization. Id. at 11.


ecocentrism. These categories will serve as a useful framework when we turn to analyzing the cases.

1. Interdependence: The Ecological Paradigm

Environmentalists share a belief that humans and things in nature are closely interconnected and that human intervention affecting one part of a human-natural system can be expected to have deleterious effects elsewhere in the system. I will refer to this central tenet variously as the "interdependence" or "ecological" model. The interdependence model combines elements of environmentalist beliefs detected by Kempton et al. and Dunlap et al., including concepts of nature as limited and of humans as dependent upon it and also of nature as interdependent such that disturbances are likely to cause other "multiply linked chain reactions."23 Associated with these holistic views Kempton et al. also found beliefs that the "interdependencies are so complex that the interactions are impossible for humans to predict" and thus warrant a general "proscription against human interference with nature."24 The interdependence model might be confirmed or refuted in particular cases by persuasive evidence of harmful secondary effects or their absence. Without such evidence, it operates for environmentalists as a kind of presumption or default rule.

Prophets of modern environmentalism repeatedly voiced the idea of a highly interdependent human-natural system. John Muir said: "When we try to pick out anything by itself, we find it hitched to everything else in the universe."25 Aldo Leopold advanced the notion of a complexly interdependent "land organism" or "biotic community" which included humans as well as non-human nature.26 In Silent Spring, Rachel Carson described diverse harms to humans and wildlife from chemical poisons as "a problem of ecology, of interrelationships, of interdependence."27

The idea of interdependence occurs in images of popular discourse such as the "web of life" (interconnecting strands supporting the larger structure) and "spaceship earth" (earth as a single system with interlocking parts essential for survival of the whole). It has also made its way into public policy. It is evident, for example, in the "purpose"

23. Kempton, Boster & Hartley, supra note 18, at 40–43; Dunlap & Van Liere, Measuring Endorsement of the New Ecological Paradigm, supra note 21, at 432–33.
24. Kempton, Boster & Hartley, supra note 18, at 43.
25. JOHN MUIR, MY FIRST SUMMER IN THE SIERRA 157 (1911).
26. ALDO LEOPOLD, A SAND COUNTY ALMANAC: WITH ESSAYS ON CONSERVATION FROM ROUND RIVER 197, 262 (1966 ed.).
27. RACHEL CARSON, SILENT SPRING 189 (1961).
provisions of federal statutes such as the National Environmental Policy Act (NEPA),\textsuperscript{28} the Endangered Species Act,\textsuperscript{29} and the Clean Water Act.\textsuperscript{30}

Although the interdependence model embodies a belief about the way the world works, it is often associated with a collective responsibility to care for the environment. Aldo Leopold’s “land ethic” extends moral consideration to an expanded “community” that includes both humans and non-human nature.\textsuperscript{31} Leopold believed that this “extension of ethics” would take root as society came to understand its essential dependency on an increasingly beleaguered land organism.\textsuperscript{32} “All ethics . . . rest upon a single premise: that the individual is a member of a community of interdependent parts.”\textsuperscript{33} In his influential account of the environmental movement, Philip Shabecoff quoted this sentence from Leopold with the comment that “[a]lmost all else in environmentalism proceeds from that premise.”\textsuperscript{34}

2. Urgency Factor

A second element of environmentalism relevant to the analysis is the belief that the environment is in a serious state of decline. Kempton et al. do not separately identify this belief, but it is implicit in other elements of their environmentalism.\textsuperscript{35} Dunlap et al. make it explicit in their addition of “ecocrisis” to the NEP,\textsuperscript{36} and it is evident in numerous works in the environmentalist canon.\textsuperscript{37} This urgency factor may combine with the interdependence model, for which it can act as a kind of valence—

\begin{itemize}
\item \textsuperscript{28} 42 U.S.C. § 4331(a) (2006) (“recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment” and seeking to establish conditions “under which man and nature can exist in productive harmony”).
\item \textsuperscript{29} 16 U.S.C. § 1531(a)-(b) (2006) (“various species of fish, wildlife and plants . . . have been rendered extinct as a consequence of economic growth and development”; “purposes of this Act are to provide a means whereby the ecosystems upon which endangered species depend . . . may be conserved”).
\item \textsuperscript{30} 33 U.S.C. § 1251(a) (2006) (“to restore and maintain the chemical, physical and biological integrity of the Nation’s waters”).
\item \textsuperscript{31} LEOPOLD, supra note 26, at 239.
\item \textsuperscript{32} Id. at 217–19, 239–41.
\item \textsuperscript{33} Id. at 219.
\item \textsuperscript{34} PHILIP SHABECOFF, A FIERCE GREEN FIRE xv (2003).
\item \textsuperscript{35} Kempton, Boster & Hartley, supra note 18, at 43–45 (fragility of the environment as a function of “interdependencies and chain reactions”).
\item \textsuperscript{36} Dunlap & Van Liere, Measuring Endorsement of the New Ecological Paradigm, supra note 21, at 432–33. See also ROBERT C. PAEHlke, ENVIRONMENTALISM AND THE FUTURE OF PROGRESSIVE POLITICS 160 (1989).
\item \textsuperscript{37} E.g., CARSON, supra note 27; PAUL R. ERHLICH, THE POPULATION BOMB (1986); ISAAC ASIMOV & FREDERICK POHL, OUR ANGRY EARTH (1991); JAMES GUSTAVE SPETH, RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT (2004); EDWARD O. WILSON, THE FUTURE OF LIFE (2002).
\end{itemize}
spaceship earth with the rivets popping off. Or it may operate independently in areas where the interdependence model is of limited relevance, as in cases where environmental pollution poses direct health threats that do not depend on complex ecological relationships.

The urgency factor has left its mark on the law. In addition to the pesticide bans that followed Carson’s book, numerous other federal regulatory measures have been prompted, or at least publicly justified, by environmental crises, such as Cleveland’s Cuyahoga River catching on fire (Clean Water Act), seeping chemical wastes at Love Canal (Superfund), and the Exxon Valdez oil spill (Oil Pollution Act). Innovative or demanding provisions of these and other federal statutes are attributable to the perceived seriousness of the environmental problems they seek to remedy.

3. Ecocentrism

Another aspect of environmentalism that has entered the Court’s deliberations is the extension of moral standing or reverence to the environmental other. In their interviews, Kempton et al. found three types of environmental values—religious, including feelings of spirituality not identified to a particular religion; anthropocentric, “concerned with only those environmental changes that affect human welfare;” and ecocentric, “which grant nature itself intrinsic rights.”


40. Like the interdependence model, the urgency factor has an empirical dimension—what is the state of the environment or what is the level of risk to it?—and therefore is scientifically debatable. Recently in The Skeptical Environmentalist, statistician Bjorn Lomborg set out to prove that “[o]ur doomsday conceptions of the environment are not correct.” Bjorn Lomborg, The Skeptical Environmentalist: Measuring the Real State of the World xix (2001) (originally published in Danish in 1998). Lomborg’s book continues a tradition of publications refuting environmental “doomsayers.” See Jonathan H. Adler & Andrew P. Morriss, Introduction: The Virtues and Vices of Skeptical Environmentalism, 53 Case W. Res. L. Rev. 249 n.4 (2002) for a list of Lomborg’s predecessors. While Lomborg enjoys some support within the scientific and policy communities, he has also attracted vigorous criticism; from their responses to his book, it is clear at least that environmentalists have not abandoned their general belief that the world is facing serious risks that demand strong action. For articles critical of Lomborg, see Michael Grubb, Relying on Manna from Heaven?, 294 Science 1285 (2001); Stuart Pimm & Jeff Harvey, No Need to Worry about the Future, 414 Nature 149 (2001); John Rennie et al., Misleading Math about the Earth: Science Defends Itself Against the Skeptical Environmentalist, Sci. Am., Jan. 2, 2002, at 61; see also Speth, supra note 37, at 113–15.

41. Kempton, Boster & Hartley, supra note 18, at 87–88. The authors acknowledge that their “three categories of values overlap and encompass poorly defined subcategories.” Id. at 88.
Environmentalism includes anthropocentric elements that emphasize non-commodity and existence values of nature and protection of environmental resources for future generations—so-called "weak anthropocentrism." But, strong forms of environmentalism are closely identified with ecocentric values and religious or spiritual regard for nature for its own sake.

D. Dominant Culture

Dunlap and Van Liere explored the relationship between American society's "dominant social paradigm" (DSP) and environmental concern as measured in part by the NEP. The DSP is the collection of shared beliefs and values that form "the core of [the] society's cultural heritage." Although the DSP is not necessarily endorsed by society as a whole or even by a majority of society, it is held by dominant groups and perpetuated by prevailing institutions. Dunlap and Van Liere concluded generally that commitment to the DSP is "a major factor influencing environmental concern." They further concluded that four elements of the DSP in particular—support for private property rights, support for economic growth, faith in material abundance, and support for laissez faire government—had significant negative correlation with environmental concern. These elements of the DSP express values that cross-cultural studies have shown are particularly strong in the United States.
It will be useful for the analysis to situate the beliefs and values of the DSP and NEP within the more general scheme of cultural values developed by cultural psychologist Shalom Schwartz. Like other cultural theorists, Schwartz posits cultural values as shaping or orienting preferences, beliefs, and practices in social and political life. I have chosen to use Schwartz’s system from among several competing cultural value taxonomies because it seems particularly well-suited to detecting cultural cleavages affecting environmental concerns.

Schwartz identifies seven types of cultural values by which national cultures can be characterized and compared. These values can be arrayed along three dimensions. The first of these dimensions contrasts “autonomy values,” which emphasize the desirability of people expressing and pursuing their own interests, with “embeddedness values,” which emphasize group solidarity and individual restraint. The autonomy-embeddedness dimension is similar to the opposition between “individualism” and “collectivism” developed by other social theorists, and I use the terms interchangeably here. This dimension’s organizing
principle is the tension between pursuing values that tend to benefit the individual ("self-promotion") and those that tend to benefit the collective ("self-transcendence").

The second value dimension contrasts "mastery values," which emphasize getting ahead through "active self-assertion in order to master, direct, and change the natural and social environment to attain group or personal goals," and "harmony values," which include "a cultural emphasis on fitting harmoniously into the natural environment." Mastery values are positively related to autonomy values, but differ in that the interests asserted are not necessarily those of the individual but may be collective interests. Both autonomy and mastery values support technological advancement and manipulation of nature in pursuit of personal or group interests and are thus opposed to harmony values, which encourage unity with nature and caring for the environment. The tension between autonomy and mastery values, on the one hand, and harmony values on the other, is at the core of the analysis of the cases.

Schwartz' last value dimension contrasts "hierarchy values," which emphasize the legitimacy of unequal allocation of social roles and resources, and "egalitarian values," which emphasize equality and overcoming selfish interests in "voluntary commitment" to the welfare of others. Hierarchy values are linked to mastery values, because exploitive self-assertion, whether by individuals or groups, often generates unequal allocations of resources and power. Egalitarian and harmony values are compatible, both emphasizing cooperation. Although this dimension bears some similarities to the mastery/harmony pairing, it focuses specifically on the desirability of treating people as equals. Karl Dake and others have documented a correlation between egalitarian values and increased environmental concern, and I include the hierarchy/egalitarian opposition in the analysis, although its separate influence—distinct from the mastery-harmony tension to which it is
closely connected—is often difficult to trace in the Court’s environmental decisions.\textsuperscript{65}

Schwartz’s cultural value sets are formulated at a higher level of generality than the elements of the DSP and NEP. To the extent that they play a formative role in the development of social beliefs and practices, they can be understood as influencing the prevalence of these more specific elements. All four environmentally relevant elements of the DSP—support for private property rights, economic growth, material abundance, and laissez faire government—reflect mastery and related hierarchy values. In addition, at least two of these elements—property rights and laissez faire government—express autonomy values, particularly those that relate to personal advancement. The NEP embodies harmony and also, in a more qualified way, embeddedness values. Embeddedness values are opposed to autonomy values and may oppose the expression of mastery values as well, but only to the extent that this expression is inconsistent with the collective interest; under some circumstances, embeddedness values may support economic growth and material abundance, and thus they offer less certain support for environmentalist tenets.\textsuperscript{66} The NEP also reflects egalitarian values, to the extent that environmental manipulation by individuals or groups produces inequalities in roles, resources, and burdens within society.

Autonomy and mastery values and the related elements of the DSP are present in all highly developed, democratic societies, but they appear to be particularly salient in the United States. In a comparative study of the United States and Western Europe, Schwartz and a colleague found that both cultures share “an individualist view of the person as an autonomous, voluntary actor” but that U.S. individualism was distinct in its “relatively strong emphasis on [m]astery and [a]ffective [a]utonomy values and a weak emphasis on [h]armony values.”\textsuperscript{67} The authors speculate that the United States’ strong emphasis on mastery values and de-emphasis of harmony values stem from “[t]he frontier experience and the centrality of entrepreneurial businesses” and also from low population densities compared to Europe, providing “less intense experience of the ecological dangers of fragile interdependence.”\textsuperscript{68}

\begin{footnotesize}
\begin{enumerate}
\item The studies by Dake and others were carried out using a two-dimensional scheme developed by Wildavsky that did not include the mastery-harmony dimension in Schwartz’s scheme. It is therefore likely that the mastery-harmony dimension, which plays a central role in this Article’s analysis, is performing at least some of the work that would otherwise be done by the hierarchy-egalitarian dimension.
\item Schwartz & Ros, \textit{Values in the West}, supra note 53, at 111–12. In Schwartz, \textit{Mapping and Interpreting Cultural Differences}, supra note 53, at 63, Schwartz frames this individualistic aspect of American values as an “emphasis on affective autonomy and mastery at the expense of harmony.”
\item Schwartz & Ros, \textit{Values in the West}, supra note 53, at 114–15.
\end{enumerate}
\end{footnotesize}
Similarly, a cross-national study of individual values by Schwartz and Galit Sagie found that personal achievement is unusually important in the United States and other-regarding values are unusually unimportant, yielding "the pervasive self-centeredness that critics find in America."^{69}

While negatively correlated with environmental concern, the emphasis in the United States on mastery and autonomy values and associated elements of the DSP does not necessarily mean opposition to environmental measures. While receiving relatively less emphasis than autonomy and mastery values, harmony values are also available within the culture for expression. Moreover, they may be expressed in ways that minimize their opposition to other values. This leaves room for accommodation of environmental measures perceived as posing limited threat to society's dominant values, even without a transformation of the sort sought by environmentalists.^{70}

**E. The Court**

Of the major institutions of national government, the Court would seem most likely to reflect the beliefs and values of the dominant culture and therefore most resistant to the claims of a social movement like environmentalism. The Court is not elected and therefore not directly vulnerable to shifts in public beliefs or sentiments. Moreover, although it also interprets contemporary legislation, the Court's most prominent role is as interpreter of an eighteenth century text establishing the nation's foundational institutional arrangements—the Constitution. This text as it has been expounded by the Court fairly bristles with elements of the dominant paradigm that Dunlap and Van Liere concluded were inimical to environmentalism, including protection of private property rights, support for limited government, and freedom to pursue individual interests within a laissez faire system—all backed by a thoroughgoing anthropocentrism. Finally, lacking an electoral base, the Court maintains legitimacy by adherence to precedent and use of other traditional interpretative methods. These features suggest both a commitment to the pre-ecological dominant worldview and an inherent institutional conservatism that would make the Court particularly resistant to the changes environmentalists demand.

Nevertheless, the potential for reform is inherent in the Court's deliberation. Reform, as Paul Kahn has described it, "is an opening within law to developments outside of law, such that the world of law has

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^{70} Dunlap and Van Liere found that "many people endorse the DSP and support environmental protection efforts." Dunlap & Van Liere, *Commitment to the Dominant Social Paradigm*, supra note 45, at 1025. See infra, pages ***173-74***.
a self-regulating mechanism that stabilizes law in relation to wider patterns of belief and practice.\textsuperscript{71} There are notable examples of such reform by the Court on school desegregation, abortion rights, and, most recently, execution of juveniles.\textsuperscript{72} There are also notable examples of the Court’s resistance to reform.\textsuperscript{73} In either case, the Court’s rulings not only have practical effects but also generate social meanings: the Court as “moral symbol.”\textsuperscript{74}

None of this is to suggest that the Court’s response to environmentalist claims is monolithic—indeed it is richly diverse. Justices vary in their interpretation of the legal culture and in their willingness to consider changes in that culture to accommodate environmentalist claims. Thus, not only is there a tension between environmentalism and the canonical legal culture but there is also lively dispute among members of the Court on the extent to which the one resists the other. This conflict gives a core of the Court’s decisions in environmental cases a deep resonance, and this resonance ultimately may define what is most distinctive and meaningful about these cases.

F. The Interpretive Dialectic

With these additional insights, we can frame the interpretive dialectic in environmental cases more concretely. As depicted in Figure 1, the beliefs and values prevalent in the dominant culture and the beliefs and values identified with environmentalism influence the Court’s interpretive practice from opposing directions. The Court weighs these competing cultural claims in its deliberations and interprets and applies them in its decisions.

The dialectic framework I propose incorporates the beliefs and values that appear most relevant to the Court’s environmental cases. However, it is not meant to explain everything in those cases. Cultural beliefs and values affect the Court’s interpretations, but so do other factors, including the justices’ characters and personal interests. The claim is only that this model has some explanatory power and is useful in unlocking the cultural significance of the Supreme Court’s work.

\textsuperscript{74} KAHN, supra note 71, at 136.
Figure 1

Autonomy (Individualism)

Mastery

Hierarchy

Egalitarianism

Harmony

Ecocentrism

Interdependence (land community)

Environmental urgency

Statutory interpretation

CAA

CWA

ESA

RCRA, etc.

Free exercise

Property rights

Judicial access

Federalism

Limited government (laissez faire)

Property rights

Economic growth

Material abundance


G. Method

The method of this paper is descriptive and interpretive, although it does rely on quantitative evaluations by others. It is also positive, not normative. Although interpretation is always colored by one's own perspectives, this paper seeks as much as possible to understand and articulate what is going on in the cases rather than to diagnose judicial faults or suggest improvements; if there is a lesson, it is for environmentalists, not for the Court. As in standard legal accounts, the analysis attends to holdings and doctrinal framings, but in the effort to elicit the cultural meanings of these cases, it also attends closely to rhetoric, particularly the expressive dimensions that seem to evoke meanings beyond the cases' doctrinal necessities. This approach includes attention to tone or emotional coloration as an element of meaning.

The cases discussed in this paper are selected from a group of over 250 environmental cases decided between 1970 and the present. Although any line of demarcation is ultimately arbitrary, the analysis generally uses 1970—the year of the first Earth Day—as the year in which environmentalist beliefs and values might begin to impinge on the Court's deliberations.

THE ANALYSIS

The analysis covers both constitutional and statutory interpretation cases. Constitutional cases affecting environmental interests are concentrated in a few doctrinal areas—judicial access/separation of powers, federalism, and takings; the statutory cases extend across dozens of federal statutes. One might expect that members of the Court would be more likely to address environmentalist tenets in the constitutional cases, which involve foundational questions of often obvious cultural significance. But the justices have also dealt with environmentalist beliefs and values in statutory cases, particularly where there are broad institutional implications. In demarcating the cultural cleavages in the Court's interpretations, the analysis focuses on cases in which there are substantial disagreements among members of the Court on the relevance or soundness of environmentalist tenets or on their compatibility with existing doctrine. The following analysis is organized according to the three broad categories that comprise environmentalism mentioned above: interdependence, environmental urgency, and ecocentrism.

75. This group includes the 241 environmental cases identified by Lazarus, supra note 7, at 773 (App. A), current through 1999, as well as a supplemental set of twenty-eight environmental cases decided through June 2005.

I. INTERDEPENDENCE

The interdependence model has potentially sweeping implications for law. As compared to a model in which effects are assumed to be discrete or contained within a narrow physical or temporal sphere, the interdependence model projects damage on a broader scale. It is more likely to assume secondary effects or externalities from environmental disturbances, even though they may be difficult to predict or measure. This has direct implications for areas of constitutional concern, as well as for statutory interpretation. Members of the Court who favor limited judicial access, federalism, and property rights have resisted the ecological model, advancing instead more limited notions of environmental causation and harm. Members of the Court with contrary views on these issues have tended to embrace the model.

A. Access to the Courts

Federal law offers environmentalists two broad judicial avenues for challenging actions that may damage the environment. Environmental groups as well as regulated parties may seek judicial review of federal agency actions under the Administrative Procedure Act.\(^77\) Under the citizen suit provisions contained in most federal environmental statutes, "any person" may also bring an action to compel a federal official to perform a mandatory duty or to enforce the statute against a violator.\(^78\) Citizen suits were among the real institutional innovations of environmental legislation and were included to ensure that the executive branch would scrupulously implement and enforce the legislation as Congress intended.\(^79\)

For some members of the Court, however, ready access to the courts by environmental groups and other beneficiaries of regulatory legislation contravenes the limited role of the judiciary under Article III of the Constitution and may also threaten the primary role of the executive branch in executing the law under Article II. These justices have worked to narrow standing as a way of limiting access to the courts for those purporting to represent the "public interest." Other members of the Court, seeing a more active judicial role in vindicating legislative policies, support a broader standing doctrine.


With this tension providing the central dynamic, the Court's standing doctrine and its environmental jurisprudence have evolved together. Many if not most of the Court's important standing decisions over the past thirty years have come in environmental cases, several of them in citizen suits. One of the defining issues in these environmental standing cases has been the nature of the "injury" necessary to meet the "case or controversy" requirement for the exercise of the federal judicial power under Article III, and the interdependence model has influenced the Court's deliberations on this issue.

In 1973, in the first flush of the environmental movement, the Court rendered a liberal version of standing in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP I).* In that case, five law students sought review of the refusal by the Interstate Commerce Commission (ICC) to suspend a nationwide railroad freight rate surcharge, alleging that the surcharge would discourage shipment of recyclable goods. The members of SCRAP alleged that they "used the forests, streams, mountains and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities." More (but not too much more) specifically, they alleged that not using recyclable goods would cause "unnecessary destruction of timber and extraction of raw materials, and the accumulation of otherwise recyclable solid and liquid waste materials"—all to the detriment of the students' enjoyment of the forests and streams. The Court held that the students had alleged injury-in-fact sufficient to give them standing.

Notwithstanding the relatively modest scope of the challenged action, a general 2.5 percent surcharge on freight rates, the Court was ready to assume pervasive environmental impacts. The challenged action, it said, was "applicable to substantially all of the Nation's railroads, and thus allegedly [had] an adverse environmental impact on all the natural resources of the country," allowing "all who breathe [the nation's] air" to claim injury. The Court acknowledged an "attenuated line of causation"

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82. See id. at 678.
83. Id. at 685.
84. Id. at 676.
85. See id. at 686–90. The Administrative Procedure Act § 10(a), 5 U.S.C. § 702 provides judicial review for "a person . . . adversely affected or aggrieved by agency action."
86. *SCRAP I*, 412 U.S. at 687.
between the ICC's action and the "eventual injury" alleged, but its ruling accepted the plausibility of a highly interconnected system in which not only do increased freight rates cause reduced recycling but also adverse impacts of reduced recycling on natural resources ripple throughout the system to all corners of the nation. It would be hard to imagine a version of environmental injury and causation more encompassing.

This was not, however, a world view shared by dissenting Justices White, Burger, and Rehnquist, who found the "alleged injuries [to be] so remote, speculative, and insubstantial in fact that they fail to confer standing." In a 1983 article in the Suffolk University Law Review, then U.S. Circuit Court Judge Antonin Scalia also criticized SCRAP I and argued that the constitutional requirement of a concrete, particularized injury-in-fact functions as a limitation on Congress' power to grant standing to beneficiaries of "a general program (such as environmental protection) which will enhance the welfare of many individuals." The role of the courts, he maintained, was "protecting individuals and minorities against impositions of the majority," i.e., against requirements and prohibitions imposed by government, not enforcing such impositions at the behest of citizens. He concluded with the following, now famous remark: "Does what I have said mean that, so long as no minority interests are affected, 'important legislative purposes ... [can be] lost or misdirected in the vast hallways of the federal bureaucracy?' Of course it does—and a good thing, too." By this, Michael Herz argues, Scalia did not mean that "less regulation is better but [rather that] underenforcement by the executive branch will reflect changing circumstances." But the anti-regulatory implication of Scalia's one-way ratchet remains: the executive may not overenforce with impunity.

Scalia's 1983 article prefigured Lujan v. Defenders of Wildlife, decided almost a decade later, and his successful efforts to infuse the Court's standing doctrine with the autonomy and mastery values that animate his understanding of the doctrine's function. In his opinion for the Court in Defenders, concluding that environmental plaintiffs lacked standing, Justice Scalia articulated a vigorous commitment to limited

87. Id. at 688.
88. See Farber, Geographic Nexus, supra note 2, at 1250.
89. SCRAP I, 412 U.S. at 723 (White, J., dissenting).
91. Id. at 894.
92. Id. at 897.
judicial access for beneficiaries of environmental legislation and a corresponding skepticism of claims of universal injury of the sort credited in \textit{SCRAP I}. The plaintiffs sought to enjoin a rule issued by the Secretary of Interior limiting protections of the federal Endangered Species Act (ESA) to actions taken in the United States or on the high seas.\textsuperscript{95} The Secretary's contested rule reversed a prior interpretation that ESA obligations extend to actions by federal officials supporting development projects in foreign countries.\textsuperscript{96} Plaintiffs brought their action under the citizen suit provision of the ESA, which authorizes suits by "any person" against the "United States and any other governmental instrumentality or agency...who is alleged to be in violation" of the statute.\textsuperscript{97}

The Court held that injury-in-fact meant injury that is "concrete and particularized" and "actual or imminent," not "conjectural" or "hypothetical."\textsuperscript{98} The Court rejected the proposition, relied upon by the court below, that plaintiffs had standing by virtue of the citizen suit provision authorizing suit by "any person" to enforce the ESA.\textsuperscript{99} Echoing his Suffolk University Law Review article, Justice Scalia wrote that a "generally available grievance about government" does not meet the injury-in-fact requirement.\textsuperscript{100} Plaintiffs' allegations that they had visited habitats of endangered species in foreign countries affected by U.S.-supported development and intended some day to visit these habitats again were not sufficient to establish injury that was "actual or imminent."\textsuperscript{101}

Scalia's opinion roundly dismissed efforts by plaintiffs to establish injury-in-fact through an "ecosystem nexus," an "animal nexus," or "vocational nexus." The "inelegantly styled 'ecosystem nexus'...proposes that any person who uses \textit{any part} of a 'contiguous ecosystem' adversely affected by the funded activity has standing even if the activity is located a great distance away."\textsuperscript{102} Although not rejecting outright the notion that ecosystem effects could produce injury remote from the activity, Scalia asserted that the "ecosystem nexus" cannot avail

\begin{itemize}
\item \textsuperscript{95} See 504 U.S. at 557. The Secretary of Interior issued the rule jointly with the Secretary of Commerce. \textit{Id.} at 558.
\item \textsuperscript{96} See 504 U.S. at 558–59.
\item \textsuperscript{97} 16 U.S.C. § 1540(g)(1)(A) (2006).
\item \textsuperscript{98} Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (quotations and citations omitted).
\item \textsuperscript{99} \textit{Id.} at 571–73.
\item \textsuperscript{100} \textit{Id.} at 573.
\item \textsuperscript{101} \textit{Id.} at 564.
\end{itemize}
persons "who use portions of an ecosystem not perceptibly affected by the unlawful action in question."\textsuperscript{103}

Lamenting also the inartful styling of the "animal nexus" and the "vocational nexus," Scalia demolished these theories as well. He described them, respectively, as the notion that "anyone who has an interest in studying or seeing the endangered animals anywhere in the globe has standing" and that "anyone with a professional interest in such animals can sue."\textsuperscript{104} One might argue that actions threatening the continued existence of an endangered species, even actions that are geographically distant, have the potential to "injure" humans interested in the species.\textsuperscript{105} But Scalia did not allow room for such an argument, declaring that "[t]his is beyond all reason."\textsuperscript{106} For those observing or working with animals, Scalia imagined, injury may come from harm to particular animals in a particular locale. "It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection."\textsuperscript{107}

The refusal of the Court in \textit{Defenders} to credit systemic mechanisms of injury is in sharp contrast to \textit{SCRAP I}. One might try to reconcile these cases on the basis that \textit{SCRAP I} was decided at the pleading stage, on a motion to dismiss,\textsuperscript{108} whereas \textit{Defenders} was decided on a motion for summary judgment, in which plaintiffs were required to make a factual showing of harm sufficient to create a genuine issue for trial.\textsuperscript{109} But, at bottom, these cases project very different images of the world. In \textit{SCRAP I} effects of human actions reverberate broadly with potentially serious consequences throughout the human-natural world. However, in the world evoked by Justice Scalia in \textit{Defenders}, effects of actions are presumed to be discrete, limited to particular locales and indeed individual creatures. Justice Scalia's rhetorically heightened castigation of the various "nexus" theories seemed intended to marginalize, if not reject entirely, injury arguments based on the genetic commons or on ecosystem effects and the interdependence model that those arguments assume.

Other justices were more receptive to the plaintiffs' theories. In an opinion concurring in part and concurring in the result, Justice Kennedy joined by Justice Souter observed that "in different circumstances a nexus

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\item \textsuperscript{103} Lujan v. Defenders of Wildlife, 504 U.S. 555, 566 (1992).
\item \textsuperscript{104} Id. at 566.
\item \textsuperscript{105} See id. at 594 (Blackmun, J., dissenting).
\item \textsuperscript{106} Id. at 566.
\item \textsuperscript{107} Id. at 567.
\item \textsuperscript{108} \textit{SCRAP I}, 412 U.S. 669, 680–81 (1973).
\item \textsuperscript{109} Lujan v. Defenders of Wildlife, 504 U.S. 555, 566, 591 (1992).
\end{itemize}
theory . . . might support a claim of standing."110 In dissent, Justice Blackmun joined by Justice O'Connor urged the viability of plaintiffs' nexus theories. Drawing on the ecological model, he observed that "[m]any environmental injuries ... cause harm distant from the area immediately affected by the challenged action," such as disturbances affecting "animals traveling over vast geographical ranges."111 Also, eradication of an endangered species could cause harm to those with a "vocational or professional" interest in the species located far away.112

Blackmun accused the Court of applying "rigid principles of geographic formalism [that would not be applied] anywhere outside the context of environmental claims."113 From Justice Scalia's point of view, rigid principles of geographic formalism were precisely what were necessary to protect limited judicial access and associated mastery and autonomy values against the threat posed by the fuzzy globalism of the nexus theories.

After Defenders, Justice Scalia authored two other opinions for the Court in environmental standing cases, creating a string of setbacks for environmentalists. In one of them, Bennett v. Spear, the Court upheld the standing of plaintiffs, ranch operators and irrigation districts adversely affected economically by endangered species protections, in a citizen suit under the ESA.114 This case was a foil for Defenders, offering an image of the regulation-burdened "minority" interests that, in Scalia's view, were the proper subject of judicial attention. The interests in the case were involved in managing land and water resources for economic gain, exemplifying the close connection between autonomy and mastery values in the ownership and use of property that we will encounter again in our discussion of property rights.115

This run of Scalia-authored standing decisions was broken by Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.116 Since the decision in Defenders, Justices Ginsburg and Breyer had

110. Id. at 579 (Kennedy, J., concurring).
111. Id. at 594 (Blackmun, J., dissenting).
112. Id. Justice Stevens concurred on the merits, concluding as a matter of law that section 7 does not have extra-territorial application. He argued, however, like Justices Blackmun and O'Connor, that plaintiffs had established injury-in-fact, even though plaintiffs had no firm plans to return to their ecosystems abroad, because it could reasonably be concluded that they would return. But even if they did not have an intent to return, they might be injured by changes in the aesthetics or ecology of the project areas by virtue of an interest in those areas that is analogous to a family relationship. Id. at 584 n.2.
113. Id. at 595.
115. In the other standing decision that Scalia authored during this period, Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), the Court held that environmental plaintiffs in a citizens suit under the Emergency Planning and Community Right to Know Act had failed to meet the redressability requirement for standing.
joined the Court. Ginsburg wrote the opinion for the Court in *Laidlaw* upholding the standing of environmental plaintiffs in a citizen suit under the Clean Water Act (CWA).\textsuperscript{117} The plaintiffs had alleged—and the district court found—that discharges from Laidlaw’s wastewater treatment plant into the Tyger River in South Carolina violated the limitations in Laidlaw’s discharge permit.\textsuperscript{118} Plaintiffs living near the facility stated that, although they would like to, they no longer engaged in recreation in or near the Tyger River because of the effects of Laidlaw’s discharges, and that Laidlaw’s violations diminished the value of their property.\textsuperscript{119} Laidlaw contended there was no injury-in-fact, because the district court had found “no demonstrated proof of harm to the environment” from its permit violations.\textsuperscript{120}

On the premise that “the relevant showing for purposes of Article III standing... is not injury to the environment but injury to the plaintiff,” the Court concluded that plaintiffs had established injury-in-fact.\textsuperscript{121} Even in the absence of demonstrated environmental harm, plaintiffs’ concerns were creditable. “[W]e see nothing ‘improbable’ about the proposition that a company’s continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms.”\textsuperscript{122}

Limited to a discrete segment of the Tyger River near Laidlaw’s plant, *Laidlaw* was by no means a reprise of *SCRAPJ*, but it did revive in some limited measure the ecological model that animated that decision. In this, the Court’s injury-in-fact inquiry showed some deference to the statutory context provided by the CWA.\textsuperscript{123} The purpose of the Act is to protect and restore the “chemical, physical and biological integrity of the Nation’s waters;” permit limitations are imposed to secure that purpose; and dischargers are strictly liable for violations of those limitations without a separate showing of environmental harm.\textsuperscript{124} This structure lends itself to a presumption that permit violations will impair “the integrity of the nation’s waters.” The Court in *Laidlaw* gave plaintiffs the benefit of this presumption: to require actual proof of injury to the environment, the Court said, would be “to raise the standing hurdle

\textsuperscript{117} See id. at 180–94.
\textsuperscript{118} See id. at 173–76.
\textsuperscript{119} See id. at 181–82.
\textsuperscript{120} Id. at 181 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 956 F. Supp. 588, 602 (D.S.C. 1997)).
\textsuperscript{121} Id. at 181.
\textsuperscript{122} Id. at 184.
higher than the necessary showing for success on the merits in an action alleging noncompliance with [a discharge] permit."{125

The Court's model of the connections between dischargers, harm to the aquatic environment, and injury to plaintiffs' economic, recreational, and aesthetic interests was modest enough to draw the support of Chief Justice Rehnquist, who had joined with Justices Scalia, Thomas, and White (now no longer on the Court) in rejecting the nexus theories in *Defenders*. It drew a vigorous objection from Justice Scalia, however, joined by Justice Thomas in dissent. Refusing to concede the linkages that would support an inference of adverse riverine impacts from illegal wastewater discharges, Scalia concluded that plaintiffs claims are merely "subjective apprehensions"{126 and that the Court's holding "makes the injury-in-fact requirement a sham."{127 In Justice Scalia's universe, human disturbances are not presumed to cause detrimental effects on natural systems, even at a local scale, in the absence of specific evidence of those effects.

Justice Scalia's 1983 article and his opinion for the Court in *Bennett v. Spear* (granting ranch operators leave to contest imposition of endangered species protections) emphasize autonomy values and also reveal the close connection between those values and self-advancement through technological manipulation of earth's resources (mastery values). His opinions in *Defenders* and *Laidlaw* emphasize mastery values and related hierarchy values. Both cases involve resource exploitation not by individuals but by hierarchies (government agencies in *Defenders*, a corporation in *Laidlaw)*. Egalitarians would oppose the imposition of involuntary burdens on individuals, such as the neighbors of Laidlaw's plant on the Tyger River, by such hierarchical structures. In making room for self-assertion through appropriation of natural resources (whether for individual or group interests), however, Scalia necessarily resists the egalitarian appeal of the plaintiffs in these cases. Elsewhere, though, he embraces the rhetoric of egalitarianism where it is consistent with exploitative self-assertion.{128

**B. Federalism**

The Court has also resisted the implications of the ecological paradigm in its federalism cases. Federalism is typically understood to concern the relationship between the federal government, as a

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126. *Id.* at 199-200 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983)).
127. *Id.* at 201.
128. *See infra* text accompanying notes 226-32 & 260-63 (discussing *Lucas* and *Sweet Home*, respectively).
government of enumerated powers, and the states, as sovereign entities retaining powers not allocated to the central government. The analysis in this section concludes, however, that recent federalism doctrine is also about—perhaps mostly about—the relationship between the individual and the collective and further demonstrates the significant role that autonomy values as well as mastery values have played in the Court's reluctance to embrace ideas of interdependence.

1. **Affirmative Commerce Clause**

   Since its 1992 decision in *New York v. United States*, the Court has been "rewriting federalism doctrine," giving new definition to the concept of a federal government of limited powers. This project has included reinvigoration of state sovereign immunity under the Eleventh Amendment, expansion of Tenth Amendment anti-commandeering doctrine, and limitation of the Commerce Clause as the basis of federal regulatory controls. This last development is of particular importance to environmental law, since the federal environmental regulatory statutes are primarily based on the commerce power.

   Competing views of nature and its relationship to human activity are manifest in this new generation of environmental Commerce Clause cases. The ecological model, with its expansive notions of causation and injury, is associated with generous interpretations of federal regulatory power. More atomistic world views, in which human-nature interactions are projected as individualized or locally discrete, support more limited interpretations of that power, in deference to state and local authorities.

   In its only major decision directly addressing the constitutionality of an environmental statute as within the commerce power, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, the Court upheld the statute. But that was before the Court announced a new era in Commerce Clause jurisprudence with its decisions in *United States v. Lopez*, striking down the Gun-Free School Zones Act of 1990.

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133. The Court also addressed Commerce Clause issues in *Hodel's companion case, Hodel v. Indiana*, 452 U.S. 314 (1981), but its treatment of those issues in the second case was relatively limited.
(GFSZA), and *United States v. Morrison*, invalidating the Violence Against Women Act (VAWA). Since then numerous Commerce Clause challenges to environmental statutes have advanced in the lower courts, and in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, discussed in detail below, the Court invoked Commerce Clause concerns in its restrictive interpretation of a Clean Water Act (CWA) provision.

In *Hodel*, the Court upheld the Surface Mining Control and Reclamation Act (SMCRA) against constitutional attack on several fronts, including a claim that it exceeded the Commerce Power. The mining interest plaintiffs challenged the Act’s provisions for interim federal standards governing surface mining operations. They argued that SMCRA regulates land use, and because land use is a local activity not affecting interstate commerce, it is not within the Commerce Power. The Court responded that “[t]he denomination of an activity as a ‘local’ or ‘intrastate’ activity does not resolve the question.” A “local” activity that produces goods shipped in interstate commerce may be regulated under the Commerce Clause if the “activity of producing these goods itself affects interstate commerce;” Congress may also regulate local activity to prevent destructive interstate competition among states, i.e., a race to the bottom, or interstate environmental spillovers, e.g., air and water pollution. The Court found no “remaining foundation” for plaintiffs’ arguments based on characterization of SMCRA as land use regulation. In its dismissal of the local as a determinative factor in Commerce Clause regulation, *Hodel* has been characterized as embracing “a web or ecosystem model” for commerce. Although *Hodel* has not been repudiated by the Court, its model no longer reflects the thinking of the majority of the justices in affirmative Commerce Clause cases, as *Lopez*, *Morrison*, and *SWANCC* make clear.

*Lopez* was decided in 1995, and *Morrison* followed five years later. In both cases the Court described the Commerce Clause as authorizing federal regulation of three things: “the use of the channels of interstate

138. See id. at 273.
139. See id. at 280–81.
140. Id. at 281.
141. Id.
142. Id. at 281–82.
143. Id. at 282–83.
commerce;" the "instrumentalities of interstate commerce, or persons or things in interstate commerce;" and "activities that substantially affect interstate commerce." The Court invalidated the statutes in both cases as falling outside any of these categories, paying particular attention to the third. Both statutes criminalized behavior that was intrastate and non-commercial in nature—possession of a firearm in the vicinity of a school in *Lopez* and violence against women in *Morrison*. The Court in both cases observed that the Commerce Clause supports federal regulation of intrastate activity as substantially affecting interstate commerce only if the activity is economic or commercial. *Morrison* made clear, if it was not already clear from *Lopez*, that in determining substantial effects on commerce the Court would not, as a general matter at least, aggregate impacts of non-economic activity. This limitation was to allow the Court to maintain the distinction between "what is truly national and truly local" against arguments based on attenuated causal relationships. *Morrison* also suggested, contrary to *Hodel*, that "areas of traditional state regulation" provided a touchstone in affirmative Commerce Clause cases. Both *Lopez* and *Morrison* were decided by 5-4 votes, with Souter, Ginsburg, Stevens, and Breyer dissenting. For environmental issues, this narrowing of the purview of potential regulation had the effect of advancing both autonomy and mastery values at the expense of harmony and collectivist values that might be served by such regulation.

*SWANNC* followed shortly after *Morrison*. Although it was not a constitutional ruling, the Court's interpretation of the Clean Water Act in that case was heavily influenced by its recent Commerce Clause holdings. To understand what the Court was about in *SWANNC*, some attention is due its predecessor, *United States v. Riverside Bayview Homes, Inc.* Like *SWANNC*, *Riverside Bayview* addressed the scope of the CWA's key jurisdictional term, "navigable waters." Discharges of fill material and other pollutants into "navigable waters" are subject to federal permitting requirements; discharges into anything other than "navigable waters" are not. The Act defines "navigable waters" as "waters of the

146. *Lopez*, 514 U.S. at 559–60; *Morrison*, 529 U.S. at 610–11.
147. See *Morrison*, 529 U.S. at 612–13, 617–18. See Schroeder, *Environmental Law, Congress and the Court's New Federalism Doctrine, supra* note 130, at 416 (articulating the rationale for aggregating the effects of individual action to support regulation) (quoting *Wickard v. Filburn*, 317 U.S. 111 (1942)).
United States, including the territorial seas.”152 At issue in Riverside Bayview was the regulatory jurisdiction of the Army Corps of Engineers over wetlands “adjacent to” open waters.153 In a unanimous ruling, the Court agreed with the Corps that wetlands could qualify as “waters” and upheld the assertion by the Corps of jurisdiction over adjacent wetlands as a reasonable interpretation of an ambiguous statute.154

The Riverside Bayview Court rested its rationale on the stated purpose of the Act: to protect and restore the “integrity” of the nation’s waters.155 In the Court’s view “[t]his objective incorporated a broad, systemic view of the goal of maintaining and improving water quality.”156 Although the wetlands at issue were physically adjacent to a stream that was navigable in the traditional sense of that term, they were not flooded or permeated by waters of that stream.157 The Court nevertheless observed that the wetlands were connected to the stream through the “hydrological cycle” and further that wetlands performed valuable ecosystem services such as water filtration, flood prevention, and “biological functions.”158 Deferring to the “ecological judgment” of the Corps embedded in the regulatory definition, the Court concluded that “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.”159

While taking its cue from Congress, the Court in Riverside Bayview enthusiastically embraced a view of “waters” as highly interconnected aquatic systems, in which various components functioned together to provide natural services including cleansing water and providing habitat.160 Congress’ intent to protect these systems extended to their individual components, such as wetlands, even in the absence of an obvious connection, such as flooding, to traditional navigable waters.161 The Court concluded that “navigable” in the Act’s jurisdictional grant was of “limited import” given the broad statutory goals and the statutory definition of “navigable waters” as simply “waters of the United States.”162

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153. 474 U.S. at 131.
154. See id. at 139.
155. Id. at 132.
156. Id.
157. See id. at 134.
158. Id.
159. Id. at 133–34.
160. Id. at 133–35.
161. Id. at 129–30.
162. Id. at 133.
The Court in *Riverside Bayview* reserved for a future day the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to open bodies of water."163 Given the robust notion of interdependence that grounded the Court's unanimous decision in *Riverside Bayview*, it would not have been unreasonable to expect that these "isolated waters" would also be ruled as properly within the compass of the Act. But by the time that issue came before the Court in *SWANCC*, the Court had acquired six new justices164 and, in *Lopez* and *Morrison*, had declared a new interest in preserving traditional state and local prerogatives.

The specific concern of the Court in *SWANCC* was the Corps’ Migratory Bird Rule.165 The Corps had adopted this interpretive rule to clarify the portion of its regulatory definition of "waters of the United States" that extends jurisdiction to non-adjacent intrastate waters or "isolated waters," the degradation or destruction of which "could affect interstate or foreign commerce."166 The Migratory Bird Rule covered isolated waters "which are or would be used as habitat by birds protected by Migratory Bird Treaties; or . . . used as habitat by other migratory birds which cross state lines."167 In *SWANCC*, the Corps invoked the rule to claim jurisdiction over the filling of isolated waters on a site proposed for construction of a solid waste disposal facility by a consortium of twenty-three suburban Chicago municipalities.168 Although the site received all necessary local and state permits, the Corps denied the fill permit under the CWA.169

In an opinion by Chief Justice Rehnquist, joined by Justices Kennedy, Scalia, O’Connor, and Thomas, the Court held that the Migratory Bird Rule exceeded the Corps’ authority under the statute.170 While mentioning the Act’s integrity goal, which had been the heart of the decision in *Riverside Bayview*, it emphasized the statute’s recognition of the "the primary responsibilities and rights of the States" in achieving that goal.171 The Court acknowledged its statement in *Riverside Bayview* that "navigable" was of "limited import," but argued that that did not

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163. *Id.* at 131 n.8.
164. The six new justices were Scalia, Kennedy, Thomas, Souter, Ginsburg, and Breyer. Rehnquist, O’Connor, and Stevens were common to both cases.
166. 33 C.F.R. § 328.3(a)(3) (1999); see also Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs, 531 U.S. 159, 164 (2001).
168. 531 U.S. at 162–65.
169. See *id.* at 165.
170. See *id.* at 166–67, 174.
171. *Id.* at 166–67.
mean that "navigable" was of no import at all.172 "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."173 The Court concluded:

We thus decline respondents' invitation to take what they see as the next ineluctable step after Riverside Bayview Homes: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds.174

The Court believed section 404(a) "to be clear."175 But even if it were not clear, the Court declined to give deference to the Corps' regulatory interpretation.176 Extension of CWA jurisdiction would pose significant questions under the Commerce Clause, both because it would extend federal regulation to an intrastate activity that was not plainly of a commercial nature and because it "would result in a significant impingement of the States' traditional and primary power over land and water use."177 Finding no clear indication of congressional intent to force these questions, the Court interpreted the statute to avoid them.

The Court's interpretation of section 404 was marked by a near total absence of discussion of the possible ecosystemic consequences of filling the lakes and ponds north of Chicago. The Court briefly explained the contrary result in Riverside Bayview as based on "the significant nexus" in that case between the adjacent wetlands and "navigable waters."178 But it did not explore the possible nexus between the isolated waters in this case and other "waters of the United States" or the "aquatic ecosystem," as expansively portrayed in Riverside Bayview. The Court appeared simply to assume that isolated waters were just that: "isolated" physically and biologically from "navigable waters" or "waters of the United States." It was as if by consigning these waters to the states' "traditional and primary power over land and water use"179 the Court disposed of the

172. Id. at 172.
173. Id. at 172.
174. Id. at 171-72.
175. Id. at 172. Section 404(a) reads:

Discharge into navigable waters at specified disposal sites. The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

177. Id. at 173-74.
178. Id. at 167.
179. Id. at 174.
possibility that their disturbance would have significant extra-local effects warranting federal regulation.

Development of the Cook County site expresses mastery values at the expense of harmony values that would be served by allowing the site to remain undisturbed as habitat. Thus, the Court’s rejection of the interdependence model might be read as an effort to assure the dominance of mastery values, and for some in the majority such an interpretation would be appropriate. But we know, from Justice Rehnquist’s stance in dormant Commerce Clause cases, discussed below, that he would also have been comfortable in supporting a state or local government’s decision not to convert open space to waste sites or other intensive uses. Therefore, it may be a fairer interpretation of Rehnquist’s opinion in this case that his resistance to an expansive interdependence model stemmed from its use to justify the imposition of a judgment about relative values by a distant source rather than by the jurisdiction most immediately affected.

In his dissent, joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens evoked the lost world of Riverside Bayview and placed isolated wetlands within it. In Riverside Bayview, he argued, there were two types of connection that justified regulation—a hydrological connection (surface run-off from the wetland into the adjacent stream) and an “ecological connection.”180 “Both types of connection are also present in many, and possibly most, ‘isolated waters.’”181 Stevens’ dissent emphasized the second, more comprehensive type of connection:

As we recognized in Riverside Bayview, the interests served by the statute embrace the protection of ‘significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites’ for various species of aquatic wildlife. For wetlands and ‘isolated’ inland lakes, that interest is equally powerful regardless of the proximity of the swamp or the water to a navigable stream.182 In Stevens’ ecological worldview, the extensive connections between these waters and the larger system made them “anything but isolated.”183

Because he concluded that the statute extends to isolated waters, Stevens completed the Commerce Clause analysis that the Court only essayed preliminarily. The intrastate activity regulated in this case, development of a solid waste disposal site, was economic (a question on which the Court expressed doubt but left unresolved).184 Justice Stevens found that, in the aggregate, the filling of isolated waters serving as

180. Id. at 176 n.2 (Stevens, J., dissenting).
181. Id. (citing an amicus curiae brief).
182. Id. at 181–82 (citations omitted).
183. Id. at 176 n.2.
184. Id. at 173.
migratory bird habitat would harm migratory bird populations, substantially affecting the interstate commerce generated by birdwatchers and hunters of these birds. As a response to interstate spillovers or "externalities" in the form of impacts on interstate bird populations, Stevens argued, the Migratory Bird Rule did not violate the distinction between "what is truly national and what is truly local" but rather honored it. This version of federalism is animated by the interdependence model and associated harmony values.

2. Dormant Commerce Clause

The Court's environmental dormant Commerce Clause cases offer an interesting comparison to their counterparts under the affirmative Commerce Clause. They emphasize the concept of economic interdependence, as distinct from the more expansive ecological model of interconnectedness within and between natural and human systems. The comparison suggests that much more is at work in the Court's environmental federalism cases than adjudicating the respective powers of separate sovereigns.

Although the Commerce Clause contains only an affirmative grant of power to Congress, the Court has read into it a prohibition on state regulations that threaten "economic protectionism." Under the dormant Commerce Clause, the Court in recent years has closely scrutinized state environmental laws that discriminate against interstate commerce. The scrutiny has not gone well for the states: "[w]ith only one exception, the Court has invalidated every state law protecting water or land resources that it has considered [under the dormant Commerce Clause] between

185. See id. at 194–95.

186. Id. at 195 (quoting United States v. Morrison, 529 U.S. 598, 617 (2000)). PUD No. 1 v. Washington Dep't of Ecology, 511 U.S. 700 (1994), offers an interesting comparison to SWANCC, which it preceded by several years. PUD No. 1 also upheld state prerogatives against assertion of federal interests, although here Stevens, Souter, and Ginsburg were in the majority (Breyer had not yet joined the Court) and Thomas and Scalia were alone in dissent. The issue was the permissible breadth of state water quality certifications required by section 401(d) of the CWA as a condition of federally licensed projects discharging into navigable waters. Id. at 710–11. The State of Washington's water quality certification for a federally licensed hydroelectric facility on the Dosewallips River set a minimum stream flow to protect fish. Id. at 703. Plant proponents sought to overturn the certification as in excess of the state's authority, arguing among other things that the CWA concerned only water quality, not quantity. Id. at 719. The majority opinion cited the broad ecosystemic purposes of the CWA in support of its holding that the state requirements were within the scope of section 401(d). Id. at 719–20. Justices Scalia and Thomas complained that the Court's broad reading of section 401(d)) would give the states virtually limitless veto authority over federally licensed energy projects, allowing "parochial environmental interests" to overpower the "Nation's power needs." Id. at 735–36.

1978 and the end of the twentieth century. The laws invalidated have included state limitations on withdrawal of groundwater for sale in other states, state laws prohibiting importation of solid waste into the state, or imposing differential fees on disposal of out-of-state solid wastes, and a local ordinance requiring deposit of all solid waste at a town-run facility. As the Court explained in Philadelphia v. New Jersey, these decisions have been based on the "principle that our economic unit is the Nation, [with the] corollary that the states are not separable economic units." Conceptualizing natural resources and wastes as commodities in trade, the Court has viewed even modest state-imposed burdens on the flow of these commodities from other states as risking "isolation" or "economic Balkanization." While one can dispute whether the dormant commerce clause has support in the text of the Constitution, the Court's doctrine does capture the commitment to economic expansion and material prosperity shaped by the emerging nation's strong embrace of mastery values.

These decisions have attracted broad majorities of the Court. Alone among the justices, Chief Justice Rehnquist consistently voted to uphold the state laws in these cases, never joined in dissent by more than two of his colleagues. In his view, these laws were primarily about protection of human health and the environment rather than about commodities in trade and thus were legitimate exercises of states' regulatory authority over resources within their jurisdiction. In his dissent in Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources, he observed that the national economic system, operating unrestrainedly,

195. Id. at 623-24.
would distribute the health and environmental risks associated with solid waste disposal to states where landfill space is cheapest and saw "no reason in the Commerce Clause ... that requires cheap-land states to become the waste repositories for their brethren." In a sense, Chief Justice Rehnquist's posture in these cases was simply an extension of the localism that has characterized his views in the affirmative Commerce Clause cases, in particular SWANCC, here directed against the hegemony of national markets rather than against centralized regulation. In this context his localism produced "pro-environment" rather than "anti-environment" votes.

The Court's decisions under the two aspects of the Commerce Clause indicate seemingly contrary trends—reducing federal regulatory power under the affirmative Commerce Clause (based on a restrictive notion of what substantially affects interstate commerce) and limiting state regulatory authority under the dormant Commerce Clause (based on an expansive notion of state discrimination against interstate commerce). Underlying this phenomenon is the Court's reluctance to extend the idea of interdependence beyond the limits of "commerce" narrowly defined. In the dormant Commerce Clause cases, the Court has embraced a robust notion of interdependence within the national "economic unit" and worked zealously to protect national markets from disturbance by states. In the affirmative Commerce Clause cases, the Court has resisted recognition of interconnections between economic and non-economic systems, including natural systems as in SWANCC, for fear that such recognition would prevent it from maintaining a preferred or "traditional" allocation of power between state and federal governments. This cabined view of interdependence—along with a certain latitude as to what gets counted as within the economic system—has allowed the Court both to shrink the affirmative commerce power and expand the reach of the dormant Commerce Clause.

The results in the dormant Commerce Clause cases have played to both sides of the Court—to justices with autonomy leanings, like Scalia, by limiting the ability of local and state governments to restrict private economic interests; to others, with collectivist leanings, by ensuring a national economy unimpeded by parochial interests. Only Rehnquist seemed committed to a federalist structure as a good in itself.

200. Id. at 373.
201. See Klein, The Environmental Commerce Clause, supra note 188, at 53–59 (arguing that an ambiguous line between natural resource and market commodity has helped the Court to have it both ways in its Commerce Clause cases, with the effect of hampering environmental regulation at all levels of government).
3. **Federal Lands**

The ecological paradigm has also played a role in cases involving the extent of Congress’ power to regulate within the federal domain, where such regulation may be to the detriment of state or state-sanctioned private interests. In these cases, as in other contexts, the interdependence model has typically been invoked to support an expanded scope of injuries or harms warranting regulation.\(^{202}\) Probably the most compelling example is *United States v. New Mexico*,\(^{203}\) which was, like *SWANCC*, a statutory interpretation case with strong federalism overtones. This case was decided under the implied-reservation-of-water doctrine, which supposes that “Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, impliedly authorized him to reserve [unappropriated water rights] ‘to the extent needed to accomplish the purpose of the reservation’.\(^{204}\) Over New Mexico’s objection, the United States claimed reserved water rights for the Gila National Forest that included recreational, wildlife protection, and stock watering uses.\(^{205}\) The question was whether the purposes for which the forest was established in 1899 supported reservation of water rights for these uses.\(^{206}\)

In an opinion by Justice Rehnquist, joined by Chief Justice Burger and Justices Stevens, Blackmun, and Stewart, the Court held that they did not.\(^{207}\) The Court read the Organic Administration Act of 1897 and its predecessors as establishing two purposes for the national forests—"[t]o conserve the water flows, and to furnish a continuous supply of timber for the people.’ National forests were not to be reserved for aesthetic, environmental, recreational or wildlife-preservation purposes."\(^{208}\) The Court reached the same conclusion for stock watering.\(^{209}\)

A dissenting opinion by Justice Powell, joined by Justices White, Brennan, and Marshall, agreed that water is not appropriately reserved

\(^{202}\) See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (upholding the Wild Free-roaming Horses and Burros Act against New Mexico’s objections based on congressional findings that “the regulated animals [were] ‘an integral part of the natural system of the public lands’ . . . , and . . . that their management was necessary ‘for achievement of an ecological balance on the public lands.”’ *Id. at 535*); *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (upholding federal limitations on state-sanctioned groundwater irrigation in order to maintain the water level of a pool in Devil’s Hole National Monument, the only remaining habitat of the desert pupfish, with the observation that the “[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle.”) (internal quotations omitted)).


\(^{204}\) *Id. at 699–700*.

\(^{205}\) See *id. at 697–98*.

\(^{206}\) See *id. at 698*.

\(^{207}\) *Id. at 697–98*.

\(^{208}\) *Id. at 707–08* (citations omitted).

\(^{209}\) See *id. at 715–17*. 
for recreational and stock watering purposes but disagreed that forest protection was limited to water supply and timber production.

I do not agree . . . that the forests which Congress intended to 'improve and protect' are the still, silent, lifeless places envisioned by the Court. In my view, the forests consist of the birds, animals, and fish—the wildlife—that inhabit them, as well as the trees, flowers, shrubs and grasses. I therefore would hold that the United States is entitled to so much water as is necessary to sustain the wildlife of the forests, as well as the plants.  

This understanding, Powell argued, "is confirmed by the modern view of the forest as an interdependent, dynamic community of plants and animals." Given this interdependence, he found it "doubtful whether the timber and watershed that the Court prizes so highly could flourish without a complement of wildlife." The dissent stands as among the most eloquent renderings of the ecological world view by a Supreme Court justice. It was written by a justice who, in Lazarus' quantitative ranking, stands with Justices Scalia and Thomas as among the justices with the lowest "environmental protection" scores over the last three decades and who has demonstrated strong allegiance to economic interests and limited government. Yet in New Mexico, as Lazarus comments, Powell sounds "more like Aldo Leopold than a former industry counsel." It's as if, entering the forest, Powell activated a different set of values than those he reserved for everyday use in the world of economic striving, reflecting a kind of compartmentalized solution to the conflict between competing values: the case stirred Powell's inner environmentalist. Lazarus has speculated that the justice was motivated here by his experiences as a life-long hunter; in any event, Powell's dissent serves as a vivid reminder of the role of the idiosyncratic in judicial decisionmaking.

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210. Id. at 719 (Powell, J., dissenting).

211. Id. at 723 n.4 (citing SPURR, FOREST ECOLOGY (1964) and other scientific publications).

212. Id.


214. Lazarus, supra note 7, at 732. Lazarus speculates that in New Mexico Justice Powell was speaking from his experience as a life-long hunter rather than as former counsel to industries with environmental regulatory problems.
In the last several decades, ecologically based regulation has burgeoned at the state and local levels as well as at the federal level. Modern state and local land use controls seek to protect against cumulative systemic effects—such as flooding, erosion, deforestation, traffic congestion, and other effects of development—that are understood to flow from myriad actions of individual landowners. In advocating for these laws, environmentalists have not only stressed the complex interrelations of human-nature systems but have also argued that being part of the “land community” imposes an obligation protect it. Their opponents predictably have questioned the degree of interconnectedness assumed by the environmentalists' model and also resisted the model's ethical extension to support constraints on the choices of private landowners. Private property implicates autonomy and mastery values as well as the competing harmony values, and we will see all of these values at play in the Court's response to the interdependence model in its property cases.

The Court has addressed the implications of the interdependence model for land use regulation in cases interpreting the Fifth Amendment's prohibition against taking of private property for public use without compensation. In several Fifth Amendment cases decided before the blossoming of the environmental movement, the Court had “suggested that ‘harmful or noxious’ uses of property may be proscribed by government regulation without the requirement of compensation.” The ecological paradigm, with its pronounced tendency to find injury at the human-nature interface, promised to substantially expand the universe of “harmful or noxious” uses. In the late 1980s and early 1990s, with a Court whose membership had recently become more conservative showing renewed interest in takings doctrine, one question was how the Court would deal with those precedents, and with the definition of property rights more generally, in the new environmental era.
The Court addressed that question in *Lucas v. South Carolina Coastal Council*,221 which has been variously characterized as a breakthrough victory for the property rights movement and as "anticlimactic."222 In that case, in an opinion by Justice Scalia joined by Chief Justice Rehnquist and Justices White, O'Connor, and Thomas, with Justice Kennedy concurring in the judgment, the Court articulated a per se takings rule applicable "where regulation denies all economically beneficial or productive use of land."223

In *Lucas*, South Carolina's Beachfront Management Act was applied to prohibit the construction of "occupiable improvements" on two beachfront lots owned by Lucas.224 The South Carolina General Assembly based the Act on findings that the coastal "beach/dune system" provided important ecosystem services such as protection against storms and habitat for coastal flora and fauna and that beachfront development threatened the stability of this system.225 These findings were not contested by the property owner, and the Court's analysis assumed that, apart from its failure to provide compensation, the legislation to protect the beach/dune system was a valid exercise of the state's police power.

In advancing its per se rule, the Court was concerned that land use regulations like those adopted under the Beachfront Management Act would require "land to be left substantially in its natural state."226 Noting the "practical equivalence" of legislation pursuing conservation objectives through exercise of eminent domain, the Court observed that these regulations "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."227 The South Carolina Coastal Council argued that restrictions necessary to protect against the harms identified in the legislation functioned as an "implied limitation" on Lucas' title, but the Court rejected that argument as "inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."228

The Court defined an exception to its per se rule based on "background principles" of state property law and nuisance. It reasoned that because property uses in violation of these background principles

224. *Id.* at 1009.
225. *See id.* at 1022 n.10.
226. *Id.* at 1018.
227. *Id.* at 1018-19.
228. *Id.* at 1028.
were "always unlawful," they were never part of the owner's title. They could adopt use prohibitions implementing the background principles without paying compensation; they would be "taking nothing." The Court remanded the case to the state courts to determine whether common-law principles would have prevented construction on Lucas' land.

By framing the exception to its per se takings rule in common law nuisance terms, the Court effectively distinguished between land use controls based on an ecological paradigm, such as under the South Carolina statute, and environmental regulation of a more traditional kind. Common law nuisance had long addressed environmental insults involving direct harms, including various forms of pollution. Indeed, modern pollution control statutes are readily understood as elaborations of common law principles that evolved in response to industrial development. By the dawn of the modern environmental era, however, there had been a significant shift from common law to legislation. The emerging ecological model and the stewardship values associated with it found expression in statutes like the South Carolina act rather than in further evolution of the common law, which courts had come increasingly to view as fixed.

The Court in Lucas did acknowledge the common law's potential to evolve "through changed circumstances or new knowledge." But its emphasis was on the limited nature of its exception, requiring specific identification by the state court of the "background principles... that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found." Although there was some speculation after Lucas that state and local environmental controls adopted prior to a current owner's acquisition of property could provide a newly operative set of "background principles," the Court later appeared to reject that possibility in Palazzolo v. Rhode Island.

The Court's posture in Lucas was different than in Lujan or SWANCC. Rather than discounting the interconnectedness of the

229. *Id.* at 1030. The background principles are provided by state law of private nuisance, by state power to abate public nuisances, and other principles, including decisions that absolve parties of responsibility when responding to fire or other grave threats. *Id.* at 1029 & n.16.

230. *Id.* at 1030-32.


233. *Id.*


235. 533 U.S. 606 (2001). While not ruling out entirely that legislative enactments could render a change in "background principles," the Court observed that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title." *Id.* at 629-630.
“beach/dune system,” the Court granted, as Lucas himself did, that South Carolina’s findings of systemic harms were plausible and formed a proper basis for regulation. Where the Court drew the line, however, was at the notion that the fragile beach/dune system imposed limitations on the property owner’s prerogatives not requiring compensation. Thus, Lucas rejected the ethical extension of the interdependence model: that owners of property that is part of a natural system or “land community” have an obligation to avoid activities that may adversely affect the larger community. The Court’s message to states and localities was: if you choose to exercise your authorities in accord with the ecological paradigm, beyond the scope of traditional nuisance-type actions, and if the result is that property is to be kept in its natural state, it is your obligation to compensate, not the owner’s to forebear. In this sense, the decision was not, strictly speaking, libertarian, although the Court certainly could have expected that it would dampen the appetite of states and localities for regulation to protect ecological services provided by land, and thus it would advance autonomy as well as mastery values.

In his opinion concurring in the result, Justice Kennedy maintained that the common law of nuisance was “too narrow a confine for the exercise of regulatory power in a complex and interdependent society.” Speaking ecologically, he observed that “[c]oastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.” Justice Stevens, in dissent, argued similarly against the nuisance exception as “too rigid and too narrow” and as “effectively freez[ing] the State’s common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property.” “The human condition is one of constant learning and evolution—both moral and practical. . . . New appreciation of the significance of endangered species; the importance of wetlands; and the vulnerability of coastal lands shapes our evolving understandings of property rights.”

Stevens’ dissent is thus a more robust version of Kennedy’s point: that changing ecological awareness and ethical sensitivities can and should, through the intermediary of the legislature, condition what property owners may expect to do with their land. This translates into political and legal terms Aldo Leopold’s “land ethic as a product of social evolution.”

237. Id.
238. Id. at 1063, 1068–69 (Stevens, J., dissenting).
239. Id. at 1069–70 (citations omitted).
240. LEOPOLD, supra note 26, at 263.
In an influential article on *Lucas* written from the environmentalist perspective, Joseph Sax describes “two fundamentally different views of property rights... land in the ‘transformative economy’ and land in the ‘economy of nature.’” Land in the “transformative economy” works off “an image of property as a discrete entity that can be made one’s own by working it and transforming it into a human artifact”—an image expressive of both autonomy and mastery values. The demarcation between public and private land is clear, and private landowners “have no obligations.” Land in the economy of nature, by contrast, is not “a passive entity waiting to be transformed by its landowner.” Nor is land thought of as “distinct tracts” but as consisting of systems defined by their function, not by man-made boundaries. It is property fit to the interdependence model. “The line between public and private is blurred,” and landowners have a “custodial, affirmative protective role for ecological functions.” The staunchly “transformative view” advanced in *Lucas*, Sax argues, “represents the Court’s rejection of pleas to engrat the values of the economy of nature onto traditional notions of the rights of land ownership. Justice Scalia assumes that redefinition of property rights to accommodate ecosystem demands is not possible.” One might quibble with this assumption: not wise or not wanted perhaps, but not impossible. Both Kennedy’s concurrence and Stevens’ dissent offered suggestions for how the engratting could be done.

*Lucas* has a limited reach, as it affects only properties whose economic value has been wholly destroyed. It has been further limited by recent rulings that it does not apply to temporary moratoria on land development to accommodate the planning process and also that the determination of whether all value has been extinguished must be based on the value of the parcel as a whole rather than only the portion on which development is prohibited. But there are few if any more illuminating artifacts of the Supreme Court’s environmental culture wars than the battle in *Lucas* between Justice Scalia’s “constitutional culture” of property rights and the Leopoldian land ethic.

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242. *Id.*
243. *Id.* at 1445.
244. *Id.* at 1442.
245. *Id.* at 1445.
246. *Id.* at 1446.
247. Sax goes on in his article to propose a version of property law that would “accommodate ecological needs without impairing the necessary functions of the transformational economy.” *Id.* at 1446. His views have been criticized as belonging to the Romantic period of takings scholarship. Albert Gidari, *The Economy of Nature, Private Property and the Endangered Species Act*, 6 FORDHAM ENVTL. L. J. 661 (1995).
Babbitt v. Sweet Home Chapter of Communities for a Great Oregon\textsuperscript{250} was not a takings case, but it emitted strong property rights vibrations in response to the assertion of the ecological paradigm under the federal Endangered Species Act (ESA). Decided three years after Lucas, with Ginsburg and Breyer having joined the Court in the interim, \textit{Sweet Home} was in some ways a replay of \textit{Lucas}, only this time in the guise of interpretation of a statutory term (coincidentally "take"), rather than a Fifth Amendment takings case, and with the core of the majority in \textit{Lucas}—Scalia, Thomas, and Rehnquist—now in the minority.

Section 9 of the ESA prohibits the "take" of an endangered species.\textsuperscript{251} "Take" is defined in the statute as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."\textsuperscript{252} The Department of Interior (DOI) had defined "harm" to include "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."\textsuperscript{253} Whereas DOI applied other components of the "take" definition to protect individuals of the species from being directly injured, the purpose of this regulation was to protect endangered species from indirect harm through alteration of the ecosystems on which they depend.\textsuperscript{254}

The opinion for the Court, authored by Stevens and joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer, upheld DOI's regulation.\textsuperscript{255} The Court found support in the dictionary definition of "harm," which encompassed indirect as well as direct injury, and in one of the Act's central purposes: "to provide a means by which the ecosystems on which endangered species and threatened species depend may be conserved."\textsuperscript{256} Accordingly it upheld DOI's regulation protecting endangered species from adverse effects of habitat modification or degradation.

Justice O'Connor conditioned her concurrence on her understanding of the rule as limiting "harm" to habitat alteration causing "actual" (not hypothetical) death or injury to "identifiable protected animals" (not the

\begin{itemize}
  \item \textsuperscript{250} 515 U.S. 687 (1995).
  \item \textsuperscript{251} 16 U.S.C. \textsuperscript{252} § 1538(a)(1)(B) (2006).
  \item \textsuperscript{252} Id. § 1532(19).
  \item \textsuperscript{253} 50 C.F.R. § 17.3 (2006).
  \item \textsuperscript{254} See id.
  \item \textsuperscript{255} Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 708 (1995).
  \item \textsuperscript{256} 515 U.S. at 697–02 (quoting 16 U.S.C. § 1531(b) (2006)). The Court's analysis also relied on section 10(a)(1)(B) of the Act, which authorizes DOI to permit certain actions that "take" endangered species "if such taking if incidental to, and not the purpose of" the action. \textit{Id.} at 700. The Court reasoned that if "take" contemplated only direct harm to endangered species, the provision for incidental take permits would be of no use. \textit{Id.} at 700–01.
\end{itemize}
species generally) and as applying principles of "proximate causation." Proximate causation, O'Connor explained, was to protect against the unfairness of "imposing liability for remote consequences"—in this case, effects on endangered species through extended ecosystemic causal chains.

Justice Scalia's dissenting opinion, joined by Chief Justice Rehnquist and Justice Thomas, opened with a rhetorical flourish that might have been written for a Fifth Amendment takings case.

The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use. This was, for Scalia, the specter of the Beachfront Management Act in Lucas revisited: application of the ecological model to require preservation of land in its natural state, complete with the image of the "simplest farmer" to dramatize the burden. Here the issue before the Court is whether a federal statute supports such an imposition—a "conscript[ion] to national zoological use"—not whether compensation is due. But the concern is the same, the restriction of individual landowners to provide a broad public benefit. The rhetoric masterfully conveys Scalia's commitment to the "transformative economy," in Sax's phrase. Privately owned endangered species habitat is not defined by its ecological functions within a "land community;" it is property subject to the private will of its owner now converted to "zoological use" at the government's whim.

Scalia's objections to the rule were that, contrary to the statute, it does not require "an act" directed against endangered species (merely an "omission will do"), does not require that habitat modifications that cause death or injury to wildlife be foreseeable ("no more than the cause-in-fact" is sufficient), and encompasses injury to "populations of the protected species" ("not only upon individual animals"). He contended that none of these objectionable features is supported by section 9's anti-take provision. Arguing that "take" in section 9 controls the meaning of its subordinate terms, including "harm," he traced the meaning of "take" in wildlife law back to an eighteenth century treatise to conclude that the

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257. Id. at 709 (O'Connor, J., concurring).
258. Id. at 709, 712.
259. See id. at 713.
260. Id. at 714 (Scalia, J., dissenting).
261. Sax, supra note 2, at 1442; see also supra text accompanying note 241.
263. Id. at 715.
264. Id. at 716.
term is limited to affirmative actions done directly and intentionally to individual animals.\textsuperscript{265}

Evident here, as in other cases in which Scalia has confronted the ecological model, were concerns about the attribution of injury or harm through complex and not fully predictable or even fully definable mechanisms of ecosystem interactions. In \textit{Lujan}, the concerns were focused on expanded judicial access based on the nexus theories; here they were focused on the "large number of routine activities" on private land that could be brought within section 9's prohibition under the rubric of habitat modification or degradation, "no matter how remote the chain of causation and no matter how difficult to foresee (or to disprove) the 'injury' may be."\textsuperscript{266}

The majority's reliance on the Act's purpose of ecosystem protection, Scalia argued, begged the question "by what means (and hence to what \textit{length}) Congress pursued that purpose."\textsuperscript{267} He uncovered his own answer to that question in section 5 of the ESA, which authorizes expenditure of federal funds for the purchase of land for habitat protection.\textsuperscript{268} Congress did act to protect habitat for endangered species; however, its means for achieving that purpose were not regulatory, imposing uncompensated burdens on landowners, but through compensated acquisition of lands for the "national zoological park."\textsuperscript{269} The result for Scalia was very similar to \textit{Lucas}: the legislature may legislate based on the ecosystem paradigm, but the legislation is not read to alter pre-existing (i.e., pre-ecological era) expectations concerning what owners may do with their land. Where lands are appropriated for "zoological use" the expectation remains that compensation—either by statute or under the Fifth Amendment—will be provided.

\textbf{D. Conclusions, Part I}

The analysis suggests distinct patterns among recent and current justices with significant tenures on the Court. Justices Scalia and Thomas, and to lesser extent Chief Justice Rehnquist have largely rejected an ecological world view or sought to limit its implications for institutional arrangements between branches of government, between state and federal governments, and between governments and individual property owners. They have advanced legal constructs rooted largely in the pre-ecological era, such as nuisance, navigability, and the states' traditional power over land and water use, and have used these constructs to counter

\begin{thebibliography}{9}
\item \textsuperscript{265} \textit{Id.} at 717.
\item \textsuperscript{266} \textit{Id.} at 721.
\item \textsuperscript{267} \textit{Id.} at 726.
\item \textsuperscript{268} \textit{See id.} at 714.
\item \textsuperscript{269} \textit{Id.} at 714–15.
\end{thebibliography}
expansive notions of causation and injury associated with the interdependence model as well as its normative overtones. Their alternative model is atomistic; it emphasizes the boundaries, distances, and distinctions among components of human-natural systems. It is a world of discrete events, with largely individual or local significance (*Defenders, SWANCC*), and enforced property boundaries and jurisdictional lines (*Lucas, dissent in Sweet Home*). It provides a setting consistent with the emphasis of these justices on individual decisionmaking (autonomy values) and economic use and development of land and other natural resources (mastery values), as well as their acceptance of the unequal allocation of resources and burdens (hierarchy values) that assertive use of resources may produce.

Justices Stevens, Souter, Ginsburg, and Breyer have more consistently embraced the ecological model. They have identified the model with new scientific knowledge and societal norms and have criticized the traditionalist constructs deployed by their colleagues to limit the model's expression, arguing that these constructs inhibit the evolutionary process of the law. Their model emphasizes connections among components of human-natural systems across space and time. It projects a world in which individual actions or local events are likely to have broader systemic effects (e.g., *Riverside, FOE*), and in which property boundaries and jurisdictional lines are permeable and conditional (e.g., dissents in *Lucas* and *SWANCC*). It is closely associated with the emphasis of these justices on subordination of individual interests to the collective good (embeddedness or collectivism values), living harmoniously with nature (harmony values) and protecting against unequal burdens imposed by nature-disturbing activities (egalitarian values). In character with their larger roles on the Court, Justices O'Connor and Kennedy have occupied a middle ground, with Kennedy being somewhat more favorably disposed to the environmentalist world view.

All these justices, with the exception of Chief Justice Rehnquist, have subscribed in varying degrees to the preeminence of an unfettered national economy over recognition of state environmental regulatory authority in the dormant commerce clause cases. This stance is consistent with the anti-regulatory stance typically attributed to conservative members of the Court. On the part of the liberal justices, we may see in it a welfarism that is linked to both mastery and collectivism values and that may in other contexts offer resistance to environmentalist claims, as we explore in Part II.
II. URGENCY FACTOR

Urgency, the sense that environmental problems pose threats requiring a strong collective response, has been environmentalism's motive force. This sense animated Congress' enactment of the federal environmental laws of the 1970s and '80s, which restructured institutional arrangements to address a range of perceived environmental crises. This urgency-driven restructuring included shifting decision authority from one institution to another believed to be more responsive to environmental concerns or more competent to address them, for example, from states to federal authorities. It also included raising the priority given to environmental concerns in governmental decisionmaking, for example, by flatly prohibiting environmentally damaging actions or by limiting consideration of costs or technological feasibility in setting environmental standards. This Part analyzes Court decisions that address both these elements of the congressional response to environmental crisis.

In the earliest days of the movement, it appeared that the Court also might internalize environmentalists' sense of urgency. In a decision that predated the first Earth Day, the Court extended the criminal prohibitions of the Rivers and Harbors Act to industrial polluters, citing the water pollution "crisis" as a background condition of its interpretation.270 In Citizens to Preserve Overton Park, Inc. v. Volpe, decided in 1971, the Court expanded judicial scrutiny of informal agency decisions in securing adherence to congressional policy that the Court interpreted as giving "paramount importance" to protecting parkland against "accelerating destruction."271 "The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes."272 "Few green havens"—the Court's words, not Congress'—gave rhetorical support to the Court's contention that Congress intended park preservation to be accorded the highest priority and signaled the Court's subjective alignment with the policy.

The Court's early affirmations of the urgent need for protective measures, combined with a willingness to craft institutional relationships to express that need, gave encouragement to environmentalists seeking a sea change in the legal culture commensurate with the dangers they perceived. In the years after Overton Park, however, it became clear that there would be no sea change, at least not with the Court as its catalyst.

272. 401 U.S. at 413.
The analysis below explores the Court’s withdrawal to a more distant, questioning, and sometimes hostile posture.

A. Crisis of the Day

_New York v. United States_273 was the first in a line of decisions, including _Lopez_ and _Morrison_, in which the Rehnquist Court restricted federal power and asserted its commitment to federalism. It was also a test of the relative strength of pressures, on the one hand, to address an imminent environmental crisis and, on the other, to maintain a preferred institutional system—in this case, “the constitutional structure underlying and limiting [federal] authority” with respect to the states.274 The federalism claim won out over the environmental one, giving the majority an opportunity to put environmentalism in its place relative to what the majority believed were more important human concerns, although this outcome drew vigorous dissent.

The environmental problem in _New York v. United States_ was the lack of disposal capacity for low level radioactive wastes (LLRW).275 LLRW are produced in every state by a wide range of industrial and commercial activities.276 Although we all benefit from these activities, there are costs associated with the disposal of these wastes that are born primarily by those living near disposal facilities. As a result, responding to the preferences of their own citizens, states have tended to undersupply disposal capacity and have had difficulty in agreeing among themselves on measures to correct this undersupply. In the mid-1980’s only three disposal sites existed in the United States, established under regional interstate compacts, and there was concern that those sites would be closed to waste from states outside the compact regions.277 After several unsuccessful efforts, negotiations among all the states produced a plan that Congress adopted as the Low-Level Radioactive Waste Policy Act of 1985 (LRWPA).278 The LRWPA sought to hold each state “responsible for providing, either by itself or in cooperation with other states, for the disposal of low-level radioactive waste generated within the state.”279 This was to be accomplished through a combination of three “incentives.” The Court found no constitutional problem with the first two incentives, which authorized states with disposal sites to collect disposal fees and limit access to the sites from outside the state or

274. See id. at 159.
275. See id. at 149–50.
276. See id.
277. See id. at 151.
The constitutional defect was with the third incentive, which required that states that did not provide disposal capacity take title to and possession of LLRW produced within their boundaries and become liable for all damages suffered by waste generators for failure to do so. The Court concluded that this incentive—the “take title” provision—was in violation of the Tenth Amendment’s reservation of powers to the states.

The question, as the Court saw it in an opinion by Justice O’Connor, was the extent to which the Tenth Amendment empowered Congress to use states “as implements of regulation.” Based on a lengthy review of constitutional history and precedent, the Court concluded: “We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.” The take title provision of the LRWPA ran afoul of this understanding by forcing the states to choose between regulating as Congress directed (providing disposal capacity) or assuming title to and liability for wastes generated within their jurisdiction. Because either alternative by itself would be an impermissible intrusion on state sovereignty, the Court reasoned, the choice was also unconstitutional.

The Court acknowledged that states, including petitioner New York, had consented to the LRWPA’s enactment, and it was at pains to defend itself against the charge of empty formalism: “The Constitution does not protect the sovereignty of states for the benefit of the States . . . [but] for the protection of individuals. . . . ‘A’ healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” In this rendering, the rationale for federalism sounds in a desire to check governmental authority at all levels; “therefore, the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.” The Court’s argument confirms the intuition developed in Part I that the Court’s federalism doctrine, at least for some justices, may be less about protecting state sovereignty than about protecting individual autonomy.

In the opening sentence of its opinion, the Court set up a tension between “one of our Nation’s newest problems of public policy and
perhaps our oldest question of constitutional law."\textsuperscript{288} The Court returned at the end to resolve that tension, and the resolution was straightforward. "The shortage of disposal sites for radioactive waste is a pressing national problem," but it is only the "crisis of the day."\textsuperscript{289} "The Constitution protects us from our own best intentions" by enabling us to "resist the temptation to concentrate power... as an expedient solution to [such] crises."\textsuperscript{290} The hierarchy is clear. Environmental concern is a policy fashion that for our own good must be subordinated to the institutional ecosystem ordered by the Constitution to avoid "tyranny," i.e., uphold autonomy values. We should not expect the Court to alter that system to accommodate environmental "crises," no matter how urgent.

In dissent, Justice White, joined by Justices Blackmun and Stevens, argued that the Court's analysis "undervalued the effect the seriousness of this [LLRW] public policy problem should have on the constitutionality of the take title provision."\textsuperscript{291} This public policy problem was "a crisis" whose "imminence... cannot be overstated."\textsuperscript{292} Under the pressure of this crisis, sited and unsited states engaged in protracted negotiations that resulted finally in a compromise that Congress enacted, acceding "to the wishes of the States by permitting local decisionmaking rather than imposing a solution from Washington."\textsuperscript{293} White argued that New York should be estopped from complaining about this agreement in which it freely participated and on which it was now reneging, having obtained the benefit of concessions from other states in the negotiations. Alternatively, the LRWPA should be upheld as constitutional, as White found no principle of federalism to prevent "the National Government from acting as referee among the States to prohibit one from bullying the other."\textsuperscript{294}

For our purposes, the most salient difference between White's approach and the Court's was White's integration of the LLRW "problem" into his search for an appropriate legal outcome. O'Connor rhetorically minimized the problem ("crisis of the day") in cordonning it off from her constitutional analysis, which was crisis-proof by design. White invoked the problem repeatedly and with intensity ("crisis" whose "imminence... cannot be overstated,"\textsuperscript{295} "very serious danger,"\textsuperscript{296} "problem of grave import"\textsuperscript{297}). In his opinion, the problem was driving

\begin{itemize}
\item \textsuperscript{288} Id. at 149.
\item \textsuperscript{289} Id. at 187.
\item \textsuperscript{290} Id.
\item \textsuperscript{291} Id. at 189 (White, J., dissenting).
\item \textsuperscript{292} Id. at 190.
\item \textsuperscript{293} Id. at 206.
\item \textsuperscript{294} Id. at 199.
\item \textsuperscript{295} Id. at 190.
\item \textsuperscript{296} Id. at 193.
\item \textsuperscript{297} Id. at 210.
\end{itemize}
the central events of the LRWPA story; it was a major actor, and the law
could not be ascertained without it. According to White, it was the
function of law to foster and support a collective solution to this urgent
problem, against the abstract claims of an institutional design.

B. Questioning Priorities

Institutional responses to environmentalists’ urgency claims include
raising the priority of environmental concerns in government
decisionmaking. This occasions debate on how competing considerations
should be weighed, including whether and to what extent policymakers
should consider the costs of environmental protection as well as the
benefits. Environmentalists argue that it is difficult or impossible to
quantify many environmental benefits and therefore cost-benefit
comparisons will routinely result in policies that are underprotective.298
They also argue that aspects of environmental protection—such as
assuring minimum standards of human health or preventing species
extinction—have a moral or ethical status that makes one-to-one
comparison of the costs and benefits of securing these goals
inappropriate.299 In both Tennessee Valley Authority v. Hill300 (TVA) and
Whitman v. American Trucking Associations, Inc. (ATA),301 the Court
addressed claims that Congress had foreclosed consideration of costs,
giving uncontested priority to environmental concerns. Decided more
than two decades apart and involving quite different statutes and factual
settings, these cases demonstrate the Court’s willingness to enforce
legislation forbidding consideration of costs in environmental
decisionmaking, even in the face of potentially competing constitutional
concerns (ATA) or a challenge to the traditional equitable discretion of
the courts (TVA). But they also carry undertones, some quite explicit, of
skepticism about the wisdom of such policies.

1. TVA v. Hill

In the exercise of their judicial power under Article III of the
Constitution, federal courts have adopted and refined equitable doctrines
from the English chancery courts.302 At least since the onset of the
industrial revolution, equity rules have required that in issuing an
injunction a court must not only consider irreparability of harm to the
plaintiff and the adequacy of legal remedies but must also undertake a

298. See SHABECOFF, supra note 34, at 213–15.
299. See SHABECOFF, supra note 34, at 215–17.
302. See David E. Cole, Judicial Discretion and the “Sunk Costs” Strategies of Government
"balancing of the utilities." The court weighs the interests of the parties and makes an assessment of the overall public interest. Consideration of the costs of injunctive relief as well as the benefits advances equity's purpose to ensure reason and justice in particular cases. In TVA, this equitable tradition of balancing to determine the common good came into conflict with a congressional directive for the protection of endangered species.

Perhaps the "best-known case in environmental law," TVA interpreted section 7 of the Endangered Species Act (ESA) to prohibit completion and operation of the Tennessee Valley Authority's Tellico Dam, a monument to mastery values on the Little Tennessee River. Section 7 directs federal agencies such as TVA "to insure that any action authorized, funded, or carried out by [them] is not likely to jeopardize the continued existence" of an endangered species or "result in the destruction or adverse modification of habitat of such species." With funds appropriated by Congress, TVA began construction of the Tellico dam in 1967. The Endangered Species Act of 1973, including section 7 as quoted above, was passed some seven years later. Also in 1973 an ichthyologist discovered a new fish species, the snail darter, inhabiting the river in the area of the dam. In response to a petition by opponents of the dam, the Department of Interior listed the snail darter as an endangered species and also designated the area that would be affected by the dam as critical habitat. Environmental plaintiffs sued in federal district court, claiming that TVA's determination to proceed with the dam violated section 7 and seeking an injunction against final completion and operation of the dam.

The district court concluded that the completion of the dam and the filling of the reservoir would adversely modify the snail darter's critical habitat and jeopardize the continued existence of the species. But it declined to enjoin further work on the dam, which was now 80 percent complete and represented over $50 million in sunk costs. Sitting as "a court in equity," the district court fixed on the disproportionate costs of

303. Id. at 713.
304. See id. at 714.
308. 437 U.S. at 157.
309. 437 U.S. at 158-59.
310. See 437 U.S. at 161; see also 40 Fed. Reg. 47,505-06 (Oct. 8, 1975) (codified at 50 C.F.R. § 17.11(i) (1976)). The snail darter is still listed at 50 C.F.R. § 17.11(h) (2006).
311. See id. at 165-66.
312. See id. at 166.
protecting the snail darter under the circumstances and the "unreasonable result" that would flow from applying a "statute enacted long after the inception of the project." The Court of Appeals reversed, holding that the district court abused its discretion in not enjoining the statutory violation, and the Supreme Court affirmed.

In an opinion by Chief Justice Burger, the Court addressed whether the completion and operation of the Tellico Dam would violate section 7 and, if so, whether the courts retained equitable discretion not to issue an injunction. In answering yes to the first question, the Court offered a lengthy analysis of the legislative history of the ESA and the language and structure of the Act. It cited congressional testimony and reports that stressed the rapid decline in species resulting from disruption of habitats, the irreversible impact of this loss on potential future uses of genetic information and on the planetary ecosystem, and the "quite literally, incalculable" value of these genetic resources. The Court read the 1973 amendments to the ESA as a response to the real and immediate threat of incalculable loss that had been conveyed to Congress and internalized by it in the legislative process. The language of section 7 itself, the Court found, admitted of no exception, framing an absolute prohibition against federal actions that put endangered species in jeopardy of extinction or destroyed their critical habitat. The Court concluded that Congress' intent was to "halt and reverse the trend toward species extinction, whatever the cost" and to "give endangered species priority over the 'primary missions' of federal agencies."

Acknowledging that "in this case the burden on the public through the loss of millions of unrecoverable dollars [might be argued to] greatly outweigh the loss of the snail darter," the Court insisted nevertheless that Congress had not authorized it to make "such fine utilitarian calculations." Further, even if Congress had left room for "a weighing process," the Court would hardly know where to begin, given that one side of the cost-benefit equation, the value of species loss, had already been determined by Congress to be "incalculable."

The Court's opinion on the issue of its equitable discretion proceeds directly from its analysis of the statute. Generally, the Court said, when a

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315. Id. at 166 (quoting Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1331-32 (4th Cir. 1972).
316. See id. at 200.
317. See id. at 193.
318. See id. at 174-93.
319. See id. at 178.
320. See id. at 194-95.
321. Id. at 184.
322. Id. at 185.
323. Id. at 187.
324. Id. at 188.
court is considering an equitable remedy, "the balancing of equities and hardships is appropriate." But here the Court was not facing the general case. Here Congress had ordered the priorities, "making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." Under the Constitution, it is the job of Congress to set legislative policies and priorities, and it is the job of the courts to enforce them. Taking a step beyond this bare separation-of-powers rationale, the Court also wondered aloud about its own institutional competence to balance the equities in a case such as this. "We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam." Its hands were tied, the Court suggested, and there were reasons for its not struggling to untie them.

_TVA can be—and typically is—understood as a ringing endorsement of the preeminent importance of species preservation: "Chief Justice Burger’s stentorian declaration repeatedly echoed in successive endangered species cases." But the meaning of the case is more complex. Burger initially voted in dissent, then switched to the majority and assigned himself the opinion for the Court, after it became clear that a majority of the justices were for affirming the Sixth Circuit. The Court’s opinion reveals a studied ambivalence. The opening lines of the analysis set a skeptical tone: "It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million." It further trivializes the snail darter with a footnote stating that there are upward of one hundred species of darters in Tennessee, that new species of darters are constantly being discovered, and that it is hard even for experts to tell the species apart. The Court calls this sacrifice of so large a project for so small a fish "a paradox," but

325. _Id._ at 193.
326. _Id._ at 194.
327. _Id._
329. See Lazarus, _supra_ note 7, at 714, 738.
332. _Id._ at 159 n.7.
it is a paradox that the Court really never tries to resolve. It is simply, the Court tells us, the result required by congressional enactment.

The Court’s analysis is tightly focused on ascribing congressional intent in establishing the priority for species in section 7. Unlike Overton Park, the Court’s opinion provides no cues that it is in sympathy with this priority, or with the protection afforded the snail darter in this case; the whole emphasis is on finding and enforcing “the law” and maintaining appropriate institutional roles as between the courts and Congress. This sense of distance from the policy of the statute gathers at the end of the opinion and revives the skepticism expressed at the beginning. The Court quotes a passage from Robert Bolt’s play on Sir Thomas More which turns on a metaphor of the law as a forested landscape in which the devil is hiding. “What would you do?” More asks. “Cut a great road through the law to get after the Devil?” And he gives his own answer, arguing that because the trees protect him as well as the devil, “I’d give the Devil the benefit of law, for my own safety’s sake.”333 Here, by the metaphor’s logic, the devil is the “paradox” of sacrificing a completed dam for an inconsequential species. This logic is carried into the final words of the opinion: “[I]n our constitutional system the commitment to separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with ‘common sense and the public weal.’”334 The result here may be a bad one, the Court suggests, contrary to “common sense and the public weal,” but to ignore congressional edict would be worse.

This undercurrent of skepticism puts the Court’s opinion much closer to the two dissenting opinions than might first appear. Joined by Justice Blackmun, Justice Powell argued that it was unreasonable to believe that Congress could have intended the “absurd result” in this case335 and predicted that Congress would amend the Act “to prevent the grave consequences made possible by today’s decision.”336 In a separate dissent, Justice Rehnquist argued that section 7 did not clearly constrain the Court’s equitable discretion and therefore that the district court had appropriately declined to issue an injunction because of the harm to the public interest that would flow from it.337

The doubts about the wisdom of stopping the project that to one degree or other pervaded all the opinions in TVA were almost certainly expressed with Congress in mind: in an internal memo to the justices, Burger wrote that in his opinion for the Court he intended to “serve

333. Id. at 195.
334. Id.
335. See id. at 196, 204-05 (Powell, J., dissenting).
336. Id. at 210.
337. Id. at 213 (Rehnquist, J., dissenting).
notice on Congress that it should take care of its own ‘chestnuts.’” 338 Congress amended the ESA to empower a cabinet-level committee to grant exceptions from the Act based on a limited cost-benefit evaluation, 339 and the committee’s first case for review was the Tellico Dam. Ironically, however, given the tacit assumption by the Court that “utilitarian balancing” would favor the project, the dam failed to win the committee’s approval. 340 It took an appropriations rider specifically mandating completion of the dam to fulfill Justice Powell’s prophecy and salvage the project. 341 So in the end David succumbed to Goliath, although populations of snail darters have since been found outside the area of the dam. One might congratulate the Supreme Court for taking David’s part, but it did so with its fingers crossed.

Potentially the most significant aspect of TVA, from the standpoint of institutional practice, was the Court’s limiting its equitable discretion—its ability effectively to make policy in fashioning remedies in enforcement actions. The Court’s opinion might be read to suggest that injunctive relief is mandatory in any action to enforce a regulatory prohibition of the sort present in most environmental statutes. In Weinberger v. Romero-Barcelo, 342 however, decided four years later, the Court made clear that this was not what it meant. There the Court upheld a district court’s refusal to enjoin the U.S. Navy’s firing of ordnance into the waters of Puerto Rico in violation of the Clean Water Act. 343 Thus, the Court reasserted its capacity—and will—not only to identify outcomes giving questionable priority to environmental concerns, as it had done in TVA, but to avoid them through the exercise of judicial good sense, 344 recapturing territory that it seemed momentarily to have ceded to an environmentally sensitized Congress.

2. ATA v. Whitman

Like section 7 of the ESA, sections of the Clean Air Act (CAA) foreclose consideration of costs in regulatory decisions as an expression

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338. Doremus, supra note 330, at 131 (internal quotations omitted).
340. See Farber, supra note 305, at 37 (“One member of the committee, economist Charles Schultze, said ‘the interesting phenomenon is that here is a project that is 95 percent complete, and if one takes just the cost of finishing it, against the total benefits and does it properly, it doesn’t pay, which says something about the original design!’”).
343. See id. at 306.
of the overriding importance of the environmental concerns at stake. As it did with the ESA in *TVA*, the Court in *ATA*\textsuperscript{345} legitimated the priority for environmental protection accorded by the CAA. It did so in the face of what seemed at least to be a serious claim that the statute violated the prescribed relationship between Congress and the Executive Branch by improperly delegating legislative power to EPA, an executive branch agency. Like *TVA*, *ATA* carries complex valences, as we explore below.

*ATA* arose under section 109 of the CAA, which requires EPA to set national ambient air quality standards (NAAQS) for certain pollutants and periodically to review and revise those standards.\textsuperscript{346} The NAAQS anchor the Act’s regulation of stationary sources of air pollution under Title I of the Act, including the preparation of state implementation plans for attainment and maintenance of the standards.\textsuperscript{347} The statute requires the Agency to set primary NAAQS at a level “requisite to protect the public health” with “an adequate margin of safety.”\textsuperscript{348} EPA consistently interpreted this language as precluding the consideration of costs and feasibility in setting and revising the standards, and this reading was upheld in a series of decisions by the D.C. Circuit.\textsuperscript{349}

Under review by the Court in *ATA* were the Agency’s simultaneous revision of the NAAQS for ozone and its establishment of a new NAAQS for fine particulate matter.\textsuperscript{350} These combined actions were among the most significant EPA had ever taken. The cost-benefit study required by Executive Order for all “major rules” projected that together the new standards would impose an additional $10 billion in annual compliance costs by the year 2010 and full attainment costs of over $45 billion per year.\textsuperscript{351} As it had in the past, however, EPA studiously ignored the costs in its standard-setting.\textsuperscript{352} The Court’s response to EPA’s action features a revealing reversal of roles for Justices Scalia and Breyer in environmental cases.

\begin{itemize}
\item \textsuperscript{345} 531 U.S. 457 (2001).
\item \textsuperscript{346} 42 U.S.C. § 7409(a) (2006).
\item \textsuperscript{347} See id. §§ 7409–10.
\item \textsuperscript{348} Id. § 7409(b)(1).
\item \textsuperscript{349} See, e.g., Am. Lung Ass’n v. EPA, 134 F.3d 388 (D.C. Cir. 1998); Natural Res. Def. Council v. Adm’r, United States EPA, 902 F.2d 962 (1990), vacated in part on other grounds, 921 F.2d 326 (D.C. Cir. 1991); Am. Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981); Lead Indus. Ass’n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980).
\item \textsuperscript{350} See 531 U.S. 457, 463 (2001).
\end{itemize}
In the D.C. Circuit, industry petitioners attacked the standards as not supported by scientific evidence on the record, as unlawfully failing to consider costs, and as violative of separation of powers.\textsuperscript{353} Consistent with its prior opinions, the D.C. Circuit rejected the cost argument.\textsuperscript{354} But it did hold that the CAA as applied by EPA in this case was an unconstitutional delegation of legislative power.\textsuperscript{355} It based this holding on the lack of an "intelligible principle" for channeling congressional grants of authority to administrative agencies.\textsuperscript{356} Crucial to the court's analysis was its understanding that ozone and fine particulate matter were non-threshold pollutants—that is, there was no ambient concentration for either pollutant below which adverse effects were known not to occur.\textsuperscript{357} In the absence of a demonstrable "safe level," EPA had justified its decisions based on an assortment of factors, such as severity of effect, certainty of effect, and size of population affected.\textsuperscript{358} Finding that the Agency offered no "determinative criterion" for drawing the line for either pollutant at any level above zero, Judge Williams writing for the D.C. Circuit reversed and remanded with an invitation to the Agency to correct the constitutional infirmity.\textsuperscript{359} In sending the case back to the EPA Judge Williams noted that, but for the prior decisions of the D.C. Circuit precluding consideration of costs, cost-benefit analysis would supply precisely the kind of "intelligible principle" the court had in mind.\textsuperscript{360} Thus, he offered the outline of an argument that industry would use in the Supreme Court against his court's own interpretation of the statute.\textsuperscript{361} While eight of the justices had little difficulty declining Williams' veiled invitation, Justice Breyer was tempted to accept.

On review, the Supreme Court addressed both the cost and delegation issues and upheld the Agency on both. Justice Scalia's opinion for the Court addressed industry arguments that the terms of section 109—such as "public health," "requisite," "adequate"—were sufficiently open to accommodate consideration of costs.\textsuperscript{362} Noting that numerous other provisions of the Act expressly authorize EPA to consider costs, the Court rejected industry's readings.\textsuperscript{363} The consideration of costs in setting the NAAQS was too important an issue for Congress to address.

\textsuperscript{353} Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1033–34 (D.C. Cir. 1999).
\textsuperscript{354} See id. at 1040.
\textsuperscript{355} See id. at 1038.
\textsuperscript{356} Id. at 1038–40.
\textsuperscript{357} See id. at 1034–35.
\textsuperscript{358} Id.
\textsuperscript{359} Id. at 1034–35, 1053.
\textsuperscript{360} See id. at 1038.
\textsuperscript{363} Id.
"through vague or ancillary provisions;" Congress "does not, one might say, hide elephants in mouseholes." To prevail, the Court said, industry "must show a [clear] textual commitment of authority to EPA to consider costs in setting NAAQS," and it failed to do so.

Scalia's opinion is, as a legal matter, a vindication of the priority for public health concerns that EPA had been claiming in its NAAQS decisions for decades. The tone of the opinion is straightforward; indeed, as Michael Herz observed, "Justice Scalia could not have written a less interesting opinion." In contrast to Burger's opinion in TVA, there is no expression of disagreement with Congress' policy choice, no invitation to reconsider the law. The Court's requirement that there be "a clear textual commitment" of agency authority to consider costs creates a strong presumption in favor of the interpretation favored by environmental interests, and although the Court derives this requirement from the relevant structure and text of the Act, it might well—as Justice Breyer's concurrence fears—have implications beyond this particular statutory setting.

At the same time, the opinion evinces no particular sympathy for the path that Congress has laid down. Similar neutrality is apparent in other Scalia opinions for the Court rendering environmentally protective statutory interpretations. While common in judicial prose, this absence of emotion is hardly characteristic of Justice Scalia, who has demonstrated his capacity to write passionate defenses of preferred institutional arrangements against environmental enthusiasms, as in his opinions for the Court in Lucas and Defenders of Wildlife or his dissent in Sweet Home. The absence of comparable emotional investment in the elevation of human health protection in ATA may be revealing: we infer from it that Scalia's sympathies were elsewhere. But it does not undercut the Court's holding.

Given Justice Scalia's reputation as the most anti-environmental of sitting Supreme Court justices, perhaps the most striking fact about ATA is that he and his conservative colleagues sided with EPA at all. There are several possible explanations. First and most obviously, Justice Scalia's methodological commitment to strict statutory construction may have compelled it. The structure of the opinion combined with its lack of

364. Id. at 468.
365. Id. at 468-71.
367. See City of Chicago v. Envtl. Def. Fund, 511 U.S. 328 (1994) (holding that the text of RCRA did not provide an exemption for ash from municipal solid waste incinerators); see also infra text accompanying note 373.
369. See Appendix A.
emotion supports this theory, but there are reasons to believe that this is not the full explanation. In other environmental cases, Justice Scalia has associated himself with arguably strained statutory readings at the expense of environmental concerns. In this case, as Herz has pointed out, there were several plausible, albeit bold, readings that the Court might have adopted in reaching an opposite result. The question remains why it did not.

Second, unlike provisions such as section 9 of the ESA (Sweet Home) or section 404 of the CWA (SWANCC) which deal primarily with ecological harm, the NAAQS address human health concerns. Public health protection has a long tradition in common law torts (e.g., public nuisance) and local and state regulation (e.g., anti-smoke ordinances) that validate its appropriateness as a basis for legal constraints. Although the federal CAA is a relatively recent creation, the NAAQS and other CAA provisions are readily understood as extensions of this tradition. One might speculate that an environmental regulatory statute giving priority to public health concerns would have plausibility for Scalia as part of received legal culture, whereas a statute that accorded priority to protecting natural resources following the modern ecological model would not. City of Chicago v. Environmental Defense Fund, an earlier case in which Justice Scalia wrote for a unanimous Court requiring EPA to apply strict regulatory requirements to ash generated by municipal waste combustors, bears out this distinction: as in ATA, the regulations addressed threats to human health through direct exposure to environmental contaminants—the nuisance paradigm.

Third, the NAAQS are not self-executing but depend for their attainment on state implementation plans, enforceable measures selected by each state and approved by EPA. In an earlier decision, Train v. Natural Resources Defense Council, Inc., the Court had said that the Act allowed states to consider economic and technological feasibility in formulating their plans. In ATA, Scalia takes that a step further, remarking that “[i]t would be impossible to perform the [implementation planning] task intelligently without considering which abatement technologies are most efficient, and most economically feasible.” His discussion of an implementation process that is sensitive to considerations of costs and feasibility, by contrast to a standard-setting
process that is not, bolsters the interpretation of section 109. But it also
serves to establish the reasonableness of the statutory scheme as a whole
and perhaps also to suggest why he himself finds it tolerable.

Finally, the delegation question—the foundation of the D.C.
Circuit's invalidation of EPA's statutory interpretation—turned out to
hold no attraction for Scalia and most of the other justices. In two cases
in the early 1980s involving worker health protection standards, Justice
Rehnquist wrote separately to argue that the standards were not
permissible congressional delegations of authority to an administrative
agency.376 With his elevation to Chief Justice, there seemed the possibility
that nondelegation would join federalism and property rights as a
document for expansion. But in A TA that possibility evaporated, as Justice
Scalia made short work of the D.C. Circuit's expansive construction of
nondelegation doctrine. Contrary to the assumption of the D.C. Circuit,
the Court lectured, it was not within the power of an agency to correct an
unconstitutional delegation.377 Moreover, the discretion afforded to EPA
by section 109 needed no correcting because it was "well within the outer
limits of our nondelegation precedents."378 "Judgments of degree" of the
sort section 109 calls on EPA to make for nontreshold pollutants like
ozone and particulate matter did not have to be disciplined by a
"determinate criterion," as asserted by the D.C. Circuit.379 Thus, Scalia
rejected a version of nondelegation doctrine with the potential to drive
an interpretation of the CAA that would make cost-benefit analysis into
a decisional principle.

Justice Thomas, in concurrence, urged future consideration of the
possibility that a grant of administrative authority meeting the Court's
nondelegation requirements might nevertheless constitute a forbidden
delegation of legislative power;380 Justices Stevens and Souter argued in a
separate concurrence for express recognition of the authority of Congress
to delegate its legislative power.381 The Court kept to established middle
ground, affirming doctrine that in practice imposes no real constraints on
broad delegations of legislative authority.

A stricter nondelegation doctrine might be expected to produce a
number of significant institutional changes, including reducing the total
amount of federal regulation due to the relative difficulty of enacting

dissenting); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980) (Rehnquist, J.,
concurring in the judgment).
377. See 531 U.S. at 472–73.
378. Id. at 474.
379. Id. at 475.
380. See id. at 487 (Thomas, J., dissenting).
381. See id. at 488–90 (Stevens, J., dissenting).

2006] ENVIRONMENTALISM AND THE SUPREME COURT 423
Conservative commentators have linked the existing doctrine to a bloated regulatory state. To the extent that stricter nondelegation rules would shrink the federal regulatory state, they appeal to the same values (autonomy and mastery) that we have seen animating the Court's revitalization of federalism. But the Court has been much less aggressive in policing separation of powers than federalism. Exactly why is a matter of speculation. In the context of nondelegation doctrine, one can imagine that the Court would be concerned about delivering too strong a blow to current institutions. Elizabeth Magill has argued, by way of explaining the Court's trepidation, that "[a] revitalized nondelegation doctrine . . . would mean sweeping invalidation of significant parts of the apparatus of federal government." Establishing and monitoring "a particular level of specificity" in congressional delegations could also prove difficult for the Court to do, as at least some of the justices have acknowledged. Finally, strengthening nondelegation would have the effect of strengthening the role of Congress vis à vis the executive; in other contexts, including federalism, the Court has been about "trimming the powers of Congress." It is possible that here, as in Defenders, Justice Scalia is quite comfortable with an arrangement where the executive has broad discretion in implementing congressional mandates.

In ATA, in the absence of competing foundational concerns that he was inclined to advance, Justice Scalia, conventionally identified with the "anti-regulatory, pro-business" faction of the Court, penned an opinion upholding the most far-reaching and costly regulatory action by EPA in a decade. In the same case, Justice Breyer, whose environmentalist sympathies we explored in Part I, wrote an opinion that probed the wisdom of Congress' priorities and raised larger questions about contemporary environmental policy.

All members of the Court except Justice Breyer concurred in Justice Scalia's opinion on the consideration of costs under the CAA's section 109. Breyer agreed with the Court's conclusion but concurred separately to express reservations about the broader implications of the opinion. Before he joined the Court, Breyer had argued against inordinate

385. Id. at 72.
386. Herz, supra note 93, at 358 n.300.
387. Merrill, supra note 382, at 2160-61.
expenditures to eliminate "the last 10 percent" of the risks posed by pollution. In *ATA*, he was particularly concerned with the Court's presumption that authority to consider costs must flow from a clear textual commitment. If followed generally, he feared, such a presumption would produce irrational results.

In order better to achieve regulatory goals... regulators must often take account of all of a proposed regulation's adverse effects, at least where those adverse effects clearly threaten serious and disproportionate public harm. Hence, I believe that, other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation.

In ultimately coming to terms with section 109, Breyer parsed the options available to the EPA Administrator and was persuaded that, even without the authority to consider compliance costs, the Administrator has "sufficient flexibility to avoid setting ambient air quality standards ruinous to industry." But in concluding that the NAAQS scheme need not "lead to deindustrialization," he made his cautionary meaning clear: "Preindustrial society was not a very healthy society; hence a standard demanding the return of the Stone Age would not prove 'requisite to protect the public health.'" The images of "[p]reindustrial society" and a "return to the Stone Age" are a stark depiction of the risks of overzealous pursuit of environmental goals. Ironically, given his vote to affirm EPA's interpretation, Breyer's argument in *ATA* precisely echoes industry's main contention that "public health" in section 109 should be interpreted to include economic costs of regulation because those costs too can adversely affect health.

389. Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 11-19 (1993). Breyer characterized "the last 10 percent" problem as a problem of suboptimal resource allocation. He argued that this "classic administrative disease" brings about more harm than good by spending vast sums to produce insignificant increments of additional safety. *Id.* at 11. Meanwhile, relatively cost-effective ways to reduce risk, such as widespread breast cancer screenings, are not executed. *Id.* at 19.

390. *Id.* at 490.

391. *Id.* at 490.

392. *Id.* at 494-96 (noting that the statute authorizes the Administrator to consider potentially moderating factors such as "a pollutant's potential adverse effects, the number of those likely to be affected, the distribution of the adverse effects, and the uncertainties surrounding each estimate," and the Administrator is not required to regulate trivial risks).

393. *Id.* at 496.

394. *Id.* These images are, if anything, even starker than the imagery deployed by Justice Powell in his concurrence in one of the Court's earlier encounters with the CAA, *Union Electric Co. v. EPA*, 427 U.S. 246, 272 (1976) (decrying the "Draconian possibility" that the Act could precipitate "the shutdown of an urban area's electrical service" that would "sacrifice the well-being of a large metropolitan area" to "technologically impossible" demands).

Justice Breyer enjoys a relatively high “pro-environment” ranking among sitting justices, but in *ATA* he was a short step away from rejecting the environmentalist reading entirely. For Scalia and other conservative members of the Court, commitments to property rights or principles of limited government may offer the principal challenge to environmentalist priorities. For Breyer, policy rationality, with its link to mastery values (opposing de-industrialization and a return to the Stone Age), is the more likely source of resistance.

C. Conclusions, Part II

The Court’s receptivity to environmentalists’ urgency claims can be gauged by its tone or rhetorical stance as well as by its legal arguments or outcomes. By comparison to earlier cases, in which the Court’s rhetoric signaled solidarity with environmentalists’ views about the relative importance of their concerns (*SCRAP I, Overton Park*), later decisions have been more circumspect, where not dismissive. Even in cases where the Court has recognized and enforced heightened environmental priorities established by Congress, its tone has tended toward neutral (*ATA*) or skeptical (*TVA*). This distancing was perhaps inevitable, as the Court sought to maintain its limited institutional role and to project impartiality in an area of vigorously contested priorities. Because the Court responds to public opinion, it is also possible that the Court’s increasing distance is related to the public’s declining identification with environmentalism and diminishing sense of crisis.

Underneath the institutional stance of neutrality, the cases reveal a diversity of views among the justices about how the urgency of environmental problems should (or should not) be taken into account. Justices with strong commitments to limited government and related autonomy and mastery values have been more likely to resist the claims of environmental urgency than others, just as they resisted the claims of the interdependence model in the cases described in Part I. In *New York v. United States*, Justice O’Connor was joined by Chief Justice Rehnquist and by Justices Scalia, Thomas, Kennedy, and Souter in ruling that the radioactive waste “crisis of the day” did not justify federal intrusions on state sovereignty and the erosion of institutional checks against “tyranny.” Similarly, justices less identified with this element of the DSP have shown a greater willingness to integrate their sense of the importance of environmental concerns into doctrinal analysis, just as they

396. See Appendix A.

397. A 2004 Gallup poll shows 62 percent of Americans worry a great deal or a fair amount about the environment, down from 77 percent in 2001. The Gallup Org., Environment Not a Pressing Concern, Question 11(C) (March 2004), http://www.gallup.com/poll/content/default.aspx?CI=11380. See infra note 470 and accompanying text.
have been more open to incorporating the ecological model. In *New York v. United States*, Justices Stevens and Blackmun joined Justice White’s argument for the legal relevance of the LLRW “crisis” in interpreting and applying federalism doctrine. Similarly in *Lucas*, Justice Stevens would have used “[n]ew appreciation” of the importance of endangered species and the “vulnerability of coastal lands” to shape our understanding of property rights.\(^{398}\)

In addition to the factors identified in Part I, however, there is another element at work in these cases: a concern for policy rationality. Rather than focusing on the distribution or limitation of power, this concern focuses on the wisdom of policy outcomes, trading on and sometimes expressly invoking the equity court tradition of weighing competing interests to arrive at a welfare-enhancing result. This concern for policy rationality is not limited to conservative justices. In *TVA*, for example, Justice Blackmun joined Justice Powell’s dissent stressing the “absurd results”\(^{399}\) and “grave consequences” of abandoning Tellico Dam. Similarly in *ATA*, Justice Breyer worried alone among the justices about the welfare consequences of a return to the “Stone Age.”\(^{400}\) This suggests that environmentalism, in at least some of its manifestations, threatens not only the conservatives on the Court but also liberals committed to an ideal of welfare-enhancing technical and economic progress.

### III. ECOCENTRISM

Commentators associate environmentalism with ecocentric values or values based on religious or spiritual regard for nature for its own sake.\(^{401}\) In legal settings, these values support representation of the interests of the environmental other in judicial proceedings; legal redress for injury to those interests; and preservation and restoration of the environmental other for its own sake.\(^{402}\) It might be argued that Congress has advanced ecocentric values in adopting near-absolute legal protections for species (e.g., the Endangered Species Act) and landscapes (e.g., the Wilderness Act), but the statutory justifications for these measures are largely if not entirely anthropocentric.\(^{403}\) As we saw in *TVA*, Congress wanted to

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401. *See supra* notes 43–44.
403. *See* 16 U.S.C. § 1531(a)(3) (ESA) (“these species . . . are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people”); id. § 1131(a) (purpose of National Wilderness Preservation system is “to secure for the American people of present and future generations the benefits of an enduring resource of wilderness”).
protect endangered species regardless of costs not because of the intrinsic value of species but because the cost of species loss to humans was deemed "incalculable."\textsuperscript{404} Congress has made no express provision for the representation in legal proceedings of the interests of the environment, as distinct from the interests of its human users and appreciators, and the Court has resisted arguments that non-humans have their own independent legal interests or rights. The Court's decisions endorse the dominant culture's pervasive anthropocentrism and the marginalization of ecocentric views in the public discourse.

A. Standing for Trees

In \textit{Sierra Club v. Morton},\textsuperscript{405} the Sierra Club opposed the Department of Interior's approval of construction of a ski resort in the remote Mineral King Valley of California, part of the Sequoia National Park and a national game refuge. Like plaintiffs in \textit{SCRAPI}, the Sierra Club sued under section 10 of the Administrative Procedure Act, which entitles "a person adversely affected or aggrieved by agency action" to judicial review.\textsuperscript{406} The group alleged that the development would destroy the scenery and wildlife of the park and would impair the park for future generations.\textsuperscript{407} There was no allegation that members of the Sierra Club used the portions of the park that would be destroyed or that they would otherwise be affected by the resort development.\textsuperscript{408} Instead, the Sierra Club sought standing under section 10 based on its established interest in conservation and the preservation of game refuges and national parks.\textsuperscript{409} It offered itself as a representative of the public interest or of Mineral King Valley's interest.\textsuperscript{410}

While the case was pending before the Court, UCLA law professor Christopher Stone published a now-famous law review article arguing that things in nature should be accorded some legal rights, including the right to seek legal redress on their own behalf, i.e., "standing."\textsuperscript{411} Stone pointed out that the law recognized the rights or "independent jural life" of other non-human entities such as corporations, trusts, and ships.\textsuperscript{412} Extending rights to natural objects would be consistent with the "history..."
of man’s moral development [as] “the continual extension . . . of [man’s] ‘social instincts and sympathies,’” an argument very similar to the argument for extension of moral consideration to the land community that Leopold had made two decades earlier. Stone took a step beyond Leopold in arguing that “[t]he history of the law suggests a parallel development”; legal institutions will evolve to incorporate expanded social instincts and sympathies. Although Stone’s article was not published in time for the oral argument in Mineral King, it is evident from Justice Douglas’ dissent that it reached at least one justice before the Court’s decision.

The Court ruled that the Sierra Club had not alleged the necessary injury for standing under the statute. The Court made clear that plaintiffs could rely on injury to aesthetic and conservation interests as well as economic values. Score one for the weak anthropocentrists. But the Court also held that the party, the “person” seeking review under APA section 10, had herself to have suffered injury. It was not enough simply to allege that the wildlife of the Mineral King Valley would be harmed; the plaintiffs had to show that they were themselves harmed—in effect they had to show that they used the area to be developed in a way that would leave them worse off as a result of the development. Score zero for the ecocentrists.

In a classic lone dissent, Justice Douglas argued that standing should be conferred on the environment itself, where injury to the environment was shown. Citing Stone, he drew support for this innovation from “[c]ontemporary public concern for protecting nature’s ecological equilibrium” and from precedents in corporate and maritime law for inanimate beings as parties in litigation. Groups with established interests in the affected environment would have leave to speak on the environment’s behalf, but the interests they represented and the harms they sought to redress would be those of the environment itself. At the close of his opinion, Douglas quoted Aldo Leopold on the land ethic, affirming the ecocentric pedigree of his argument.

413. Id. at 450 (quoting CHARLES DARWIN, DESCENT OF MAN 119 (1874)).
414. Id.
416. See id. at 741.
417. See id. at 734.
418. See id. at 734–35.
419. See id. at 743.
420. Id. at 741–42.
421. See id. at 742.
422. See id. at 752 (quoting from A SAND COUNTY ALMANAC 204 (1949): “The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.”).
Little has changed since Douglas’ dissent in the *Mineral King* case, although both the dissent and Stone’s article are venerated in the environmentalist canon. The Court made clear again in *Lujan v. Defenders of Wildlife* that standing turned on harm to humans and further that the harm had to be direct and concrete. While *Laidlaw* later stopped the trend toward more restrictive definitions of injury in standing, it did so by expanding the scope of human injury to include subjective harms, not by according legal status to environmental injury. The very premise of the Court’s analysis in *Laidlaw*, that the measure of injury in standing is harm to humans, not harm to the environment, rested on the *Mineral King* holding.423

**B. Property, Eco Religions, and Free Exercise**

In *Lucas*, a majority of the Court rejected Leopoldian arguments for limitations on the prerogatives of private landowners, confirming allegiance to the “transformative economy.”424 *Lyng v. Northwest Indian Cemetery Protective Association*,425 decided three years before *Lucas*, rejected the religious claims of Indian tribes for protection of sacred sites on federal lands. Although *Lyng* involved public, not private, property and First Amendment free exercise rather than Fifth Amendment takings claims, its resolution of the conflict between ecocentric views and property interests prefigured *Lucas*: according to dissenting Justice Brennan, the majority’s ruling in *Lyng* privileged “the dominant Western culture, which views land in terms of ownership and use” over “that of the Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred.”426

The controversy in *Lyng* was over decisions by the Forest Service to construct a road and allow timber harvesting in the Chimney Rock area of the Six Rivers National Forest.427 According to the Court, it was undisputed that “the logging and road-building projects at issue in [the] case could have devastating effects on traditional Indian religious practices. Those practices are intimately and inextricably wound up with the unique features of the Chimney Rock area.”428 In his dissent, Justice Brennan elaborated: “The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. Rituals are performed in prescribed locations . . . because land, like other living things, is unique, and specific sites possess different

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426. *Id.* at 473 (Brennan, J., dissenting).
427. *See id.* at 441–42.
428. *Id.* at 451.
For the local tribes, the high country, including the Chimney Rock area, was "the most sacred of lands," and its disturbance by the road-building and timbering would "virtually destroy the . . . Indians' ability to practice their religion."\(^{429}\)

The Indian tribes argued, as they had successfully below, that the Forest Service's actions violated their right to free exercise of religion under the First Amendment.\(^{431}\) The Court reversed, with Chief Justice Rehnquist and Justices White, Scalia, and Stevens joining O'Connor's opinion for the Court and Justices Marshall and Blackmun joining Brennan's dissent. While granting "the severe adverse impacts" on the Indian's religious practice, the Court reasoned that the free exercise clause protects against forms of government compulsion affecting religion but does not protect against the effects of the government's conduct of its "internal affairs" not directed at religion.\(^{432}\) It declined the tribes' invitation to distinguish between government actions that would interfere significantly with religious practice, as acknowledged in this case, from those that offered only minor interference; the Court was not equipped to "measur[e] the effects of a governmental action on a religious objector's spiritual development."\(^{433}\) That would cast the Court in an obtrusive arbiter's role—"a role that we were never intended to play."\(^{434}\)

The Court's analysis turned, unexceptionally, on a strict reading of the constitutional text ("Congress shall make no law . . . prohibiting the free exercise [of religion]") and an appreciation of its limited institutional role.\(^{435}\) By way of further justification, however, the Court focused on the interests of the government as property owner and the effect that recognition of the Indian's claims would have on those interests.\(^{436}\) Characterizing the Indians as seeking to impose a "religious servitude" on national forest lands, the Court expressed its concern that their "beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property."\(^{437}\) The Court was particularly upset by the prospect of a lockup of substantial portions of federal lands otherwise available for development (e.g., construction of roads and timbering). "Whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, its
Because this was publicly owned property, impacts on the personal autonomy of the landowner were not at issue, but mastery values, inherent in the government's right to use and develop "its land," certainly were. The claims of the Indians in Lyng threatened those values by creating competing rights in sacred places or entire landscapes that could stifle use and development reflecting majority wishes. For Brennan, as we have seen, this opposition between the culture of the Indians and the dominant culture is at the core of the case, and the Court's refusal to mediate it is the chief failing of its decision.

The dynamic in Lyng is primarily along the mastery-harmony axis, but the hierarchy-egalitarian opposition enriches the analysis. The dominant culture, through power concentrated in its institutions of public land management, imposes its will at the expense of the minority culture. While Justice O'Connor acknowledges the adverse effect on the subordinate group, she is comfortable enforcing the hierarchy's claim. The dissent, by contrast, while not arguing that the Indian's eco-religious beliefs should necessarily prevail, would create a space for judicial deliberation in which they might be credited. This egalitarian strain reinforces the harmony values in the dissent and resonates against the backdrop of the historical abuse of Indians at the hands of the dominant white culture.

**CONCLUSION**

In *SCRAP I* and *Overton Park*, decided early in the environmental movement, the Court seemed poised to embrace the mood of the movement and advance its tenets. But that embrace was short-lived. The Court has since distanced itself and adopted a more neutral and sometimes skeptical stance. In cases as doctrinally diverse as *Defenders*, *SWANCC*, *Lucas*, *New York v. United States*, and *Lyng* the Court rejected interpretations that would have incorporated beliefs and values of the NEP in favor of interpretations that reasserted opposing beliefs and values of the DSP. In *TVA*, while adopting the

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438. *Id.* at 453 (emphasis in original).
439. *See generally* Christopher E. Smith, *The Supreme Court's Emerging Majority: Restraining the High Court or Transforming its Role?* 24 AKRON L. REV. 393 (1990) (discussing "majoritarianism" on the Court and citing *Lyng* in the context of "slighted" religious minorities).
environmentalist interpretation, the Court’s opinion disparaged the outcome. Other decisions such as *Laidlaw*, *Sweet Home*, and *ATA* have countered the tone of resistance to environmentalist tenets that one detects in these cases, but even these more sympathetic rulings lack a strong environmental voice. Thus, invoking the dialectical model, we might characterize the present synthesis as one of accommodation of environmentalist beliefs and values expressed in legislation and regulatory action, but tempered significantly by continuing allegiance to the competing beliefs and values of the DSP.

Changes in the Court’s personnel may explain the shift away from the early enthusiasm to the Court’s much more qualified stance. But this shift may also represent a natural progression in the Court’s response to an emerging social movement, as society’s own response to the movement matures and the Court comes to a measured view on how to deal with it appropriately within the legal setting. Whether marginally more “conservative” or “liberal,” the Court is “a mainstream institution within the overall legal and political culture.” It reflects that culture, and culture changes slowly.

One can argue that the Court has been less hospitable to environmentalism than to other contemporary social movements, such as the civil rights movement, betraying an institutional bias that is not in keeping with the level of environmental concern among the general public. There is evidence, for example, that the Court has done less to accommodate environmentalism than civil rights. The Court has issued no epic affirmative declaration on the environment comparable to *Brown v. Board of Education*. Perhaps the closest environmentalists have come is *TVA*, but that case may have done as much in the end to staunch the momentum of the movement as to advance it. On issues such as judicial access and attorneys’ fees under citizen suit provisions, the Court’s rulings have placed more onerous restrictions on environmental plaintiffs than on plaintiffs in civil rights cases. Below I explore two related explanations for these differences: first, the relative strangeness, at least to a majority of the Court, of environmentalist claims compared

443. In the late 1980s and early 1990s Justices Kennedy, Thomas, Souter, and Scalia joined the Court, while Justices Burger, Powell, Brennan, and Marshall departed. Later, Justice Ginsburg joined the Court after Justice White departed and Justice Breyer joined after Justice Blackmun departed.


446. 347 U.S. 483 (1954).

447. 437 U.S. 153 (1978); *see also* supra notes 306-38 and accompanying text.

to claims of the civil rights movement and other social causes; second, the larger culture’s more thorough internalization of the beliefs and values of the civil rights movement than environmentalist tenets.\textsuperscript{449}

A. Environmentalism’s Strangeness

In a number of the cases we have examined, the Court’s tone conveys a sense of the strangeness of the environmentalists’ contentions. In \textit{Lucas}, the Court stoutly resisted the implications of the ecological paradigm for the “constitutional culture” of private ownership of land.\textsuperscript{450} Similarly, in \textit{Lyng} the Court raised and then slew the specter of eco-spiritualism’s imposing “religious servitudes” over vast areas of public lands.\textsuperscript{451} In \textit{Defenders} a plurality of the justices, per Justice Scalia, betrayed incredulity at the extension of concern to distant ecosystems and species.\textsuperscript{452} The entire Court in \textit{TVA} expressed its uneasiness over congressional solicitude for the endangered snail darter and other obscure species at the expense of public works.\textsuperscript{453} In all of these cases, a rhetorical distance accompanies the Court’s reluctance to recognize claims on behalf of the environmental other that threaten to disturb established priorities within the human community.

There are at least two qualifications to this characterization, in addition to noting that it is based on a small number of the Court’s environmental cases. First, the sense of strangeness seems limited to cases that involve protecting the environmental other, rather than directly protecting human health and well-being. In \textit{ATA}, for example, Justice Scalia led a unanimous Court in upholding cost-blind air pollution standards.\textsuperscript{454} He followed a similar path in \textit{City of Chicago}.\textsuperscript{455} Both these cases were viewed by the Court as involving straightforward issues of statutory interpretation, amenable to a textualist approach. But it is also significant that neither implicated the ecological model. Both involved pollutants or contaminants with direct mechanisms of injury to humans and thus fell within a category of cases involving regulatory activities, including worker and food safety and consumer protection, where issues are fought on more familiar ground of opposition between protecting individual freedom or economic productivity, on the one hand, and concerns for human well-being, on the other.

\textsuperscript{449} A third possible explanation is the legal culture’s long and profound history of involvement first with slavery and later with civil rights, compared to its much more recent and arguably more superficial engagement with environmental issues. \textit{Id.}

\textsuperscript{450} See supra notes 221-34 and accompanying text.

\textsuperscript{451} See supra notes 425–40 and accompanying text.

\textsuperscript{452} See supra notes 94–107 and accompanying text.

\textsuperscript{453} See supra notes 306–37 and accompanying text.

\textsuperscript{454} See supra notes 345–87 and accompanying text.

\textsuperscript{455} See supra notes 367 & 373 and accompanying text.
Particularly given the conservatism inherent in its institutional role, the Court’s reluctance to embrace the ecological world view and associated values seems, in hindsight at least, to be inevitable. Such an embrace would require a potentially far greater change in the legal culture’s received structures and understandings of the world than would, for example, extending equal treatment to all people within the existing anthropocentric frame. If social (and legal) advancement involves an extension of moral consideration to successively more distant beings, as Aldo Leopold and Justice Stevens dissenting in *Lucas* supposed, one might expect equal treatment of fellow humans to occur a good deal more readily than standing for trees.

The second qualification is that the sense of the foreignness of environmentalist values—the sense as in *Lyng* that these values belong to a culture not our own—is not shared equally by all the justices. In *Sweet Home*, a majority of the Court endorsed a robust application of the interdependence model to protect ecosystems for endangered species; in *Laidlaw* a more modest version of the model animated the Court’s grant of standing to local river users. In *Defenders*, *Lucas*, and *Lyng*, dissenters laid out alternative institutional responses by which environmentalist beliefs and values could be accommodated. Their dissents signaled not only how the legal culture might have evolved, with a different balance represented on the Court, but also pathways for possible future accommodation of those values.

### B. The Cases and the Culture

It may also be that the Court’s hesitancy accurately reflects the larger culture. Commentators in the decades after the first Earth Day spoke confidently of the cultural “transformation” that the environmental movement had wrought. Based on their studies Kempton et al. declared that environmentalism was a core cultural value in America, embraced by the vast majority of people and not opposed on its own terms by competing cultural values. Similarly, Dunlap and Van Liere showed majority adherence to their New Environmental

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456. See supra notes 425–40 and accompanying text.
457. See supra notes 250–69 and accompanying text.
458. See supra notes 116–27 and accompanying text.
459. See supra notes 94–107 and accompanying text.
460. See supra notes 221–34 and accompanying text.
461. See supra notes 425–40 and accompanying text.
462. See infra pages 437–38 for discussion of these pathways.
But as the Court's opinions and virtually every other mode of public discourse on environmental issues make plain, while environmentalism is not opposed on its own terms (there is no anti-environmental movement per se), it is in tension with competing values that are important in the culture. The justices may care about natural ecosystems, but when push comes to shove, they—or at least a majority of them—may care more about preserving an institutional ecosystem that expresses competing autonomy and mastery values, as we saw for example in *Defenders*, *SWANCC*, *Lucas*, and *New York v. United States*. In this, the Court may simply reflect what continues to be mainstream American culture.

The resilience of these competing values in our national culture, as constraints on the advance of environmentalism, may be evident in recent declines in the percentage of the public identifying itself as environmentalist and in acknowledgements among environmentalists that the movement has stalled or lost ground. With conservatives in the White House and dominating both Houses of Congress, environmental advocates have suffered a string of political defeats, including U.S. withdrawal from the Kyoto process and the retreat from the "roadless rule" policy in national forests. Michael Shellenberger and Ted Nordhaus place the major blame for this malaise on the leaders of the movement. Environmental advocates, they argue, have fallen into narrow tactical thinking, sure of their own rectitude but unable to

466. See supra notes 94–113 and accompanying text.
467. See supra notes 165–87 and accompanying text.
468. See supra notes 221–35 and accompanying text.
469. See supra notes 273–98 and accompanying text.
474. SHELLENBERGER & NORDHAUS, supra note 471, at 34.
connect with the broader concerns of the public or to appeal to that public with "a more expansive vision and set of values." This risks the demotion of environmentalism from movement to mere interest group status. An alternative fate for environmentalists is relegation to outsider status as cultural border dwellers, isolated from mainstream social and political discourse.

Perhaps here we find a collective meaning in the Court's environmental decisions and a message for environmentalists. As a series of holdings and pronouncements on the law, these decisions seem to have no coherent significance. As a reflection of changing and conflicting understandings of the environment, however, these cases offer a nuanced, multi-faceted interpretation of an important cultural struggle. They help us understand where environmentalism has come and where it may go.

The cases tell us that, while environmentalism may not be opposed on its own terms, it challenges beliefs and values that are deeply embedded in our core institutions and are enduring elements of our culture. Although claims of crisis may generate strong public responses, as with much federal environmental legislation now on the books, institutions have a way of leveling those responses over time in recognition of competing values that may have been subordinated in the moment of crisis but that remain culturally salient. We have seen this leveling process at work in the Court's environmental cases. At the same time, however, the Court has accommodated environmentalist values, where competing values were not seen to compel their rejection. And dissenting and concurring justices have traced pathways for future exploration and development: for example, in Defenders, Justices Kennedy (concurring) and Blackmun (dissenting) sought space in the law for notions of causation based on ecological interconnectedness, and in Lucas, Justice Stevens (dissenting) envisioned evolution of property law in parallel with the evolution of our moral and scientific understanding of fragile environments.

This analysis suggests that neither of the alternative pathways for environmentalism outlined above—relegation to interest group or border dweller status—is fated. There seems no reason why environmentalists should not continue to advance basic beliefs and values that have energized the movement, avoiding the trap of narrow tactical thinking. Those beliefs and values have made institutional inroads and may make further inroads as knowledge or circumstances change—for example, increased congestion providing more "intense experience of the

475. Id.
476. See MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE 182, 191 (1982).
477. See Lazarus, supra note 7; Farber, supra note 9.
ecological dangers of fragile interdependence." 478 At the same time, the Court teaches, environmentalists would do well to keep in mind, by analogy to their own ecological world view, the interdependence of the social and political systems that they seek to change. As Rick Bass observed, writing about the reintroduction of Mexican wolves into the wild: "We must take care of the wolves and yet concern ourselves, too, with the rest of the system—the increasingly huge society of man, that immense biomass in the middle—without compromising our beliefs and values." 479

C. Environmentalism’s Next Iteration

The elements of an environmentalism that would meet Bass’ challenge are already present in the intellectual and policy debate over the movement’s future. I will briefly sketch two elements of that environmentalism to illustrate how the movement might continue to draw strength from its noetic sources while at the same time minimizing the resistance of dominant cultural strains. The first of these elements is replacing ecocentrism with a concept of human well-being as dependent on harmony with the environmental other. Ecocentrism and its religious or spiritual variants, although prevalent in the environmentalist canon, have not succeeded in displacing the pervasive anthropocentrism of our public discourse on environmental issues. And they carry some unfortunate cultural connotations. In particular, they tend to sacralize pristine environments and, by implication at least, to denigrate built environments and other areas of concentrated human activity; urban areas, where the majority of people in the United States live and work, risk being seen as devalued environments. 480 This implication of ecocentrism contributes to the sense of environmentalism’s strangeness, its distance from core human experience and values, that has chilled receptiveness to the movement. It has also encouraged environmentalists to focus their attention away from the places where arguably the most serious environmental problems and the greatest potential for environmental progress exist.

The harmony values of Schwartz’s matrix seek maintenance of both the social and material environments and thus can support a more integrative environmentalism than ecocentrism alone would suggest. Environmental ethicists have advanced non-ecocentric or pluralist theories that would acknowledge the dignity and worth of urban as well as rural landscapes and aim at achieving a sustainable human presence on

478. Schwartz & Ros, Values in the West, supra note 53, at 373.
the landscape to the long-term benefit of both humans and non-human nature. The 1970 National Environmental Policy Act articulated a policy goal supporting this emphasis: to encourage "productive and enjoyable harmony between man and his environment." This formulation, which acknowledges that humans will be using Earth's resources to live and to enjoy their lives, is less directly at odds with mastery values and creates a space for fruitful interaction.

A second element of a new environmentalism is freeing the movement from its heavy identification with regulation, the control of individual and corporate behavior by collective prescription. In the early days of the movement, stirred by anger at examples of gross abuse, environmentalists vilified the responsible landowners and corporations as well as governmental bodies and sought constraints on all of them. Thus, it threatened interference with the values of individualism associated with use of private property and entrepreneurial activity and also with the mastery values associated more generally with economic production and material abundance.

More recently, however, there is growing recognition that environmental problems are not merely the function of oppressive hierarchies or deviant property owners but are caused by all of us. The impulse then may be less to punish miscreants with restrictive controls than to find the most effective ways to achieve "productive harmony." The tools to do this include not only command-and-control regulation but also market mechanisms such as tradable permits, payment schemes such as taxes and subsidies, and voluntary information-driven programs. Some environmentalists have objected to tradable permits and subsidy programs as immoral, but others are choosing not to stigmatize them.

481. See id. at 3; see also Bryan G. Norton, Integration or Reduction: Two Approaches to Environmental Values, in ENVIRONMENTAL PRAGMATISM 105, 106-07 (Andrew Light & Eric Katz eds., 1996) (arguing that the search for a unified theory of environmental ethics is misguided and advocating a more applied, pluralist system). This emphasis is apparent in recent articulations by some environmental groups. For example, the Nature Conservancy opened its 2005 Annual Report by observing that "at the dawn of the 21st century, the nature of conservation has changed and a new dialogue is emerging: Conservation today is about conserving lands and waters for people, rather than protecting nature from people." THE NATURE CONSERVANCY ANNUAL REPORT 2005, at 1 (emphasis in original), available at http://www.nature.org/aboutus/annualreport2005.pdf..


483. This identification is not exclusive. A number of powerful environmental organizations, such as the Nature Conservancy, have focused their energies on voluntary acquisition of properties for conservation and cooperative ecosystem management of areas surrounding those properties. See Steven J. McCormick, Thinking Outside the Park, 56 NATURE CONSERVANCY 4-5 (Spring 2006).


Environmental Defense, for example, has embraced a suite of market approaches as appropriate policy tools.\textsuperscript{486} Such approaches are less threatening to both individualists and free market exponents than regulation, while still able to achieve environmental results.\textsuperscript{487} And, perhaps even more than regulation, they have the ability to identify and express environmental interdependencies in ways that can be widely understood and appreciated, thus potentially broadening acceptance of environmentalist tenets.

These elements of a new environmentalism may make reforms more likely to succeed because they are more closely adjusted to the culture in which the reforms are advanced.\textsuperscript{488} Framed in terms of shared ideas of what is good and right and desirable, however, they also preserve environmentalism as a force for cultural change and not merely a tactical exercise.


\textsuperscript{488} See Licht et al., \textit{Culture, Law, and Corporate Governance}, supra note 14, at 252.
APPENDIX A
Environmental Protection (EP) Scores
For Justices Sitting for the October 2004 Term\textsuperscript{489}

<table>
<thead>
<tr>
<th>Justice</th>
<th>EP Score</th>
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<tbody>
<tr>
<td>Breyer</td>
<td>.522</td>
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<tr>
<td>Ginsburg</td>
<td>.571</td>
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<tr>
<td>Kennedy</td>
<td>.341</td>
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<td>O'Connor</td>
<td>.361</td>
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<tr>
<td>Rehnquist</td>
<td>.330</td>
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<tr>
<td>Scalia</td>
<td>.189</td>
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<tr>
<td>Souter</td>
<td>.579</td>
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<tr>
<td>Stevens</td>
<td>.539</td>
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<tr>
<td>Thomas</td>
<td>.216</td>
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\textsuperscript{489} This Appendix updates Environmental Protection Scores for each sitting justice, covering his or her entire tenure on the Court, as per Lazarus, \textit{supra} note 7.