

# ARTICLE

## EROSIVE INTERPRETATION OF ENVIRONMENTAL LAW IN THE SUPREME COURT'S 2003-04 TERM

*Albert C. Lin\**

### ABSTRACT

In the October 2003 Term, the Supreme Court decided seven environmental law cases—an extraordinarily large number. Although all of the cases revolved around questions of statutory interpretation, the issues presented were diverse, and the Court's flurry of activity might appear coincidental. Indeed, some of the issues addressed by the Court border on the trivial, which could point to the absence of any broader meaning in these decisions. When the decisions are considered in the aggregate and in the context of the Court's prior environmental jurisprudence, however, a pattern does emerge. The October 2003 Term's environmental law decisions continue a trend in the gradual, but discernible, erosion of environmental law and of governmental authority to address environmental concerns. This Article critically examines the tools of statutory interpretation that have contributed to this erosion, particularly in the October 2003 Term's decisions: the textualist approach to interpreting statutes, the importation of common-law causation analysis into modern statutory schemes, and the

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\* Albert C. Lin, Acting Professor of Law, University of California, Davis, School of Law. J.D., Boalt Hall School of Law, University of California, Berkeley 1996; M.P.P., Harvard University 1995; B.S., Emory University 1992. Thanks to Andrea Bjorklund, Jennifer Chacon, Holly Doremus, Chris Elmendorf, Edward Imwinkelried, Elizabeth Joh, Carlton Larson, Robert Mikos, Angela Onwuachi-Willig, Donna Shestowsky, and Justin Smith for helpful suggestions. Thanks also to Dean Rex Perschbacher and the U.C. Davis School of Law for financial support of this project, to my research assistant, Sean Strauss, for his assistance, and to Linh Thai for her support.

invocation of federalism principles to inform statutory interpretation. The Article concludes that the Court has used these tools selectively to circumvent Congress’s intent and to narrow the scope of environmental regulation. This narrowing is particularly problematic because the Court’s rhetoric in using these tools has allowed it to disclaim responsibility for policy choices and thus to avoid accountability for those choices.

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## I. INTRODUCTION

The Supreme Court's 2003-04 Term was noteworthy for its decisions asserting the rule of law in the war on terrorism cases.<sup>1</sup> The Term was also remarkable for another, less-noted reason: an extraordinary number of cases concerning the environment. In all, the Court decided seven cases that squarely raised issues of environmental or natural resources law—one tenth of its docket<sup>2</sup> and a marked departure from the Court's usual yearly diet of only two or three such cases.<sup>3</sup> These cases touched on wide-ranging areas, including air pollution, water pollution, mineral rights, and public lands management.<sup>4</sup> Notwithstanding a pair of decisions affirming environmental protection in a pair of cases, the Term generally resulted in the weakening of environmental law.

Was the Court's flurry of activity in this area a coincidence, and what do these decisions portend for the future of environmental law? Viewed in isolation, each case seems for the

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1. See *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2722, 2727 (2004) (determining proper jurisdiction over a habeas petition filed by a suspected terrorist); *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004) (finding that U.S. federal courts have jurisdiction to hear habeas corpus challenges filed by foreign nationals detained at Guantanamo Bay, Cuba); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (requiring that a U.S. citizen be given an opportunity to contest his status as an enemy combatant); see also Charles H. Whitebread, *The Rule of Law, Judicial Self-Restraint, and Unanswered Questions: Decisions of the United States Supreme Court's 2003-2004 Term*, 26 WHITTIER L. REV. 101, 102 (2004) (noting that a leading theme of the 2003-04 Term was the assertion of judicial oversight over the war on terrorism). See generally Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N.Y. TIMES, July 5, 2004, at A1 (providing an overview of the 2003-04 Term).

2. The Court decided a total of 73 cases with full opinions in the 2003-04 Term. See Whitebread, *supra* note 1, at 101.

3. See Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547, 547 (1997) (estimating that since 1970, the Court has decided an average of two or three environmental law cases per year). Professor Richard Lazarus has used the term "environmental case" to refer to the larger set of cases in which environmental protection or natural resources matters are at stake, even if the legal issues involved have no environmental character. See Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 708 n.4, app. A (2000) (identifying approximately 240 such cases decided between 1969 and 1999).

4. See generally *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983, 990 (2004) (air pollution); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 1540 (2004) (water pollution); *BedRoc Ltd. v. United States*, 124 S. Ct. 1587, 1590 (2004) (mineral rights); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756, 1759 (2004) (air pollution); *Dep't of Transp. v. Pub. Citizen*, 124 S. Ct. 2204, 2209 (2004) (air pollution); *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373, 2376 (2004) (land management).

most part ordinary or even picayune. For example, one case involved the scope of federal mineral reservations in certain land grants limited to the state of Nevada.<sup>5</sup> Another case addressed the ability of a local regulatory body to require operators of certain vehicle fleets to purchase only vehicles meeting specified emissions requirements.<sup>6</sup> Such issues are important in their respective fields, but do not pose the weighty problems the Supreme Court might typically confront.<sup>7</sup>

However, if the cases are considered in the aggregate and in the context of the Court's overall jurisprudence over the last 10 to 15 years, a pattern does emerge. The Term's decisions continue a trend in the gradual but discernible erosion of environmental law and of governmental authority to address environmental concerns. The trend is an erosion, rather than a demolition, for it does not involve a frontal assault on environmental law. The Court did not invalidate a substantial portion of a major environmental statute in any case during the Term. Nor did any case pose a challenge to Congress's authority to regulate under the Commerce Clause, or directly raise any other constitutional issues.<sup>8</sup> Rather, more mundane tools of legal analysis—tools that may appear neutral at first glance, but are hardly neutral in effect—bear responsibility for the continuing erosion of environmental law. These tools are: the textualist approach to interpreting statutes, the importation of common-law causation analysis into modern statutory schemes, and the invocation of federalism principles to inform statutory interpretation.

This Article critically examines the use of these tools in the Court's recent environmental docket, particularly in the 2003-04 Term. The Article concludes that the Court has used these tools selectively to circumvent Congress's intent and to narrow the scope of environmental regulation, thereby undermining environmental protection.

Part II of this Article provides a brief overview of the Court's decisions in environmental and natural resources cases from the

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5. *BedRoc Ltd.*, 124 S. Ct. at 1590, 1594.

6. *Engine Mfrs. Ass'n*, 124 S. Ct. at 1759.

7. Cf. Richard Lazarus, *High Court Not in a State of Denial*, ENVTL. F., Jan.–Feb. 2004, at 10, 10 (noting that cases for which certiorari was granted did not present “traditional indicia of a case clearly warranting the High Court’s attention,” such as circuit conflicts, sweeping lower court rulings, or novel interpretations of constitutional law).

8. Indeed, Professor Dan Tarlock has suggested that environmental law “is vulnerable to long run erosion through ossification, marginalization, or assimilation” because it lacks a constitutional basis that might “buffer” its objectives from political swings. A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. L. 213, 226 (2004).

2003-04 Term. The Article then explores the roles played by the three legal tools used in those decisions, and focuses in particular on how their use has resulted in the erosion of environmental law. Part III considers textualism, the approach to statutory interpretation advocated most strongly by Justice Antonin Scalia, and its effect on environmental statutes. Part IV examines the Court's use of common-law causation analysis, and particularly the doctrine of proximate cause, to limit the scope of federal environmental regulation. Part V discusses federalism, perhaps the leading legacy of the Rehnquist Court, and the Court's selective use of that doctrine in environmental cases to undermine regulation of business interests. Finally, Part VI observes that the Term's cases fall within a larger erosive trend in environmental law—one in which the Court, or at least certain of its members—are subverting the current system of environmental regulation.

## II. THE 2003-04 TERM IN ENVIRONMENTAL LAW

The Court's 2003-04 environmental docket addressed a variety of legal issues in wide-ranging factual contexts. Two cases concerned the role of the states in implementing the federal Clean Air Act (CAA): *Alaska Department of Environmental Conservation (ADEC) v. EPA*,<sup>9</sup> and *Engine Manufacturers Association v. South Coast Air Quality Management District*.<sup>10</sup> A third case, *Department of Transportation v. Public Citizen*, also involved air pollution concerns, although the legal dispute centered on the Federal Government's obligations under the National Environmental Policy Act (NEPA).<sup>11</sup> There was also a water pollution case, *South Florida Water Management District v. Miccosukee Tribe of Indians*, which raised fundamental questions of the regulation of point sources under the federal Clean Water Act (CWA).<sup>12</sup> Two cases involved disputes over ownership of natural resources: *BedRoc Limited, LLC v. United States*,<sup>13</sup> and *Virginia v. Maryland*.<sup>14</sup> The final case, *Norton v. Southern Utah Wilderness Alliance*, concerned the ability of plaintiffs to challenge the management of federal lands.<sup>15</sup>

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9. 124 S. Ct. 983, 990 (2004).

10. 124 S. Ct. 1756, 1759 (2004).

11. 124 S. Ct. 2204, 2209 (2004).

12. 124 S. Ct. 1537, 1540, 1543 (2004).

13. 124 S. Ct. 1587, 1590–99 (2004).

14. 124 S. Ct. 598, 601 (2004).

15. 124 S. Ct. 2373, 2376 (2004). This Article does not discuss *Cheney v. United States District Court for the District of Columbia*, 124 S. Ct. 2576 (2004), though it arose

Factual and legal variations aside, these cases shared certain notable characteristics. First, all seven cases involved questions of statutory interpretation.<sup>16</sup> None of the cases posed fundamental constitutional questions regarding the ability of Congress or the states to protect the environment. That all cases raised questions of statutory interpretation underscores the importance of understanding exactly how the Court goes about interpreting statutes. Second, all cases (with the exception of *Virginia v. Maryland*,<sup>17</sup> an original jurisdiction case) had been decided in favor of environmental interests by the appellate courts below.<sup>18</sup> This fact suggests that the Court's selection of cases was not accidental, and implies a skepticism by the Court of lower court rulings favorable to environmentalists.<sup>19</sup>

Support for this hypothesis comes from the outcomes of the six cases heard via certiorari. In the two cases where the lead plaintiffs were public interest environmental organizations, *Public Citizen* and *Southern Utah Wilderness Alliance*, the Court ruled unanimously in favor of the Government and against the plaintiffs.<sup>20</sup> In *Public Citizen*, the Court held that NEPA did not require the Government to evaluate the environmental effects of

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in the context of an environmental dispute, because the legal issues in that case involved executive privilege, rather than substantive environmental law.

16. *Virginia v. Maryland* involved the interpretation of an interstate compact, which the Court interpreted "just as if [it] were addressing a federal statute." *Virginia*, 124 S. Ct. at 605; see *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373, 2376 (2004); *Dept. of Transp. v. Pub. Citizen*, 124 S. Ct. 2204, 2209 (2004); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756, 1761 (2004); *BedRoc Ltd. v. United States*, 124 S. Ct. 1587, 1590 (2004); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 1541–43 (2004); *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983, 1000 (2004).

17. 124 S. Ct. at 599.

18. *S. Utah Wilderness Alliance*, 124 S. Ct. at 2376–78; *Public Citizen*, 124 S. Ct. at 2212–13; *Engine Mfrs. Ass'n*, 124 S. Ct. at 1760–61; *BedRoc Ltd.*, 124 S. Ct. at 1592; *Miccosukee*, 124 S. Ct. at 1542; *Alaska Dep't of Env'tl. Conservation*, 124 S. Ct. at 998.

19. See Lazarus, *supra* note 7, at 10 (contending that "the skewing of the Court's docket . . . suggests either an unfortunate apprehension about the Court . . . or the even worse possibility that any such possible apprehension is reasonable because a majority of the Court is in fact more skeptical of lower court rulings favorable to environmentalists"); Richard J. Lazarus, *The Nature of Environmental Law and the U.S. Supreme Court, in DEFENDING THE ENVIRONMENT IN AN UNCERTAIN CLIMATE* (M. Wolf ed., forthcoming 2005) (manuscript at 10, 12–13, on file with the Houston Law Review) (suggesting from the 2003-04 environmental cases that "the Court is apparently more concerned about the possibility of regulatory overkill than underkill"). Richard Lazarus has noted that the 2003-04 environmental cases fit within a pattern during the last two decades of the Court reviewing a disproportionate number of lower court rulings favorable to environmental interests. See *id.* at 13.

20. *Public Citizen*, 124 S. Ct. at 2209; *S. Utah Wilderness Alliance*, 124 S. Ct. at 2376, 2385.

Mexican trucks operating in the United States.<sup>21</sup> In *Southern Utah Wilderness Alliance*, the Court held that the plaintiffs could not use section 706(1) of the Administrative Procedure Act to challenge the Government's alleged failure to manage a wilderness study area as wilderness.<sup>22</sup> The Court also reached unfavorable outcomes for the environment in the two cases brought by private industry as lead plaintiffs, *Engine Manufacturers* and *BedRoc*.<sup>23</sup> In *Engine Manufacturers*, the Court held that "at least certain aspects" of the air quality management district rules allowing local fleet operators to purchase only vehicles that met certain emissions requirements were "likely" preempted by the federal CAA.<sup>24</sup> In *BedRoc*, the Court held that the Government's mineral reservations in land grants under the Pittman Act, a homesteading statute, did not include sand and gravel.<sup>25</sup> In the other two cases, *ADEC* and *Miccosukee*, the Court upheld environmental regulatory schemes, but in a less-than-resounding manner.<sup>26</sup> In *ADEC*, the Court held by a 5–4 margin that the EPA possessed authority under the CAA to oversee a state agency's determination of appropriate pollution control technology.<sup>27</sup> And in *Miccosukee*, the Court rejected a water management district's argument that its pump did not require a CWA permit merely because the pump itself did not generate pollutants.<sup>28</sup> The Court, however, left open other arguments that might allow the water district to avoid having to obtain a permit.<sup>29</sup>

While the Term was not an unmitigated disaster for the environment, its overall tenor was antiregulatory and hostile to environmental protections. Indeed, several of the decisions unfavorable to the environment involved overwhelming if not unanimous margins—in contrast to closer environmental decisions from prior years.<sup>30</sup> These outcomes might not be objectionable, if they accurately interpreted the statutes at issue.

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21. 124 S. Ct. at 2217.

22. 124 S. Ct. at 2380–84.

23. *Engine Mfrs. Ass'n*, 124 S. Ct. at 1764–65; *BedRoc Ltd.*, 124 S. Ct. at 1595–96.

24. 124 S. Ct. at 1764.

25. 124 S. Ct. at 1595; *id.* at 1596 (Thomas, J., concurring).

26. *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983, 1009 (2004); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 1543–47 (2004).

27. 124 S. Ct. at 1009.

28. 124 S. Ct. at 1543.

29. *See id.* at 1543–47.

30. *See, e.g., infra* Part III.C.1 (describing the 5–4 ruling in *SWANCC*, a 2001 decision that limited the Government's regulatory authority under the Clean Water Act (CWA)).

However, as subsequent sections of this Article will explain, the Court employed textualism, proximate cause doctrine, and federalism to achieve results that squarely contradict the environmental statutory schemes and their underlying intent.<sup>31</sup>

### III. TEXTUALISM

Championed by Justice Scalia, textualism has become a leading approach to statutory interpretation at the Supreme Court. This Part begins by describing the primary approaches to statutory interpretation: intentionalism, purposivism, and textualism. This Part then discusses the erosive threat to environmental regulation from the manner in which the Court is applying textualism, as reflected in several decisions from the 2003-04 Term. These decisions, as well as earlier Court rulings, demonstrate both the potential for textualism to be used to obscure policy choices and the realization of that potential.

#### A. *Background: Theories of Statutory Interpretation*<sup>32</sup>

Statutory interpretation typically begins with the text of the statute.<sup>33</sup> The text by itself, however, often provides insufficient

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31. This Article does not examine the Court's use of justiciability doctrines, such as standing, nonreviewability, and finality, to limit environmental plaintiffs' access to the courts. These doctrines, which the Court extended in *Southern Utah Wilderness Alliance*, 124 S. Ct. at 2378–81, have been the subject of much academic attention. See, e.g., Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004) (examining standing and nonreviewability doctrines in agency law); David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004) (suggesting that justiciability doctrines create a paradox); Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317 (2004) (exploring the contours of justiciability and the "zone of interest" test); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) (analyzing the *Lujan* decision and its impact on standing); see also Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990) (probing the unreviewability doctrine in the agency discretion context).

32. This section provides background on textualism and other theories of statutory interpretation, but it does not review comprehensively the extensive literature in this area. See ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 191–94 (1997) (listing a number of selected references); 2A NORMAN A. SINGER, STATUTES & STATUTORY CONSTRUCTION § 45:01, at 2 n.1 (6th ed. 2000).

33. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) ("[T]he 'rule of law' requires that statutes enacted by the majoritarian legislature be given effect, and that citizens have reasonable notice of the legal rules that govern their behavior. When the statutory text clearly answers the interpretive question, therefore, it normally will be the most important consideration."); Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 6–7 (2003) (asserting that the first step of statutory interpretation is to "[l]ook at the text").

guidance to the interpreter. This is for a number of reasons: words do not convey ideas perfectly, statutes usually “address[] categories of conduct”—rather than specific but varying individual situations, legislatures may not anticipate factual situations to which a statute might apply, or legislatures may simply leave the drafting of details to administrative agencies.<sup>34</sup> Where the text does not provide an obvious answer, the critical question is often “how free *should* judges feel themselves to be from the fetters of text and legislative intent in applying statutes.”<sup>35</sup>

Courts traditionally have followed an “intentionalist” approach, interpreting statutes so as to effectuate the “intent of the legislature.”<sup>36</sup> Determining that intent, however, is often neither easy nor uncontroversial. Legislative intent is a figure of speech that commonly refers to “the sum of the individual ideas, views, and attitudes of all of the members of the legislature.”<sup>37</sup> Intentionalists may consider, in addition to the statutory text, other provisions of the same statute, similar provisions in completely different statutes, legislative history, underlying policy, rules of construction, and concepts of reasonableness.<sup>38</sup> In some instances, nontextual sources such as legislative history can override even the plain language of an inconsistent statutory text.<sup>39</sup>

Legal process theorists, pointing out that individual legislators might support a particular bill for diverse reasons, questioned the coherence of the concept of legislative intent.<sup>40</sup>

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34. MIKVA & LANE, *supra* note 32, at 20–22; *see also* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 114 (1990) (observing that “words are not self-defining; their meaning depends on both *culture* and *context*”).

35. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 271 (1990).

36. 2A SINGER, *supra* note 32, § 45:05, at 25; *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13 (1994) (“Theories of statutory interpretation in the United States have in this century emphasized the original meaning of statutes.”). There is, of course, significant debate regarding the fictitious nature of attributing intent to a collective body. *See* 2A SINGER, *supra* note 32, § 45:06, at 34–37.

37. 2A SINGER, *supra* note 32, § 45:06, at 35–36.

38. *Id.*, § 45:13, at 106–09; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990).

39. Eskridge, *supra* note 38, at 628 (characterizing the traditional approach as “[t]he soft plain meaning rule”). In what is often described as the leading case for this approach, *Church of the Holy Trinity v. United States*, the Court refused to enforce a statute that made it unlawful to prepay the transportation costs of any alien or foreigner “to perform labor or service of any kind in the United States” against a church that had prepaid such expenses for an English clergyman, where the legislative history suggested that Congress did not intend to exclude “brain toilers” from entry. 143 U.S. 457, 458, 464 (1892).

40. *See* ESKRIDGE, *supra* note 36, at 26–27 (suggesting that legislators are motivated by the desire to be re-elected and to gain prestige in addition to the motivation

Such theorists advocated a more dynamic approach to statutory interpretation, purposivism, to provide “creative elaboration of the principles and policies initially formulated in the statute.”<sup>41</sup> Under this approach, a court seeking to resolve statutory ambiguities would first identify the purpose of a statute, which could be inferred from its context, legislative history, and other sources.<sup>42</sup> The court would then “[i]nterpret the words of the statute . . . so as to carry out the purpose as best it can,” while avoiding giving those words a meaning they could not bear.<sup>43</sup> In contrast to intentionalism, purposivism “allows a statute to evolve to meet new problems while ensuring legitimacy by tying interpretation to original legislative expectations.”<sup>44</sup> Indeed, the purposivist approach contemplates that a judge may alter the plain language of a statute if that language would produce an unreasonable result plainly at odds with the underlying purpose.<sup>45</sup>

Both intentionalism and purposivism came under increasing criticism in the 1980s. Critics attacked the concept of legislative purpose, like that of legislative intent, as fictitious or not subject to historical reconstruction.<sup>46</sup> They also argued that purposivism and intentionalism were undemocratic because of their potential to allow judges to import their own policy preferences in the interpretive process.<sup>47</sup>

Amidst these criticisms, Judge Frank Easterbrook and Justice Scalia argued for a literal approach to interpretation, sometimes referred to as “new textualism.”<sup>48</sup> This approach,

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to contribute to good public policy).

41. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1380 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

42. *See id.* at 1374, 1377–80.

43. *Id.* at 1374.

44. ESKRIDGE, *supra* note 36, at 26; *see also* William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 678 (2001) (contending that “[p]urposive interpretation . . . is usually the appropriate theory of interpretation” because it “captures the congressional expectation that the policy community will work out details consistent with the political deal”).

45. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 11 (2001).

46. *See* Eskridge, *supra* note 38, at 641–50 (listing three criticisms of the traditional approach).

47. *See* ESKRIDGE, *supra* note 36, at 26–29 (suggesting that the application of statutory purpose is dependent on the perspective of the interpreter); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 250–51 (1992) (discussing Judge Posner’s criticism, rooted in public choice theory, that purposivism allows judges to ignore legislative compromises and to attribute purposes to a statute that merely reflect the judges’ own policy preferences).

48. *See* Frickey, *supra* note 47, at 252–54 (describing the development of the

which Justice Scalia has advocated aggressively on the Supreme Court, gives precedence in statutory interpretation to the statutory text.<sup>49</sup> The textualist approach goes beyond traditional plain-meaning analysis in that it considers a broader range of sources to determine meaning, including the internal context and structure of the text, statutes other than the one in dispute, canons of statutory construction, and dictionary definitions.<sup>50</sup> Textualism rests on a particular theory of constitutional lawmaking: The Constitution specifically vests lawmaking authority in Congress and the President, and the law is comprised of only that text passed by both Houses of Congress and signed by the President.<sup>51</sup> Based on this theory, textualists reserve special condemnation for the use of legislative history. Legislative history, textualists complain, is drafted by unelected staffers, often with the intent of influencing judicial construction rather than informing legislators, who may not even read it.<sup>52</sup>

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approach advocated by Judge Easterbrook and Justice Scalia); *see also, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POLY 59 (1988) (criticizing original intent statutory interpretation). For the sake of convenience, this Article will use the term “textualism” to refer to Justice Scalia’s approach.

49. *See* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1296, 1299–1300 (1990) (noting that Justice Scalia considers statutory text, construction, and other statutory provisions to be “the only source for interpretive guidance”); *see, e.g.*, *Johnson v. United States*, 529 U.S. 694, 723 (2000) (Scalia, J., dissenting) (“Our obligation is to go as far in achieving the general congressional purpose as the text of the statute fairly prescribes—and no further. We stop where the statutory language does, and do not require explicit prohibition of our carrying the ball a few yards beyond.”).

50. Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 825 (2002).

51. *See* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 25 (1997) (providing an example to illustrate the lawmaking process and the role of congressional intent); *see also* Eskridge, *supra* note 38, at 671 (“Justice Scalia’s main constitutional argument seems to be that an exclusive focus on the statute’s text is mandated by the bicameralism and presentment clauses of article I.”).

52. *See, e.g.*, *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring).

I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote . . . . As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.

*Id.*; *see also* *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 620 (1991) (Scalia, J., concurring) (“It is most unlikely that many Members of either Chamber read the pertinent portions of the Committee Reports before voting on the bill—assuming (we cannot be sure) that the Reports were available before the vote.”); *cf.* Victoria F. Nourse &

Textualists argue that not only is legislative history unreliable, but it also allows courts to decide cases based on “policy preferences, rather than neutral principles of law.”<sup>53</sup> Although textualists reject the consideration of legislative history,<sup>54</sup> they are willing to consider certain other contextual sources of meaning, such as dictionary definitions and canons of statutory construction.<sup>55</sup> Justice Scalia has frequently relied on a particular subset of canons: “clear statement principles” that “systematically narrow[] the domain of statutes.”<sup>56</sup> As a result of Justice Scalia’s influence, the Supreme Court relied less and less on legislative history beginning in the early 1990s.<sup>57</sup>

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Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 607–08 (2002) (reporting on interviews in which staffers acknowledged that legislators often did not read legislative history but that such history served institutional purposes such as explaining bills to other legislators’ offices, agencies, or the public); Seth A. Metsch, Note, *Tools for Understanding: Problems With Legislative History in Environmental Law*, 9 FORDHAM ENVTL. L.J. 181, 185 (1997) (arguing that courts should look to legislative history only as a last resort).

53. SCALIA, *supra* note 51, at 35.

54. See SCALIA, *supra* note 51, at 36–37 (calling for an end to the overuse of legislative history). Some textualists, including Justice Scalia, do allow for the very limited use of legislative history, but only as a last resort or to correct mistakes in statutory language. See, e.g., W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 387–88, 423 (1992) (arguing that legislative history should be used sparingly).

55. See SCALIA, *supra* note 51, at 26–27 (defending canons of statutory construction); Manning, *supra* note 45, at 108–09 (distinguishing textualists from plain-meaning literalists, in that the former do not limit themselves wholly to statutory text); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 218–19 (noting textualists’ use of “textual,” as opposed to “substantive,” canons); see also Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 527 (1998) (criticizing textualist judges’ selective use of canons that “favor states’ rights and private economic interests”); cf. Bradley C. Karkkainen, Note, “Plain Meaning”: Justice Scalia’s Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL’Y 401, 410–13 (1994) (describing Scalia’s use of external legal context and specific policy considerations in statutory interpretation).

56. Karkkainen, *supra* note 55, at 450.

57. See Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique*, 36 HARV. J. ON LEGIS. 369, 384–87 (1999) (finding a significant drop in legislative history citations in Supreme Court opinions from 1980 to 1998, and observing that Scalia’s criticism of its use “has led to its substantial decline”); Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 398 (1996) (“During the 1993 Term, after Justice Scalia had been on the Court for five years, only a small percentage of cases examined legislative history, and no majority opinion cited legislative history as a necessary ground for its conclusion.”); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355–57 (1994) (comparing the Court’s use of legislative history and of dictionary definitions in the 1981, 1988, and 1992 Terms, and concluding that “there can be no doubt that textualism is in ascendancy and the use of legislative history to discover congressional intent is very much on the decline”); Karkkainen, *supra* note 55, at 401–02 (arguing that although only Justices Kennedy and Thomas “can be called adherents of Justice Scalia’s plain meaning approach,” Scalia “undoubtedly is

Nevertheless, textualism has been attacked on several grounds. First, because words can have multiple meanings, a statute often lacks a single objective “plain meaning.”<sup>58</sup> In the hard cases—the cases in which the text is not clear—textualism fails to provide determinate answers.<sup>59</sup> When the text yields no clear answer, judicial choice in interpretation is inevitable, and the selection of a particular dictionary definition may determine the outcome.<sup>60</sup> Second, much of the textualists’ criticism of those who use legislative history—that members of Congress neither draft nor read committee reports—applies to the text of a bill as well.<sup>61</sup> Indeed, textualism relies on its own additional legal fiction when it looks to other statutes to construe the statute at issue.

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forcing the Court to re-examine its jurisprudence of statutory interpretation”). *But see* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 5 (1998) (“[W]hen measured against other empirical analyses, the 1996 Term reflects some resurgence in the use of legislative history and an apparent decline in another benchmark of the new textualism—citations to the dictionary.”).

58. David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1408 (1999); *see also* Karkkainen, *supra* note 55, at 476 (concluding that Scalia’s determination that a statute has plain meaning “is often an interpretive conclusion reached only after a series of difficult and controversial interpretive choices are made”).

59. *See* Frickey, *supra* note 47, at 258 (arguing that textualism may be less useful in the types of cases usually heard by the Supreme Court); Zeppos, *supra* note 49, at 1321 (“The act of statutory interpretation involves resolving the unprovided-for case.”); *see also* ESKRIDGE, *supra* note 36, at 38 (noting that “for any statute of consequence, the legislative drafting process ensures textual ambiguities, which only multiply over time”).

60. *See* Mank, *supra* note 50, at 828 (suggesting that a judge’s biases may affect which among multiple plausible meanings is chosen from the dictionary); Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995) (criticizing “hypertextualists” who “find[] linguistic precision where it does not exist” and “rely[] exclusively on the abstract meaning of a particular word or phrase even when other evidence suggests strongly that Congress intended a result inconsistent with that usage”); Schacter, *supra* note 57, at 38–39 (suggesting that failure to consider legislative history may actually reflect a greater degree of judicial activism because judges are more free to weigh other sources, including “policy considerations of their own making”); Zeppos, *supra* note 49, at 1325–26 (citing a case where Judge Easterbrook and Justice Scalia, leading textualists, read a federal statute differently); *see also* MIKVA & LANE, *supra* note 32, at 33 (arguing that the failure to use legislative history results in “judicial dominance of the interpretive arena” because judges can then selectively employ canons of construction as the basis for their decisions).

61. *See* Schacter, *supra* note 57, at 43–45 (questioning the basis for drawing a distinction between the use of a bill’s text and of its legislative history when both are drafted by staffers); Zeppos, *supra* note 49, at 1312–13 (reporting that “while Justice Scalia may be right that ‘only a small proportion of the members of Congress read . . . Committee Reports,’ this would seem equally true of the text of the bill”). However, legislative history may “possess[] less democratic legitimacy” than the actual provisions of a bill because “[w]hat most legislators think they are considering, most of the time, is just a bill’s language” and not necessarily the legislative history. Slawson, *supra* note 54, at 405.

Here, the fiction is that Congress crafts each statute with full awareness of all other statutes it has previously passed and with full understanding of what the terms in those statutes mean.<sup>62</sup> Third, textualism sometimes generates outcomes that neither Congress nor any of its individual members intended because textualists reject the notion of congressional intent.<sup>63</sup> Textualists inevitably consider certain types of external information, such as context and dictionary definitions, and individual policy preferences may guide their choices of what to consider.<sup>64</sup> By categorically rejecting legislative history, textualists willfully blind themselves to sources of meaning that are often more pertinent and that can guard against “judicial usurpation of legislative responsibilities.”<sup>65</sup> Furthermore, textualism may not accurately describe what agencies and courts actually do when they interpret statutes.<sup>66</sup> One response to textualism, dynamic interpretation, contends that statutes are—and should be—interpreted “in light of their present societal, political, and legal context.”<sup>67</sup> To these “dynamists,” interpretation is a form of “dialectical creation,” rather than “archeological discovery,”<sup>68</sup> involving the active exercise of common-law powers of interpretation within fact-specific contexts, rather than the mere deciphering of legislative intent.<sup>69</sup>

The textualists’ critique nevertheless spurred reconsideration of the use of legislative history, even among

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62. See William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 173 (2000) (criticizing “the one-Congress fiction,” particularly as the basis for using different statutes from different contexts, including different sessions of Congress, to draw inferences in interpretation); Zeppos, *supra* note 49, at 1320 (suggesting that textualists may have to “creat[e] the fiction of a rational or omniscient legislature as draftsperson” to reach conclusions about the meaning of a statute).

63. Zeppos, *supra* note 49, at 1313–14.

64. See SUNSTEIN, *supra* note 34, at 114 (“The basic problem is that words are not self-defining; their meaning depends on both *culture* and *context*.”).

65. Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia’s Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121, 136 (2000) (asking “without the use of legislative history how are we to protect against judicial manipulation?”); see also Mank, *supra* note 50, at 829–30 (suggesting that legislative history can be more pertinent than dictionary definitions or other statutes).

66. ESKRIDGE, *supra* note 36, at 34.

67. Eskridge, *supra* note 33, at 1479, 1481–82; see also ESKRIDGE, *supra* note 36, at 50 (arguing that statutory interpreters in fact take a pragmatic approach of dynamic interpretation).

68. Eskridge, *supra* note 33, at 1482.

69. Manning, *supra* note 45, at 22–23; see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 2 (1982) (arguing for judicial authority to determine whether a statute is obsolete and can be treated as if it were part of the common law); ESKRIDGE, *supra* note 36, at 116–18 (suggesting that Article III powers include the equitable power to interpret statutes beyond original intent).

nontextualists.<sup>70</sup> At the Supreme Court, Justices Stevens and Breyer have advocated a more discerning use of legislative history—primarily committee reports, the type they consider the most trustworthy.<sup>71</sup> Acknowledging that most legislators in fact do not read committee reports, Justices Breyer and Stevens nevertheless have argued that these forms of legislative history reflect Congress's intent because legislators, who lack the time to familiarize themselves with all the details of proposed bills, "endorse" the reports when they vote in favor of legislation.<sup>72</sup> Jurists have also reconsidered the weight given to legislative history. Rather than using legislative history to establish original intent, courts may look to legislative history as one source of guidance among many to help identify important policy concerns.<sup>73</sup>

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70. See, e.g., MIKVA & LANE, *supra* note 32, at 33 ("What seems in order is not the avoidance of legislative history, but its careful use."); Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 85–86 (1999) (arguing for the consideration of legislative history that is part of a statute's public justification, such as committee reports and floor manager statements); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) (arguing that "those who attack [the use of legislative history] ought to claim victory once they have made judges more sensitive to problems of the abuse of legislative history; they ought not to condemn its use altogether"); Eskridge, *supra* note 38, at 684–86 (agreeing with Scalia that the "traditional approach relies too much on legislative history," and arguing for "a harder plain meaning rule" under which the "legislative history cannot displace a statutory meaning suggested by its plain language, the whole act, statutory analogues, current policy, and the canons of construction"); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1446–50 (2003) (acknowledging that legislative history often contains multiple and conflicting statements, but contending that certain statements are more reliable, particularly those by legislators whose support is pivotal to passage of legislation); see also Koby, *supra* note 57, at 392–95 (compiling and presenting data suggesting reduced citation of legislative history by Chief Justice Rehnquist and Justice Stevens following Justice Scalia's appointment to the Court).

71. See Tiefer, *supra* note 55, at 225 (finding that the Court's opinions citing legislative history, often by Justices Breyer or Stevens, usually rely on committee report items that are directly on point); cf. Koby, *supra* note 57, at 390 (finding that committee reports and congressional debate are the predominant sources of legislative history cited by the Supreme Court). Committee reports are generally considered to be the most reliable type of legislative history, with sponsor statements, rejected proposals, floor colloquies, statements from nonlegislative drafters, legislative silence, and subsequent history viewed as decreasingly reliable. See Eskridge, *supra* note 38, at 636–40 (providing a hierarchy of the authoritative value of each type of legislative history).

72. Tiefer, *supra* note 55, at 230–31 (quoting *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276–77 (1996) (Stevens, J., concurring)).

73. See Schacter, *supra* note 57, at 53–54 (suggesting that legislative history can be useful in identifying policy concerns if the legislative history can be separated from its strong conception of intent).

*B. Textualism in the Court's 2003-04 Environmental Cases*

Federal environmental law is largely statutory in nature. Accordingly, debates over statutory interpretation may significantly affect the scope and application of environmental law. The rise of textualism and the declining use of legislative history at the Supreme Court could be especially consequential. The likely effects of textualism on environmental laws, which often contain broad aspirational language, are not immediately obvious.<sup>74</sup> Textualists themselves have argued that their interpretive method is outcome-neutral.<sup>75</sup> Yet an examination of the Court's 2003-04 environmental docket illustrates that textualism is no more neutral than other means of statutory interpretation. Rather, textualist interpretations can and often do reflect judges' unstated policy choices.<sup>76</sup> To a large degree, the making of policy judgments in judicial decisionmaking is unavoidable. What makes textualism particularly troubling is that it allows judges to avoid taking responsibility for these judgments by asserting claims of neutrality.

Notwithstanding suggestions that more moderate members of the Court, led by Justices Stevens and Breyer, have turned back Justice Scalia's efforts to establish textualism as the dominant theory of statutory interpretation,<sup>77</sup> the Court's 2003-04

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74. Compare Richard J. Lazarus & Claudia M. Newman, *City of Chicago v. Environmental Defense Fund: Searching for Plain Meaning in Unambiguous Ambiguity*, 4 N.Y.U. ENVTL. L.J. 1, 23 (1995) (suggesting that textualism may benefit environmental plaintiffs because the "literal language of most environmental statutes tends to be extraordinarily aspirational and unforgiving"), with Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1233-35 (1996) (arguing that textualism tends to undermine environmental regulation because it often leads to narrow readings of statutory authority and downplays the role of expert agencies).

75. See, e.g., SCALIA, *supra* note 51, at 23 ("A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."); see also Karin P. Sheldon, *"It's Not My Job to Care": Understanding Justice Scalia's Method of Statutory Interpretation Through Sweet Home and Chevron*, 24 B.C. ENVTL. AFF. L. REV. 487, 488 (1997) ("Justice Scalia ignores the substantive consequences of his decisions on the environment because worrying about the environment is not his job. He believes that judges are the least suited members of the government to decide what is best for society as a whole, or its environment.").

76. See Zeppos, *supra* note 49, at 1331 ("At the heart of textualist theory is a particular vision about the distribution of power in our governmental structure. Thus, the textualist is being less than candid when he claims that he is guided by neutral rules which are not designed to reach particular substantive outcomes.").

77. See R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 PEPP. L. REV. 37, 39 (1997) ("Over the last five years, support has waned for Justice Scalia's New Textualism model of statutory interpretation."); Mikva & Lane, *supra* note 65, at 123

environmental docket reflected a strong textualist influence. Virtually all of the cases on that docket turned on questions of statutory interpretation.<sup>78</sup> In two cases, textualism played a decisive role in generating outcomes that appear contrary to congressional intent and that make little sense in terms of environmental policy. First, in *Engine Manufacturers*, an 8–1 majority interpreted the Clean Air Act’s preemption provisions to bar local “fleet rule” requirements relating to the purchase of new vehicles.<sup>79</sup> In holding that preemption applied to all “standards,” as defined broadly in a general dictionary, the court largely overlooked the purpose underlying the preemption provisions.<sup>80</sup> Second, in *BedRoc*, a plurality of the Court followed a textualist approach to narrowly construe the Government’s mineral reservation in a land grant, disregarding legislative history that supported a broader interpretation.<sup>81</sup> In a third case, *Miccosukee*, the Court interpreted the Clean Water Act in a way that was consistent with either a textualist or nontextualist approach.<sup>82</sup> And in a fourth case, *ADEC*, a 5–4 majority narrowly defeated a textualist interpretation that would have dramatically limited the EPA’s authority to supervise state implementation of the CAA, contrary to congressional intent.<sup>83</sup>

1. *Engine Manufacturers*. *Engine Manufacturers* involved a challenge to a local air quality management district’s attempts to reduce air pollution through “fleet rules” governing the purchase or lease of motor vehicles.<sup>84</sup> The rules mandated that

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(contending that Scalia’s efforts to instill textualism have had little impact on the Supreme Court, other federal courts, and state courts, which continue to use legislative history); Schacter, *supra* note 57, at 14–17 (arguing, based on data from an analysis of Supreme Court opinions from the 1996 Term, that textualists have not effected a major transformation in use of legislative history); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 251–52, 270–71 (arguing that a majority of Justices are retreating from textualism, perhaps in recognition of its overly simplistic understanding of human language, and particularly the role of context); Tiefer, *supra* note 55, at 206–07 (“In recent Terms, however, Justices Breyer and Stevens have assembled a majority on the Court for selective use of legislative history, notwithstanding Justice Scalia’s continuing, sharply worded opinions in opposition.”).

78. See *supra* note 16 and accompanying text.

79. *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756, 1761–64 (2004).

80. *Id.* at 1761.

81. *BedRoc Ltd. v. United States*, 124 S. Ct. 1587, 1593–94 (2004).

82. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 1543–45 (2004).

83. *Alaska Dep’t of Env’tl. Conservation v. EPA*, 124 S. Ct. 983, 1010–11 (2004) (Kennedy, J., dissenting). A textualist approach was not obvious in the Court’s other three environmental cases.

84. *Engine Mfrs.*, 124 S. Ct. at 1759.

certain vehicle fleet operators—including public transit operators, waste collection operators, and operators of fleets that transport passengers to and from local airports—purchase or lease only specific vehicles designated by the air district as meeting its requirements.<sup>85</sup> The effect of the rules was to ban the purchase of diesel-burning vehicles by fleet operators, unless cleaner vehicles were unavailable.<sup>86</sup> The Engine Manufacturers Association alleged that these rules ran afoul of section 209(a) of the CAA, which prohibits, subject to certain exceptions, states and their political subdivisions from adopting or attempting to enforce “any standard relating to the control of emissions from new motor vehicles.”<sup>87</sup>

In an 8–1 opinion by Justice Scalia, the Court held that the fleet rules were prohibited by section 209(a) because they constituted “standards” “relate[d] to the emission characteristics of a vehicle or engine.”<sup>88</sup> To determine whether the fleet rules were a “standard,” Justice Scalia applied a textualist approach. He turned first to an ordinary dictionary, which defined “standard” as “that which ‘is established by authority, custom, or general consent, as a model or example; criterion; test.’”<sup>89</sup> Relying on this extremely broad definition, Justice Scalia rejected the air district’s argument that section 209 preempted only production mandates that require manufacturers to ensure that the vehicles they produce have particular characteristics.<sup>90</sup> In the context of the CAA’s provisions governing emissions from mobile sources, Justice Scalia interpreted “standards” to encompass all emissions criteria.<sup>91</sup> In Justice Scalia’s view, “[t]he language of § 209(a) is

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85. *Id.* at 1759–60.

86. *Id.* at 1759 n.1; *id.* at 1767 (Souter, J., dissenting).

87. 42 U.S.C. § 7543(a) (2000).

88. *Engine Mfrs.*, 124 S. Ct. at 1761–63. The Court remanded for consideration of whether the rules might not be preempted to the extent that they governed internal state purchases, vehicle leases, or the purchase of used vehicles. *Id.* at 1764–65. On remand, the district court held that “[t]o the extent that the Fleet Rules apply to local and state government actors, they constitute proprietary action by the state,” and therefore were not preempted. *See Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, No. CV00-09065FMC(BQRX), 2005 WL 1163437, at \*7 (C.D. Cal. May 5, 2005).

89. *Engine Mfrs.*, 124 S. Ct. at 1761 (quoting WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY 2455 (1945)).

90. *See id.* at 1761–62 (noting that “standards target vehicles or engines, [while] standard-enforcement” targets manufacturers or purchasers).

91. Justice Scalia contended that the air district had conflated “standards” and the means of enforcing them. *See id.* at 1761–62 (contrasting section 202, which sets out emission criteria, with sections 203–06, which provide for the enforcement of those criteria).

categorical” and simply provided no exception to preemption for any “standards.”<sup>92</sup>

The majority’s dictionary-based analysis, however, glossed over the particular use of the term “standard” in neighboring sections of the CAA, particularly section 202.<sup>93</sup> As the air district had argued, “section 209(a) is a companion provision to section 202 of the Clean Air Act, which establishes emissions ‘standards’ for the motor vehicle industry by requiring that the vehicles or engines that manufacturers produce meet defined emissions criteria.”<sup>94</sup> Although the majority characterized the section 202 standards as emissions standards,<sup>95</sup> the section 202 standards—which apply only to manufacturers and not to purchasers—could just as accurately be described as production mandates.<sup>96</sup>

Furthermore, the majority’s narrow focus ignored the broader context of the CAA and the policy rationale for the preemption provision—a point that Justice Souter emphasized in dissent. The dissent sharply criticized the majority’s textualist analysis and argued that it had gone astray in two fundamental ways. First, the majority failed to apply a presumption against federal preemption, and the related statutory canon of narrowly interpreting preemption provisions, particularly for legislation in an area within “the historic police powers of the States.”<sup>97</sup> Second, the majority failed to use legislative history to inform interpretive choice.<sup>98</sup> Both of these principles, Justice Souter contended, pointed in favor of limiting the scope of section 209 preemption to production mandates imposed directly on manufacturers as a condition of sale.<sup>99</sup>

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92. *Id.* at 1763.

93. *See* 42 U.S.C. § 7521 (2000) (establishing emission standards for new motor vehicles and new motor vehicle engines); *see also* § 7525 (requiring vehicle and engine compliance testing and certification for new motor vehicles submitted by manufacturers).

94. Brief for Respondent at 19, *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756 (2004) (No. 02-1343), *available at* 2003 WL 22766722.

95. *Engine Mfrs.*, 124 S. Ct. at 1762.

96. *See* Rebecca Noblin, Note, *Engine Manufacturers Association, et al. v. South Coast Air Quality Management District, et al.*, 28 HARV. ENVTL. L. REV. 571, 576 & nn.51–52 (2004) (citing 42 U.S.C. § 7521(a)(3)(B)–(C), 7521(a)(6) (2000)). The air district’s understanding that the term “standard” referred more narrowly to production mandates was consistent with a prior statement by the EPA that “standard” means the same thing in sections 202 and 209 of the Clean Air Act (CAA) and that “standard” in section 202 clearly encompasses both “a numerical emission limitation and the number of vehicles that are subject to that limitation.” Brief for Respondent, *supra* note 94, at \*23 & n.9 (attachment to Letter from Gary S. Guzy (EPA General Counsel) to the Hon. Thomas F. Reilly, Sept. 15, 1999).

97. *See Engine Mfrs.*, 124 S. Ct. at 1765 (Souter, J., dissenting).

98. *See id.* at 1766.

99. *Id.* at 1765–67.

The failure to consider legislative history allowed the Court to give short shrift to the policy concerns underlying the preemption provision. That history, combined with the broader context in which CAA legislation was enacted, would have provided a more informed basis for interpreting the statute. The House and Senate committee reports indicated that Congress enacted section 209 to prevent states from imposing regulatory requirements that directly limited what auto manufacturers could sell.<sup>100</sup> The auto industry was concerned that the fifty states might all enact different specifications, which would create vast difficulties for an industry employing mass production techniques.<sup>101</sup>

The fleet rules at issue in the case, however, did not run directly afoul of this concern because they regulated only a small subset of purchasers—not manufacturers—and because they required fleets to purchase vehicles meeting certain specifications (i.e., having cleaner engines) only if such vehicles were commercially available.<sup>102</sup> Obviously, the rules gave manufacturers an incentive to develop and market vehicles to meet such specifications, but the rules did not compel the manufacturers to do so. Such an incentive hardly differs from voluntary incentive programs, which the majority suggested were not preempted.<sup>103</sup> Viewed more generally, the outcome in *Engine Manufacturers* is inconsistent with the overall thrust of the CAA, which sought to rectify states' unwillingness or inability to address air pollution problems, not to restrict their efforts.<sup>104</sup>

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100. See *id.* at 1766 (citing S. REP. NO. 90-403, at 33 (1967); H.R. REP. NO. 90-728, at 21 (1967)).

101. See *id.* The portion of the Senate report quoted by the dissent stated that “[t]he auto industry . . . was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry.” S. REP. NO. 90-403, at 33 (1967). The House report indicated that car manufacturers were concerned with safeguarding “[t]he ability of those engaged in the manufacture of automobiles to obtain clear and consistent answers concerning emission controls” and to prevent “a chaotic situation from developing in interstate commerce in new motor vehicles.” H.R. REP. NO. 90-728, at 20 (1967), as reprinted in 1967 U.S.C.C.A.N. 1938, 1956–57. See also E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326 (1985) (stating that federal regulation of motor vehicle air pollution was driven by auto industry efforts to avoid inconsistent and increasingly stringent state and local regulation).

102. See *Engine Mfrs.*, 124 S. Ct. at 1767 (Souter, J., dissenting). In the majority's view, the commercial availability requirement did not save the rules from preemption because the effect of the rules would still be to demand production of a certain type of vehicle. See *id.* at 1764 (majority opinion).

103. *Engine Mfrs.*, 124 S. Ct. at 1764.

104. See *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000) (explaining that “[t]he overriding purpose of the Clean Air Act is to force the states to do their job in

There are nevertheless policy counterarguments to support the Court's broader construction of the preemption provision. Under the CAA, Congress treated the regulation of motor vehicles differently from the regulation of stationary sources, in response to auto industry pleas for protection from more stringent state regulation.<sup>105</sup> Preemption of the fleet rules advances one of the auto industry's goals: avoiding a potentially fragmented market.<sup>106</sup> The point here is to suggest not that the legislative history unambiguously supported an outcome contrary to the one reached by the majority, but rather that the majority's textualist approach precluded consideration of valuable contextual evidence.<sup>107</sup> Indeed, the use of textualism obscured a very real policy choice that the Court was making in deciding what a "standard" meant.

The majority's refusal to look beyond the plain language of the statute—and the dictionary definition of "standard"—deprived states and local air districts of one tool for achieving the air quality standards mandated by the CAA. The immediate impact of the case may be relatively modest in that the Court did not completely invalidate the district's rules, apparently leaving open the options of states instituting voluntary incentive programs and internal state purchase restrictions.<sup>108</sup> Local air districts in California, including the defendant district in this case, also have an alternative means to try to adopt rules like the fleet rules; the CAA authorizes these jurisdictions to apply to the

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regulating air pollution effectively so as to achieve baseline air quality standards"); ROGER W. FINDLEY ET AL., *CASES AND MATERIALS ON ENVIRONMENTAL LAW* 288 (6th ed. 2003) (explaining that Congress significantly enhanced federal control over air pollution in the Clean Air Act Amendments of 1970 after earlier legislation was "largely ineffective in inducing states to act"); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1192–93 (1995) (noting that Congress "viewed state autonomy with suspicion because the states had failed to impose adequate air pollution controls"); see also Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1198 (1977) (describing "unreliable state cooperation" in environmental regulatory initiatives). *But see* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 578–79 (2001) (disagreeing with the assumption that states largely ignored environmental problems before 1970, and asserting that prior to federal regulation, the number of state and local governments "with regulatory programs to control air pollution was increasing rapidly, and the concentrations of important air pollutants were falling").

105. See Elliott et al., *supra* note 101, at 326.

106. *Engine Mfrs.*, 124 S. Ct. at 1766.

107. Cf. Lazarus, *supra* note 19 (manuscript at 28) (stating that the preemption issue "does at least possess more shades of gray than suggested by the majority opinion").

108. See *Engine Mfrs.*, 124 S. Ct. at 1764–65; see also Noblin, *supra* note 96, at 578 (arguing that the decision gave the district court the leeway to find that the majority of fleet rules are not preempted).

EPA, through the State of California, for a preemption waiver that allows them to adopt their own vehicle specification standards.<sup>109</sup>

The greater significance of the case may lie in the near-unanimous acceptance of what was essentially a textualist approach. Particularly noteworthy is the fact that Justice Scalia was able to attract the votes of Justices Stevens and Breyer, the Court's leading advocates for the thoughtful use of legislative history.<sup>110</sup> Justice Scalia's opinion relied heavily on the dictionary definition of "standard," declaring the language of section 209 to be "categorical."<sup>111</sup> Given the malleability of that critical term, one might have expected Justices Stevens and Breyer to look to the committee reports cited by the dissent. There are some hints that they may have done so—Justice Scalia's opinion mentioned that "not all Members of this Court agree" on the use of legislative history.<sup>112</sup> The opinion then added, however, that looking to legislative history would not have changed the case's outcome.<sup>113</sup> These remarks suggest that not all Justices are willing to follow lock-step Justice Scalia's textualist approach. However, the fact that eight Justices joined in Justice Scalia's opinion underscores the extent to which certain aspects of textualism, such as the use of common dictionary definitions, have become well-established.

2. *BedRoc*. The other case in which textualism played a decisive—and limiting—role was *BedRoc*. At issue in *BedRoc* was the scope of the Federal Government's reservation "of all the coal and other valuable minerals" in land grants made under the Pittman Underground Water Act of 1919.<sup>114</sup> The Act, a homestead law aimed at promoting development and population growth in

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109. See 42 U.S.C. § 7543(b) (2000); see also *Engine Mfrs.*, 124 S. Ct. at 1766 n.3. Although other states are not free to adopt their own standards, they can adopt California standards that have been approved by the EPA. See 42 U.S.C. § 7507.

110. See *supra* notes 70–72 and accompanying text.

111. *Engine Mfrs.*, 124 S. Ct. at 1763. Although Justice Scalia generally ignored the policy concerns underlying the preemption provision, as well as the broader historical context that led to enactment of the CAA, he did worry that multiple jurisdictions might adopt rules akin to the fleet rules, though different in substance, and thus "undo Congress's carefully calibrated regulatory scheme." *Id.* at 1762. Congress's scheme, however, was intended only to address "industry's fear that States would bar manufacturers from selling engines that failed to meet specifications that might be different in each State." See *id.* at 1766 (Souter, J., dissenting). It was not intended to bar states from issuing "regulations that govern a vehicle buyer's choice between various commercially available options." *Id.* at 1767.

112. *Id.* at 1763 (majority opinion).

113. See *id.*

114. See *BedRoc Ltd. v. United States*, 124 S. Ct. 1587, 1591 (2004) (quoting Pittman Underground Water Act of 1919, ch. 77, § 8, 41 Stat. 293, 295).

the state of Nevada, authorized the Secretary of the Interior to designate “nonmineral’ lands”<sup>115</sup> and to issue land grants of up to 640 acres to any settler who could demonstrate successful irrigation of at least 20 acres of crops.<sup>116</sup> However, each land grant “issued under the Act was required to contain ‘a reservation to the United States of all the coal and other valuable minerals in the lands.’”<sup>117</sup>

BedRoc, the owner of property originally granted to settlers under the Pittman Act, filed a quiet title action to establish its right to remove sand and gravel from the property.<sup>118</sup> BedRoc argued that sand and gravel are not “valuable minerals” because they are not commonly considered to be valuable and because there was no market for these minerals at the time of the land grants.<sup>119</sup>

Writing for a plurality of four, Chief Justice Rehnquist agreed that the use of the “term ‘valuable’ ma[de] clear that Congress did not intend to include sand and gravel in the Pittman Act’s mineral reservation.”<sup>120</sup> Declaring that the Court’s “inquiry begins with the statutory text, and ends there as well if the text is unambiguous,” the Chief Justice explained that “the proper inquiry focuses on the ordinary meaning of the reservation at the time Congress enacted it.”<sup>121</sup> Thus, “the ultimate question is whether the sand and gravel found in Nevada were commonly regarded as ‘valuable minerals’ in 1919.”<sup>122</sup> To answer this question, the Chief Justice resorted to “[c]ommon sense”—which revealed that sand and gravel “have no

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115. *Id.* Because lands were designated as “nonmineral” as long as the “highest use” of the land involved a nonmineral use, such a parcel might still contain large quantities of minerals. *See id.* at 1591 n.2 (citing *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 48 n.9 (1983)).

116. *Id.* at 1591 (citing Pittman Underground Water Act §§ 1–2, 5).

117. *Id.* (quoting Pittman Underground Water Act § 8).

118. *Id.* at 1592.

119. Brief for Petitioners at 13, *BedRoc Ltd. v. United States*, 124 S. Ct. 1587 (2004) (No. 02-1593), available at 2003 WL 22766729.

120. *BedRoc*, 124 S. Ct. at 1593. Justices O’Connor, Scalia, and Kennedy joined in the Chief Justice’s opinion. *Id.* at 1589. Justice Thomas, joined by Justice Breyer, agreed in a concurrence that the reservation did not include sand and gravel. *See id.* at 1596–97 (Thomas, J., concurring).

121. *Id.* at 1593–94 (majority opinion). This historical focus is consistent with Chief Justice Rehnquist’s general approach to statutory interpretation, which has been characterized as intentionalist. *See Eskridge, supra* note 33, at 1490–91 (describing the Rehnquist dissent in *United Steelworkers v. Weber*, 433 U.S. 193, 235–51 (1979) (Rehnquist, J., dissenting), which focused on Congress’s intent at the time it enacted Title VII of the Civil Rights Act of 1964).

122. *BedRoc*, 124 S. Ct. at 1594.

intrinsic value” and “were commercially worthless in 1919 due to Nevada’s sparse population and lack of development.”<sup>123</sup>

Chief Justice Rehnquist’s opinion reflects several techniques of textualism—and illustrates some of its dangers. First, the opinion insisted that the statutory text was clear.<sup>124</sup> Yet the text, which referred only to “valuable minerals,” was subject to multiple interpretations.<sup>125</sup> The term “valuable minerals” is not defined by the statute. Nor does the statutory text mention “sand,” “gravel,” or any particular mineral other than coal.<sup>126</sup> Moreover, the Pittman Act uses the terms “valuable minerals” and “minerals” interchangeably, thus undermining any reliance on the term “valuable.”<sup>127</sup> Second, the Chief Justice purported to search for the “ordinary meaning” of the statute. Apparently finding no common dictionary guidance on the matter,<sup>128</sup> he turned to “common sense” to conclude that sand and gravel were not valuable in 1919. Contemporaneous documents from the Department of the Interior, however, indicated that sand and gravel in fact did have commercial value during the early 1900s, a point the court of appeals had noted.<sup>129</sup> Third, having concluded that the statute was clear, the Chief Justice refused to consider legislative history,<sup>130</sup> despite its potential relevance.

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123. *Id.*

124. *Id.* at 1593.

125. *Id.* at 1596 (Thomas, J., concurring).

126. Because coal had been exempted from the application of the general mining laws, Congress specifically listed coal to make clear that it was reserved in statutes such as the Pittman Act. *See* *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 44 n.5 (1983) (explaining that the reference to “coal” in reservation under the Stock-Raising Homestead Act was intended to make it clear that it was included even though existing law treated coal differently than other minerals).

127. *See* *BedRoc*, 124 S. Ct. at 1596 (Thomas, J., concurring); *see also* Scott Dasovich, Comment, *BedRoc Ltd. v. United States*, 28 HARV. ENVTL. L. REV. 561, 569 (2004) (observing that “the Pittman Act is not a model of unambiguous statutory composition” in light of “the *Western Nuclear* precedent, conflicting agency decisions, and the distinguishing modifier ‘valuable’ used only two of eight times in its discussion of reserved ‘minerals’” (citations omitted)).

128. *Cf. W. Nuclear*, 462 U.S. at 42–43 (asserting that “the word ‘minerals’ is ‘used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case’”) (citing *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 530 (1903)).

129. *BedRoc Ltd. v. United States*, 314 F.3d 1080, 1088–89 (9th Cir. 2002).

130. *See* *BedRoc*, 124 S. Ct. at 1595 (“Because we have held that the text of the statutory reservation clearly excludes sand and gravel, we have no occasion to resort to legislative history.”). For the same reason, the Chief Justice also disregarded the statutory canon that “‘ambiguities in land grants are construed in favor of the sovereign.’” *Id.* at 1594 (quoting *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 880 (1999)). The selective use of canons of interpretation is another characteristic of textualism. *See supra* note 55 and accompanying text.

Resorting to legislative history might not have provided a clear answer, but it would have shed at least some light on an ambiguous issue. Indeed, Justice Stevens's dissent relied heavily on the legislative history of the Pittman Act, as well as the Court's 1983 decision in *Watt v. Western Nuclear*.<sup>131</sup> In *Western Nuclear*, the Court held that a mineral reservation in the Stock-Raising Homestead Act (SRHA), similarly worded to the Pittman Act reservation, applied to sand and gravel.<sup>132</sup> The House committee report for the Pittman Act stated that the scope of the mineral reservation in the Pittman Act was intended to be the same as that in the SRHA.<sup>133</sup> Thus, reasoned Justice Stevens, the mineral reservation at issue in *BedRoc* should also include sand and gravel.<sup>134</sup> The difficulty with this conclusion, as Chief Justice Rehnquist noted, is that the text of the SRHA reservation applied to "all the coals and other minerals"; it was not limited to "valuable minerals."<sup>135</sup>

Another part of the Pittman Act's legislative history, however, addressed the matter more directly. In response to a question regarding whether the language of the reservation was sufficiently broad, the Act's sponsor, Senator Key Pittman of Nevada, explained that the reservation was intended to prevent the acquisition of *any* mineral resources:

When a similar bill was introduced in the House of Representatives, at my request, it met with serious opposition on the very ground that it might be used for the purpose of grabbing mineral lands. There was not the slightest chance on earth of passing such a bill through the House of Representatives if there was the slightest suspicion that the bill could be utilized for the purpose of acquiring mineral lands under the guise of obtaining agricultural lands. This reservation from all characters of agricultural entries is usual; and . . . I must say that it is the policy of Congress, as I see it, not to permit the acquisition of any character of minerals through any agricultural entry.<sup>136</sup>

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131. *BedRoc*, 124 S. Ct. at 1597–98 (Stevens, J., dissenting); *W. Nuclear*, 462 U.S. at 36. Justices Souter and Ginsburg joined in Justice Stevens's dissent in *BedRoc*, 124 S. Ct. at 1597.

132. *W. Nuclear*, 462 U.S. at 59–60.

133. *See BedRoc*, 124 S. Ct. at 1597 (Thomas, J., concurring) (citing H.R. REP. NO. 66-286, at 1 (1919)).

134. *Id.* at 1597–98 (Stevens, J., dissenting).

135. *Id.* at 1592 (majority opinion) (quoting Stock-Raising Homestead Act § 9, 43 U.S.C. § 299 (2000)).

136. 53 CONG. REC. S707 (1916), *quoted in* *BedRoc Ltd., LLC v. United States*, 50 F. Supp. 2d 1001, 1006 (D. Nev. 1999).

Not all legislative history deserves equal weight, and a statement from the congressional debate (albeit from the bill's sponsor) should generally be viewed with greater skepticism than a committee report.<sup>137</sup> This may explain why Justice Stevens's dissent does not mention Pittman's statement. Nevertheless, the statement does address, at least in a general way, the issue before the Court. While it is not clear that Congress specifically contemplated the reservation of sand and gravel, Pittman's sweeping statement suggests an intent to create the broadest mineral reservation possible. Such an interpretation would be consistent with the underlying purpose of the Pittman Act as well as the SRHA—"encouraging the concurrent development of both surface and subsurface resources."<sup>138</sup> Because the purpose of the Pittman Act was to promote the settlement of Nevada for agricultural purposes, and not to give mineral rights of any kind to surface estate grantees, the Government's reservation should have included sand and gravel.<sup>139</sup>

The direct impact of *BedRoc* is likely to be small because the Pittman Act is a relatively minor statute. Yet as Richard Lazarus has contended, the very insignificance of the issue presented suggests that the Court's conservative members chose this case in order to promote their basic belief in private property ownership of natural resources.<sup>140</sup> Moreover, the case represents another triumph for textualism, and demonstrates its potential to allow judges to assert their personal policy preferences. Here, the plurality elevated the protection of private property rights over the statute's policy goal of encouraging settlement while

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137. See Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 384 (noting that colloquies are often staged exchanges aimed at a judicial audience, rather than spontaneous discussions designed to persuade other members); Slawson, *supra* note 54, at 397-98 (questioning value of legislative history "manufactured" via colloquy, since it only requires cooperation of two members of Congress and is far easier than amending a bill).

138. *BedRoc*, 124 S. Ct. at 1597 n.\* (Stevens, J., dissenting) (quoting *W. Nuclear*, 462 U.S. at 53-54).

[T]he purposes of the SRHA strongly support the Government's contention that the mineral reservation in the Act includes gravel. . . . While Congress expected that homesteaders would use the surface of SRHA lands for stockraising and raising crops, it sought to ensure that valuable subsurface resources would remain subject to disposition by the United States, under the general mining laws or otherwise, to persons interested in exploiting them.

*W. Nuclear*, 462 U.S. at 47.

139. In *Western Nuclear*, the Court interpreted the mineral reservation to include gravel that "can be used for commercial purposes." 462 U.S. at 53. The Court left open the question of whether a surface estate owner could use gravel to the extent necessary to carry out ranching and farming activities successfully. *Id.* at 54 n.14.

140. See Lazarus, *supra* note 19 (manuscript at 31-32).

protecting publicly owned resources. Justice Stevens's dissent explicitly recognized the dangers of the Chief Justice's approach:

A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, increases the risk that the judge's own policy preferences will affect the decisional process. The policy choice at issue in this case is surely one that should be made either by Congress itself or by the executive agency administering the Pittman Act.<sup>141</sup>

3. *Miccosukee*. In a third statutory interpretation case from the 2003-04 Term, *Miccosukee*, the Court relied exclusively on the express language of the statute to reach a result consistent with Congress's intent.<sup>142</sup> The main issue in *Miccosukee* was whether the Clean Water Act (CWA) required a discharge permit for a pump that moved polluted water from one side of a levee to the other, where the water was cleaner.<sup>143</sup> Such permits are required for "any addition of any pollutant to navigable waters from any point source."<sup>144</sup> The water district operating the pump contended that no permit was required because the pump itself did not add pollutants to the water.<sup>145</sup> The Court rejected this argument, relying on the CWA's definition of "point source," which includes "any discernible, confined and discrete conveyance, . . . from which pollutants are or may be discharged."<sup>146</sup> "That definition," the Court wrote, "ma[de] plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'"<sup>147</sup> The Court noted that examples of "point sources" listed in the statute include pipes and conduits, which "do not themselves generate pollutants but merely transport them."<sup>148</sup> The Court ultimately did not decide whether a permit was required for the pump at issue; rather, it remanded the case for consideration of two other arguments raised by the water district and by the United States.<sup>149</sup>

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141. *BedRoc*, 124 S. Ct. at 1598 (Stevens, J., dissenting).

142. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004).

143. *Id.* at 1540.

144. 33 U.S.C. § 1362(12) (2000) (defining "discharge"); see § 1311(a) (prohibiting noncompliant discharges); § 1342 (establishing permit system).

145. *Miccosukee*, 124 S. Ct. at 1542-43.

146. 33 U.S.C. § 1362(14).

147. *Miccosukee*, 124 S. Ct. at 1543.

148. *Id.* (citing 33 U.S.C. § 1362(14)).

149. *Id.* at 1547; see *infra* Part IV.B.2 (discussing the open arguments).

The Court's analysis in *Miccosukee* is consistent with the leading approaches to statutory interpretation because the statutory text clearly addressed the main issue before the Court.<sup>150</sup> Nevertheless, the case also serves as a further example of textualism's potential to erode environmental law. Finding ample guidance in the statute itself, the Court did not employ the typical textualist maneuver of relying on dictionary definitions. Such an approach might have produced a different outcome. In fact, the water district's brief to the Court contained several dictionary citations, including "addition"—defined as "the result of adding," and "[f]rom"—"a function word to indicate . . . the place of origin, source or derivation of a material or immaterial thing."<sup>151</sup> Based on these definitions, the water district argued—and a textualist might have concluded—that the pump did not require a permit because it was "not the 'starting point,' 'source,' or 'origin' of any pollutants."<sup>152</sup> A purposivist or intentionalist approach, however, likely would have found such an argument nonsensical. Acceptance of the water district's argument, for instance, would have left the EPA without the authority to regulate municipal wastewater treatment plants and storm sewer systems—sources that the CWA clearly encompasses.<sup>153</sup> In addition, a primary—and explicit—goal of the statute was "that the discharge of pollutants into the navigable waters be eliminated by 1985."<sup>154</sup> While implementation of the CWA has fallen far short of that goal, excluding point sources that themselves do not add pollutants would have eviscerated the statute's coverage.

4. ADEC. The Court's 2003-04 environmental docket did include one case, *ADEC*, in which a slim majority of the Court

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150. The obvious correctness of the result reached by the Court is reflected by one commentator's remark that "[t]he Court's first error was to grant certiorari to review a question a child could answer." William H. Rodgers, Jr., *The Tenth U.S. Supreme Court Justice (Crazy Horse, J.) and Dissents Not Written—The Environmental Term of 2003-2004*, 34 ENVTL. L. REP. 11,033, 11,037 (2004).

151. Brief for Petitioner at 26, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004) (No. 02-626), available at 2003 WL 22137015 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971)).

152. *Id.* at 27. Resort to dictionary definitions might also have led to the opposite conclusion. See *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 n.6 (11th Cir. 2002) (concluding that "from" means "by," based on THE RANDOM HOUSE DICTIONARY definition of "from" as indicating an "agent or instrumentality" by which pollutants are added).

153. See 33 U.S.C. §§ 1311(b)(1)(B), 1342(p) (authorizing regulation of municipal stormwater discharges and discharges from publicly owned treatment works); see also *Miccosukee*, 124 S. Ct. at 1543.

154. 33 U.S.C. § 1251(a)(1).

rejected a textualist approach.<sup>155</sup> ADEC posed the issue of the EPA's authority to oversee state agencies' determinations of best available control technology (BACT) under the prevention of significant deterioration (PSD) program of the CAA.<sup>156</sup> Like most other regulatory components of the CAA, the PSD program is a "cooperative federalism" scheme: it sets out federal requirements and gives states the option of taking on the responsibility of administering these requirements, subject to EPA oversight.<sup>157</sup> The Alaska Department of Environmental Conservation, whom the EPA had authorized to administer the PSD program in Alaska, issued a PSD permit designating "low-NO<sub>x</sub>" technology as BACT to a mine operator.<sup>158</sup> The EPA objected to ADEC's BACT determination and issued administrative orders invalidating the permit.<sup>159</sup> The EPA noted that ADEC had initially proposed a more stringent technology, selective catalytic reduction (SCR), as BACT and that ADEC had failed to justify its determination that SCR was not cost-effective.<sup>160</sup>

In a 5–4 opinion by Justice Ginsburg, the Court held that the EPA had properly exercised its supervisory authority.<sup>161</sup> The Court explained that the CAA provided the EPA with authority to decide whether a state's BACT determination is unreasonable.<sup>162</sup> The Court then held that the EPA's orders invalidating the permit were not arbitrary because ADEC had never determined the impact of SCR's cost on operating the mine

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155. See *Alaska Dep't of Env'tl. Conservation (ADEC) v. EPA*, 124 S. Ct. 983, 1010 (2004) (Kennedy, J., dissenting) (arguing that "[t]he majority[s] . . . reasoning conflicts with the express language of the Clean Air Act").

156. The prevention of significant deterioration (PSD) program requires new and modified stationary sources of pollution in certain parts of the country to apply best available control technology (BACT) to control emissions of specified pollutants. See 42 U.S.C. §§ 7470–7479 (2000) (describing the program).

157. See 42 U.S.C. § 7471 (requiring state implementation plans to have a PSD component).

158. *ADEC*, 124 S. Ct. at 994. Low-NO<sub>x</sub> technology entails changes to a generator "to improve fuel atomization and modify the combustion space to enhance the mixing of air and fuel." *Id.* at 994 n.6.

159. See *id.* at 997–98.

160. See *id.* at 996–97.

161. *Id.* at 1009. Justice O'Connor likely provided the critical fifth vote. Although O'Connor has sometimes followed a textualist approach, she is less committed to it than several of her more conservative colleagues. See John F. Manning, *The Nondelegation Doctrine As a Canon of Avoidance*, 2000 S. CT. REV. 223, 226 (describing Justices Scalia and Thomas as "the Court's most committed textualists" and O'Connor as having "expressed sympathy with textualism"); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 300 (1990) (describing Justices Scalia and Kennedy as "true believers" in textualism and O'Connor as a "some-of-the-timer").

162. See *ADEC*, 124 S. Ct. at 1003.

and because of ADEC's prior statements suggesting that SCR would be economically feasible.<sup>163</sup>

Justice Kennedy dissented, joined by Chief Justice Rehnquist, Justice Scalia and Justice Thomas. Justice Kennedy's opinion focused primarily on federalism concerns,<sup>164</sup> but was also noteworthy for its textualist approach. Justice Kennedy emphasized that the CAA defined BACT as "an emission limitation based on the maximum degree of reduction of each pollutant . . . , which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, *determines* is achievable for such facility."<sup>165</sup> Quoting a common dictionary definition of the word "determines," the dissent argued that the statute authorized ADEC "[t]o decide or settle . . . conclusively and authoritatively" the appropriate level of pollution control.<sup>166</sup> Viewing this as a "clear mandate that States bear the . . . exclusive role in making BACT determinations," the dissent dismissed the EPA's policy arguments for oversight authority.<sup>167</sup>

Like *Miccosukee*, *ADEC* illustrates how a textualist approach to statutory interpretation can be used to undermine federal environmental regulation. Congress enacted environmental statutes like the CAA largely in response to a history of failure by the states to address pollution problems.<sup>168</sup> Although Congress preserved a significant administrative role for the states, it also made clear that the EPA would retain ultimate oversight responsibility for the program.<sup>169</sup> Yet Justice Kennedy's

163. *See id.* at 1007–08.

164. *Id.* at 1018 (Kennedy, J., dissenting).

The broader implication of today's decision is more unfortunate still. . . . Under the majority's reasoning, [statutes other than the CAA] could be said to confer on federal agencies ultimate decisionmaking authority, relegating States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect.

*Id.*

165. *Id.* at 1010 (quoting 42 U.S.C. § 7479(3) (2000) (emphasis added)).

166. *Id.* (quoting AMERICAN HERITAGE DICTIONARY 495 (4th ed. 2000)).

167. *Id.* at 1012. Consistent with the view of commentators that Justice Kennedy is not a strict textualist, *see* Mank, *supra* note 50, at 826, the *ADEC* dissent did make a brief reference to legislative history. *See ADEC*, 124 S. Ct. at 1012.

168. *See ADEC*, 124 S. Ct. at 991 (majority opinion) (explaining that "Congress enacted the Clean Air Amendments of 1970 in response to 'dissatisfaction with the progress of existing air pollution programs.'" (citing 42 U.S.C. § 7401 and quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976)); *see also supra* note 104 and accompanying text.

169. *See* 42 U.S.C. § 7410(a) (requiring that states prepare state implementation plans for EPA approval); 42 U.S.C. § 7413 (providing for federal enforcement of CAA requirements, including those found in state implementation plans).

narrow interpretation would have reduced the EPA's direct oversight role to a triviality—merely ensuring that a state followed the formal procedures of the Act.<sup>170</sup> The EPA would have been left with virtually no substantive review authority over BACT determinations.<sup>171</sup> Rather, its sole means of voicing substantive objections would have been the same as that of an ordinary citizen: to navigate the state administrative review process, and if necessary, petition for review of that process in state courts.<sup>172</sup> Justice Kennedy's textualist approach in *ADEC* ignored the broader context of the workings of the CAA as a whole, and misunderstood the federal role in its cooperative federalism scheme.

C. *Textualism and Environmental Law Prior to the 2003-04 Term*

In the 2003-04 Term, textualism generally produced decisions or opinions that were contrary to statutory purposes and, not coincidentally, undermined environmental regulation. This pattern can be compared with a sampling of earlier environmental decisions by the Court. Although the application of a textualist approach in these earlier cases generated a range of results, the cases also demonstrate the policy flexibility available to textualists seeking to narrow environmental regulation or otherwise advance particular policy agendas.

1. SWANCC. The potential for courts to make significant policy choices under the guise of a purportedly neutral textualist approach is well illustrated by *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*.<sup>173</sup> At issue in *SWANCC* was the authority of the Corps of Engineers to regulate under the CWA an isolated wetland that was not subject to navigation.<sup>174</sup> As noted earlier, the CWA prohibits “the discharge of any pollutant”—“any addition of any pollutant to navigable waters from any point source”—without a permit.<sup>175</sup> Under section 404(a) of the CWA, however, the Corps may issue

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170. *ADEC*, 124 S. Ct. at 1011 (Kennedy, J., dissenting).

171. *See id.* at 1011–12.

172. *See id.* at 1013. Justice Kennedy did leave open the possibility that the EPA also might be able to seek review of a final state administrative determination in federal court pursuant to 28 U.S.C. § 1345. *See id.* at 1014.

173. 531 U.S. 159 (2001).

174. *Id.* at 162.

175. 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12).

a permit “for the discharge of dredged or fill materials into the navigable waters.”<sup>176</sup>

The critical question, of course, was whether the isolated wetland constituted “navigable waters” within the meaning of the CWA. The term “navigable waters” originated in the 1899 Rivers and Harbors Act, which sought to keep waters navigable for commerce.<sup>177</sup> Congress carried over this traditional term to the CWA, which focused on pollution control rather than navigation, but explicitly broadened its scope to encompass all waters of the United States.<sup>178</sup> The CWA thus defined “navigable waters” as “waters of the United States, including the territorial seas”<sup>179</sup>—a term that could reasonably refer to all water bodies within U.S. borders.<sup>180</sup> Nevertheless, in a 5–4 opinion, Chief Justice Rehnquist proclaimed it “to be clear” that the statute’s plain language limited the CWA’s jurisdiction only to those waters physically connected to waters that are subject to navigation.<sup>181</sup>

Chief Justice Rehnquist also rejected the Corps’s plea for *Chevron* deference<sup>182</sup> to its regulatory definition of “waters of the United States,” which included wetlands and intrastate waters used by migratory birds.<sup>183</sup> Instead, he employed another textualist technique, invoking a clear statement canon that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”<sup>184</sup> Finding no such indication in the CWA, the Court concluded that the Corps’s regulatory

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176. 33 U.S.C. § 1344(a).

177. See *Solid Waste Agency of N. Cook County* (SWANCC), 531 U.S. at 177–78 (Stevens, J., dissenting) (providing a “history of federal water regulation”).

178. *Id.* at 179–81.

179. 33 U.S.C. § 1362(7); see also SWANCC, 531 U.S. at 180–81 (Stevens, J., dissenting) (citing 33 U.S.C. § 1362(7)).

180. See William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 ENVTL. L. REP. 10,741, 10,746 (2001) (“[O]n the face of the Act, there seems no basis for limiting the Act to waters related to navigation, leaving the scope of the Act ‘the waters of the United States.’”).

181. SWANCC, 531 U.S. at 172.

182. *Id.*; see *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (requiring the courts to grant agencies discretion in interpreting statutes that fall within their purview, provided that Congress has not directly addressed the precise question at issue).

183. SWANCC, 531 U.S. at 171–72.

184. *Id.* at 172. Justice Stevens’s dissent retorted that the “clear indication” demanded by the majority could be found in the legislation’s conference report, which “explained that the definition [of navigable waters] was intended to ‘be given the broadest possible constitutional interpretation.’” SWANCC, 531 U.S. at 181 (Stevens, J., dissenting) (quoting S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.)).

definition exceeded its statutory authority.<sup>185</sup> The effect of invoking this canon in statutory interpretation cases, however, is hardly a neutral one. General application of the canon would tend to systematically reduce the regulatory authority of federal agencies.<sup>186</sup>

The Court's approach in *SWANCC* stands in stark contrast to the Court's previous decision in *United States v. Riverside Bayview Homes*, which had also addressed the scope of section 404(a).<sup>187</sup> At issue in *Riverside Bayview* was the Corps's jurisdiction over a wetland adjacent to a navigable water. There, the Court recognized that given the text of the statute, "it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'"<sup>188</sup> Nevertheless, the Court ruled unanimously in favor of the Corps, relying on legislative history and on a functional interpretation of "waters of the United States."<sup>189</sup> As the Court declared, "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for [w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."<sup>190</sup>

The juxtaposition of *SWANCC* and *Riverside Bayview* illustrates how a textualist approach can produce an overly narrow statutory interpretation that has little relation to a statute's policy and purpose. The tying of CWA jurisdiction to navigability in *SWANCC* makes no sense in terms of the CWA's underlying goal of protecting and improving water quality. As the dissenters in *SWANCC* contended, adherence to *Riverside Bayview* and a consideration of legislative history should have resulted in deference to the Corps's assertion of jurisdiction over intrastate waters used by migratory birds.<sup>191</sup> As one commentator observed, the Court's shift to a textualist approach "yield[ed] an interpretation that has no contextual legitimacy and undermines

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185. *SWANCC*, 531 U.S. at 174.

186. See Michael P. Healy, *Textualism's Limits on the Administrative State: Of Isolated Waters, Barking Dogs, and Chevron*, 31 ENVTL. L. REP. 10,928, 10,940–41 (2001) (arguing that this approach "greatly restricts the range of *Chevron* deference"); Karkkainen, *supra* note 55, at 450 (observing that Justice Scalia's use of clear statement canons "systematically narrows the domain of statutes").

187. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985); see also Healy, *supra* note 186, at 10,928–35 (comparing *SWANCC* and *Riverside Bayview*).

188. *Riverside Bayview*, 474 U.S. at 132.

189. *Id.* at 131–32.

190. *Id.* at 132–33 (quoting S. REP. NO. 92-414, at 77 (1972), as reprinted in 1972 U.S.C.C.A.N. 3668, 3742).

191. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 175–76 (2001) (Stevens, J., dissenting).

the federal regime of water pollution control.”<sup>192</sup> Even more troubling, the Court disingenuously claimed that it was doing no more than effecting Congress’s intent, when it in fact was making a very real and significant policy choice.<sup>193</sup>

2. *City of Chicago*. A textualist approach does not invariably undermine environmental regulation, as *City of Chicago v. Environmental Defense Fund* demonstrates.<sup>194</sup> This case also illustrates, however, the potential for textualist methods to obscure policy choices. At issue in *City of Chicago* was the scope of an exemption from the Resource Conservation and Recovery Act (RCRA) for incinerators burning municipal solid waste.<sup>195</sup> Subtitle C of RCRA subjects persons who generate, transport, treat, store, or dispose of hazardous waste to a comprehensive “cradle to grave” regulatory system.<sup>196</sup> Facilities that treat, store, or dispose of hazardous waste (“TSD facilities”) face more stringent regulatory requirements than generators and transporters of such waste.<sup>197</sup>

Section 3001(i) of RCRA provides that facilities burning household waste and nonhazardous industrial waste “shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes.”<sup>198</sup> The City of Chicago’s incinerator was just such a facility, and there was no dispute that it was exempt from the stringent requirements applicable to TSD facilities.<sup>199</sup> The City contended, however, that this provision also exempted its incinerator from being regulated as a generator—even if the ash it generated was in fact hazardous.<sup>200</sup> The City’s

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192. Healy, *supra* note 186, at 10,928; see also Robert W. Adler, *The Supreme Court and Ecosystems: Environmental Science in Environmental Law*, 27 VT. L. REV. 249, 261–63 (2003) (characterizing legislative history on the meaning of navigable waters as “somewhat ambiguous,” but arguing that the Court should have applied concepts of ecological connectivity to determine if ponds in SWANCC fell within CWA jurisdiction).

193. See *SWANCC*, 531 U.S. at 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.”).

194. *City of Chicago v. Env’tl. Def. Fund*, 511 U.S. 328 (1994). See Lazarus & Newman, *supra* note 74, at 19–23, for an account of the Supreme Court litigation in this case.

195. *City of Chicago*, 511 U.S. at 330–31.

196. See 42 U.S.C. §§ 6921–6934 (2000); see also *City of Chicago*, 511 U.S. at 331–32 (describing the Resource Conservation and Recovery Act (RCRA) and its requirements).

197. Compare 42 U.S.C. § 6924, with 42 U.S.C. §§ 6922, 6923; see also *City of Chicago*, 511 U.S. at 332.

198. 42 U.S.C. § 6921(i).

199. *City of Chicago*, 511 U.S. at 330, 339.

200. Brief of the Petitioners at 16–17, *City of Chicago v. Env’tl. Def. Fund*, 511 U.S. 328 (1994) (No. 92-1639), available at 1993 WL 460270.

argument relied on the plain language of the exemption, the EPA's construction of the statute, and the exemption's legislative history.<sup>201</sup>

The Court, however, ruled that the plain language of the statute required the opposite result.<sup>202</sup> Taking a textualist approach, Justice Scalia declared that section 3001(i)'s "plain meaning . . . is that so long as a facility recovers energy by incineration of the appropriate wastes, *it* (the *facility*) is not subject to Subtitle C regulation" *as a TSD facility*.<sup>203</sup> Justice Scalia added, however, that the text of the exemption "quite clearly does *not* contain any exclusion for the *ash itself*"—which meant that the City would be regulated as a RCRA generator if its ash turned out to be hazardous.<sup>204</sup>

To the dissenters, resolution of the case was hardly so clear. Justice Stevens, joined by Justice O'Connor, found the legislative and regulatory history of the exemption particularly instructive.<sup>205</sup> The dissent first recounted the regulatory background against which Congress had enacted section 3001(i).<sup>206</sup> In 1980, the EPA had established by regulation an exemption to RCRA for incinerators that handled only household waste; this "waste stream" exemption excepted such incinerators both as TSD facilities and as generators of hazardous waste, regardless of a waste's actual characteristics.<sup>207</sup> In the dissent's view, the enactment of section 3001(i) in 1984 simply extended the waste stream exemption to incinerators that handled a mixture of household waste and nonhazardous industrial waste.<sup>208</sup> The majority's textualist interpretation ignored this history and had the unexpected effect of eliminating the waste stream exemption even for facilities that processed only household waste.<sup>209</sup>

The dissent cited the Senate committee report, which "clarifie[d]" the intent to extend the household waste exclusion to exempt "[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste."<sup>210</sup> The majority responded by pointing to the

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201. *Id.*

202. *City of Chicago*, 511 U.S. at 334–35.

203. *Id.* at 334.

204. *Id.*

205. *Id.* at 340 (Stevens, J., dissenting).

206. *Id.* at 340–42.

207. *Id.* at 341; *see also id.* at 333 (majority opinion).

208. *See id.* at 342–43 (Stevens, J., dissenting).

209. *See id.* at 347 n.9.

210. *Id.* at 343–44 (quoting S. REP. NO. 98-284, at 61 (1983)).

text of the statutory exemption, which, in contrast to the Senate Report, omitted the word “generation.”<sup>211</sup> The majority explained that this omission signified an intent not to exempt such incinerators from regulation as generators of hazardous waste.<sup>212</sup> Although these opinions illustrate that a textualist approach can result in a more environmentally protective outcome, the textualist tendency to disregard underlying policies approved by Congress remains troubling.

Indeed, *City of Chicago* provides further evidence that the textualist approach—or more specifically, Justice Scalia’s version of it—is being used to promote a conservative agenda.<sup>213</sup> As Professor Richard Pierce has suggested, *City of Chicago* advanced the longtime conservative goal of subjecting “public entities . . . to the same burdensome and expensive regulatory rules that are a constant source of frustration to private individuals and firms.”<sup>214</sup>

3. American Trucking. Finally, in some statutory interpretation cases, such as *Whitman v. American Trucking Ass’ns*, the potential for textualist manipulation may be more limited, and the result may be the same, regardless of whether one applies a textualist approach.<sup>215</sup> In *American Trucking*, Justice Scalia authored an opinion holding that the CAA requires the EPA to set national ambient air quality standards for air pollutants based solely on health impacts, and without any consideration of costs.<sup>216</sup> The opinion relied heavily on the statutory text, which did not mention costs.<sup>217</sup> Rather, the statute simply required the EPA to set standards, “the attainment and

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211. See *id.* at 337 (majority opinion).

212. See *id.* at 337–38.

213. See Pierce, *supra* note 60, at 780–81 (noting, from the Court’s 1993–94 Term decisions, that application of an extreme version of textualism “reduced the ability of plaintiffs to prevail in three classes of tort disputes and reduced the scope of federally protected union activities” (footnotes omitted)); see also Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 68 (1994) (contending that a conservative-dominated Supreme Court sent signals to appellate courts to defer to administrative agencies in the mid-1980s, when those agencies held a more conservative policy position relative to Congress and the appellate courts, but that these signals stopped when the agencies became more liberal than the courts).

214. Pierce, *supra* note 60, at 781.

215. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 471 (2001) (“[T]he canon requiring texts to be so construed as to avoid serious constitutional problems has no application here.”).

216. See *id.* at 465.

217. See *id.* at 471 (“The text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process.”).

maintenance of which . . . are requisite to protect the public health' with 'an adequate margin of safety.'"<sup>218</sup> Given the potential for cost considerations to undermine conclusions based on direct health effects, the Court refused to read into the statute any implicit authority for the EPA to weigh costs.<sup>219</sup> In a concurring opinion, Justice Breyer added that the CAA's legislative history "made clear" the EPA's obligation "to develop air quality standards set independently" of cost and technical feasibility.<sup>220</sup> Congress's intent, reflected in the legislative history, was to force the development of technology to control pollution through such standards, without consideration of economic costs.<sup>221</sup>

#### D. Synthesis

Although its defenders claim textualism executes congressional intent more faithfully than other approaches,<sup>222</sup> the preceding discussion suggests that textualism generally has been used by certain members of the Court to disguise antiregulatory environmental policy choices. How have the textualists accomplished this?

First, as in *SWANCC* and *BedRoc*, textualists often have adopted narrow statutory interpretations.<sup>223</sup> This trend is not

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218. *Id.* at 465 (quoting 42 U.S.C. § 7409(b)(1) (2000)).

219. *See id.* at 469 (noting that cost is not only unrelated to public health but may also cancel "the conclusions drawn from direct health effects"). Incidentally, economic analyses of the CAA have found that the benefits of the statute dwarf the costs of compliance. *See* Shi-Ling Hsu, *Fairness Versus Efficiency in Environmental Law*, 31 *ECOLOGY L.Q.* 303, 342 n.159 (2004) (citing EPA, FINAL REPORT TO CONGRESS ON BENEFITS AND COSTS OF THE CLEAN AIR ACT, 1970 TO 1990, which estimated costs at \$523 billion and benefits at \$22.2 trillion).

220. *Am. Trucking*, 531 U.S. at 491 (Breyer, J., concurring). The trucking associations had argued that the legislative history did not directly address whether costs could be considered, "apparently because Congress simply assumed that benefits would dwarf those costs." Brief for Cross-Petitioners at 42 n.2, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (No. 99-1426), available at 2000 WL 1014021.

221. *Am. Trucking*, 531 U.S. at 490-92 (Breyer, J., concurring); *see id.* at 496 ("Although I rely more heavily than does the Court upon legislative history and alternative sources of statutory flexibility, I reach the same ultimate conclusion. Section 109 does not delegate to the EPA authority to base the . . . standards, in whole or in part, upon the economic costs of compliance.").

222. *Cf.* David L. Shapiro, *Statutory Dilemmas in the Regulation of the Environment*, 5 *N.Y.U. ENVTL. L.J.* 292, 295 (1996) ("'[T]extualism' does not have a clear ideological impact by necessarily loading the dice for either the haves or the have-nots, the individual or the government, the 'vested interests' or those who oppose them, the advocates of continuity or of change.").

223. *See also, e.g., Adamo Wrecking Co. v. United States*, 434 U.S. 275, 276-77 (1978) (holding that a work practice standard regulating the removal of asbestos was not an "emission standard," the violation of which is a criminal offense, despite agency

inevitable; one can imagine, for example, textualist interpretations that rely on the broadest dictionary definitions available, or on canons of construction more deferential to broad assertions or delegations of legislative authority.<sup>224</sup> Justice Scalia in particular, however, has demonstrated an affinity for narrow dictionary definitions that reduce the scope of congressional enactments, and indirectly, executive power.<sup>225</sup> These definitions often come from older sources—sometimes not contemporaneous with the statute being interpreted—as in *Engine Manufacturers*.<sup>226</sup> In addition, Justice Scalia and other textualists often “apply[] grammatical and structural canons aggressively and rigidly to narrow, but almost never to expand, the range of plausible interpretations.”<sup>227</sup> Chief Justice Rehnquist’s opinion in *SWANCC*, which relied on a clear statement canon to reach a narrow interpretation of regulatory authority under the CWA, illustrates this tendency.<sup>228</sup> Given textualists’ view that “statutes

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interpretation and legislative history to the contrary); *see also* Mank, *supra* note 74, at 1254–55 (observing that “judges applying a textualist approach have often given a constricted reading to the text of an environmental statute”); Merrill, *supra* note 57, at 366 (stating that “Scalia sees textualism as a doctrine of judicial restraint, reducing the range of possible statutory meanings”); Zeppos, *supra* note 49, at 1332–33 (concluding that textualism reduces legislative power because “[t]he original work product of the legislature is given a narrow reach, and an already overworked Congress is forced to rewrite statutes whose language does not neatly cover every conceivable situation”).

224. For example, one canon provides that remedial statutes should be liberally construed. KENT GREENWALT, *LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS* 207 (1999). *But see* MIKVA & LANE, *supra* note 32, at 26–27 (arguing that this canon is contrary to the realities of the legislative process, in which the building of majorities necessarily requires compromise, and advocating moderate construction of remedial statutes).

225. *See* Karkkainen, *supra* note 55, at 474–75 (observing that Justice Scalia’s tactic of relying on “narrow dictionary definitions of crucial terms to resolve ambiguities” has resulted in “a pattern of decisions that quite consistently tend to narrow the reach of statutory law”); *see also id.* at 427 (“Yet Justice Scalia’s formalism is not formalism merely for its own sake. His is a vision of governmental minimalism, resting on strict separation of powers to preserve individual liberties by keeping the power of each branch limited . . . .”); Mank, *supra* note 55, at 549 (“While textualism in theory ought to be relatively value neutral, modern or ‘new’ textualists, most notably Justice Scalia, often use ‘canons’ of statutory construction that narrow the interpretation of a statute.”).

226. *See Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756, 1761 (2004) (citing WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY (1945)). Another example of this tendency can be found in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, in which Justice Scalia relied heavily on a narrow common-law understanding of the term “take,” even though that understanding conflicted with the definition explicitly found in the statute. *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714–18 (1995) (Scalia, J., dissenting).

227. Karkkainen, *supra* note 55, at 475; *see also* Mank, *supra* note 55, at 551 (arguing that textualists’ use of “‘clear-statement canons,’” which require express congressional authorization for government regulatory action, tends to narrow the scope of statutory language).

228. *See supra* notes 181–86 and accompanying text.

are predominantly designed to give special interest groups subsidies at the expense of the [general] public,” such narrowing of statutes is hardly accidental.<sup>229</sup>

Tellingly, when textualists have adopted broader dictionary definitions, they have done so in a context that curbs the scope of congressional enactments. In *Engine Manufacturers* and *ADEC*, for example, the textualists turned to very broad definitions to interpret the terms “standard” and “determines.”<sup>230</sup> In both instances, use of a broad dictionary definition had the effect of reducing, rather than enlarging, regulatory authority. These cases underscore the potential for textualists to assert their personal policy preferences under the guise of a purportedly neutral approach.

Second, textualists tend to defer less frequently to agency interpretations,<sup>231</sup> and thus may ignore policy concerns that underlie environmental statutory schemes.<sup>232</sup> Environmental statutes often reflect a balance between broad protective goals and regulatory costs, or a delegation of this balancing to agencies, which frequently take a wide range of policy concerns into account when interpreting and implementing statutes.<sup>233</sup> The textualist application of dictionary definitions and statutory canons may obscure these concerns and usurp the agencies’ delegated authority. In *ADEC*, for example, the textualist

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229. Zeppos, *supra* note 49, at 1304–05; see Mikva & Lane, *supra* note 65, at 121 (suggesting that a goal of Justice Scalia is to limit judicial activism and to curb congressional overreaching driven by special interests).

230. See *supra* Part III.B (discussing the *Engine Manufacturers* and *ADEC* decisions).

231. See Merrill, *supra* note 57, at 354 (contending that “[t]extualism tends to approach problems of statutory interpretation like a puzzle,” which “in turn tends to make statutory interpretation an exercise in ingenuity—an attitude that may be less conducive to deference”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (explaining that he often finds the meaning of a statute apparent from its text and thus infrequently gives *Chevron* deference to agency interpretations).

232. Mank, *supra* note 74, at 1254. For example, at issue in *Sweet Home* was the scope of the Endangered Species Act’s prohibition on the “tak[ing]” of endangered species. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 690 (1995). The statute defined “take” to include “harm”; the majority, in an opinion by Justice Stevens, deferred to the Government’s definition of “harm,” which incorporated “significant habitat modification . . . where it actually kills or injures wildlife.” *Id.* at 691, 703–04. Based on a narrow common-law understanding of the term “take,” Justice Scalia concluded that the statute was clear and that a broad interpretation of “harm” was unreasonable. *Id.* at 717–19 (Scalia, J., dissenting). From a policy perspective, Justice Scalia’s view “ma[de] no biological sense” because it completely ignored the critical role of habitat loss in the decline of most endangered species. Sheldon, *supra* note 75, at 538.

233. See Mank, *supra* note 74, at 1254 (“Textualist courts applying traditional statutory canons . . . are unlikely to come to grips with the policy dimensions of achieving a workable balance between health and cost issues.”).

approach ignored the importance of the EPA's oversight role in the CAA's balance between federal coercion and state flexibility.<sup>234</sup> And although the textualist approach in *City of Chicago* resulted in stronger environmental regulation, it paid little heed to the rationale for exempting incinerators from regulation, or to the unexpected policy consequences of its decision.<sup>235</sup> To the extent that textualists defer less frequently to agencies, they fail to take advantage of the agencies' technical expertise and experience in implementing a statute.<sup>236</sup> Moreover, textualists' greater reliance on their own intuition, such as Chief Justice Rehnquist's appeal to "common sense" in interpreting the term "valuable minerals" in *BedRoc*, enables the injection of personal values into the interpretative process.<sup>237</sup>

Third, textualists generally shun legislative history. This tendency can be especially problematic because environmental regulation frequently addresses highly complex and technical issues informed by scientific expertise.<sup>238</sup> Congress often writes environmental legislation in very specific detail because of this complexity.<sup>239</sup> Such specificity may produce greater precision, but just as often can generate unintended or even erroneous results.<sup>240</sup> Legislative history can shed light on the proper

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234. See *supra* Part III.B.4.

235. See *supra* Part III.C.2.

236. See Mank, *supra* note 74, at 1290–91 ("One should not expect that ordinary users of the English language, including judges, will understand the text, legislative history, or practical problems of a complex regulatory statute as well as the administrative agency in charge of the statute's implementation.").

237. See *supra* Part III.B.2.

238. Mank, *supra* note 74, at 1280–81; Shapiro, *supra* note 222, at 292 ("Concern with environmental issues . . . has generated a bevy of environmental statutes whose complexity and interrelationship have in turn generated a host of problems for administrators, courts, and scholars.").

239. See Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 177–80 (1992). In some instances, Congress has micromanaged the EPA in response to agency footdragging or failure. For example, in the 1990 CAA Amendments, Congress specifically designated 189 hazardous air pollutants that the EPA was to regulate; prior to the amendments, the EPA had discretion to determine which pollutants to regulate, but had only identified eight substances as hazardous air pollutants over a nineteen-year period. See S. REP. NO. 101-228, at 3389 (1989); see also Robert J. Martineau, Jr., *The Development of Emissions Standards for Hazardous Air Pollutants*, in THE CLEAN AIR ACT HANDBOOK 228–29 (Robert J. Martineau, Jr. & David P. Novello eds., 2d ed. 2004) (recounting the EPA's difficulties in listing and establishing emission standards for hazardous air pollutants and summarizing Congress's response in the 1990 Amendments).

240. Herz, *supra* note 239, at 203–04; cf. Albert C. Lin, *Refining Fair Notice Doctrine: What Notice is Required of Civil Regulations?*, 55 BAYLOR L. REV. 991, 1024 (2003) ("Writing a rule with greater specificity increases the risk of 'loopholing,' as regulated entities seek creative ways to skirt the law's edges without violating it.").

interpretation of a complex statute in certain instances, and thus might serve as an additional constraint on the interpretive choices available to courts.<sup>241</sup> Yet because legislative history is generally off-limits to them, textualists have greater liberty to choose definitions that suit their ends or to look to their own “common sense.”

#### IV. COMMON-LAW CAUSATION

A second way in which the 2003-04 Court employed a tool of statutory interpretation to curb the scope of environmental regulation was in its application of the tort doctrine of proximate causation. This move was particularly questionable in *Department of Transportation v. Public Citizen*, in which the Court construed the scope of the National Environmental Policy Act (NEPA). Proximate cause also made a questionable appearance in one other decision from the 2003-04 Term, *Miccosukee*. This Part examines the relationship between proximate-cause doctrine and environmental law generally, and then critically assesses the Court’s application of proximate-cause doctrine to environmental statutes.

##### A. *Background: Proximate Cause Doctrine*

Proximate causation is a fundamental concept in tort law that delimits the acts for which a defendant can be held legally responsible.<sup>242</sup> In order for a defendant’s conduct to be considered the cause of a plaintiff’s injury, it must be both an actual cause and a proximate cause.<sup>243</sup> Actual cause, or “causation in fact,” is typically determined by applying a “but for” test—i.e., courts ask whether an injury would have occurred “but for” the act.<sup>244</sup> Proof of actual causation, by itself, is insufficient to establish causation in a tort case; a tort plaintiff must also demonstrate proximate

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241. See Herz, *supra* note 239, at 203–04 (“The point is not merely that when Congress is too specific it runs a particular risk of unintended results, although that is certainly true. It is that with judicial textualism ascendant, a court will not correct the error, nor will it allow an agency to do so.”); see also Zeppos, *supra* note 49, at 1331–32 (observing that disregard of legislative history reduces the power of the legislative branch by eliminating informal means of policymaking).

242. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 264 (5th ed. 1984).

243. *Id.* at 272–73; see also DAN B. DOBBS, THE LAW OF TORTS 443 (2000).

244. KEETON ET AL., *supra* note 242, at 266. Courts apply the “substantial factor” test instead of the “but for” test where two causes concur to bring about an event and either of them alone would have caused the identical result. See *id.* at 266–67 (describing the substantial-factor test as an improvement over the but-for test in cases in which there is more than one cause).

causation. Proximate causation generally involves a judgment, based on policy concerns, of whether the plaintiff's harm was a foreseeable result of the defendant's conduct.<sup>245</sup>

Although proximate causation is critical in tort law, and although the origins of environmental law lie in the common-law tort doctrine of nuisance,<sup>246</sup> it does not necessarily follow that environmental law incorporates proximate cause principles. Modern environmental law is largely statutory, and in each statute, Congress determines the role, if any, of proximate cause. Indeed, this "shift in regulatory policy away from a common-law system requiring individualized proof of causal injury to one dominated by precautionary regulation" is often unappreciated by the courts.<sup>247</sup>

The issue of whether Congress intended for common-law causation principles to apply within an environmental statutory scheme has arisen, for example, in cases involving section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>248</sup> Under section 107(a), owners and operators of a site where a hazardous substance is found, as well as generators and transporters of substances sent to the site, are liable for the costs of cleaning up the site.<sup>249</sup> Section 107(a) makes no mention of proximate cause, and courts generally have rejected defendants' contentions that the statute implicitly requires a showing of proximate cause before liability can be imposed.<sup>250</sup> As these courts have recognized, a proximate cause requirement would impose an unreasonably high burden of proof and would completely undermine CERCLA's scheme of making polluters, rather than taxpayers, bear the cost of hazardous waste cleanups.<sup>251</sup> Section

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245. See *id.* at 272–74 (describing theories of proximate cause); see also DOBBS, *supra* note 243, at 444, 447 (asserting that proximate cause serves to "facilitate or express a value judgment about the appropriate scope of liability").

246. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 60–64 (4th ed. 2003).

247. Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 188.

248. 42 U.S.C. § 9607(a) (2000).

249. *Id.*

250. See *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266 (3d Cir. 1992) (rejecting the defendant's argument that the plaintiff must prove that the defendant's shipment of hazardous waste to the site caused the release of a hazardous substance or incurrence of response costs); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (agreeing with the State that the statute imposes liability without regard to causation).

251. See *Alcan*, 964 F.2d at 265–66 (describing decisions that reject a causation requirement as consistent with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)); *Shore Realty*, 759 F.2d at 1045 (asserting

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107(a) is typical of environmental statutes in its disregard of proximate cause.

*B. Proximate Cause in the 2003-04 Term*

The Supreme Court discussed the applicability of proximate cause doctrine with respect to two environmental statutes in the 2003-04 Term: the NEPA in *Public Citizen*, and the CWA in *Miccokuskee*. The invocation of proximate cause was problematic in both cases.

1. *Public Citizen*. *Public Citizen* is the latest in a string of anti-NEPA decisions by the Supreme Court.<sup>252</sup> The events that prompted the *Public Citizen* litigation began in 2001, when President Bush announced his intent to end a moratorium that had prevented Mexican trucks from operating within the United

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that a causation requirement “would open a huge loophole in CERCLA’s coverage”).

252. See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 385 (1989) (holding that a determination by the Army Corps of Engineers that new information regarding the construction of a dam did not require preparation of a supplemental Environmental Impact Statement (EIS) was not arbitrary or capricious); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (holding that the National Environmental Policy Act (NEPA) did not require the Forest Service to include in its EIS a fully developed mitigation plan and “worst case analysis” (internal quotation marks omitted)); *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 89–90 (1983) (holding that the assumption made by the Nuclear Regulatory Commission (NRC) in licensing decisions that permanent storage of certain nuclear wastes would have no significant environmental impact complied with NEPA’s requirement of consideration and disclosure); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 779 (1983) (holding that NRC’s refusal to consider psychological health damage from risks of a nuclear accident was proper under NEPA); *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 145–46 (1981) (holding that the Navy was not required to prepare and release to the public a “hypothetical” EIS before completing facilities capable of storing nuclear weapons); *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (observing that “once an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences”); *Andrus v. Sierra Club*, 442 U.S. 347, 364–65 (1979) (holding that appropriation requests by federal agencies do not constitute “proposals for legislation” or “proposals for . . . major Federal actions” that would trigger the NEPA obligation to include an EIS with report); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551, 558 (1978) (holding that NEPA “is essentially procedural” and that its requirement that an agency consider alternatives to a proposed action is “bounded by some notion of feasibility”); *Kleppe v. Sierra Club*, 427 U.S. 390, 401 (1976) (holding that absent a proposal for regionwide action, NEPA does not require preparation of a regionwide EIS); *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n*, 426 U.S. 776, 788 (1976) (holding that when “a clear and unavoidable conflict [between NEPA and other statutory authority] exists, NEPA must yield”); *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 320–21 (1975) (holding that when the only proposal for major federal action was a rate increase filed by railroads, the earliest time at which NEPA required an EIS was at the time of the Interstate Commerce Commission’s report, some time after oral hearing).

States.<sup>253</sup> Congress subsequently passed legislation barring the Federal Motor Carrier Safety Administration (FMCSA) from expending funds to process applications for Mexican trucks to operate in the United States, unless it first issued rules containing certain safety-monitoring requirements.<sup>254</sup> Accordingly, FMCSA promulgated rules to establish an application and safety-inspection regime for Mexican trucks seeking to conduct cross-border operations.<sup>255</sup>

At issue in *Public Citizen* was the scope of environmental impacts that FMCSA had to consider under NEPA. NEPA requires preparation of an environmental impact statement (EIS) before a federal agency undertakes a “major Federal action significantly affecting the quality of the human environment.”<sup>256</sup> An agency may prepare an environmental assessment instead of an EIS if it determines that its action will not have a significant effect on the environment.<sup>257</sup> To fulfill its obligations under NEPA, FMCSA prepared an environmental assessment of its new rules. The assessment, however, considered only the environmental effects of the increased number of roadside inspections of Mexican trucks due to the proposed regulations; it did not consider environmental impacts resulting from the increased presence of Mexican trucks in the United States.<sup>258</sup>

Environmental groups challenged the rules in *Public Citizen*, arguing that FMCSA had violated NEPA by failing to consider the increased Mexican truck traffic that would result from lifting the moratorium.<sup>259</sup> The regulations implementing NEPA, the plaintiffs noted, require the consideration of direct effects as well as indirect effects—those effects that are “caused by the action and are later in time or farther removed in distance, but are still *reasonably foreseeable*.”<sup>260</sup> The plaintiffs

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253. Dep’t of Transp. v. Pub. Citizen, 124 S. Ct. 2204, 2211 (2004).

254. See *id.* (discussing section 350 of the Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 107-87, § 350, 115 Stat. 833, 864 (2002)).

255. See *id.* at 2211–12.

256. 42 U.S.C. § 4332(C) (2000).

257. See 40 C.F.R. § 1501.4(e) (2004).

258. See *Public Citizen*, 124 S. Ct. at 2211–12.

259. See *id.* at 2213. The plaintiffs also asserted a claim under section 176(c)(1) of the CAA, which requires federal agencies to undertake a “conformity determination” to ensure that their actions will not contribute to the violation of a state’s air-quality implementation plan. *Id.* at 2217–18; 42 U.S.C. § 7506(c)(1). Although such a determination is required when federal action causes direct or indirect emissions that surpass a certain threshold, the Court ultimately held that the Mexican truck emissions were neither direct nor indirect emissions caused by FMCSA’s proposed regulations. *Public Citizen*, 124 S. Ct. at 2217–19.

260. Brief for the Respondents at 32, Dep’t of Transp. v. Pub. Citizen, 124 S. Ct. 2204

argued that because increased traffic and pollution were a reasonably foreseeable result of issuing the rules, their issuance was a “but for” cause and a “proximate cause” of such effects.<sup>261</sup>

The Supreme Court held unanimously that NEPA did not require the Government to evaluate the environmental effects of the increase in Mexican truck traffic.<sup>262</sup> The Court acknowledged that the Government was required to consider “[d]irect effects, which are caused by the action and occur at the same time and place,” and “[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”<sup>263</sup> The Court, however, rejected the plaintiffs’ argument that the increased cross-border operations of Mexican trucks were an effect caused by the issuance of FMCSA’s rules. In doing so, the Court held that “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.”<sup>264</sup> “NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause,” a requirement that the Court analogized “to the ‘familiar doctrine of proximate cause from tort law.’”<sup>265</sup>

The Court did stop just short of applying tort law’s proximate cause standard directly to NEPA analysis. Specifically, the Court explained that its analysis was *similar* to proximate cause analysis in that it would look to underlying policies or legislative intent to determine the legally relevant effects.<sup>266</sup> Consideration of the increased cross-border operations of Mexican trucks, the Court explained, would not further

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(2004) (No. 03-358), available at 2004 WL 250237 (quoting 40 C.F.R. § 1508.8(b) (2003) (emphasis added by Respondents)).

261. *Id.* at 33–35.

262. See *Public Citizen*, 124 S. Ct. at 2213–18.

263. *Id.* at 2213 (quoting 40 C.F.R. § 1508.8 (2003)).

264. See *id.* at 2215 (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). In *Metropolitan Edison*, the Court held that NEPA did not require the government to consider the psychological stress that might result from the operation of a nuclear power plant because such stress was not sufficiently related to a direct effect on the physical environment. *Metro. Edison*, 460 U.S. at 766. The causation question in *Metropolitan Edison* was quite different from that in *Public Citizen*, however, in that it addressed the length of the causal chain—as opposed to the breadth of an action’s consequences—that an agency is required to consider.

265. *Public Citizen*, 124 S. Ct. at 2215 (quoting *Metro. Edison*, 460 U.S. at 774). The Court’s “reasonably close causal relationship” language echoes a leading tort treatise’s description of proximate cause. See KEETON ET AL., *supra* note 242, at 300 (explaining that proximate cause is used to limit liability “to those consequences which have some reasonably close connection with the defendant’s conduct and the harm which it originally threatened”).

266. See *Public Citizen*, 124 S. Ct. at 2215.

NEPA's purpose of incorporating environmental concerns into agency decisionmaking because FMCSA lacked the discretion to countermand the President's lifting of the moratorium.<sup>267</sup> And such consideration, the Court added, would not further NEPA's purpose of providing information to the public because it would not provide information that could affect FMCSA's decisionmaking process.<sup>268</sup>

Although the Court recited NEPA's purposes, its heavy reliance on the tort-law concept of proximate cause to determine the scope of "reasonably foreseeable" effects under NEPA was misguided.<sup>269</sup> Both tort law and NEPA's implementing regulations use the term "reasonably foreseeable," but the concept of foreseeability serves very different roles in the two contexts. Tort law employs proximate cause to limit liability to effects that a defendant should have foreseen at the time of a negligent act.<sup>270</sup> Here, the foreseeability inquiry is an *ex post* inquiry that considers the consequences of the defendant's act and delineates those consequences for which the defendant should be legally responsible.<sup>271</sup> The separation of proximately-caused consequences from the broader universe of actually-caused consequences is a policy-driven process that asks whether the resultant harms are "so clearly outside the risks [a defendant] created that it would be unjust or at least impractical to impose liability."<sup>272</sup>

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267. See *id.* at 2216.

268. See *id.*

269. The Court quoted with approval footnote 7 from *Metropolitan Edison. Id.* at 2215. A portion of the footnote not quoted in *Public Citizen*, however, cautioned that "[i]n drawing this analogy [to proximate cause], we do not mean to suggest that any cause-effect relation too attenuated to merit damages in a tort suit would also be too attenuated to merit notice in an EIS; nor do we mean to suggest the converse." *Metro. Edison*, 460 U.S. at 774 n.7; see also Thomas O. McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 856-57 (1977) (arguing that "[t]ort law . . . is an inappropriate framework for NEPA analysis"); cf. DANIEL R. MANDELKER, UPDATE ON THE NATIONAL ENVIRONMENTAL POLICY ACT, ALI-ABA COURSE OF STUDY, SK002 ALI-ABA 791, 796 (2004) (observing that "[t]he Court's use of a causation test to decide what was essentially a question of statutory authority is also surprising").

270. KEETON ET AL., *supra* note 242, at 272-74; McGarity, *supra* note 269, at 858.

271. See McGarity, *supra* note 269, at 858-59 ("This retrospective hypothesizing [in analyzing foreseeability] has nothing to do with actual causation, but is more directly analyzed as a policy determination to limit the scope of defendant's duty despite proof of cause-in-fact.").

272. DOBBS, *supra* note 243, at 443. See also *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.").

The policy concerns that underlie NEPA, however, are quite different from the policy concerns motivating the tort-law concept of proximate cause.<sup>273</sup> The requirement that an agency consider “reasonably foreseeable” effects is not equivalent to a policy determination regarding the appropriate scope of legal liability for a potential tortfeasor. Rather, NEPA employs the “reasonably foreseeable” requirement to set a boundary for the scope of the predictive exercise that an agency undertakes in an EIS or an environmental assessment. Here, foreseeability is an *ex ante* inquiry that considers the events that could result from the agency’s act and separates out those events that are too speculative to consider in a meaningful way.<sup>274</sup> In the NEPA context, foreseeability limits the agency’s information-gathering responsibilities, but it need not and should not be as restrictive as proximate causation in tort because no substantive liability is involved.<sup>275</sup> Given NEPA’s informational purpose, the reasonably foreseeable effects that an agency must consider in an EIS should be broader in scope, and should include, at a minimum, all likely—but not speculative—consequences of an agency’s action.<sup>276</sup>

The above discussion calls into question the Court’s declaration that the “legally relevant cause of the entry of the Mexican trucks is *not* FMCSA’s action, but instead the actions of

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273. See McGarity, *supra* note 269, at 858–59 (contending that for purposes of NEPA analysis, “[a]ny question of whether the appropriate agency should have foreseen a particular result of a proposed project is logically irrelevant”); George J. Skelly, Note, *Psychological Effects at NEPA’s Threshold*, 83 COLUM. L. REV. 336, 365 (1983) (“The nature of this causal relation [between an agency action and a change in the environment] derives from NEPA’s purpose to foster environmentally informed decisions.”).

274. See McGarity, *supra* note 269, at 855 & n.210 (noting the policy concern of “avoiding the judicial and administrative costs of preparing and overseeing grossly speculative impact statements”).

275. Cf. Richard J. Pierce, Jr., *Causation in Government Regulation and Toxic Torts*, 76 WASH. U. L.Q. 1307, 1307–08 (1998) (distinguishing between a more stringent causation inquiry when tort liability is imposed for toxic tort exposure in particular cases and a less stringent inquiry when a regulatory agency is deciding how to address risks posed by such exposure).

276. See McGarity, *supra* note 269, at 859 (arguing that agencies should be required to consider environmental effects that are more likely than not to occur); Skelly, *supra* note 273, at 365 (contending that “[s]ince NEPA’s goal is informational rather than compensatory, the causation standard should be liberal”). This broad understanding of effects that an agency must consider is consistent with the NEPA regulations issued by the Council on Environmental Quality. See 40 C.F.R. § 1508.8 (2004) (defining “effects” that must be considered to include “[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable” and “may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems”).

the President.<sup>277</sup> What the Court presumably meant by this statement is that FMCSA's issuance of regulations did not proximately cause (in a tort sense) the entry of the Mexican trucks. This conclusion, however, hardly ends the matter from NEPA's perspective. The action of a federal agency may set in motion a series of forces or events that ultimately have a significant impact on the environment.<sup>278</sup> Under tort law, these subsequent forces might relieve the original actor of tort liability and be characterized as intervening causes<sup>279</sup> or as independent causal agents. NEPA, however, contemplates that the impacts of these subsequent forces also be considered, as long as they are reasonably foreseeable.<sup>280</sup>

The Court's most significant misstep was to assume that NEPA requires that an agency discuss only information that could have an impact on FMCSA's decisionmaking.<sup>281</sup> The Court was clearly concerned with an outcome that would seem to attribute to the agency responsibility for acts of the President or of Congress. Contrary to this crabbed view, however, the informational purpose of NEPA does in fact extend more broadly to include Congress, the President, and other parts of the Government outside the agency, as well as the public at large.<sup>282</sup>

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277. Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204, 2216 (2004).

278. McGarity, *supra* note 269, at 854.

279. See KEETON ET AL., *supra* note 242, at 301 (describing an intervening cause as one that comes into operation in producing harm after a defendant's negligent act). Had the Court fully applied a tort law framework to NEPA, it might have characterized the lifting of the moratorium not only as an intervening cause, but also as a foreseeable intervening cause whose effects FMCSA would be required to consider. See *id.* at 302 (noting that a negligent defendant may be held liable for events that have foreseeable intervening causes).

280. See McGarity, *supra* note 269, at 857–58 (“Whether or not society holds an agency responsible for the environmental consequences of its actions in the context of tort litigation, NEPA demands that the agency consider the effects and make them public.”); see also *supra* note 276 and accompanying text.

281. See *Public Citizen*, 124 S. Ct. at 2216 & n.2 (dismissing the contention “that an EIS would be useful for informational purposes entirely outside FMCSA's decisionmaking process”).

282. See *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 835 (D.C. Cir. 1972).

The impact statement is not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers [i.e., Congress and the President], and must provide them with the environmental effects of both the proposal and the alternatives, for their consideration along with the various other elements of the public interest.

*Id.*; William B. Ellis & Turner T. Smith, Jr., *The Limits of Federal Environmental Responsibility and Control Under the National Environmental Policy Act*, 18 ENVTL. L. REP. 10,055, 10,058 (1988) (contending that “NEPA's chief goal—promoting better-informed federal decisionmaking—would seem to favor full disclosure” of significant environmental effects directly resulting from private action but made possible by federal

NEPA is intended to provide information to all of these constituencies, and is not limited in purpose to improving agency decisionmaking. This intention is reflected in the requirement that an agency consider a reasonable range of alternatives, including alternatives that are beyond its jurisdiction.<sup>283</sup>

On its face, the Court's decision in *Public Citizen* appears to have a modest impact. The case involved unusual factual circumstances in which the scope of the NEPA analysis required was unclear because the agency's statutory authority was limited.<sup>284</sup> Litigants may nevertheless seek to constrict NEPA's scope by extending the causation analysis in *Public Citizen* to other circumstances. Such circumstances may include "small handle" cases where federal approval is required for a small but integral part of a nonfederal project. For example, a state constructing a highway with state funds might nonetheless need federal approval to allow the highway to cross a park.<sup>285</sup> Or a company building a manufacturing plant may require a federal permit to build a discharge pipeline in wetlands.<sup>286</sup> In such cases,

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action); Rodgers, *supra* note 150, at 11,034 (contending that *Public Citizen* "misstates the audiences to which the EIS is addressed [in] not mentioning Congress at all and dismissing the 'larger audience' of the public on the spurious ground that they 'can have no impact on FMCSA's decisionmaking'").

283. 40 C.F.R. § 1502.14(c) (2004) (mandating that discussion of alternatives "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency"); see Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 17, 1981):

An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed . . . if it is reasonable . . . . Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies.

*Id.*; see also *Natural Res. Def. Council*, 458 F.2d at 834 (rejecting the Government's contention "that the only 'alternatives' required for discussion under NEPA are those which can be adopted and put into effect by the official or agency issuing the statement"); McGarity, *supra* note 269, at 858 ("That choosing a particular alternative action may not forestall the environmental consequences may be relevant to the choice between alternatives; it does not, however, relieve the agency of the duty to set forth publicly those alternatives and study them.").

284. See MANDELKER, *supra* note 269, at 795 (remarking that the case "considers an issue that does not usually arise under NEPA" and that "[i]n most NEPA cases it is absolutely clear the agency has the authority to undertake the action that is claimed to be subject to a NEPA environmental review"); see also Joseph Miller, Note, United States Department of Transportation v. Public Citizen, 28 HARV. ENVTL. L. REV. 593, 598 (2004) (suggesting, prior to the Court's decision, that "the unique facts of this case ensure that the ruling will have narrow long-term environmental applicability").

285. See *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (holding that the conversion of park land required federal approval because the park was established with federal funds).

286. See generally *Save the Bay, Inc. v. U.S. Corps of Eng'rs*, 610 F.2d 322, 326-27

lower courts have differed over whether NEPA analysis must cover the entire project, or only the portion of the project subject to federal approval.<sup>287</sup> Litigants now may argue that the “proximate cause” analysis in *Public Citizen* limits the scope of the required analysis to the portion of the project over which the federal agency has discretion.

2. *Miccosukee*. Although the Court’s reliance on tort concepts of causation in the 2003-04 Term was most prominent in *Public Citizen*, it also hinted at a role for tort causation principles in *Miccosukee*. As discussed above, the *Miccosukee* opinion rejected a water district’s argument that no CWA permit was necessary for a water pump that itself did not add pollutants to navigable waters.<sup>288</sup> The Court, however, left two other arguments for consideration on remand. One argument, asserted by the Federal Government in an amicus brief, was that all navigable waters of the United States—no matter how physically distinct or spatially separate—are unitary.<sup>289</sup> Under this “unitary waters” argument, no permit would be required if pollution is simply transferred from one navigable water to another.<sup>290</sup> The other argument, made by the water district, was that no permit was required because the canal from which water was taken and

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(5th Cir. 1980) (indicating that if “major federal action” were involved, federal approval may be required (internal quotation marks omitted)).

287. *Compare Md. Conservation Council*, 808 F.2d at 1042 (holding that an entire highway project, where federal approval would be required for the portion of highway that would cross park land, was “federal action” for which a NEPA analysis was required), and *Sierra Club v. Marsh*, 769 F.2d 868, 877–78 (1st Cir. 1985) (holding that, where federal permits were required for construction of a port and causeway, a NEPA analysis must consider environmental effects of the entire industrial development that would be enabled by such construction), with *Save the Bay*, 610 F.2d at 327 (upholding a NEPA analysis that examined only the environmental consequences of pipeline construction and maintenance and not of the entire manufacturing facility), and *Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269, 272–73 (8th Cir. 1980) (upholding a NEPA analysis that considered only the area subject to federal permit requirement, rather than the impact of the entire transmission line project).

288. *See supra* Part III.B.3.

289. Brief for the United States as Amicus Curiae Supporting Petitioner at 22, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004) (No. 02-626), available at 2003 WL 22137034 (“The S-9 pumping station does not add pollutants to the waters of the United States ‘from any point source’ because the pumping station does not physically add *anything* into those waters; instead, it merely conveys or connects navigable waters, which already contain pollutants.”).

290. *Id.*; cf. *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1296–97 (1st Cir. 1996) (rejecting “singular entity” theory positing that two separate bodies of water were “singular” waters of the United States). The Court declined to rule on the issue because the argument apparently had not been raised below or addressed by other courts. *Miccosukee*, 124 S. Ct. at 1545. *But see id.* at 1547 (Scalia, J., concurring in part and dissenting in part) (arguing that although “not phrased in the same terms,” the issue had been raised and decided in the court of appeals’ opinion).

the body of water into which the water was pumped (the Everglades) were indistinguishable parts of the same water body.<sup>291</sup>

On this second issue, the district court had determined at summary judgment that “[t]he canal and the Everglades are two separate bodies of water because the transfer of water or its contents from [the canal] into the Everglades would not occur naturally.”<sup>292</sup> The Supreme Court ordered the district court to reconsider the issue because it believed summary judgment was premature, but declined to decide the appropriate test for determining whether two bodies of water are separate.<sup>293</sup> The Court nevertheless included rather extensive dicta suggesting that the tort concept of actual causation might be relevant:

The limited record before us suggests that if [the pump] were shut down, the area drained by C-11 would flood quite quickly. . . . That flooding might mean that C-11 would no longer be a ‘distinct body of navigable water,’ . . . but part of a larger water body . . . . It also might call into question the Eleventh Circuit’s conclusion that [the pump] is the cause in fact of phosphorous addition to WCA-3.<sup>294</sup>

In these comments, the Court seems to have lost sight of the task at hand. The CWA simply requires a permit for “any addition of any pollutant to navigable waters from any point source.”<sup>295</sup> If the purpose of the permit requirement is to protect water quality by enabling regulators to “place limits on the type and quantity of pollutants that can be released into the Nation’s waters,”<sup>296</sup> then the question of distinctness should simply depend on whether the water bodies are physically distinct as they exist. For the Court instead to become embroiled in imagining what might happen if the pump were shut down—i.e., an inquiry into actual, “but for” causation<sup>297</sup>—only confuses the matter. Indeed, had the Court been mindful of the underlying purpose of the

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291. *Id.* at 1545–48 (majority opinion).

292. *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, No. 98-6056-CIV, 98-6057-CIV, 1999 WL 33494862, at \*6 (S.D. Fla. Sept. 30, 1999).

293. *See Miccosukee*, 124 S. Ct. at 1546 (noting that the record indicated some factual issues remained unresolved).

294. *Id.* at 1546 (citations omitted).

295. 33 U.S.C. § 1362(12) (2000) (defining “discharge of a pollutant”); *see also* § 1311(a) (making pollutant discharges unlawful if not in compliance with statute); § 1342(a) (defining the permit system).

296. *Miccosukee*, 124 S. Ct. at 1541.

297. The Court’s dicta were likely aimed not just at the district court, but also at the Eleventh Circuit, which had heavily relied on “cause-in-fact” analysis. *See Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368–69 (11th Cir. 2002). Nevertheless, these dicta are misguided and potentially misleading.

CWA, it not only would have found this causation inquiry irrelevant, but also would have squarely rejected the Federal Government's unitary waters argument.

C. *Proximate Cause in Sweet Home*

Prior to the 2003-04 Term, the Supreme Court invoked proximate cause in the context of one other environmental statute: the Endangered Species Act (ESA).<sup>298</sup> In that case, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the importation of proximate cause doctrine into a federal environmental statutory scheme was again questionable.

The *Sweet Home* plaintiffs challenged a regulation defining "harm" to a protected species to include "significant habitat modification or degradation where it actually kills or injures wildlife."<sup>299</sup> The plaintiffs argued that the ESA prohibits only the direct application of force against individual animals, not the destruction of habitat.<sup>300</sup> A 6–3 majority of the Court rejected this argument and held the regulation to be a reasonable interpretation of the ESA and within the Secretary of the Interior's statutory authority.<sup>301</sup> In a concurring opinion, Justice O'Connor emphasized her understanding that the regulation—and the statute—cabined the scope of potential liability by incorporating "ordinary principles of proximate causation."<sup>302</sup> In her view, persons prosecuted for harming a protected species "should be held liable . . . only if their habitat-modifying actions proximately cause death or injury to protected animals."<sup>303</sup> The majority apparently agreed with Justice O'Connor on this point.<sup>304</sup>

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298. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 696 n.9 (1995).

299. *Id.* at 691 (quoting 50 C.F.R. § 17.3 (1994)).

300. *Id.* at 692–93.

301. *Id.* at 688, 700.

302. *Id.* at 712–13 (O'Connor, J., concurring) ("I see no indication that Congress, in enacting [the Endangered Species Act (ESA) provision imposing liability for violating the Act], intended to dispense with ordinary principles of proximate causation.").

303. *Id.* at 712.

304. *See id.* at 696–97 n.9 (majority opinion) (observing that "[r]espondents have suggested no reason why . . . the 'harm' regulation . . . should not be read to incorporate ordinary requirements of proximate causation and foreseeability"); *id.* at 700 n.13 (noting that "[t]he dissent incorrectly asserts that the Secretary's regulation . . . 'dispenses with the foreseeability of harm'"). In dissent, Justice Scalia agreed that the statute incorporated a requirement of proximate cause but would have invalidated the regulatory definition of "harm" because it encompassed indirect injuries, which, in his view, are not proximately caused. *Id.* at 732–33 (Scalia, J., dissenting).

Whether the tort-law doctrine of proximate causation should apply to the ESA is open to debate. On the one hand, as the majority and concurring opinions in *Sweet Home* recognized, there must be limits on the scope of harm to protected species for which a person may be held liable. For instance, Justice O'Connor suggested that it would be unreasonable, and almost surely beyond Congress's intent, to hold liable "a farmer whose fertilizer is lifted by a tornado from tilled fields and deposited miles away in a wildlife refuge" where protected species are harmed as a result.<sup>305</sup> On the other hand, the ESA's limits and traditional proximate cause doctrine are not necessarily coterminous. Congress did not define "harm" in the ESA, and it gave no explicit indication of whether it intended to incorporate proximate cause doctrine into the statute.<sup>306</sup> Achieving the ESA's broad purposes of conserving threatened and endangered species and the ecosystems on which they depend<sup>307</sup> might in fact demand a broader and more protective standard than common-law proximate causation. For example, the standard of liability might be defined in terms of whether a person's conduct was—or is likely to be—a substantial factor in harm to a species.<sup>308</sup> Indeed, an examination of the specific examples discussed by Justice O'Connor suggests that she used the term proximate cause not to incorporate notions of foreseeability but rather to incorporate spatial and temporal limitations on the potential scope of liability.<sup>309</sup>

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305. See *id.* at 713 (O'Connor, J., concurring). It is worth noting, however, that the probability of such a farmer being prosecuted in the first instance is remote.

306. See *id.* at 712 (noting that the ESA is "a strict liability statute that is silent on the causation question"); *cf. id.* at 732 (Scalia, J., dissenting) (basing the inference that the statute contains a proximate-cause limitation on terms used in the prohibitory provision of the ESA, 16 U.S.C. § 1538(a)(1)(B)).

307. See 16 U.S.C. § 1531(b) (2000) (describing the purposes of the ESA).

308. See, e.g., Steven G. Davison, *Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155, 190 (1995) (arguing that "harm" be interpreted to include habitat modification or degradation "if there is a finding that 'but for' the habitat modification or degradation the specific dead animal would not have been killed, or that the habitat modification was a substantial factor in the killing of the animal").

309. In addition to the hypothetical of the farmer whose fertilizer is transported miles away by a tornado, Justice O'Connor identified one actual case where she found the causal connection too attenuated: *Palila v. Hawaii Department of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), in which the Ninth Circuit held that a state agency had committed a "taking" in violation of the ESA by permitting sheep to eat seedlings of a tree species that, when full grown, might have fed and sheltered an endangered bird. *Sweet Home*, 515 U.S. at 713–14 (O'Connor, J., concurring); *cf.* Steven P. Quarles et al., *Sweet Home and the Narrowing of Wildlife "Take" Under Section 9 of the Endangered Species Act*, 26 ENVTL. L. REP. 10,003, 10,011–12 (1996) (suggesting that in both examples harm is foreseeable but that Justice O'Connor was apparently troubled by

Ten years after *Sweet Home*, the standard of liability remains unsettled in the lower courts. One commentator has observed that “*Sweet Home*’s discussion of proximate cause and foreseeability have not . . . had much impact on subsequent cases.”<sup>310</sup> Another commentator has bemoaned the fact that “the rich body of tort scholarship, legislation, and case law on causation has largely been ignored by the agencies and the courts” in interpreting the scope of the ESA.<sup>311</sup> Ultimately, the critical question is what Justice O’Connor—and perhaps the rest of the Court—meant in referring to “ordinary principles of proximate causation.”<sup>312</sup> Although she noted that “proximate cause principles inject a foreseeability element into the statute,” she also declined to go into further detail, except to state that “[p]roximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences.”<sup>313</sup> These comments hint that the Court understood the need for liability limits akin to—but not necessarily the same as—those provided by the doctrine of proximate causation in tort law.

#### D. Synthesis

In all three cases discussed in this Part, the Court imported proximate cause doctrine into a federal environmental statute, despite the absence of any indication in the text of any of the statutes that such a move was appropriate. The opinions in these cases were authored by two proponents of textualism, Justices Thomas and O’Connor, a fact that undermines the textualists’ assertions that their methodology simply involves the neutral

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the lack of direct causation).

310. Holly Doremus, *Water, Population Growth, and Endangered Species in the West*, 72 U. COLO. L. REV. 361, 389–90 (2001) (also noting that “[n]o reported opinion has so far rejected a claim under section 9 [of the ESA] for lack of proximate cause or foreseeability”); see also *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1251 n.23 (11th Cir. 1998) (suggesting that the discussion of proximate cause in *Sweet Home* is dicta); *Strahan v. Coxe*, 127 F.3d 155, 163–64 (1st Cir. 1997) (rejecting the argument by the state-agency defendant that issuance of licenses to use certain fishing gear did not proximately cause a taking under the ESA); Andrew J. Doyle, Note, *Sharing Home Sweet Home with Federally Protected Wildlife*, 25 STETSON L. REV. 889, 922 (1996) (arguing that “[b]ecause the ESA does not require proximate cause . . . [c]ourts should either ignore *Sweet Home*’s arguable dicta, or interpret ‘ordinary’ requirements of proximate cause/foreseeability to be consistent with current ‘harm’ case law”).

311. James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons From Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENVTL. L. 595, 598 (2003).

312. *Sweet Home*, 515 U.S. at 712 (O’Connor, J., concurring); see Rasband, *supra* note 311, at 606 (observing that “[t]he element of proximate cause is notoriously malleable”).

313. *Sweet Home*, 515 U.S. at 713 (O’Connor, J., concurring).

interpretation of plain statutory text. Each decision to look beyond the text—and also beyond dictionary definitions and statutory structure—was inconsistent with textualism. The invocation of proximate cause doctrine, like the application of certain textualist techniques, represented a conscious policy choice that in each case served to narrow the scope of environmental regulation. Through these interpretative moves, the Court countermanded Congress's choices (as in *Public Citizen*), or at least made policy decisions without having to acknowledge that it did so.

## V. SELECTIVE FEDERALISM

Three cases from the 2003-04 Term—*Engine Manufacturers*, *ADEC*, and *Miccosukee*—resulted in decisions adverse to state and local governments.<sup>314</sup> This pattern might suggest a retreat from the Court's tendency to protect state autonomy in its recent federalism jurisprudence. A closer examination of these cases, however, reveals that the Court's more conservative members continue to profess adherence to the values of federalism, while applying federalism principles selectively. In particular, juxtaposition of the opinions in *Engine Manufacturers* and *ADEC* supports Professor Richard Fallon's observation that “[w]hen federalism and substantive conservatism come into conflict, substantive conservatism frequently dominates.”<sup>315</sup> The selective invocation of federalism is the third tool of statutory interpretation that is prominent in the Court's 2003-04 environmental decisions. Like textualism and proximate cause doctrine, it can be a potent means of obscuring policy choices that undermine environmental regulation.

### A. Background

The term “federalism” generally refers to positive and normative principles concerning the division of powers among

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314. See *supra* Part III.B.

315. Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 434 (2002); cf. Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 499–501 (1995) (recounting historical use of federalism arguments to resist progressive federal efforts in areas of civil rights and social welfare). Fallon defines “substantively conservative positions” in economic cases as “anti-union, pro-business . . . , anti-liability, and anti-injured-person,” and in civil liberties cases as “those disfavoring ‘the criminally accused’ and ‘civil rights/civil liberties claimant[s],’” except in affirmative action and Takings Clause cases. Fallon, *supra* at 447 (citations omitted).

layers of government.<sup>316</sup> Federalism, the Supreme Court has emphasized, is an integral part of our constitutional structure, distributing power between the Federal Government and the states, and thus “reduc[ing] the risk of tyranny and abuse from either front.”<sup>317</sup> The Court has stated that the system of joint sovereigns in our federalist structure serves the values of promoting “a decentralized government that will be more sensitive to the diverse needs of a heterogenous society,” “increas[ing] opportunity for citizen involvement in democratic processes,” “allow[ing] for more innovation and experimentation in government,” and “mak[ing] government more responsive.”<sup>318</sup>

At the Supreme Court, Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas have promoted a particular vision of federalism that calls for limiting federal authority and safeguarding state sovereignty on various fronts.<sup>319</sup> First, the Court has curbed Congress's authority to legislate pursuant to the Commerce Clause. After decades in which that authority was understood to be almost without limit,<sup>320</sup> the Court, in the wake of *United States v. Lopez*, now inspects statutes to ensure that activities regulated under that authority have “a substantial relation to [interstate] commerce.”<sup>321</sup> Second, in

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316. See Fallon, *supra* note 315, at 439; see also Chemerinsky, *supra* note 315, at 504.

317. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

318. *Id.* But see Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 47–51 (2002) (presenting empirical results suggesting that federalism reduces decentralization because state power is amassed at the expense of local power); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 909 (1994) (distinguishing between decentralization and federalism and arguing that the “Court should never invoke federalism as a reason for invalidating a federal statute or as a principle for interpreting it” because federalism involves “no normative principle . . . worthy of protection”).

319. See Fallon, *supra* note 315, at 429–30; Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1165–71 (1995); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 3 (2004).

320. See Holly Doremus, Comment, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 293 (1991) (“As currently interpreted, the Commerce Power has a virtually unlimited sweep.”).

321. *United States v. Lopez*, 514 U.S. 549, 558–60 (1995) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 (1968), and holding the Gun-Free School Zones Act, which criminalized possession of firearm within 1000 feet of a school, to be beyond Congress's Commerce Clause authority); see *United States v. Morrison*, 529 U.S. 598, 609–18 (2000) (invalidating the civil damages provision of the Violence Against Women Act and rejecting the argument that Congress can regulate noneconomic conduct based on its aggregate effect on interstate commerce); see also Christopher H. Schroeder, *Environmental Law, Congress, and the Court's New Federalism Doctrine*, 78 IND. L.J. 413, 416–17 (2003) (contending that *Lopez* and *Morrison* “signaled a change in ‘mood’”—i.e., in Commerce Clause cases, the Court would apply a less deferential review akin to a “hard look”).

Tenth Amendment decisions such as *New York v. United States* and *Printz v. United States*, the Court has prohibited Congress from “commandeering” state governments to regulate pursuant to federal dictates or to otherwise implement federal legislation.<sup>322</sup> Third, in decisions interpreting Section 5 of the Fourteenth Amendment, the Court has determined that Section 5 is remedial only and does not authorize Congress to create new rights or expand the scope of existing rights enforceable against states.<sup>323</sup> Similarly, the Court’s Eleventh Amendment jurisprudence has expanded the scope of sovereign immunity for state governments from private suit.<sup>324</sup> Finally, in addition to constitutional doctrines, the Court has also employed equitable doctrines, interpretive canons, and other devices of statutory construction to protect state and local governments.<sup>325</sup>

Federalism issues have the potential to be particularly important to environmental law because the Rehnquist Court’s philosophy of a Federal Government with strictly limited powers is in tension with the broad scope and authority that characterizes federal environmental law.<sup>326</sup> The sharing of

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*Lopez* and *Morrison* addressed whether an activity had a substantial effect on interstate commerce; both cases acknowledged that Commerce Clause authority also extends to two other categories of activity: “the use of the channels of interstate commerce”; and “the instrumentalities of interstate commerce, or persons or things in interstate commerce.” *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 558.

322. *Printz v. United States*, 521 U.S. 898, 925–33 (1997) (invalidating the Brady Handgun Violence Prevention Act because it “commandeered” state and local law enforcement officers to perform firearm background checks); *New York v. United States*, 505 U.S. 144, 174–76 (1992) (invalidating the “take title” provision of the Low-Level Radioactive Waste Policy Amendments Act because it forced state governments either to accept ownership of waste or to regulate according to Congress’s instructions).

323. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding that, given the lack of evidence of widespread and unconstitutional age discrimination by states, the Age Discrimination in Employment Act did not validly abrogate state sovereign immunity under the Fourteenth Amendment); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636–48 (1999) (holding that the Fourteenth Amendment did not authorize Congress to abrogate state sovereign immunity where the Patent Remedy Act was not congruent and proportional to the historical pattern of patent infringement by the states); *City of Boerne v. Flores*, 521 U.S. 507, 519–36 (1997) (invalidating the Religious Freedom Restoration Act, which required courts to apply the strict scrutiny test in free exercise challenges).

324. *See Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996) (holding that Congress may authorize suits against states only through laws enacted under the Fourteenth Amendment or the Interstate Commerce Clause); *see also Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that because the state had not consented to suit, state employees could not sue the state in state courts for an alleged violation of the federal Fair Labor Standards Act).

325. *See Fallon, supra* note 315, at 433, 462–65 (discussing the Court’s use of “equitable doctrines, interpretive canons, and other devices” to protect local and state governments).

326. *See Jay Austin & Scott Schang, Fundamentalism Federalism*, ENVTL. F., Sept.–

responsibility by the states and the Federal Government for regulating and implementing many environmental statutes ameliorates some of the potential conflict.<sup>327</sup> This shared responsibility, sometimes referred to as “cooperative federalism,” reflects a balance between, on the one hand, the desire to address the “failure of decentralized approaches to environmental protection”<sup>328</sup> and, on the other hand, states’ traditional jurisdiction over environmental matters and their interest in representing local interests and concerns.<sup>329</sup> Precisely where this balance should be struck in environmental regulation has been the subject of intense debate.<sup>330</sup>

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Oct. 2004, at 28, 28 (contending that the Court’s federalism cases represent a “profoundly different view of the Constitution that challenges the basic premises of federal regulation”); Robert V. Percival, *“Greening” the Constitution—Harmonizing Environmental and Constitutional Values*, 32 ENVTL. L. 809, 840 (2002) (noting that “[a]s a result of the Rehnquist Court’s ‘new federalism,’ constitutional challenges to federal environmental regulations are now being raised with regularity”).

327. Cf. CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP* 14–16 (2003) (describing preservation of the states’ roles in regulation in the wake of federal environmental enactments).

328. Percival, *supra* note 247, at 165; see Percival, *supra* note 319, at 1142 (stating that “Congress mandated national environmental standards only after a long history of failed efforts to encourage states to act on their own”); Stewart, *supra* note 104, at 1196 (characterizing federal environmental legislation as a reaction “to the perceived inability of the states to check or reverse environmental degradation”). The leading justifications for federal regulation include: the prevention of destructive competition between states for industrial development (i.e., a “race to the bottom”), the need to address spillover effects, and the economies of scale available through federal regulation. RECHTSCHAFFEN & MARKELL, *supra* note 327, at 22–30; Stewart, *supra* note 104, at 1211–19. *But see* Revesz, *supra* note 104, at 563 (disputing public choice argument for federal environmental regulation and contending that states can be effective environmental regulators); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1253 (suggesting that interstate competition with respect to environmental standards may enhance net social welfare).

329. See RECHTSCHAFFEN & MARKELL, *supra* note 327, at 15 (“Congress was careful not to write off states’ interests, as sovereigns, in protecting their people and serving as stewards for their environment.”); see also Stewart, *supra* note 104, at 1210–11 (noting that decentralization of environmental regulation can allow for “geographical variations in preferences for collective goods[,]” facilitate policy experimentation, and encourage self-determination).

330. See, e.g., Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 570–71 (1996) (criticizing the push for across-the-board decentralization and advocating the selection of regulatory responses that match the scope of a particular environmental problem); David L. Markell, *States as Innovators: It’s Time for a New Look to Our “Laboratories of Democracy” in the Effort to Improve our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 410–11 (1994) (arguing for a greater role of states in addressing federal environmental regulatory failures, in light of examples of state regulatory innovations); Revesz, *supra* note 328, at 1211–12 (challenging race-to-the-bottom assumptions underpinning federal environmental laws); Stewart, *supra* note 104, at 1211–17 (identifying reasons for centralized environmental regulation); see also Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS

Typically, cooperative federalism statutes such as the CAA and the CWA provide for an overarching federal structure in which states are offered the choice of either yielding to direct federal implementation or implementing federal requirements themselves.<sup>331</sup> The shared responsibility under the latter option is a practical necessity for the Federal Government, which lacks the resources, expertise, information, and political support to assume full control of all environmental regulation.<sup>332</sup> States that take on this responsibility must meet minimum federal standards, but otherwise may adopt regulatory programs to reflect local interests.<sup>333</sup> Cooperative federalism schemes thus involve a sharing of federal power with the states and do not pose the same threat to state sovereignty as when Congress preempts state law or simply compels a state to regulate.<sup>334</sup>

The Rehnquist Court's federalism decisions thus far have had a relatively modest impact on federal environmental regulation.<sup>335</sup> Of the doctrines used to promote federalism, Commerce Clause jurisprudence may warrant the closest attention because many federal environmental statutes involve the exercise of Congress's power to regulate interstate

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L. REV. 281, 313–18 (2003) (suggesting that California's authority to regulate mobile sources under the CAA is part of a "modified federalism" scheme that attempts to capture advantages of a particular state in addressing an environmental problem).

331. See, e.g., 33 U.S.C. § 1342(b) (2000) (providing for state administration of discharge permit programs under the CWA); 42 U.S.C. § 7410 (2000) (providing for state implementation plans under the CAA); see also RECHTSCHAFFEN & MARKELL, *supra* note 327, at 15–16 (describing the federal and state roles in cooperative federalism).

332. Dwyer, *supra* note 104, at 1216–19, 1224; Stewart, *supra* note 104, at 1201.

333. RECHTSCHAFFEN & MARKELL, *supra* note 327, at 16 (recognizing that states have an interest in protecting their people and environments).

334. See *Printz v. United States*, 521 U.S. 898, 925–27 (1996) (distinguishing between statutes that compel states to administer a federal regulatory program and statutes that "merely ma[k]e compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field"); see also Austin & Schang, *supra* note 326, at 29–30 (noting that under the cooperative federalism scheme, states retain the option of abandoning delegated programs should federal oversight of state implementation become too oppressive).

335. See Austin & Schang, *supra* note 326, at 29 ("While this fundamentalist federalism has had only modest success in the environmental sphere, it has already changed the shape of the debate at the highest levels."); *id.* at 35 (suggesting that the "Rehnquist Court's Commerce Clause revolution . . . may have lost its steam, at least where environmental law is concerned"); Robert V. Percival, *Environmental Implications of the Rehnquist Court's New Federalism*, NAT. RESOURCES & ENV'T, Summer 2002, at 3, 54 (noting that federalism decisions "have not caused fundamental changes in environmental regulation to date [but] could well serve as a vehicle for doing so in the future"); cf. Dwyer, *supra* note 104, at 1190 (arguing that "given the well established breadth of Commerce Clause doctrine and given that most federal environmental regulation addresses private commercial activity directly, the Court's impact on environmental law will be at the far margins of federalism").

commerce.<sup>336</sup> The Court, however, has not invalidated any environmental statutes under the Commerce Clause. In 1981, the Court rejected a Commerce Clause challenge to the federal regulation of coal mining in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*.<sup>337</sup> Chief Justice Rehnquist's citation of *Hodel* with approval in the *Lopez* decision indicates that even after the Court's recent Commerce Clause decisions, *Hodel* remains good law.<sup>338</sup>

One federalism case in which the Court did invalidate an environmental statute on constitutional grounds was *New York v. United States*. The invalidated provision—the “take title” provision of the Low-Level Radioactive Waste Policy Amendments Act—was unusual in that it forced state

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336. See, e.g., Toxic Substances Control Act, 15 U.S.C. § 2602(3)–(4) (2000) (providing a definition of commerce for use in the statute, which deals with toxic substances); Migratory Bird Treaty Act, 16 U.S.C. § 705 (regulating interstate transportation of migratory birds); Federal Water Pollution Control Act, 33 U.S.C. §§ 1342(a), 1362(7), (12) (requiring permits for discharges of pollutants into waters of the United States); see also Dwyer, *supra* note 104, at 1188 n.21 (noting that environmental statutes “are almost always tied to interstate commerce”); Steven R. McAllister & Robert L. Glicksman, *State Liability for Environmental Violations: The U.S. Supreme Court's “New” Federalism*, 29 ENVTL. L. REP. 10,665, 10,665 (1999) (stating that “federal environmental laws generally are premised on Congress'[s] Article I power to regulate interstate commerce”); cf. Richard J. Lazarus, *Environmental Law and the Supreme Court: Three Years Later*, 19 PACE ENVTL. L. REV. 653, 662–63 (2002) (noting that federal environmental laws are “*sub silentio* premised on expansive notions of Congressional power under the General Welfare Clause” but also readily fit within Commerce Clause jurisdiction because activities regulated are essentially economic).

337. 452 U.S. 264, 277–83 (1981) (upholding the Surface Mining Coal Reclamation Act and “agree[ing] with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State”).

338. See *United States v. Lopez*, 514 U.S. 549, 559 (citing *Hodel* for the proposition that Congress may regulate intrastate economic activity with a substantial effect on interstate commerce); see also Schroeder, *supra* note 321, at 419–20 (suggesting that the Court's citation of *Hodel* signals the constitutionality of environmental legislation, not just because *Hodel* involved an environmental statute, but also because *Hodel* and *Lopez* presented similar connections to interstate commerce and “similar intrusions into areas of traditional state concern,” but differed in that the statute in *Hodel* regulated a commercial activity). In the lower courts, Commerce Clause challenges to the Endangered Species Act have been raised with some frequency, but without success. See *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 638–41 (5th Cir. 2003), *cert. denied*, 125 S. Ct. 2898 (2005) (concluding that the ESA, as applied to intrastate species, falls within Congress's Commerce Clause authority because of the aggregate effect on interstate commerce of taking various species); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1066 (D.C. Cir. 2003) (accord[ing] the ESA “a presumption of constitutionality” (internal quotation marks omitted)); *Gibbs v. Babbitt*, 214 F.3d 483, 493 (4th Cir. 2000) (allowing individual takings to be “aggregated for the purpose of Commerce Clause analysis”); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1054 (D.C. Cir. 1997) (holding that the taking of an endangered species of fly “can also be regulated by Congress as an activity that substantially affects interstate commerce”).

governments either to accept ownership of waste or to regulate that waste according to Congress's instructions.<sup>339</sup> However, the ruling that this structure violated the Tenth Amendment has had little impact on federal environmental regulation. Most federal environmental statutes offer states the option of regulating according to federal instructions, or having the Federal Government itself regulate, and thus do not run afoul of the Tenth Amendment.<sup>340</sup>

Perhaps the most significant federalism decision, from the vantage point of federal environmental law, has been the Court's decision in *SWANCC*.<sup>341</sup> The issue originally presented by that case was Congress's authority to regulate isolated wetlands pursuant to the Commerce Clause.<sup>342</sup> The Court sidestepped that constitutional issue, however, and, as described earlier, resolved the case on statutory grounds.<sup>343</sup> The critical move for the Court was the application of the following clear statement interpretive rule: "Where an administrative interpretation of a statute invokes the outer limits of Congress'[s] power, we expect a clear indication that Congress intended that result."<sup>344</sup> In light of that rule, the Court held the regulation at issue to be beyond the authority conferred by the CWA.<sup>345</sup> Avoidance of the constitutional issue left open the possibility of a subsequent congressional response. However, given the slim likelihood of such a response in the present political climate, the narrowing of the statute through statutory interpretation had almost as

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339. *New York v. United States*, 505 U.S. 144, 174–75 (1992).

340. *See, e.g.*, 42 U.S.C. § 7410(a), (c) (CAA requirement that states prepare state implementation plans or, if states fail to do so, the EPA must then prepare federal implementation plan); *Virginia v. Browner*, 80 F.3d 869, 882 (4th Cir. 1996) (upholding various provisions of CAA against Tenth Amendment challenge); *see also* RECHTSCHAFFEN & MARKELL, *supra* note 327, at 41–42 (noting limited impact of *New York* on most federal environmental laws, which raise no Tenth Amendment "commandeering" concerns because they do not require states to implement federal programs).

341. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *see* Schroeder, *supra* note 321, at 453 (arguing that "[d]espite being a nonconstitutional decision, *SWANCC* has by far the greatest implications for environmental legislation of any of the recent [Commerce Clause] cases").

342. *SWANCC*, 531 U.S. at 162; Schroeder, *supra* note 321, at 454 ("[A]ll parties to the litigation had in fact come to the Court thinking this constitutional issue had been squarely presented by the case and would be decided by it.").

343. *See supra* Part III.C.1.

344. *SWANCC*, 531 U.S. at 172. A critical analysis of the Court's application of this rule, which the Court appeared to have conflated with the doctrine that a statute should not be construed to violate the Constitution, can be found in Funk, *supra* note 180, at 10,758–59.

345. *SWANCC*, 531 U.S. at 173–74.

significant an impact as a change in constitutional doctrine.<sup>346</sup> The potential ramifications of the decision extend beyond the CWA, as a systematic application of the Court's clear statement interpretive rule is likely to result in a contraction of federal regulatory authority.<sup>347</sup>

*B. Selective Federalism in the 2003-04 Term*

The Court's 2003-04 environmental docket offered the Court an opportunity to expand its federalism jurisprudence in at least three cases—*ADEC*, *Engine Manufacturers*, and *Miccosukee*. Although none of these cases directly raised constitutional questions, the statutory issues in each case posed a potential conflict between federal and state regulatory authority.<sup>348</sup> By the end of the Term, however, no obvious federalism theme had emerged. Collectively, these three decisions instead support the thesis that members of the Court voice federalism concerns inconsistently and opportunistically.<sup>349</sup> The inconsistent application of federalism principles is demonstrated most starkly by juxtaposing Justice Kennedy's dissent in *ADEC* and the majority and dissenting opinions in *Engine Manufacturers*.<sup>350</sup>

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346. See Schroeder, *supra* note 321, at 456–57 (“[E]ven if revision of Commerce Clause standards fails to narrow the scope of federal authority much, narrowing constructions of statutes or findings of curable constitutional defects can nonetheless have practical impacts ranging from negligible to substantial.”).

347. See *id.* at 457 (“Narrowing an environmental statute through statutory interpretation, as in *SWANCC* . . . will . . . cause a de facto contraction in federal problem solving abilities because the laws on the books will not soon be replaced by curative legislation.”); *cf.* Karkkainen, *supra* note 55, at 450–56 (criticizing Justice Scalia's selective use of clear statement canons to narrow statutes).

348. See Richard Lazarus, *Federalism Constant Issue At High Court*, ENVTL. F., Mar.–Apr. 2004, at 8, 8 (arguing that Justice Kennedy's dissent in *ADEC* “leaves little doubt about the depth of his commitment to promoting” state autonomy in environmental law and suggesting that *Miccosukee*, which was pending at the time, might be decided on federalism grounds).

349. Various commentators have found support for this thesis in the Court's recent jurisprudence. See, e.g., Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1309 (1999) (“Experience with federalism doctrine in particular . . . demonstrates that judges invoke the doctrine selectively to promote policy objectives.”); Fallon, *supra* note 315, at 469–74 (identifying various “doctrinal areas in which the Court is more substantively conservative than it is pro-federalism”); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 279–80 (2004) (concluding from review of citations in the Court's federalism cases that Justices claiming to seek original understanding of Constitution have leeway to mold historical record to serve instrumentalist goals); Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 122 (1998) (noting “strong correlation between Justices' general substantive orientations and their perspectives on Federal Courts law”).

350. The decision adverse to the local water district in *Miccosukee* had limited federalism implications because it did not pose a direct conflict between federal and state

1. ADEC. In *ADEC*, the majority found a statutory basis for the EPA's general oversight authority over the state's BACT determinations in two distinct provisions of the CAA.<sup>351</sup> Section 113(a)(5) of the CAA authorizes the EPA to "issue an order prohibiting the construction or modification of any major stationary source" whenever the EPA "finds that a State is not acting in compliance with any [CAA] requirement or prohibition . . . relating to the construction of new sources or the modification of existing sources."<sup>352</sup> And section 167 of the CAA gives the EPA the authority to issue orders stopping construction when "construction or modification of a major emitting facility . . . does not conform to the requirements' [of the PSD program]."<sup>353</sup> In these two provisions, the majority explained, Congress "expressly endorsed an expansive surveillance role for EPA."<sup>354</sup>

In contrast, Justice Kennedy's dissent found ADEC's statutory authority to "determine" BACT to be virtually conclusive.<sup>355</sup> To buttress his dictionary-based analysis, Justice Kennedy invoked a clear statement rule that would require any grant of oversight authority to the EPA to be unambiguous: "When Congress intends to give EPA general supervisory authority, it says so in clear terms."<sup>356</sup> Sections 113(a)(5) and 167 were insufficiently clear on that point, the dissent argued, because they did not explicitly "limit the States' latitude and responsibility to balance all the statutory factors" relevant to a BACT determination, vis-à-vis the EPA's oversight authority.<sup>357</sup> Like the clear statement rule cited in *SWANCC*,<sup>358</sup> the clear statement rule cited by Justice Kennedy would have had the effect of limiting federal regulatory authority.

The dissent's federalism concerns were hardly limited to its discussion of the clear statement rule. Justice Kennedy went on to characterize the majority's ruling as a potentially catastrophic

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or local regulatory authority. Although the water district tried to frame the case as a federalism conflict, the Court viewed the water district, which was discharging pollutants, as a potential permittee, not as a regulator. See Brief for Petitioner at 34–37, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004) (No. 02-626), available at 2003 WL 22137015; *Miccosukee*, 124 S. Ct. at 1542–43.

351. *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983, 999 (2004); see *supra* Part III.B.4 for a discussion of the textualist aspects of *ADEC*.

352. 42 U.S.C. § 7413(a)(5) (2000), cited in *ADEC*, 124 S. Ct. at 999.

353. *ADEC*, 124 S. Ct. at 999 (citing 42 U.S.C. § 7477).

354. *Id.* at 1002–03.

355. See *supra* Part III.B.4.

356. *ADEC*, 124 S. Ct. at 1012 (Kennedy, J., dissenting).

357. *Id.* at 1011–12.

358. See *supra* text accompanying notes 343–47.

blow for state sovereignty. Justice Kennedy expressed fears that the EPA could overrule a state's BACT determination at any time—perhaps even after review by the state courts—thus leaving not only the state executive branch, but also the state judiciary, under the EPA's thumb.<sup>359</sup> Citing the Court's recent Tenth and Eleventh Amendment decisions (even though these constitutional issues had not been presented by the case),<sup>360</sup> he declared that the states' "governing processes must be respected."<sup>361</sup> The dissent even went on to accuse the majority of "relegating States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect."<sup>362</sup>

2. Engine Manufacturers. *Engine Manufacturers* likewise posed the issue of the scope of local authority within a federal regulatory scheme,<sup>363</sup> but with a critical difference. In contrast to the state regulatory agency in *ADEC*, the local regulatory authority in *Engine Manufacturers* sought to impose a more stringent standard than that required by the Federal Government. One might have expected the five Justices who have been most concerned with protecting state sovereignty, or at least the four who dissented in *ADEC*, to be particularly sensitive to the local air district's views.<sup>364</sup> Yet this was not the case. Indeed, Justice Scalia's opinion—joined by every other member of

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359. *ADEC*, 124 S. Ct. at 1015 (Kennedy, J., dissenting).

The Court today denies state judicial systems the same judicial independence it has long guarded for itself—only that the injury here is worse. Under the majority's holding, decisions by state courts would be subject to being overturned, not just by any agency, but by an agency established by a different sovereign.

*Id.*

360. *See id.* (citing *New York v. United States*, 505 U.S. 144 (1992) and *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); *see also* *Austin & Schang*, *supra* note 326, at 29 (noting that citation of these cases went beyond arguments raised by Alaska and the states that joined it as amici).

361. *ADEC*, 124 S. Ct. at 1015 (Kennedy, J., dissenting).

362. *Id.* at 1018. Richard Lazarus has suggested that Justice Kennedy's strident rhetoric in *ADEC* reveals an "instinctive[]" reaction to protect federalism values based on a misunderstanding of a "carefully nuanced" statute. Lazarus, *supra* note 19 (manuscript at 19). The exaggerated nature of Justice Kennedy's fears is reflected in the fact that thirteen states filed an amicus brief in support of the EPA's oversight authority. *See* Brief of Amici Curiae Vermont et al. in Support of Respondents, *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983 (2004) (No. 02-658), available at 2003 WL 21692826.

363. *See supra* Part III.B.1.

364. *Cf.* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1313 (2004) ("One would expect that a Court concerned with federalism and states' rights also would be narrowing the scope of federal preemption of state laws.").

the Court except for Justice Souter—hardly mentioned federalism at all.<sup>365</sup>

The majority's silence cannot be attributed to lack of attention to the issue, for the local air district had highlighted the federalism issues presented by the case. Specifically, the district had argued for a narrow interpretation of the CAA's provision preempting mobile source regulation. Such an interpretation, the district had suggested, would accommodate a state's sovereign interest in exercising its "historic police powers" in "a field [which] has been traditionally occupied by the states."<sup>366</sup> The majority's response to these pleas, however, bore no resemblance to Justice Kennedy's dissent in *ADEC*. Rather than expressing concern for state sovereignty, Justice Scalia explained that the Court's ruling would protect "Congress's carefully calibrated regulatory scheme," which it feared might be undone if each state could enact its own rules.<sup>367</sup>

Ironically, it was left to Justice Souter's dissent to point out the federalism concerns underlying the case:

In all pre-emption cases, and particularly in those [where] Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.<sup>368</sup>

Application of the presumption against federal preemption, Justice Souter explained, would have limited the scope of preemption to production mandates imposed directly on

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365. See *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756, 1759–66 (2004). The Court did discuss the federalism implications of a state's ability to regulate purchases by state or local government entities at oral argument, but Justice Scalia gave little attention to this issue in his opinion. See Transcript of Oral Argument at 6–7, 16–17, 20–21, 25, *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756 (2004) (No. 02-1343), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/02-1343.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1343.pdf). The particular failure to mention the presumption against preemption may not be so surprising in light of Justice Scalia's prior rejection of the presumption that express preemption provisions be given the narrowest possible construction. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J., dissenting).

366. Brief for Respondents at 37–38, *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756 (2004) (No. 02-1343), available at 2003 WL 22766722 (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)). The district also described the CAA's "cooperative federal-state framework" and noted Congress's recognition that "air pollution control at its source is the primary responsibility of States and local governments." *Id.* at 7 (internal quotation marks omitted).

367. *Engine Mfrs.*, 124 S. Ct. at 1762.

368. *Id.* at 1765 (Souter, J., dissenting) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

manufacturers as a condition of sale.<sup>369</sup> Indeed, this presumption is a close relative of the clear statement rule cited by Justice Kennedy in his *ADEC* dissent: both principles of statutory construction are rooted in concerns of federalism and state autonomy.<sup>370</sup> Indeed, the presumption against express preemption operates in the same way as other clear statement rules in that it “ensure[s] that the federal political process has focused upon the displacement of state authority before it acts to do so.”<sup>371</sup>

The *Engine Manufacturers* decision, combined with the *ADEC* dissent, merely bolsters a trend of selective application of federalism by the Justices who most frequently voice federalism concerns. These Justices, notwithstanding their professed concern for state autonomy, consistently have upheld federal preemption claims that eliminate state regulatory burdens.<sup>372</sup> Various commentators have suggested that in these cases, the pro-federalism Justices have been motivated by principles of substantive conservatism rather than federalism.<sup>373</sup> Professor

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369. See *id.* at 1766–67.

370. Compare *ADEC*, 124 S. Ct. at 1012 (Kennedy, J., dissenting) (“Congress made the overriding judgment that States are more responsive to local conditions and can strike the right balance between preserving environmental quality and advancing competing objectives.”), with *Medtronic*, 518 U.S. at 485 (“[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.”).

371. Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 511–12 (2002).

372. See Fallon, *supra* note 315, at 471–72 & n.281 (observing that the Court found preemption of state law in every one of its seven preemption cases during the 1999 and 2000 Terms, with the five pro-federalism Justices finding preemption in each case, with the exception of Justice Thomas in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 863 (2000)); cf. Massey, *supra* note 371, at 503 (discussing “a sampling of recent preemption cases [that] suggest[s] that while the Court may be creating one brand of process federalism when the scope of the commerce clause is at issue it is engaged in a distinctly different brand when preemption is afoot”); Young, *supra* note 319, at 23 (noting that pro-federalism Justices “have opted for federalism doctrines that aggressively protect state sovereignty,” while “display[ing] relatively little sympathy for state autonomy, particularly in cases involving the preemption of state regulatory authority”); see also Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court’s Environmental Law Decisions*, 42 VAND. L. REV. 343, 398–404 (1989) (describing the Court’s retreat from a presumption against preemption in three environmental cases decided between 1976 and 1987, and suggesting that the cases reflect exercise of institutional activism as well as pro-development policy activism). *But see* Carlson, *supra* note 330, at 305 n.125 (listing preemption cases decided in the 2002 and 2003 Terms in which the Court found in favor of states).

373. See Chemerinsky, *supra* note 364, at 1315 (observing that “the Court’s recent decisions finding preemption expose the political content of its federalism rulings”); Fallon, *supra* note 315, at 469–74; Massey, *supra* note 371, at 508 (characterizing it as “hard to understand why Justices who are so aware of the values of federalism in *Lopez*, *Morrison*, or *Garrett* exhibit such blindness to those values when presented with a

Erwin Chemerinsky, for instance, has observed that the Rehnquist Court, rather than being motivated by a sincere concern for states' rights and federalism, has carefully used specific doctrines of constitutional law to "hid[e] its value choices to limit civil rights laws and to protect business from regulation."<sup>374</sup> The Court's refusal to apply the presumption against preemption in *Engine Manufacturers* had a similar effect of protecting business from regulation.

Although the immediate impact of *Engine Manufacturers* may be relatively modest,<sup>375</sup> the decision is quite troubling if understood as a harbinger of subsequent cases in which the Court will find preempted state efforts to regulate business in order to protect the environment. For example, the auto industry has recently filed a preemption challenge to California's new greenhouse gas regulation, which requires a thirty percent reduction in vehicle greenhouse gas emissions by 2016.<sup>376</sup> Such state efforts are likely to be increasingly important in light of the current retrenchment of federal environmental regulation. Yet if the challenge is successful, California and other states' ability to address significant pollution problems may be hampered. Indeed, widespread application of the preemption doctrine could result in broad spheres of environmentally damaging activity where state regulation is prohibited but federal regulation is absent. This could leave states—and their citizens—even worse off than before the advent of federal environmental law: unprotected by a Federal Government beholden to business interests, and unable

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preemption case," and finding such blindness troubling "[t]o those of us who care about federalism as an end in itself, rather than as an expedient means to accomplishment of other policy objectives"); cf. David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1130 (1999) (concluding, based on analysis of lower court decisions, that in preemption cases, judges appear to indulge ideological predispositions within constraints imposed by legal and factual context). In striking down federal statutes that "commandeer" state governments, the pro-federalism Justices have attempted to distinguish preemption provisions by explaining that preemption does not pose problems of accountability because it is done "in full view of the public." *New York v. United States*, 505 U.S. 144, 168 (1992); see also Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1339–40 (2000) (observing that the Court views commandeering as more denigratory of state authority than preemption because "[c]ommandeering may be seen as an act that treats state officials as mere puppets of the federal government").

374. Chemerinsky, *supra* note 364, at 1315.

375. See *supra* text accompanying note 108.

376. See Danny Hakim, *Automakers Sue to Block Emissions Law in California*, N.Y. TIMES, Dec. 8, 2004, at C1; see also Carlson, *supra* note 330, at 292–306 (discussing preemption issues likely to arise in a challenge to California's regulations).

to be protected by state and local governments who want to protect them.<sup>377</sup>

## VI. CONCLUSION

While the attention paid to environmental law in the 2003-04 Term was unusual, the outcomes largely were not. The decisions fit within a broader trend, reflected in Congress and the executive branch as well as in the courts, in which environmental law, as one commentator put it, “is undergoing a traditional Chinese torture death by slicing.”<sup>378</sup> Whether or not the erosion of environmental law through the Supreme Court’s decisions is intentional, the effect is unambiguous. Richard Lazarus has argued that the members of the Court “have never fully appreciated environmental law as a distinct area of law” and thus “fail to appreciate how the nature of the environmental concerns being addressed can sometimes be relevant to their resolution of those legal issues.”<sup>379</sup> The price of this “apparent indifference and occasional hostility” has become clearer in recent years, as “environmental protection concerns seem increasingly . . . to be serving a *disfavored* role in influencing” outcomes at the Court.<sup>380</sup> This was again the case in the 2003-04 Term.

What are the net effects of the Court’s inhospitable attitude towards environmental law? In 1997, Professor Daniel Farber suggested that the Supreme Court has been “largely irrelevant” in shaping and interpreting environmental law.<sup>381</sup> Farber based this conclusion on the following observations: the Court often hears environmental “cases with quirky, intriguing facts that present no issue of any broad significance”; it frequently avoids deciding such cases on the merits by dismissing them for jurisdictional reasons; and when it does address the merits, the

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377. Cf. Revesz, *supra* note 104, at 557 (suggesting that environmental groups should not view federal regulation as “a panacea” and that while working at the state level, they must mitigate “the threat of federal preemption of more stringent state standards”).

378. Tarlock, *supra* note 8, at 233. It may be inaccurate to characterize death by slicing as “traditional Chinese torture.” Death by slicing, which was reserved as a punishment for a limited class of severe crimes such as parricide and treason, was introduced to Chinese civilization by a “barbarian” tribe, possibly during the tenth century, A.D. See DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 93–95 (1967).

379. Lazarus, *supra* note 3, at 706. Lazarus observed that Justice Scalia in particular has been hostile to environmental protection laws. See *id.* at 727–28.

380. *Id.* at 706, 737.

381. Farber, *supra* note 3, at 548.

Court usually defers to agency decisions or resolves issues on narrow, technical grounds.<sup>382</sup> Farber's observations are to a large degree accurate. The Court has often failed to address significant issues in environmental law on the merits, a recent exception being the 2001 *American Trucking* decision, which resolved a critical question under the CAA.<sup>383</sup> It is less clear, however, that the Court's use of standing and other doctrines to avoid substantive rulings on the merits has been "irrelevant" to the development of environmental law. Rather, the Court's institutional restraint in this area, which has systematically excluded environmental plaintiffs from the courthouse, has had a substantial and detrimental effect.<sup>384</sup>

Some of Farber's observations nevertheless apply to the 2003-04 Term, at least in part. Although the Court heard an unusually large number of environmental cases, many of them could be described as cases "with quirky, intriguing facts that present no issue of any broad significance."<sup>385</sup> *BedRoc* and *Public Citizen* immediately come to mind as examples of cases that are quite limited in their application beyond their immediate factual contexts. Also consistent with Farber's observations, the Court sometimes avoided making difficult choices when confronted with more significant matters. The *Miccosukee* opinion ultimately did not resolve whether CWA permits are required for interbasin water transfers—an issue with nationwide implications for a broad range of constituencies.<sup>386</sup> And in *Southern Utah Wilderness Alliance*, the Court continued to steer environmental plaintiffs away from the courts through justiciability doctrines.<sup>387</sup>

382. *Id.* at 550–62.

383. *See supra* Part III.C.3.

384. *See generally* John Echeverria & Jon T. Zeidler, *Barely Standing: The Erosion of Citizen "Standing" to Sue and Enforce Environmental Law* (1999), <http://www.law.georgetown.edu/gelpi/papers/barely.htm> (arguing that the Court's skewed approach to standing, in which industry groups routinely have standing and environmental groups do not, results in a skewed administrative process and the undermining of environmental protection); Lazarus, *supra* note 3, at 750–51 (describing a trend in standing decisions that "has been so plain and disproportionately prejudicial to environmental concerns" and criticizing the Court's rigid application of standing concepts, contrary to schemes designed by Congress in various environmental statutes); *see also* Levy & Glicksman, *supra* note 372, at 349–54 (distinguishing between institutional activism, in which courts expand and exercise their judicial review powers, and policy activism, in which courts pursue their own policy preferences).

385. Farber, *supra* note 3, at 548.

386. *See* Richard Davis & Brian Doster, *South Florida Water Management District v. Miccosukee Tribe of Indians: Supreme Court Considers Extending Clean Water Act Regulation*, 35 ENV'T REP. 91, 95–99 (Jan. 9, 2004) (describing the potential implications of the case for state and local governments, water utilities and suppliers, agriculture industries, mining companies, and developers).

387. *See* *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373, 2380–87 (2004).

Farber also sketched out four future scenarios with differing levels of Court involvement: (1) continued irrelevance, (2) judicial activism—likely against rather than in favor of environmental protection, (3) the Court as Congress’s “junior partner”—playing a “useful and creative role in adjusting the fabric of the law to deal with modern environmental issues[,]” and (4) the Court as an “immune system”—viewing environmental regulation “as a foreign body invading federal law” and seeking to minimize change beyond Congress’s express mandates.<sup>388</sup> Under the fourth scenario, “[t]he goal would not be to eliminate environmental regulation, but to subsume it within the existing legal order.”<sup>389</sup> Farber declined to predict what path the Court might choose, but encouraged it to “play a constructive supporting role in environmental law.”<sup>390</sup>

The overall pattern suggested by the 2003-04 Term’s decisions is a steering towards Farber’s fourth scenario, in which the Court has curbed the scope of environmental law where possible. All three tools discussed in this Article were employed with the effect of narrowing environmental regulation and, in Farber’s terms, “subsum[ing] it within the existing legal order.”<sup>391</sup> In the Term, the textualists selected definitions of statutory terms that had the effect of reducing regulatory authority. Moreover, by disregarding congressional intent and underlying policy concerns—all the while declaring allegiance to the “ordinary meaning” of the statute as enacted<sup>392</sup>—the followers of textualism stealthily undermined (or in *ADEC*, threatened to undermine) the coherence of regulatory schemes such as the CAA.<sup>393</sup> Invocation of proximate cause doctrine represented an explicit effort by the Court to infuse environmental statutes with a more familiar common-law doctrine less favorable to environmental protection. The application of proximate cause in the 2003-04 Term had the effect of reducing the scope of NEPA and potentially limiting the reach of the CWA. Finally, the conservative members’ selective references to federalism demonstrated the political use of the doctrine to restrict not only federal regulation, but also state regulation—all in the interests of promoting private economic activity.

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388. Farber, *supra* note 3, at 563–69.

389. *Id.* at 566.

390. *Id.* at 569.

391. *Id.* at 566.

392. See *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756, 1761 (2004); *BedRoc Ltd. v. United States*, 124 S. Ct. 1587, 1594 (2004).

393. Farber, *supra* note 3, at 567–68 (noting that the textualist approach “has tended to frustrate efforts at coherent regulatory policy” in fields other than environmental law).

The immediate effects of the Court's use of these doctrines may appear modest. Among the general public, the environmental cases of the 2003-04 Term attracted little attention.<sup>394</sup> The long-term effects, however, are likely to be both significant and destructive. Like the erosive forces of wind and water, textualism, proximate cause, and selective federalism have the potential to wear away the foundations of environmental law as we know it.

Indeed, the "erosion" of environmental law is perhaps more aptly characterized as subversion than erosion. Both erosion and subversion are gradual and destructive processes. In contrast to erosion, however, subversion refers to a process in which actors work secretly from within to undermine a political system.<sup>395</sup> The Justices may not have the intent to overthrow environmental law.<sup>396</sup> But it is apparent from their actions that they are not particularly sympathetic to it—though they are also not comfortable with saying so openly. Exposing the political nature and consequences of their actions is the first step in holding the Court accountable and in ultimately combating the subversion.

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394. For instance, none of the environmental cases was listed in a chart identifying the "major rulings of the 2003-2004 Term" that accompanied Linda Greenhouse's summary of the Term published in the *New York Times*. See Greenhouse, *supra* note 1, at A1. Greenhouse's article itself mentioned only the *ADEC* case. See *id.*

395. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1177 (1987) (defining "subversion" as "the act of subverting; the state of being subverted; *esp.*: a systematic attempt to overthrow or undermine a government or political system by persons working secretly from within").

396. See Lazarus, *supra* note 19 (manuscript at 38) ("[Although] Justice Scalia perceives environmental law as a destabilizing threat to be cabined," none of the Justices "is against environmentalism or environmental protection laws *per se* . . . . They instead are concerned about the kinds of laws and lawmaking institutions that environmentalism inevitably promotes in lawmaking.").