

# HOSTILE ENVIRONMENT

*How Activist Judges Threaten  
Our Air, Water, and Land*

*An Environmental Report  
on Judicial Selection*

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July 2001

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## EXECUTIVE SUMMARY

Our nation's environmental protections constitute one of this country's most significant accomplishments of the second half of the twentieth century. Through years of effort, visionary leaders and environmentalists have successfully translated public support for protecting natural resources—our air, water, and land—into effective and far-reaching legislation. Enjoying widespread popular support and bipartisan endorsement in Congress, these statutes have been strengthened in both Republican and Democratic administrations, and they have survived repeated, industry-funded rollback attempts.

These protections now face a grave challenge in an unlikely venue: our nation's federal courts. A group of highly ideological and activist sitting judges are already threatening the very core of environmental law. New appointees to the bench could transform this threat into a death sentence for many environmental protections. In the last decade, judges have imposed a gauntlet of new hurdles in the path of environmental regulators, slammed the courthouse doors in the face of citizens seeking to protect the environment, and sketched the outline of a jurisprudence of "economic liberties" under the Takings and Commerce Clauses of the Constitution that would frustrate or repeal most federal environmental statutes.

These judges—most of them appointed to the bench by Presidents Ronald Reagan and George H. W. Bush—are engaging in anti-environmental judicial activism. They read into the Constitution powers of judicial oversight that courts have never previously exercised. They ignore statutory language and intent, substituting instead their own policy preferences. Although their opinions sometimes pay lip service to the benefits of environmental protections, their activist ideology leads them to invalidate these safeguards. They do this despite the widespread support our environmental laws enjoy among our elected representatives and the American people.

Here's how questionable legal theory translates into environmental harm:

**Commerce Clause: Preventing Congress from Protecting the Environment.** Certain justices on the U.S. Supreme Court, as well as several judges presiding in various lower federal courts, have attacked the longstanding acceptance of the Constitution's Commerce Clause as the source of Congress's authority to enact safeguards to protect our air, water, and land. Despite the clear connection between the subjects of environmental regulation—such as commercial development or chemical manufacturing plants—and interstate economic activity, some judges are beginning to argue that these activities should fall within the exclusive control of states. In one recent case, a district judge in Alabama blocked the federal government's efforts to enforce toxic waste cleanup requirements because he decided the chemical manufacturing site was a local real estate matter, not economic activity subject to federal control.

**Takings Clause: Paying Polluters Not to Pollute.** The Fifth Amendment's Takings Clause has provided another avenue of attack on fundamental environmental protections. The text and original understanding of this clause are quite narrow, requiring the



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government to pay private property owners when it expropriates or permanently occupies private land for public use. Nothing in the text, history, or jurisprudence of the Takings Clause suggests that the public should pay corporations for simply complying with environmental protections and otherwise following the law. In the last several years, however, some judges have used the Takings Clause to strike down environmental protections unless the government pays landowners compensation. Taxpayers must therefore pay polluters not to pollute.

**Eleventh Amendment: Excusing States from Compliance with Environmental Laws.**

Judges also have twisted the Constitution's Eleventh Amendment to excuse states from complying with federal environmental laws. The Eleventh Amendment's plain language prevents a federal court from hearing a suit brought against a state only by a citizen of another state or another country. Some judges have departed from the amendment's narrow text to prevent citizens from suing their own states for environmental violations. In a recent case, an appeals court used the Eleventh Amendment to reject a citizen suit against West Virginia mining companies that were removing mountaintops and discarding their waste into nearby streams.

**The Standing Revolution: Keeping Environmental Plaintiffs Out of Court.** Finally, some judges are promoting novel theories limiting the standing of environmental citizen groups to go to court. The U.S. Supreme Court, in a series of opinions written by Justice Antonin Scalia, has distinguished between the object of regulation (e.g., a corporate polluter) and the beneficiary (e.g., a citizen trying to stop pollution). Scalia has used this distinction to exclude environmental plaintiffs from court even when the applicable environmental statute contains an explicit provision authorizing citizens to sue. Under Scalia's approach, timber companies, mining conglomerates, chemical manufacturers, and the like get open access to the courts to object to regulation that they perceive to be burdensome. Citizen groups on the other hand are denied access to the court, leaving widespread environmental harms without review.

*Environmental statutes are suffering a death from a thousand cuts.*

In addition to these high profile constitutional fights, environmental statutes are suffering a death from a thousand cuts in non-constitutional cases as anti-environmental judges ignore the intent of Congress expressed in statutory text and legislative history. This trend is particularly evident on the U.S. Court of Appeals for the D.C. Circuit, a critical court empowered to hear most challenges to environmental decisions made by federal agencies. In the last decade, the D.C. Circuit has struck down a long list of environmental protections under several statutes including the Clean Air Act, Clean Water Act, and Endangered Species Act. The rationale seems to differ in every case. In one case, the court invoked an obscure doctrine of statutory construction to justify ignoring the plain meaning of the word "harm." In another, the court imposed an unfair double standard that benefits industry petitioners, while imposing an often insurmountable hurdle in front of environmentalists. Too frequently, however, the result is the same: extensive empirical research indicates that judges on the D.C. Circuit and around the country are letting their ideology influence their decision making in environmental cases.

Anti-environmental activists have not only disregarded the plain meaning of our laws and of decades of binding precedent, in some cases they have manifested overt hostility to the environment through extreme rhetoric. Certain judges have belittled our government officials who are charged with protecting the environment as “extortionists” and “pointy heads.” Another judge refused to impose a proper sentence for environmental crimes under federal sentencing guidelines because to do so, in his view, would be “crazy.” Another referred to an endangered species as mere “bugs smashed upon [our] windshields.” One judge went so far as to declare Earth Day celebrations as an unconstitutional establishment of the “Gaia” religion. Their anti-environmental personal policy preferences could not be more clear or more out of keeping with the views of the overwhelming majority of the American people.

Such anti-environmental activism in the courts was never supposed to happen. Former Presidents Reagan and Bush promised the country judges who interpret laws, rather than usurp Congress’s power to make them. In too many cases, however, the judges appointed by these presidents have ignored this promise, proving instead to be openly activist and hostile to established environmental protections. With numerous vacancies on the federal courts, the new Bush administration will have a tremendous impact on the credibility of our judicial system and the results it produces. New judges must enforce the protections mandated by our landmark environmental laws—like the Clean Water Act and the Clean Air Act. The nation cannot afford any new judges who take the bench inclined to undermine longstanding precedents with personal activism.

*The nation cannot afford any new judges who take the bench inclined to undermine longstanding precedents with personal activism.*





## CHAPTER 1

# THE CHOICE: ANTI-ENVIRONMENTAL ACTIVISM OR PROPER RESPECT FOR THE LAW

During the presidential campaign and afterwards, George W. Bush and his advisors have asserted that President Bush will nominate judges who will respect the constitutionally mandated judicial function of interpreting—rather than making—the law. They have indicated that they want judges who will defer to the policy preferences of the American people as expressed in the statutes enacted by their elected representatives, instead of deciding cases according to their own personal will. They have promised judges who will engage in a legitimate reading of the Constitution, not twist constitutional provisions to achieve a desired result. They have said that they seek judges who will pay appropriate deference to established precedent because, absent a very compelling justification, the public should be able to rely on longstanding legal principles without having the rug pulled out from under them through a radical reworking of the law by the judiciary.

While some conservative judges demonstrate a proper respect for the law, others in recent years have abandoned any pretense of restraint and instead embrace a virulent strain of judicial activism that has weakened our environmental protections. Certain potential nominees who call themselves conservatives are, in reality, activist extremists who would disregard well-established legal precedent and the clear mandates of Congress. Far-right advocates off the bench have encouraged this approach, bluntly calling for judges to usurp the policymaking role of elected officials and illegitimately rewrite the law. One activist group views their mission to be convincing conservatives that “conservative judicial activism is neither an oxymoron nor a bad idea.”<sup>1</sup> Another prominent activist has expressed concern that “the Reagan Revolution will come to nothing” unless Republican appointed judges engage in activism to advance a conservative political agenda.<sup>2</sup>

Anti-environmental activism is controversial even within conservative legal circles. Consider the debate over the Takings Clause of the Fifth Amendment. As discussed below, the Takings Clause has emerged as a principal vehicle for advancing anti-environmental activism. Judges on the U.S. Supreme Court and the two lower courts with jurisdiction over most takings claims against the government have distorted



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*President Bush's first round of judicial nominees includes individuals who have advocated on behalf of principles that underlie anti-environmental activism.*

the Constitution's language to undermine critical environmental safeguards such as those protecting wetlands and endangered species. This activism derives in large measure from the views of Professor Richard Epstein, who argues that the Takings Clause renders "constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers' compensation laws, transfer payments, [and] progressive taxation."<sup>3</sup> Epstein unapologetically calls for "a level of judicial intervention far greater than we have now, and indeed far greater than we have ever had."<sup>4</sup> Epstein's influence on takings activists has been well documented.<sup>5</sup> Other conservatives, however, emphatically reject Epstein's aggressive reading of the Takings Clause. For example, Charles Fried, solicitor general of the United States under President Reagan, criticized Epstein's "extreme libertarian views" and his aggressive reading of the Takings Clause as inspiring a "specific, aggressive, and it seemed to me, quite radical project . . . to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property."<sup>6</sup> Even Robert Bork has criticized Epstein's views as "not plausibly related to the original understanding of the takings clause."<sup>7</sup>

Anti-environmental activism has also drawn fire from some conservative judges. Last year, a Reagan appointee to the Fourth Circuit criticized anti-environmental activism because it would improperly "dismantl[e]" historic federal protections and "[s]ap[] the national ability to safeguard natural resources."<sup>8</sup> In rejecting this activism, the judge stressed that it reflects "an indiscriminate willingness to constitutionalize recurrent political controversies [that] will weaken democratic authority and spell no end of trouble for the courts."<sup>9</sup> Another Reagan appointee has condemned "unwarranted conservative judicial activism" as "perhaps a lesser known evil than, but every bit as menacing as, its first cousin liberal judicial activism."<sup>10</sup>

Although his presidency is just months old, already President Bush has begun to backtrack on his basic commitments to the American people regarding judicial selection. We should not be surprised. At the same time he promised to appoint judges who espouse a philosophy of judicial restraint, he stated that his favorite justices are Justices Scalia and Thomas.<sup>11</sup> As shown in this report, these two justices have written and joined opinions that form the core of anti-environmental activism and serve as the springboard for even more damaging rulings by the lower courts. Moreover, President Bush's first round of judicial nominees includes individuals who have advocated on behalf of principles that underlie anti-environmental activism. For example, Jeffery S. Sutton, nominated to a seat on the U.S. Court of Appeals for the Sixth Circuit, has been a leading advocate of states rights and the use of the Eleventh Amendment to cut back on federal protections for the disabled. As demonstrated below, the same reading of the Eleventh Amendment is a vehicle used by anti-environmental activists to advance their cause.

This report examines how extreme judicial activists are undermining our environmental protections. Whether this trend continues will be up to President Bush and the Senate. Will President Bush nominate people who respect the appropriate role of the Congress and the states in protecting the environment? Will he keep his word and choose

candidates who respect precedent and decide cases based on the facts and the law? Or will he appoint activist ideologues who use their judicial power to advance their personal political philosophy and anti-environmental agenda? If President Bush chooses the latter course, will the Senate acquiesce or insist that new judges respect the power of Congress and the states to protect the environment?



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## CHAPTER 2

# COMMERCE CLAUSE: PREVENTING CONGRESS FROM PROTECTING THE ENVIRONMENT

Congress has rooted most of this nation's federal environmental protections in its authority under the Commerce Clause of the Constitution, which grants Congress the right to "regulate commerce among the several states." The reason is simple. Pollution and environmental degradation are external costs of many land uses and manufacturing processes. These external costs are frequently borne by residents outside of the state in which the pollution or degradation originates. Even wholly intrastate pollution can have significant impacts on interstate commerce, for example, where the despoliation of a lake or river reduces tourism dollars spent by out-of-state vacationers. For decades, the courts have recognized that the Commerce Clause authorizes Congress to regulate such intrastate activities that have a significant effect on interstate commerce.<sup>12</sup>

Until 1995, it had been more than fifty years since the Supreme Court had invalidated a federal statute as being outside the scope of the Commerce Clause. In *United States v. Lopez*,<sup>13</sup> however, the Court ruled that the Commerce Clause does not authorize federal prohibitions on handgun possession near schools. Then last year, in *United States v. Morrison*,<sup>14</sup> it struck down a federal law prohibiting gender-related violence as outside the scope of the Commerce Clause.

In setting limits on Congress's Commerce Clause authority in *Lopez*, the Court stressed that the regulated activity in that case (handgun possession) was not economic in nature and fell within an area of traditional state control (regulation of local schools). Indeed, the Court said that the non-economic nature of the regulated conduct was "central" to *Lopez*.<sup>15</sup> As a result, *Lopez* initially appeared to pose little threat to environmental safeguards, whose commercial character had been unquestioned for years.

This initial optimism may be misplaced. Anti-environmental activists on lower courts have viewed the crack in the door made by *Lopez* as a sign that it is open season for questioning the Commerce Clause authority for federal environmental statutes. Even more disturbing, a slim majority of the U.S. Supreme Court signaled in a decision earlier this year that it might well extend *Lopez* and *Morrison* in a revolutionary manner that could lead the Court to strike down a wide range of environmental protections. The groundwork for pulling the rug out from under federal environmental protections is thus

already in place. An infusion of a new cadre of anti-environmental activists to the federal bench would seriously jeopardize environmental safeguards across the board.

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### **CLEANING TOXIC SPILLS: UNITED STATES V. OLIN CORPORATION**

The best example of lower court activism in the wake of *Lopez* is District Judge Brevard Hand's decision in *United States v. Olin Corp.*,<sup>16</sup> which struck down key provisions of the federal Superfund toxic-waste cleanup law.<sup>17</sup> The case involved federal efforts to force a chemical manufacturer to clean up a toxic waste site. Olin Corporation had operated a chemical manufacturing plant in McIntosh, Alabama for more than 30 years, producing mercury and chlorine-based chemicals that contaminated soil and groundwater around the plant.<sup>18</sup> In *Olin*, Judge Hand ruled that because the site was no longer active, the cleanup of the site was essentially a local real estate matter, not "economic activity."<sup>19</sup> Because "the law regulating real property has been traditionally a local matter," Judge Hand declared that Congress under the Commerce Clause could not regulate such activities.<sup>20</sup>

The federal appeals court for the Eleventh Circuit unanimously reversed, quite naturally concluding that intrastate toxic waste disposal significantly affects interstate commerce.<sup>21</sup> For example, a 1980 study showed that agricultural losses from chemical contamination in six states exceeded \$280 million, and intrastate disposal activities contributed to this harm.<sup>22</sup> Improper disposal also harms commercial fishing and other natural-resource-dependent interstate commerce.<sup>23</sup>

Although Judge Hand's view has been rejected by other courts<sup>24</sup> and was quickly reversed on appeal, *Olin* sets a marker as to the breadth of the threat that judicial activism poses to federal environmental safeguards and the danger presented by the potential appointment of more judges like Judge Hand. After all, if regulation of toxic waste produced by interstate economic activity does not fall within the scope of the Commerce Clause, then a wide array of environmental protections would also fall outside the clause. Consequently, corporations would be able to avoid regulation of many environmental harms at the expense of neighboring landowners and the community at large.<sup>25</sup>

*If regulation of toxic waste produced by economic activity does not fall within the scope of the Commerce Clause, then a wide array of environmental protections would also fall outside the clause.*

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### **PROTECTIONS FOR OUR NATION'S WATERS AND WETLANDS: SWANCC V. U.S. ARMY CORPS OF ENGINEERS**

Even more disturbing are the potential implications of the Supreme Court's ruling this year in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*.<sup>26</sup> The *SWANCC* case involved a challenge to the Corps's "Migratory Bird Rule," longstanding protections for intrastate water bodies and wetland areas that provide important habitat to migratory birds. In a 5-4 ruling,<sup>27</sup> the Court invalidated these protections for isolated waters as exceeding the Corps's authority under the federal Clean Water Act. It gave the act an exceedingly narrow reading, and refused to give the Corps's reading the deference normally afforded to an expert agency's reading, in large part because it perceived serious constitutional issues under the Commerce Clause.

The Court's suggestion in *SWANCC* that Congress might lack Commerce Clause authority to protect migratory birds is startling. Ensuring protection of birds that migrate through numerous states is quintessentially a task for the federal government. Indeed, as early as 1920, Justice Oliver Wendell Holmes declared for the Supreme Court that the protection of migratory birds is a "national interest of very nearly the first magnitude."<sup>28</sup> Justice Holmes explained that the federal government must provide protection because action by the states individually would be ineffectual:

*[Migratory birds] can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States.*<sup>29</sup>

Nor can the activity regulated in *SWANCC* possibly be called "non-economic." *SWANCC* wanted to fill more than 200 ponds and small lakes in order to build a large municipal landfill that would accept trash from a large portion of Illinois' Cook County.<sup>30</sup> Indeed, the filling of waters and wetlands virtually always is undertaken for commercial purposes.<sup>31</sup>

The birds themselves also generate a considerable amount of economic activity. More than 120 bird species had been seen at these ponds and lakes, and the waters served as a large breeding ground for great blue herons. The commercial value of migratory birds is manifest: each year millions of people spend more than a billion dollars in commerce on recreational pursuits related to migratory birds.<sup>32</sup> These birds also protect crops and forests by feeding on insects that would otherwise damage these commercial enterprises.<sup>33</sup>

Nevertheless, the *SWANCC* majority refused to vindicate the long-recognized, paramount federal interest in protecting migratory birds, preferring instead to rely on what it viewed as the states' traditional authority to control land and water use. As explained by the dissent in *SWANCC*, however, these federal protections for intrastate waters used by migratory birds do not impinge on local control over land-use planning, which is concerned with choosing particular uses for land. Environmental protections do not require any particular use of land, but rather only require that environmental harm be kept within prescribed limits, however the land is used. In the words of the dissent, the federal Clean Water Act "is not a land use code; it is a paradigm of environmental regulation."<sup>34</sup>

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#### **PROTECTING ENDANGERED SPECIES: *GIBBS V. BABBITT***

No case better illustrates the battle between anti-environmental activism and proper respect for congressional policy choices than *Gibbs v. Babbitt*.<sup>35</sup> In *Gibbs*, Judges Wilkinson and Luttig, two prominent Republican judges, both on the short list for promotion to the Supreme Court, warred over what it means to be a conservative judge.

At stake in *Gibbs* was nothing less than “whether the national government can act to conserve scarce natural resources of value to our entire country.”<sup>36</sup> *Gibbs* was a Commerce Clause challenge to federal protections for endangered red wolves that have been reintroduced into federal refuges in eastern North Carolina and Tennessee. The protections prohibit the intentional harming or killing of red wolves that wander onto private land, with exceptions for the defense of human life and the protection of livestock or pets.

Chief Judge Wilkinson, writing for the majority on the Fourth Circuit Court of Appeals, upheld the wolf protections because the regulated activity significantly affects interstate commerce, and because the protections are part of a comprehensive program of federal protections for endangered species. The majority concluded that the wolf protections regulate economic activity because one main reason people kill wolves is to protect commercial assets like livestock. The appeals court also observed that red wolves generate interstate commerce through tourism and scientific research related to the wolves, and through commercial trade in pelts. Experts estimate that red wolf recovery could result in more than \$354 million in additional tourism-related commerce in Great Smoky Mountains National Park alone.

The appeals court observed that other federal courts have uniformly upheld species protections against Commerce Clause challenges based on the same factors. On the facts before it, the court recognized that invalidation of the red wolf protections “would start courts down the road to second-guessing all kinds of legislative judgments.”<sup>37</sup> It concluded that the proper balance between species protection and landowner concerns “is grist for the legislative and administrative mill and beyond the scope of judicial competence.”<sup>38</sup> As a matter of constitutional policy, the court also acknowledged that invalidation of the wolf protections would throw much federal environmental law into question, thereby subjecting interstate companies to “a welter of conflicting obligations” imposed by the states.<sup>39</sup>

Judge Michael Luttig dissented and urged an activist application of the Commerce Clause to strike down the wolf protections. Luttig dismissed with little explanation the connection between protecting endangered wolves and interstate commerce. He summarily rejected the idea that reducing wolves will reduce the number of out-of-state visitors who come to North Carolina for howling events to hear the wolves and learn more about them.<sup>40</sup> Without offering any evidence to the contrary, he also dismissed the scientific studies documenting that red wolves can increase shore bird nesting by reducing raccoon predation.<sup>41</sup>

Even Judge Wilkinson, a hero to conservatives and no particular friend to the environment, recognized the extreme nature of Luttig’s theories and the fundamental threat they posed to the public’s faith in the judicial system. According to Judge Wilkinson, the dissent’s activist approach “would rework the relationship between the judiciary and its coordinate branches”<sup>42</sup> and “turn federalism on its head” because species protection is a historically federal function.<sup>43</sup> The majority described as a “mystery” the dissent’s view as to the inconsequential status of the red wolf, and stressed that “it cannot be that the mere expression of judicial derision for the efforts of the democratic branches is enough to discard them.”<sup>44</sup> Judge Luttig’s dissent is the paradigm of anti-environmental

*At stake in Gibbs was nothing less than “whether the national government can act to conserve scarce natural resources of value to our entire country.”*

activism: it represents a result-oriented disregard of the facts and the law that seeks to further the judge's apparent policy preference for less environmental protection.

*“It cannot be that the mere expression of judicial derision for the efforts of the democratic branches is enough to discard them.”*

*—Chief Judge  
Wilkinson*

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### COMMERCE CLAUSE SUMMARY

When he joined the majority in *Lopez* to strike down the gun possession law at issue, Justice Kennedy wrote separately to emphasize the importance of Congress's Commerce Clause authority to our society. Although he determined that the specific law in question exceeded Congress's Commerce Clause authority, he made clear that such judicial invalidation should be undertaken only with great caution. Because so many commonplace federal protections are rooted in the Commerce Clause, he stressed that “the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.”<sup>45</sup> Respect for precedent “operates with great force in counseling us not to call into question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature.”<sup>46</sup> In other words, the Court should not turn back the clock on modern reality by reverting to an eighteenth-century notion of our national economy. Our environmental laws stand as a prime example of federal safeguards on which the American people have reasonably come to rely for the protection of public health, our communities, and our natural resources.

The stakes are exceedingly high. The *SWANCC* ruling shows that our federal environmental protections already hang in a precarious balance. The addition of just one anti-environmental activist to the Supreme Court could result in an aggressive campaign to use the Commerce Clause to roll back scores of environmental safeguards. And because the Supreme Court hears so few appeals from lower court rulings, the appointment of activists to federal appellate courts and federal district courts also would jeopardize many environmental programs.



# TAKINGS CLAUSE: PAYING POLLUTERS NOT TO POLLUTE

The most ballyhooed vehicle for anti-environmental activism is the Fifth Amendment's Takings Clause that states: "nor shall private property be taken for public use, without just compensation."<sup>47</sup> The Takings Clause is an odd choice for judicial activists. The text of the Takings Clause is narrow and the framers' original intent is clear: the clause was intended to apply only to actual expropriations of property, not to government regulation of property. Writing for the Supreme Court in 1992, Justice Scalia recognized that the Takings Clause was originally understood to apply only to actual physical expropriation or invasion of property by the government.<sup>48</sup> Although the Supreme Court has applied the Takings Clause to land-use regulation for several decades,<sup>49</sup> it generally does so only in the "extreme circumstance[]"<sup>50</sup> in which regulation is so burdensome as to constitute the functional equivalent of a physical appropriation of property.<sup>51</sup>

Despite the Takings Clause's narrow, plain meaning and original interpretation, activist judges are rewriting this clause to attack all manner of environmental protections. These activists perceive a steady stream of opportunities to use the Takings Clause to undermine environmental protections in cases brought by large corporations and the so-called "property rights movement." Although these cases include challenges to a wide range of government protections, environmental safeguards are a special target of takings activism, particularly protections for wetlands and endangered species. The ultimate goal of takings activists is to require the government to pay corporations and other landowners whenever regulation limits the use of property, an approach that would either bankrupt the government or result in far fewer protections for the environment and other vital public interests.

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## THE SUPREME COURT

The Supreme Court has fueled takings activism in the last 15 years by ruling in favor of developers and other property owners in an unbroken string of high-profile cases. Although these rulings are relatively narrow, they reflect an untoward eagerness to overcome procedural obstacles in order to uphold takings claims.

For example, in *Nollan v. California Coastal Commission*,<sup>52</sup> the Court addressed a requirement that owners of beachfront lots obtain a permit from the California Coastal Commission if they wished to increase development on such lots. Typically, when granting such a permit, the commission demanded a concession from the landowner to



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*The Supreme Court's string of pro-developer rulings, coupled with the expansive language used by Justice Scalia, has fueled a greater and far more disturbing activism by lower federal court judges.*

mitigate the burdens the development imposed upon the community. In *Nollan*, the Coastal Commission demanded that the Nollans allow the public to pass along the beach below a seawall that separated the Nollans' house from the ocean.<sup>53</sup> In a 5-4 ruling, the *Nollan* Court invalidated the public-access requirement.

To reach the merits, the Court had to overcome a number of important procedural obstacles. As an initial matter, the Court ignored serious questions about whether the Nollans even owned the beachfront passageway that the state allegedly "took" through its regulation. As California argued in *Nollan*, the Coastal Commission only sought a passageway on land that was frequently below the mean high-tide mark and, thus, arguably state property.<sup>54</sup>

The *Nollan* Court also had to ignore the fact that, while their permit appeal was pending, the Nollans built their proposed house without a permit. Under California law, this illegal, unilateral action by the Nollans waived their right to challenge the conditions imposed on their development permit. California raised this point in seeking dismissal, but the Court simply denied California's motion without comment and proceeded to address the merits of the Nollan's claim.

*Lucas v. South Carolina Coastal Council*,<sup>55</sup> a 1992 case involving a development restriction imposed by South Carolina's 1988 Beachfront Management Act, provides an even stronger example of the Court's willingness to ignore procedural obstacles to rule for takings claimants. The first hurdle cleared by Justice Scalia's opinion in *Lucas* was ripeness. South Carolina had amended the Beachfront Management Act before the Supreme Court reviewed the case and, under the new act, Lucas could have applied for a special permit to build on his seaside lots. As a result, Lucas's permanent takings claim—the only claim he prevailed on at trial and the only claim he appealed to the Supreme Court—was not ripe because Lucas had never applied for a permit under the new act. Justice Scalia conceded this point, concluding in the first pages of his opinion that Lucas's permanent taking claim was not ripe.<sup>56</sup> Instead of dismissing the case, however, the Court addressed a question that had not even been briefed by the parties—whether Mr. Lucas had suffered a temporary taking between 1988, when the initial act was passed, and 1990, when the act was amended.<sup>57</sup>

This creative hurdling of the ripeness barrier created another procedural problem: standing. As Justices Blackmun and Stevens pointed out in dissent, Lucas had not built on his property for 18 months before the ban on development went into effect and testified at trial that he was "in no hurry" to build on his vacant lot "because the lot was appreciating in value."<sup>58</sup> Equally significant, the trial court had made no findings that Lucas had any plans to use the property between 1988 and 1990. In short, after a trial on the merits on his claims, Lucas had not shown that he was injured in any way by not being able to construct a residence from 1988 to 1990. As a result, Lucas lacked the "injury-in-fact" predicate necessary to have standing to bring a temporary takings claim. As Justice Scalia had opined just days before in denying standing to an environmental group, "'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."<sup>59</sup>

## THE TAKINGS PROJECT

Charles Fried, President Reagan's solicitor general during the tenure of Attorney General Edwin Meese, has commented:

*Attorney General Meese and his young advisors—many drawn from the ranks of the then-fledgling Federalist Society and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein—had a specific, aggressive, and it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake on federal and state regulation of business and property.*

The Meese Justice Department laid the groundwork for this “radical project” through a number of important measures. They convened conferences on “economic liberties” to discuss the strategies for reinvigorating the Takings Clause. They drafted a takings Executive Order (E.O. 12630), which requires that “government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights.” And, most importantly, they helped appoint takings activists to spots on the three federal courts—the U.S. Supreme Court, the Federal Circuit Court of Appeals, and the U.S. Court of Federal Claims—that control the direction of federal takings law.

This Takings Project lives on through the concerted efforts of funders such as the John M. Olin Foundation and Richard Mellon Scaife, president of both the Sarah Scaife and Carthage Foundations, whose money has fueled an intensive program to further takings cases. At least 12 active organizations—with a combined budget in excess of \$15 million litigate takings cases on behalf of developers. The Federalist Society and others recruit and train an army of private practitioners to assist in shepherding takings cases through the legal system. And, groups such as the Foundation for Research on Economics and the Environment host all-expenses-paid seminars in resort locations for federal judges, instructing judges on how to be activists in striking down environmental protections in takings and other cases.

Sources: Charles Fried, *Order and Law: Arguing the Reagan Revolution – A Firsthand Account* 183 (1991); Executive Order 12630 (March 15, 1988) at 1 (b); Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. Env. Aff. 509 (1998).

Richard Lazarus, the attorney for the Coastal Council before the Supreme Court, aptly summarizes the Court's disposition of *Lucas* as follows:

*The majority surmounted a range of obstacles to reach the merits of the case, including ripeness, standing, and the sheer improbability of the lower court's factual findings. [T]he Court's generosity towards the landowner contrasts sharply with its refusal to consider the state government's challenge to the trial court's findings of fact. The Lucas majority was clearly determined, and impatient, to issue a ruling favorable to the landowner.<sup>60</sup>*

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## LOWER FEDERAL COURTS

The Supreme Court's takings rulings in favor of landowners are relatively narrow and have not resulted in the wholesale invalidation of any particular environmental program. However, the Court's string of pro-developer rulings, coupled with the expansive language used by Justice Scalia, has fueled a greater and far more disturbing activism by lower federal court judges.

*One law professor has called the Federal Circuit's opinion in Florida Rock "an extremely destabilizing decision exposing all wetlands regulation, indeed all environmental and land use regulation, to compensation claims."*

### ***Wetlands Protections: Florida Rock Indus., Inc. v. United States***

Although few citizens may have even heard of the Federal Circuit Court of Appeals, this court—given its exclusive jurisdiction over most takings claims against the United States—has tremendous power over widely treasured environmental safeguards such as those protecting wetlands and endangered species.<sup>61</sup> Probably the most significant activist takings ruling from the lower courts is the Federal Circuit's 1994 opinion in *Florida Rock Indus., Inc. v. United States*.<sup>62</sup> Florida Rock is a large commercial mining operation that sought to extract limestone from more than 1,500 acres of wetlands in the Everglades region of Southern Florida.<sup>63</sup> The U.S. Army Corps of Engineers denied Florida Rock a permit to do so citing 1) concerns about the pollution that inevitably accompanies limestone mining and 2) the destruction of the wetland, which filters and recharges the underlying Biscayne Aquifer and serves as critical habitat for the unique flora and fauna that inhabit the Everglades ecosystem.<sup>64</sup> Even with the restriction on mining, Florida Rock received purchase offers for the property that would have allowed them to recover more than twice their original purchase price.<sup>65</sup>

Despite Florida Rock's ability to double its original investment, the Federal Circuit ruled that the Corps's permit denial might have taken Florida Rock's land.<sup>66</sup> Ignoring a century of Supreme Court cases interpreting the Constitution's Takings Clause, the Federal Circuit held the government may have to pay compensation for "partial regulatory taking[s]," or reductions in property value caused by regulations.<sup>67</sup> On remand, Judge Smith of the Court of Federal Claims found that a partial taking had indeed occurred.<sup>68</sup> When compound interest, attorneys' fees, and costs are added in, the federal government could end up paying Florida Rock tens of millions of dollars to prevent limestone mining on a small patch of the Florida Everglades.<sup>69</sup>

One law professor has called the Federal Circuit's opinion in *Florida Rock* "an extremely destabilizing decision, exposing all wetlands regulation, indeed all environmental and land use regulation, to compensation claims."<sup>70</sup> After *Florida Rock*, in the Federal Circuit, every time a regulation decreases the value of property, the government can be sued for monetary damages. If compensation is required for any significant reduction in value, this monetary burden could seriously hamper attempts to regulate against environmental harms.<sup>71</sup> This appears to be precisely what Judge Plager intended. As Chief Judge Nies noted in dissent, "the objective of the [partial takings] theory is to preclude government regulation precisely because regulation will entail too great a cost."<sup>72</sup>

***Endangered Species and Water Rights: Tulare Lake Basin Water District v. United States***

Recently, the Court of Federal Claims handed down an alarming ruling in the *Tulare Lake Basin* case.<sup>73</sup> The court found a taking where federal protections for endangered salmon and delta smelt resulted in reductions of water available to the claimants under their contracts with the state of California. The reductions ranged from 8 to 22 percent of the claimants' allocated water, losses that come nowhere close to the near-complete wipeout generally needed to show a regulatory taking under longstanding rulings of the U.S. Supreme Court. To sidestep these rulings, the claims court held that the water reductions were not a restriction on use (subject to the near-complete wipeout standard), but instead a "physical seizure" of the water by the federal government that constitutes a per se taking regardless of the amount of water lost. The government argued that there was no seizure because it was not using the water for its own benefit, but the claims court ruled that the mere decrease in available water constitutes a consumptive use to protect the endangered fish. On this theory, the loss of a drop of water due to federal protections would constitute a taking and require compensation.

This ruling effectively requires the federal government to protect endangered fish through purchase. More than one-third of the freshwater species in the United States are either extinct or endangered, largely due to the depletion of natural riverine flows. As the claims court chillingly concluded: "The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so."<sup>74</sup> This conclusion tolls the death knell for effective federal protections for our nation's freshwater species.

The potential implications for other environmental protections are just as troubling. Under the court's analysis, virtually any land-use restriction could be characterized as a physical seizure. A buffer zone around a stream could be viewed as a physical seizure of the restricted land to protect water quality. A routine setback requirement could be cast as a physical seizure of space to be used as a viewshed, and so on.

Moreover, the *Tulare Lake Basin* decision effectively overrules decades of California law that limits water rights. Under well-established case law, water in California is not available for appropriation where it would impair instream uses of the water, including fish and wildlife protection. In other words, under state law, the claimants in *Tulare Lake Basin* lacked any property interest to use the water in a manner that would harm the fish. The claims court refused to recognize these background principles, stating that they involved matters of state law that were beyond its competence to decide. Binding Supreme Court precedent, however, demands consideration of these background principles. The court's disregard of state law bodes ill for all kinds of federal protections that mirror protections under state law.

***Wilderness Preservation and the Constitutional Right to Use Fast Motorboats: Stupak-Thrall v. Glickman***

Few cases better demonstrate the potential impact of takings activism on the full range of environmental protections than the 1997 ruling *Stupak-Thrall v. Glickman*.<sup>75</sup> There, landowners brought a takings challenge to federal rules restricting the use of gas motor

*The Tulare Lake decision requires the federal government to protect endangered fish through purchase.*

*Recent Supreme Court rulings suggest that there are four, but not yet five, justices willing to support a dramatic expansion of the Takings Clause.*

boats on portions of Crooked Lake that fall within the boundaries of the federal Sylvania Wilderness, which is on the Michigan/Wisconsin border. These motorboat controls served to promote the goals of the federal Wilderness Act of 1964, which is designed to preserve in their natural condition “area[s] where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.”<sup>76</sup> The Wilderness Act was established to “secure for the American people of present and future generations the benefits of an enduring resource of wilderness.”<sup>77</sup>

As noted above, to find a regulatory taking, a court generally must conclude that the challenged regulation denies the landowner all or virtually all economically viable use of the land. District Judge Bell ruled that the motorboat prohibition constitutes a taking even though the challenged prohibition did not even bar all forms of motorboats. In so ruling, the court concluded that it was not bound by earlier rulings by a federal appeals court upholding a ban on sailboats, houseboats, boom boxes, and non-burnable disposable food and beverage containers in the Sylvania Wilderness.<sup>78</sup>

In effect, the court concluded that a taking occurs whenever regulation significantly restrains a landowner from exercising a particular right previously associated with ownership of the property at issue. But virtually *all* regulation of land restricts a use to which the land may be put. That is the very essence of land-use regulation: to control or prohibit uses that harm neighboring property owners or the public. Judge Bell effectively looked at each potentially permissible lake use—fishing, wading, bathing, swimming, washing sheep, watering cattle, cutting ice, boating, sailing, etc.—as a discrete, unconditional property “right,” instead of looking at the plaintiffs’ general right, as a whole, to use Crooked Lake in a reasonable manner. Applied to land use generally, this interpretation of the Takings Clause could require compensation for virtually every regulation that restricts a particular land use.

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#### **TAKINGS SUMMARY**

Recent Supreme Court rulings suggest that there are four, but not yet five, justices willing to support a dramatic expansion of the Takings Clause.<sup>79</sup> Lower court rulings in cases like *Florida Rock*, *Tulare Lake*, and *Stupak-Thrall* demonstrate just how perilous a position this places environmental protections.

# ELEVENTH AMENDMENT: EXCUSING STATES FROM COMPLIANCE WITH FEDERAL ENVIRONMENTAL LAWS

A constant tension has existed within our nation since its founding between central federal authority and the rights of states. When it comes to protecting the environment, however, sole reliance on state authority has proven a failure. It was the failure of the states to deliver clean air and water to their citizens that led to the passage of federal environmental legislation in the 1970s. While states may deserve flexibility in developing the best way to achieve environmental goals, setting the minimum standards that must be achieved is a critical federal responsibility. Everyone is entitled to healthy air to breathe and water to drink no matter where they live. If states were free to decide what should be the minimum, acceptable level of environmental protection, states could “race to the bottom” by relaxing standards in order to attract business.<sup>80</sup> Federal standards ensure that states do not compete for new business by compromising environmental quality.

Activist interpretations of the Constitution’s Eleventh Amendment are undermining these federal environmental protections. The U.S. Supreme Court, led by Chief Justice William Rehnquist, has employed the Eleventh Amendment to elevate states over their own citizens by rendering them immune to requirements of federal law.

The Eleventh Amendment’s plain language prevents a federal court only from hearing a suit brought against a state by a citizen of another state or another country.<sup>81</sup> The Court has departed from the amendment’s narrow text in three significant ways. First, the Court has ruled that the amendment applies to suits brought by a state’s own citizens, effectively extracting the word “another” from the amendment.<sup>82</sup> Second, despite the amendment’s limitation to the “Judicial power,” the Court has ruled that Congress is also powerless to subject states to suit in federal court.<sup>83</sup> Finally, heedless of the amendment’s reference only to the “Judicial power of the United States,” the Court has ruled that Congress cannot require *state courts* to hear suits challenging a state’s compliance with federal law.<sup>84</sup>

These activist rulings have already rendered innumerable victims of illegal state conduct powerless to hold states accountable for violating federal statutory rights created under laws such as the Fair Labor Standards Act<sup>85</sup> and the Americans with Disabilities Act.<sup>86</sup> In the environmental arena, the Court has overruled a landmark case called



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*Pennsylvania v. Union Gas*,<sup>87</sup> thus making it impossible for citizens to ensure that states are held financially responsible for their contributions to hazardous waste sites that must be cleaned up under the Superfund law. As discussed below, lower court rulings suggest that the Court's Eleventh Amendment jurisprudence threatens to upset the entire federal/state partnership that characterizes modern environmental law.

*Mountaintop-removal coal companies make bad neighbors: their activity causes flooding, fires, dust, noise, and cracks the foundations of nearby homes.*

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#### **MOUNTAINTOP REMOVAL AND STATES RIGHTS: BRAGG V. ROBERTSON**

In *Bragg v. Robertson*,<sup>88</sup> homeowners along with an environmental group in West Virginia sued state surface mining officials for routinely permitting one of the most environmentally devastating practices in existence today: mountaintop-removal coal mining. Just as the name suggests, under this practice, the tops of mountains are literally blown up and removed and thousands of tons of rock and debris are dumped in adjacent valleys. These "valley fills" level forests, bury streams, and pollute the rivers fed by these streams. Mountaintop-removal coal companies make bad neighbors: their activity causes flooding, fires, dust, noise, and vibrations severe enough to crack the foundations of nearby houses.

It is hard to imagine how such a practice could be permitted under the federal Surface Mining Control and Reclamation Act (SMCRA), which states as its first purpose to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."<sup>89</sup> In particular, the Office of Surface Mining (OSM) has issued regulations under SMCRA stating, "[n]o land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining." Avoiding this prohibition requires a showing that the mining "will not adversely affect the water quantity and quality or other environmental resources of the stream."<sup>90</sup>

Nonetheless, for years, West Virginia surface-mining officials have routinely and expeditiously granted permits to coal companies allowing removal of mountaintops and the dumping of waste into nearby streams—a clear violation of the prohibition against adversely affecting streams. Employing SMCRA's citizen suit provision, which authorizes suits against states to compel compliance with the "provisions of [SMCRA] or of any rule, regulation, order, or permit issued pursuant thereto,"<sup>91</sup> Bragg sued these state officials in federal court demanding that they comply with SMCRA's minimum environmental protections.

Bragg won at the district court.<sup>92</sup> The court ruled that mountaintop-removal mining was impossible to reconcile with SMCRA. In the Court's words:

*When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no*



*stream there is no water quality. The Director lawfully cannot make required findings for buffer zone variances for valley fills.*<sup>93</sup>

In late April 2001, a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit reversed the district court and ruled that the Eleventh Amendment barred Bragg's claim. Even given the Supreme Court's recent activism in this area, the Fourth Circuit's opinion is remarkable. An unbroken line of Supreme Court rulings, beginning with the 1908 case of *Ex Parte Young*, permits suits seeking injunctions to bar state officials from violating federal law even in cases where the Eleventh Amendment would bar suits for money damages directly against the states.<sup>94</sup> The Fourth Circuit bypassed *Young* by declaring that in states that have an approved program to administer SMCRA, the federal minimum standards "drop out" and a claimant's only cause of action is under state law.

To so rule, the Fourth Circuit had to ignore both the plain language of SMCRA, which makes clear that federal minimum standards never "drop out,"<sup>95</sup> and binding Fourth Circuit precedent that held that state permits and rules are "issued pursuant to SMCRA."<sup>96</sup> In doing so, the court not only freed West Virginia officials to continue permitting removal of mountain tops and the destruction of hundreds of miles of streams, but also broke Congress's core promise to the American people in passing SMCRA: the assurance that compliance with minimum federal environmental protections would not be left up to state officials.<sup>97</sup>

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## **STATES RIGHTS SUMMARY**

Congress passed comprehensive federal environmental protections over the last three decades because state efforts had fallen short. In SMCRA and other federal statutes, Congress crafted a careful balance, allowing states the opportunity to operate the federal program in their states but simultaneously establishing what the Supreme Court has termed a "maximum enforcement regime"<sup>98</sup> to guarantee that minimum federal mandates are met throughout the country. Activist rulings like *Bragg* throw Congress's careful balance out the window and threaten a return to the days when health and safety is undermined by a regulatory race to the bottom.



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## CHAPTER 5

# THE STANDING REVOLUTION: KEEPING ENVIRONMENTAL PLAINTIFFS OUT OF COURT

A powerful innovation of modern environmental law is the authority Congress granted to citizens to ensure that these laws are carried out by regulatory agencies and obeyed by polluters. Concerned that agencies would be “captured” by regulated industries, Congress authorized suits against the government to force compliance with congressional mandates. Anticipating that enforcement budgets could be slashed, Congress enacted citizen-suit provisions deputizing citizens to act as “private attorneys general” to force polluters to comply with federal mandates.

Despite Congress’s explicit mandates, over the past decade, the federal judiciary has increasingly closed its doors to environmental plaintiffs. Hewing closely to a plan sketched out in a 1983 law journal article written by then-judge Antonin Scalia,<sup>99</sup>—one of the two Justices George W. Bush says he most admires—the Supreme Court has ruled in a series of cases that environmental plaintiffs are not sufficiently injured by environmental harms to have “standing” in court.<sup>100</sup> Ignoring history and without sufficient support in the text of the Constitution, the Court has declared that Congress is limited in its ability to create legal rights that are enforceable in court.<sup>101</sup> Thus, even if Congress believes that environmental groups and citizens are sufficiently harmed by environmental pollution to have a case, judges can trump that determination. Justice Scalia has also declared that it should be easier for an “object” of regulation (e.g., a corporate polluter) to establish standing to sue than a beneficiary (e.g., a citizen trying to stop pollution).<sup>102</sup> Finally, the Court, through Justice Scalia, has suggested that most forms of judicial relief authorized by Congress under citizen suit provisions do not actually “redress” the harms suffered by environmental plaintiffs, and again he has kicked environmental plaintiffs out of court on this basis.<sup>103</sup>

Dismissal of a citizen’s suit for lack of standing, of course, has nothing to do with the question of whether or not the defendant is violating the law. When a court avoids the merits and boots a plaintiff out of the courthouse on standing grounds, polluters are allowed to continue polluting, and agencies can shirk their regulatory responsibilities, without the accountability that Congress mandated.

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### **LUJAN V. DEFENDERS OF WILDLIFE**

Justice Scalia’s opinion in *Lujan v. Defenders of Wildlife* is aptly described in Justice Blackmun’s dissent as a “slash-and-burn expedition through the law of environmental

standing.”<sup>104</sup> The Supreme Court rejected the environmentalists’ right to sue in order to ensure that federal agencies complied with endangered species protections when funding international projects.

The Endangered Species Act (ESA) requires that other federal agencies consult with the Department of the Interior prior to authorizing or funding an operation that is likely to harm an endangered species. In *Lujan*, members of Defenders of Wildlife sued to prevent the Interior Department from abandoning this consultation role in U.S.-funded projects overseas. These plaintiffs had visited several ongoing, U.S.-funded projects in foreign countries, and they stated a desire and intention to return to these sites and view and study the resident endangered species. They feared that, absent consultation, the development projects would destroy critical habitat for endangered species in the areas and lead to the extinction of these species.

Justice Scalia casually discarded the plaintiffs’ claims of injury. Past visits to the area, he declared, “proved nothing,” and “some day” intentions to return do not suffice to create a genuine interest. Justice Scalia also cavalierly dismissed several other claims of injury advanced by Defenders. For example, he called it “beyond all reason” and “pure speculation and fantasy” to suggest that a wildlife biologist that works with a particular species in one part of the world might be “appreciably harmed” when a project in another part of the world kills a member of that species.<sup>105</sup> Justice Stevens has also taken to task for having the temerity to suggest that, to committed environmentalists, harming a species is somewhat akin to harming a distant relative.<sup>106</sup> Justice Scalia could not fathom why “an interest in animals should be different from such an interest in anything else that is subject of a lawsuit.”<sup>107</sup>

*Lujan*’s collateral damage extends far beyond its holding. Two particular passages of the ruling bear special emphasis. First the *Lujan* Court expressly distinguished between objects of government regulation and beneficiaries of government regulation. In the Court’s words:

*[S]tanding depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. [W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.*<sup>108</sup>

This passage slams the courthouse doors in the face of numerous environmental plaintiffs while keeping them wide open for corporate polluters. Its message is explicit and extraordinary: while harms to the corporate bottom line are always cognizable, the injuries suffered by environmentalists at the hands of polluters rarely warrant the attention of our federal courts. The bitter irony of this opinion was hammered home five years later in *Bennett v. Spear*,<sup>109</sup> in which Justice Scalia ignored innumerable obstacles to grant standing to industry groups that were challenging a decision to list a species under the ESA.

Just as disturbing is the *Lujan* Court’s naked grab of power from Congress and the electorate. For the first time in history, the *Lujan* Court ruled that courts can second-guess congressional decisions designating individuals or groups as sufficiently harmed to warrant judicial intervention. Again, Justice Scalia distinguished cases based on the type

*Lujan slams the courthouse doors in the face of numerous environmental plaintiffs while keeping them wide open for corporate polluters.*

of interest advanced by the claimant. Congress cannot, according to Justice Scalia, grant individuals the right to “[v]indicat[e] the *public* interest (including the public interest in Government observance of the Constitution and laws).”<sup>110</sup> Because almost every environmental statute includes broad citizen suit provisions authorizing intervention on behalf of the public interest, one scholar calls *Lujan* “among the most important [rulings] in history in terms of the sheer number of federal statutes that it has apparently invalidated.”<sup>111</sup>

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### **STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT**

Environmental standing took another large hit in Justice Scalia’s 1998 opinion for the Court in *Steel Co. v. Citizens for a Better Environment*.<sup>112</sup> The issue in *Steel Co.* was “redressability,” a relatively new addition to the Supreme Court’s standing law.<sup>113</sup> Even if an environmental plaintiff has been sufficiently injured to have standing under *Lujan*, they will be tossed out of court if the damages they seek don’t “redress” their injuries. In *Steel Co.*, the Court ruled that damages paid to the U.S. Treasury do not redress past violations of environmental laws.

*Steel Co.* involved the toxic chemical reporting requirements established under the Emergency Planning and Community Right-to-Know Act (EPCRA). *Steel Co.* was subject to EPCRA’s reporting requirements and failed, for seven straight years, to meet this requirement. It complied with the law only after Citizens for a Better Environment (CBE), a local environmental group, sent it a notice indicating CBE’s intent to sue to enforce compliance under EPCRA’s citizen suit provision. CBE then sued, seeking penalties and an injunction preventing future violations.

Justice Scalia declared that the remedies CBE sought would not redress any harm they suffered from *Steel Co.*’s past violations. In rejecting CBE’s claim for money damages, Justice Scalia belittled and undermined the entire premise of public interest environmental litigation. In his words:

*[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just desserts, or that the Nation’s laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy.*<sup>114</sup>

To reject CBE’s claim for injunctive relief, the Court discarded a well-established “presumption of [future] injury when the defendant has voluntarily ceased its illegal activity in response to litigation.”<sup>115</sup>

Combined, *Steel Co.* and *Lujan* render environmental plaintiffs second-class litigants and establish standing as a major impediment to environmental compliance litigation. These cases mean that innumerable polluters could go unpunished and many environmental laws will go unenforced.

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### **FRIENDS OF THE EARTH V. LAIDLAW ENVT’L SERVICES INC.**

Justice Scalia’s ability to command a majority for his anti-environmental activism in the area of standing ended in the January 2000 case, *Friends of the Earth (FOE) v. Laidlaw*

*Combined, Steel Co. and Lujan render environmental plaintiffs second-class litigants and establish standing as a major impediment to environmental compliance litigation.*

*Env't Services*.<sup>116</sup> *Laidlaw* was similar in many ways to *Steel Co.* It involved the issue of redressability and, as in *Steel Co.*, FOE was seeking civil penalties that would be paid to the federal government. The stakes were much higher in *Laidlaw*, though, because *Laidlaw* continued to violate the terms of its Clean Water Act permit long after litigation began. If civil penalties were ruled not to redress FOE's injuries, then environmental plaintiffs could *never* prevail in a citizen suit seeking such a remedy.

The majority, over a vehement dissent by Justice Scalia, held that *Steel Co.* was limited to cases in which there was no basis for an allegation that the company would violate the statute in the future. Where future violations are possible, civil penalties redress past harms. In the Court's words: "It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress."<sup>117</sup>

Justice Scalia disagreed. In a dissent joined by Justice Thomas, Justice Scalia argued that "it is my view that a plaintiff's desire to benefit from the deterrent effect of a public penalty for past conduct can never suffice to establish a case or controversy of the sort known to our law. Such deterrent effect is, so to speak, 'speculative as a matter of law.'<sup>118</sup> Justice Scalia would, in other words, dramatically curtail every one of the numerous citizen suit provisions that permit a claimant to seek civil penalties.

Like a true activist, Justice Scalia seems unlikely to take the 7-2 ruling of the Court in *Laidlaw* as a final answer. Instead, he suggests a road map for corporations to relitigate the same question under a different constitutional vehicle.<sup>119</sup>

*Justice Scalia quite clearly does not like environmental litigants. His ideological views are driving him on a crusade in the area of environmental standing that has no basis in the text or the original meaning of the Constitution.*

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## STANDING SUMMARY

Professor Richard Pierce recently studied every standing case decided in the last several years by the Supreme Court and federal courts of appeals.<sup>120</sup> He put his conclusion starkly: "[J]udges provide access to the courts to individuals who seek to further the political and ideological agendas of judges."<sup>121</sup>

There is no plainer example of this phenomenon than Justice Scalia's opinions in the area of environmental standing. Justice Scalia quite clearly does not like environmental litigants.<sup>122</sup> His ideological views are driving him on a crusade in the area of environmental standing that is not consistent with his own views on standing in other areas<sup>123</sup> and that has no basis in the text or the original meaning of the Constitution. This is judicial activism in its most damaging form.



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## CHAPTER 6

# THE D.C. CIRCUIT'S ATTACK ON ENVIRONMENTAL PROTECTIONS

The U.S. Court of Appeals for the District of Columbia Circuit is empowered to hear most cases challenging regulatory decisions made by the Environmental Protection Agency (EPA), the Department of the Interior, and other executive branch agencies. This unique jurisdiction makes the court the second (to the Supreme Court) most prestigious and powerful court in the nation. The court is a breeding ground for Supreme Court appointees<sup>124</sup> and a battleground for judicial appointments.

Presidents Reagan and Bush appointed notable anti-environmental activists such as Stephen Williams, Douglas Ginsburg, and David Sentelle to this court, and as a result, in the last decade, the D.C. Circuit has dramatically curtailed the ability of the EPA and other federal agencies to enact regulations that advance environmental goals.<sup>125</sup>

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### **CLEAN AIR PROTECTIONS: *AMERICAN TRUCKING ASS'N V. EPA***

The most dramatic example of hostility to environmental protections is the D.C. Circuit's May 1999 opinion in *American Trucking Ass'n v. EPA*,<sup>126</sup> delaying implementation of EPA's proposed health standards for smog and soot (or to use the technical terms, the National Ambient Air Quality Standards (NAAQS) for low level ozone (smog) and particulate matter (soot)). The Clinton administration hailed these regulations as "the most significant steps we've taken in a generation to protect the American people, especially our children, from air pollution."<sup>127</sup> EPA estimates that, each year, the standards will prevent an estimated 15,000 premature deaths, 350,000 cases of aggravated asthma, and nearly a million cases of significantly decreased lung function in children.<sup>128</sup>

Striking down these regulations, Judges Douglas Ginsburg and Stephen Williams dusted off what is known as the "non-delegation doctrine" to rule that a central provision of the Clean Air Act, as interpreted by EPA, represented an unacceptable transfer of power by Congress to EPA.<sup>129</sup> The Court remanded the standards to EPA with the instruction that the agency articulate a "determinate criterion for drawing lines."<sup>130</sup>

Judge Tatel's dissent pointed out the most glaring problem with this ruling: it "ignores the last half-century of Supreme Court nondelegation jurisprudence."<sup>131</sup> As chronicled

by Judge Tatel, the Supreme Court has repeatedly approved transfers of authority that are far less restricted than the delegation under the Clean Air Act.<sup>132</sup> The D.C. Circuit had also reviewed and upheld the precise section of the Clean Air Act in 10 prior opinions without once suggesting that Congress had transferred inordinate authority to EPA.<sup>133</sup> The ruling is thus, in former EPA Administrator Carol Browner’s words, “bizarre and extreme.”<sup>134</sup> The ruling also called into question many of this nation’s health, safety, and welfare statutes. As Cass Sunstein, a preeminent constitutional scholar, put it, the ruling represents “a remarkable departure from precedent” that “if taken seriously, bring[s] much of the activity of the federal government into question.”<sup>135</sup> The Supreme Court echoed the conclusions of Tatel, Browner, and Sunstein earlier this year when it unanimously reversed the D.C. Circuit’s ruling.<sup>136</sup> The Court declared that “the scope of discretion § 109(b)(1) allows is in fact well within the outer limits of the Court’s nondelegation precedents.”<sup>137</sup> In the words of former Solicitor General Seth Waxman, who argued the case for the United States, “I can’t imagine a more thoroughgoing rebuke of the D.C. Circuit’s little escapade.”<sup>138</sup>

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### **ENDANGERED SPECIES HABITAT: *SWEET HOME V. BABBITT***

Another important example of the D.C. Circuit’s hostility to environmental safeguards is its ruling in *Sweet Home v. Babbitt*.<sup>139</sup> The D.C. Circuit struck down Department of the Interior regulations prohibiting severe habitat modifications that would kill an endangered or threatened species. The ruling gutted a central provision of the Endangered Species Act for the 15 months it was in effect.

Under what is known as the *Chevron* doctrine (named after the Supreme Court’s opinion in *Chevron U.S.A., v. NRDC*<sup>140</sup>), courts are supposed to engage in a two-step inquiry when reviewing an agency interpretation of the laws it administers. First the court determines whether Congress has unambiguously resolved the issue. If not, then under *Chevron*’s second step, a court is to defer to any “permissible construction of the statute” reached by the agency.<sup>141</sup>

*Sweet Home* should have been an easy victory for the government under *Chevron*. The Endangered Species Act makes it unlawful to “take” an endangered species. Take is defined under the act, meaning “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect.”<sup>142</sup> The Interior Department interpreted the term “harm” to include “significant habitat modification or degradation where it actually kills or injures wildlife.”<sup>143</sup> Because the statute does not define harm and nowhere prohibits the application of that term to habitat modifications, *Sweet Home* was a classic “step two” *Chevron* case. Under step two, the Interior Department’s interpretation was entitled to deference and the court’s only role was to determine whether the Interior Department’s interpretation was permissible.

Judges Williams and Sentelle jettisoned the *Chevron* standard in order to strike down the protections. Relying almost entirely on an obscure doctrine of statutory interpretation called *noscitur a sociis* (“a word is known for the company it keeps”),<sup>144</sup> the court defined harm not by its ordinary meaning (which would include habitat destruction that harms a species), but by reference to the words next to it, which all, according to the

*The ruling gutted a central provision of the Endangered Species Act for the 15 months it was in effect.*

court, suggested animus directed toward the species.<sup>145</sup> Reading the statute through this rarely used lens, the court ruled that the DOI's interpretation of the term "harm" was unreasonable.<sup>146</sup>

As Judge Mikva pointed out in dissent, that is not the way *Chevron* works. In Mikva's words:

*The whole point of Chevron deference is that when Congress has not given a clear command, we presume that it has accorded discretion to the agency to clarify any ambiguities in the statute it administers. In requiring the agency to justify its regulation by reference to such a clear command, the majority confounds its role. Ties are supposed to go to the dealer under Chevron.*<sup>147</sup>

The Supreme Court reversed 15 months later in a 6-3 ruling.<sup>148</sup> The Court chronicled three clear errors in the D.C. Circuit's logic and upheld the Interior Department's interpretation of the act under a straightforward *Chevron* analysis.<sup>149</sup>

*Empirical research confirms that judges on the D.C. Circuit are letting their ideology dictate their judicial decision making.*

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## A PATTERN OF HOSTILITY

*Sweet Home* and *American Trucking Association (ATA)* are not isolated examples. During the 1990's, the D.C. Circuit has struck down or hindered a long list of critical environmental protections ranging from wetland protections,<sup>150</sup> to corporate average fuel economy (CAFE) standards,<sup>151</sup> to Superfund site designations,<sup>152</sup> to guidelines on treatment of petroleum wastewater.<sup>153</sup> The court has also imposed barriers to environmental standing that exceed the already alarming hurdles imposed by the Supreme Court.<sup>154</sup>

Empirical research confirms that judges on the D.C. Circuit are letting their ideology dictate their judicial decision making. For example, Professors Schroeder and Glicksman recently conducted a comprehensive study of environmental rulings by federal courts of appeals. They found that pro-industry claimants had experienced a five-fold increase in their success in challenging EPA's scientific decision making during the 1990's.<sup>155</sup> Environmental claimants over the same period saw their success rate decrease by 20%.<sup>156</sup> Professors Schroeder and Glicksman also note that the D.C. Circuit's rulings exhibit a double standard that favors industry claimants.<sup>157</sup> For example, they note that the circuit has struck down several important environmental rules employing the presumption that where Congress lists factors to be considered, that list is exclusive of other non-listed factors.<sup>158</sup> Where the non-listed factor is compliance costs to industry, however, the court has reversed this presumption, instead requiring "clear congressional intent to preclude consideration of cost."<sup>159</sup>

Other studies have documented the extent to which ideology drives judicial behavior in the D.C. Circuit. Looking at D.C. Circuit standing decisions, Professor Richard Pierce found that "Republican judges voted to deny standing to environmental plaintiffs in 79.2 percent of the cases, while Democratic judges voted to deny standing to environmental plaintiffs in only 18.2 percent of cases."<sup>160</sup> Professor Richard Revesz examined 250 D.C. Circuit opinions decided between 1970 and 1994 and concluded that judges on the D.C. Circuit employ a "strategically ideological approach to judging."<sup>161</sup> For example, Pro-



### **IDEOLOGY AFFECTS OUTCOMES IN D.C. CIRCUIT**

- From 1970 to 1994, Republican judges votes to deny standing to environmental plaintiffs in 79.2 percent of cases challenging EPA decisions.
- During the same period, Democratic judges voted to deny standing to environmental plaintiffs in only 18.2 percent of EPA cases.
- From 1987 to 1994, three-judge panels consisting of two Republicans and one Democrat reversed the EPA on procedural grounds raised by industry in 54 to 89 percent of cases.
- During the same period, panels consisting of two Democrats and one Republican reversed the EPA in between 2 percent and 13 percent of these cases.
- During the 1990's, pro-industry claimants experienced a five-fold increase in their success in challenging EPA's scientific decision making.
- Over the same period, environmental claimants saw their success rate decrease by 20 percent.

Sources: Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C.L. Rev. 1741 (1999); Richard I. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997); Christopher H. Schroeder and Robert L. Glicksman, *Chevron, State Farm, and EPA In the Courts of Appeals During the 1990's*, 31 Env'tl L. Rep. 10371 (2001).

fessor Revesz found that from 1987 to 1994, panels consisting of two Democrats and one Republican reversed the EPA on procedural grounds raised by industry in between 2 and 13 percent of cases. Over the same period, panels consisting of two Republicans and one Democrat reversed EPA in 54 to 89 percent of these cases. In Revesz's words, "the magnitude of these differences is staggering."<sup>162</sup>

The difference party affiliation and ideology have made in terms of results on the D.C. Circuit should be chilling to anyone who cares about public health and the environment. While two of the most damaging recent decisions were reversed by the Supreme Court, most D.C. Circuit opinions are left unreviewed. The Supreme Court reviews less than one percent of the numerous cases in which review is sought.

Furthermore, the D.C. Circuit's approach to the numerous cases in which it reviews the legality or reasonableness of an agency action significantly affects whether the environmental mandates enacted by Congress are fulfilled, even when no constitutional claim is at issue. The public loses when the D.C. Circuit engages in a more searching review of agency decisions to enhance (or maintain) public health and environmental protections, than of decisions to cut back on or carve out exemptions from such protections.<sup>163</sup> Thus, even without advancing novel constitutional theories, the D.C. Circuit can have tremendous impact on the level of environmental protection the public receives.

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### **D.C. CIRCUIT SUMMARY**

The *ATA* and *Sweet Home* cases illustrate the climate of anti-environmental activism festering on the federal bench these days. Lower federal courts are not supposed to go on

“escapades” that fly in the face of binding Supreme Court precedent, particularly in cases where thousands of lives are at stake. Nor are they supposed to dust off obscure doctrines of statutory construction to overturn congressional intent and reasonable agency interpretations. But the Supreme Court’s activism in Commerce Clause, takings, and standing law has emboldened lower court judges with pet theories. These judges feel empowered to use cases before them as vehicles to serve up to the Supreme Court new vehicles to advance anti-environmental activism. Neither Congress nor the agencies nor the public can count on a predictable legal framework in which to establish vital protections for public health and our natural resources.

# OVERT HOSTILITY TO ENVIRONMENTAL PROTECTIONS

As shown above, activist federal judges are developing a wide assortment of questionable legal theories in an attempt to justify the results they want at the expense of environmental protection. These judges feel unconstrained by well-established legal principles or unambiguous statutory text enacted by Congress. Rather than honoring the will of the people as reflected by Congress, they are promoting their own policy preferences. Sometimes, evidence of this phenomenon is difficult to uncover because judges try to cloak their ideology in reasonable, objective language. On several occasions, however, a judge's true colors have shone through in rather extreme, anti-environmental rhetoric. Unfortunately, in all too many courts, instead of a fair and impartial forum, environmental advocates are finding a hostile environment.

At times, a judge's rhetoric reveals a clear bias against public officials charged with implementing environmental protections. Rather than viewing employees of agencies like the Environmental Protection Agency as public servants promoting the public good, some judges see them as unwarranted obstacles to the free market and an excessive burden on industry. In *Nollan v. California Coastal Comm'n*, for example, Justice Scalia accused state coastal protection officials of engaging in "an out-and-out plan of extortion" when they sought to ensure the public's access to public beaches when permitting more intense development on coastal property.<sup>164</sup> Although reasonable minds might differ as to whether the access requirement passed constitutional muster, no reasonable person could review the legitimate concerns raised by intense coastal development and conclude that coastal protection officials were engaged in outright extortion. Another judge referred to agency scientists as "pointy heads" and "so-called experts" who write "trashy regulations" that "don't make any sense."<sup>165</sup> This undisguised scorn for public officials who administer environmental protections provides little assurance that those who pollute our environment and threaten our health will be held responsible.

Some federal judges simply do not share, or even respect, the values that underlie some of the laws that protect America's treasured environmental resources. The Endangered Species Act (ESA) has come under particular fire. Endangered species provide many benefits, including serving as a source of life-saving medicines. Fifty percent of the most frequently prescribed medicines come from wild plant and animals. The most important medicines often are discovered from seemingly unimportant species.



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## ANTI-ENVIRONMENTAL ACTIVISM AND ANTI-ENVIRONMENTAL JUDICIAL SEMINARS

It is disturbing to note that anti-environmental activism on lower courts such as the DC Circuit is being supported and apparently propelled by ideologically-slanted seminars for federal judges. Many of these seminars were held at luxury locations and paid for by corporations and pro-business special interests.

A Community Rights Counsel report, *Nothing For Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public's Trust*, documents that several organizations, including the Montana-based Foundation for Research on Economics and the Environment (FREE), host seminars that instruct judges on how and why to strike down environmental protections.

These seminars appear to be having their desired effect. In the *Sweet Home* case, for example, Judge Williams first joined Judge Mikva in a published ruling upholding the habitat protection provisions of the Endangered Species Act. He then attended a FREE seminar, and upon returning, he granted rehearing, switched his vote, and wrote the opinion striking down these protections. Similarly, in *ATA*, both Judge Williams and Judge Ginsburg participated in a FREE seminar while the case was pending before them.

*Sweet Home* and *ATA* are not isolated examples. *Nothing for Free* canvasses the last decade of environmental decisions and reveals the following:

- In nine of the decade's most dramatic departures from established precedent by lower federal courts, the judge striking down the environmental protection has attended at least one FREE seminar
- In five of these cases, the judge attended the FREE seminar while the case was pending
- In at least three of these cases, the judge ruled in favor of a litigant bankrolled by FREE's sponsors

These private judicial seminars are offensive to the most basic notions of fairness in our adversarial system. Legislation has been introduced into Congress by Senators John Kerry (D-MA) and Russell Fiengold (D-WI) to ban these corporate-funded junkets, but, for now, the practice continues unabated.

For example, the pacific yew tree, long regarded as a weed species, has been found to contain taxol, an important drug used to treat cancer. Vampire bat saliva is helping to open clogged arteries and prevent heart attacks. Pit viper venom led to the discovery of drugs that regulate human blood pressure. This pharmacological benefit is one of the reasons why the Congress enacted the ESA. In his dissent in *National Ass'n of Home Builders v. Babbitt*, however, Judge Sentelle belittles the value of preserving endangered species for future medical benefits. He finds it absurd to justify the ESA based on an "undetermined" possibility that a species "might produce something at some undefined and undetermined future time which might have some undefined and undeterminable medical value."<sup>166</sup> He unjustifiably disregards Congress's decision to protect all

endangered species so that their medicinal potential remains available to us despite current ignorance regarding these uses.

When Judge Sentelle looks at the ESA, he sees it as an unwarranted obstacle to development. For example, in *National Association of Home Builders*, he disparages the ESA for “prevent[ing] counties and their citizens from building hospitals or from driving to those hospitals by routes in which the bugs smashed upon their windshields might turn out to include the Delhi Sands Flower-Loving Fly.”<sup>167</sup> He not only uses graphic pejoratives (bugs smashed upon their windshields) to describe the species at issue, but also ignores the fact that the protections in question did not prevent the construction of any hospital.

One judge’s hostility to environmental protection ran so deep that he prohibited the celebration of Earth Day activities at a New York high school. Each year, this school observes Earth Day with activities centered on environmental conservation. The activities include drum playing and other musical performances, and focus on rainforest preservation, endangered species, and other environmental issues. In 1999, in *Altman v. Bedford Central School District*, a federal district judge enjoined these Earth Day celebrations as a violation of the Free Exercise and Establishment Clauses of the First Amendment, stating that “[t]he worship of the Earth is a recognized religion (Gaia),” that “the liturgy” of Earth Day at Fox Lane High School was “truly bizarre” and “takes on much of the attributes of the ceremonies of worship by organized religions.”<sup>168</sup> A federal appeals court unanimously reversed, ruling that the Earth Day activities had a secular purpose, were not coercive, and did not have the effect of endorsing the Gaia religion.<sup>169</sup> The appeals court emphasized that no objective observer would view the Earth Day celebration as endorsing Gaia and that the evidence did not support the trial court’s conclusion that the celebration treated the Earth as though it were divine or to be worshiped.

Other judges are unwilling to adhere to Congress’s recognition that environmental crimes are real crimes with real victims that deserve appropriate punishment. For instance, in *United States v. Rapanos*, Rapanos entered an option agreement with a developer to build a shopping mall. After the landowner’s consultant informed him that he needed a state permit to fill 50 acres of wetlands on the property, Rapanos became enraged, stated that “he’d destroy all those (expletive deleted) wetlands,” fired the consultant, and ordered him to destroy his reports.<sup>170</sup> The developer then ignored two cease-and-desist orders from state officials and repeatedly destroyed wetlands on the property without the required permit. After a jury found him guilty of violating the Clean Water Act, the trial judge ignored the applicable sentencing guidelines, evidently because he shared the convicted criminal’s disdain for wetlands protections. The judge stated that the sentence for Rapanos’ crimes required by the federal sentencing guidelines showed that “our [legal] system [has] gone crazy,” and he refused to impose the proper sentence. The U.S. Court of Appeals for the Sixth Circuit unanimously reversed, concluding that “[a] fundamental disagreement with the law” is not a “permissible factor[] to consider in granting downward departures not provided for by the guidelines.”<sup>171</sup>

The public deserves judges who respect the values embodied in our landmark environmental laws and the role of federal regulators. Despite the tireless effort by countless

*One judge referred to agency scientists as “pointy heads” and “so-called experts” who write “trashy regulations” that “don’t make any sense.”*

citizens over the past 30 years to put an effective system of environmental protections in place, this system is at risk from judges who brazenly place their personal preferences and biases above plain statutory mandates and well-established legal principles. Our health, our quality of life, and our children's future cannot afford more anti-environmental activist judges.

# RECOMMENDATIONS

As this report documents, much is at stake for the environment and the public's health in the judicial selections made over the next four years. What federal judges decide has real impacts on the quality of the air we breathe, the water we drink, and the lands we treasure.

Federal courts have been instrumental to the success of the environmental movement. Courts have traditionally sustained the policy choices made by the public and the Congress to protect the environment; they generally have respected the Constitution and longstanding precedent in upholding environmental protections against industry-launched attacks; and they have ensured adequate access to the courts by citizens harmed by violations of environmental laws. As a result, our air, lakes, rivers, and other natural resources are far better off than they were in decades past.

Recently, however, certain federal judges have ignored the clear mandates of our environmental laws and well-established legal principles apparently to advance their personal policy preferences. Citizen groups have been denied access to the courts to ensure that their corporate neighbors comply with the law. A chemical manufacturing plant was excused from complying with toxic waste cleanup requirements because the judge did not believe the activity was appropriately subject to federal control. In the name of states' rights, mining companies in West Virginia have been allowed to continue to remove mountaintops and discard their waste into nearby streams despite federal prohibitions.

The public deserves judges who will respect the law and the constitutionally-mandated role for the courts to interpret, not make, the law. President Bush should nominate, and the Senate should confirm, only judges who:

- demonstrate concern for environmental protection and a respect for the policy decisions made by elected representatives to protect public health and our natural resources as reflected in our environmental laws
- have an exemplary record in the law
- bring an objective, balanced approach to decision-making and
- demonstrate a commitment to protecting the rights of ordinary Americans and do not improperly elevate the interests of the powerful over those of individual citizens

In particular, each nominee should be asked to demonstrate that he or she:

- recognizes and respects the power of Congress under the Constitution's Commerce Clause to enact and enforce strong federal minimum protections to protect every citizen's right to a clean and healthy environment



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- recognizes and respects the narrow text and limited intended purpose of the Constitution's Takings Clause
- recognizes and respects the narrow text and limited intended purpose of the Constitution's Eleventh Amendment and
- recognizes and respects that environmental harms are just as real and important as compliance costs to industry and that unfair "standing" obligations should not be used to keep environmental claimants out of court

The Senate should ensure that each nominee affirmatively establishes qualifications for the critical and esteemed position of federal judge. The mere absence of disqualifying evidence in a nominee's record should not constitute sufficient grounds for confirmation. Selecting only judges who affirmatively meet these criteria will ensure the protection of our environment and our democratic ideals.



## NOTES

- <sup>1</sup> Institute for Justice web site (<<http://www.instituteforjustice.org> (staff biographies) (visited Feb. 6, 1998).
- <sup>2</sup> James L. Huffman, *The Heritage Foundation Lectures & Education Programs: A Case for Principled Judicial Activism*, <<http://www.heritage.org/library/categories/crimelaw/lect456.html>. (visited April 30, 2001).
- <sup>3</sup> Richard Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN x (1985)
- <sup>4</sup> *Id.* at 30-31.
- <sup>5</sup> See, e.g., Douglas T. Kendall and Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998).
- <sup>6</sup> Charles Fried, ORDER AND LIBERTY: ARGUING THE REAGAN REVOLUTION -- A FIRSTHAND ACCOUNT 183 (1991).
- <sup>7</sup> Robert H. Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 230 (1990).
- <sup>8</sup> *Gibbs v. Babbitt*, 214 F.3d 483, 504-05 (4<sup>th</sup> Cir. 2000).
- <sup>9</sup> *Id.*
- <sup>10</sup> *FDIC v. Hamilton*, 122 F.3d 854, 866 n.3 (10<sup>th</sup> Cir. 1997) (Baldock, J., dissenting). To be clear, we are not holding out any particular judge as a model of judicial restraint. Still, the fire anti-environmental activism has drawn from conservatives is very telling evidence of how far certain conservative judges have drifted from the alter of judicial restraint.
- <sup>11</sup> Charles Lane, *Clinton Presses Bench Question; Activists Stress That Election Results Will Mark Supreme Court*, WASH. POST, Oct. 25, 2000, at A12.
- <sup>12</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (intrastate activity "may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . ."); *United States v. Darby*, 312 U.S. 100, 118 (1941) (rejecting a Commerce Clause challenge to the Fair Labor Standards Act because Congress's Commerce Clause power "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end . . .").
- <sup>13</sup> 514 U.S. 549 (1995).
- <sup>14</sup> 529 U.S. 598 (2000).
- <sup>15</sup> *Id.* at 610 (asserting that the non-economic nature of the handgun possession at issue in *Lopez* was central to the *Lopez* ruling); *id.* at 613 (emphasizing that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity").
- <sup>16</sup> 927 F. Supp. 1502 (S.D. Ala. 1996).
- <sup>17</sup> Other examples include *U.S. v. Wilson*, 133 F.3d 251 (4<sup>th</sup> Cir. 1997) (overturning conviction of developer for knowingly filling and excavating wetlands without a permit) and *Rice v. Harken Exploration Co.*, 2001 WL 422051 (5<sup>th</sup> Cir. 2001) (landowners could not recover for discharges of oil contaminating groundwater on their property).
- <sup>18</sup> See *Olin*, 927 F. Supp. at 1504.
- <sup>19</sup> *Id.* at 1532-1533.
- <sup>20</sup> *Id.* at 1533.
- <sup>21</sup> *United States v. Olin Corp.*, 107 F.3d 1506 (11<sup>th</sup> Cir. 1997).
- <sup>22</sup> See *id.* at 1511.
- <sup>23</sup> See *id.*
- <sup>24</sup> See *Nova Chemicals, Inc. v. GAF Corp.*, 945 F. Supp. 1098 (E.D. Tenn. 1996); *U.S. v. NL Indus.*, 936 F. Supp. 545 (S.D. Ill. 1996).
- <sup>25</sup> See *Nova Chemicals*, 945 F. Supp. at 1106 ("The release of hazardous wastes and the remediation of hazardous waste sites are clearly economic activities.").
- <sup>26</sup> 121 S. Ct. 675 (2001).
- <sup>27</sup> The five Justices in the majority in *SWANCC* (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) are the same five who struck down the federal handgun possession law in *Lopez* and who have since constituted the majority in other activist rulings invalidating portions of our federal civil rights laws.
- <sup>28</sup> *Missouri v. Holland*, 252 U.S. 416, 435 (1920).
- <sup>29</sup> *Id.*
- <sup>30</sup> The Supreme Court has repeatedly recognized that trash is an object of commerce. See *C&A Carbone v. Town of Clarkson*, New York, 511 U.S. 383 (1994).
- <sup>31</sup> *SWANCC*, 121 S. Ct. at 694 (Stevens, J., with whom Souter, Ginsburg, & Breyer, JJ., join, dissenting).
- <sup>32</sup> *SWANCC*, 121 S. Ct. at 683.
- <sup>33</sup> See *Missouri v. Holland*, 252 U.S. at 431.
- <sup>34</sup> *SWANCC*, 121 S. Ct. at 693.
- <sup>35</sup> 214 F.3d 483 (4<sup>th</sup> Cir. 2000).
- <sup>36</sup> *Id.* at 486.
- <sup>37</sup> *Id.* at 497.
- <sup>38</sup> *Id.* at 499.
- <sup>39</sup> *Id.* at 502.
- <sup>40</sup> *Id.* at 507.
- <sup>41</sup> *Id.*
- <sup>42</sup> *Id.*
- <sup>43</sup> *Id.* at 505.
- <sup>44</sup> *Id.* at 504.
- <sup>45</sup> *Lopez*, 514 U.S. at 574.
- <sup>46</sup> *Id.*
- <sup>47</sup> See Jessica Matthews, *Takings Exception*, WASH. POST, Feb. 14, 1994, at A15.
- <sup>48</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (until 1922, "it was generally thought the Takings Clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession' . . ."); *id.* at 1028 n.15 ("early constitutional theorists did not believe that the Takings Clause embraced regulations of property at all . . .").
- <sup>49</sup> The foundation of the Court's "regulatory takings" jurisprudence is *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).
- <sup>50</sup> *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 126 (1985).
- <sup>51</sup> See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (1985).
- <sup>52</sup> 483 U.S. 825 (1987).
- <sup>53</sup> *Id.* at 828-31.
- <sup>54</sup> *Id.* at 847-55 (Brennan, J., dissenting).
- <sup>55</sup> 505 U.S. 1003 (1992).
- <sup>56</sup> See *id.* at 1011.
- <sup>57</sup> See *id.* at 1010-13.
- <sup>58</sup> *Id.* at 1042 (Blackmun, J., dissenting).
- <sup>59</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Justice Scalia

attempted to justify his decision in *Lucas* by arguing that *Lujan* was decided at the summary judgment stage while *Lucas*'s claim for a temporary taking was decided at the pleading stage. This, however, was simply not the case: *Lucas* had a trial on the merits of his claim for damages for the temporary taking of his property and failed to demonstrate any imminent or concrete plans to build on or sell the lot. In short, *Lucas* did not (and probably could not) show that he had any intention of building on his property between 1988 and 1990, and, therefore, under a 17-day-old Supreme Court case, also written by Justice Scalia, he lacked standing to even bring his temporary taking claim before the Supreme Court.

<sup>60</sup> Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1418, 1420-21 (1993).

<sup>61</sup> The Federal Circuit Court of Appeals and the Court of Federal Claims were both created in 1982 and vested with the exclusive jurisdiction over takings claims against the federal government seeking over \$10,000 in money damages. The Federal Circuit hears appeals from the Court of Federal Claims. Such jurisdiction gives these courts a singular ability to shape the development of takings law. In particular, subject only to discretionary review of the Supreme Court, these courts sitting in Washington, D.C. have the power to determine the viability of critical environmental protections including the wetlands protection provisions of the Clean Water Act and the habitat protection provisions of the Endangered Species Act.

<sup>62</sup> 18 F.3d 1560 (Fed. Cir. 1994).

<sup>63</sup> *See id.* at 1562.

<sup>64</sup> *See id.* at 1563.

<sup>65</sup> *See id.*

<sup>66</sup> *See id.* at 1565.

<sup>67</sup> *Id.* at 1568.

<sup>68</sup> *Florida Rock Indus. v. United States*, 45 Fed. Cl. 21, 23 (1999).

<sup>69</sup> Judge Smith found a "partial regulatory taking" of the 98 acres and awarded plaintiff \$754,444 plus interest from 1980, attorneys' fees and costs. *Id.* at 23, 43-44 (1999). Judge Smith also strongly suggested that he would find a taking of the other 1,462 acres of land. *See id.* at 44. Assuming the same \$7,700 per acre decrease in value is applied to these other acres, the total compensation award would increase to approximately 12 million, plus interest, attorneys fees and costs. In cases where there is a long delay between a permit denial and a finding of a taking, interest charges can be many times the actual award. For example, in *Whitney Benefits v. United States*, 30 Fed. Cl. 411, 416 (1994), Judge Smith awarded \$60 million in compensation for the right to strip mine coal, and more than \$250 million in interest.

<sup>70</sup> Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 180 (1995).

<sup>71</sup> *See Florida Rock*, 18 F.3d at 1575 (Nies, C.J., dissenting) ("it requires little imagination to envision the vast sums required for lost value/use claims if the government must pay for mere impairment of rights.").

<sup>72</sup> *Florida Rock*, 18 F.3d 1560 (Nies, C.J., dissenting); *see also*, Jay Plager, *Takings Law and Appellate Decision Making*, 25 ENVTL. L. 161, 162-63 (1995) (acknowledging

that the partial takings issue had not been "fully briefed and argued," and explaining that sometimes he has a "problem of trying to fit the issue you want to write about to the case that is before you.").

<sup>73</sup> *Tulare Lake Basin Water Storage District v. United States*, No. 98-101 L (Fed. Cl. April 30, 2001).

<sup>74</sup> *Id.* at 19 (slip op.).

<sup>75</sup> 988 F. Supp. 1055 (W.D. Mich. 1997).

<sup>76</sup> 16 U.S.C. § 1131(c).

<sup>77</sup> 16 U.S.C. § 1131(a).

<sup>78</sup> *Stupak-Thrall*, 988 F. Supp. at 1060-61.

<sup>79</sup> Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 Will. & Mary L. Rev. 1099 (1997).

<sup>80</sup> *See College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 703-704 (1999) (Breyer, J., dissenting).

<sup>81</sup> U.S. CONST. amend. XI. The Amendment states simply: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

<sup>82</sup> *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). To be fair, in this interpretation, the Court was merely reaffirming a principle announced one hundred years earlier in *Hans v. Louisiana*, 134 U.S. 1 (1890). However, *Hans* is a relic of the Court's *Lochner* era, the Court's last dalliance with conservative judicial activism and as recently as 1987, a majority on the Court seemed inclined to overrule it. *In Welch v. Texas*

*Dept. of Highways*, 483 U.S. 468, 496 (1987) (Scalia, J., dissenting), the Court divided evenly on the question of whether or not to overrule *Hans*, with Justice Scalia in the odd position of being the swing vote, questioning the "correctness of *Hans* as an original matter." *See also* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 25 (1989) (Stevens, J., concurring) (arguing that *Hans* "departed from the plain language, purpose, and history of the Eleventh Amendment.").

<sup>83</sup> *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1997). *Seminole Tribe* reversed the opposite opinion reached by the Court just eight years earlier in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

<sup>84</sup> *See Alden v. Maine*, 527 U.S. 706 (1999). Justice Souter's dissent in *Alden* provides a scholarly, detailed and persuasive rebuttal to the majority's Eleventh Amendment jurisprudence. *Id.* at 760 (Souter, J., dissenting). Justice Souter ends his dissent with a stinging conclusion:

*The resemblance of today's state sovereign immunity to the Lochner era's industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor the structure of the Constitution. I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting. Id.* at 814.

- <sup>85</sup> See *id.*
- <sup>86</sup> See *University of Alabama v. Garrett*, 531 U.S. 356 (2001).
- <sup>87</sup> 490 U.S. 1 (1989), overruled by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).
- <sup>88</sup> *Bragg v. Robertson*, 2001 WL 410382 (4<sup>th</sup> Cir. 2001).
- <sup>89</sup> 30 U.S.C. § 1202 (a).
- <sup>90</sup> 30 C.F.R. § 816.57.
- <sup>91</sup> 30 U.S.C. § 1270 (a) (1).
- <sup>92</sup> *Bragg v. Robertson*, 72 F. Supp.2d 642 (1999).
- <sup>93</sup> *Id.* at 661-62.
- <sup>94</sup> *Ex Parte Young*, 209 U.S. 123 (1908). *Young* permits suits seeking injunctions against state officials under the presumption that in such cases the court is simply requiring the state official to act within the scope of the official's duty. The Supreme Court has narrowed *Ex Parte Young* in recent years, see Edelman v. Jordan, 415 U.S. 651 (1974) (*Young* only permits prospective injunctions); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) (no injunctions for state claims reached under supplemental jurisdiction); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (*Young* does not permit use of what amounts to a "quiet title" action against state officials), but *Young* remains a critical part of Eleventh Amendment law.
- <sup>95</sup> See, e.g. 30 U.S.C. § 1260(b)(1) (requiring that permits issued under a state-approved program meet "all the requirements of this chapter and the State or Federal program"). See also 30 U.S.C. §§ 1257 & 1271 (allowing federal enforcement of state laws passed under SMCRAs).
- <sup>96</sup> *Molinary v. Powell Mountain Coal Co.*, 125 F.3d 231 (4<sup>th</sup> Cir. 1997).
- <sup>97</sup> *Bragg* does not prevent the Office of Surface Mining from stepping in to ensure that West Virginia complies with the minimum mandates of federal law. See 30 U.S.C. § 1257 & 1271. However such federal "overfiling" is controversial and rare even when the president in office believes in strong federal environmental protections. It seems unlikely indeed in an administration committed to devolving responsibility for environmental protections down to the state.
- <sup>98</sup> *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 489 (1985).
- <sup>99</sup> Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881 (1983); see also Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) (comparing the ideas in Justice Scalia's law journal article with his opinion in *Lujan*).
- <sup>100</sup> Prominent historians are virtually unanimous in their conclusion that nothing in the Constitution or in the practice of courts throughout history suggests that there are limits to the authority of Congress to create judicially enforceable rights. See Sunstein, *supra* note 103; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).
- <sup>101</sup> See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
- <sup>102</sup> *Lujan*, 504 U.S. at 562 (when an "injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed."); see Sunstein, *supra* note 103 (explaining why Congress and the Warren Court rejected the distinction between objects and beneficiaries).
- <sup>103</sup> *Lujan*, 504 U.S. at 571. As noted below, in *Friends of the Earth v. Laidlaw Env'tl. Services, Inc.*, 528 U.S. 167 (2000), the Supreme Court, over a dissent by Justices Scalia and Thomas, ruled that an environmental group had standing to sue in a Clean Water Act case and called into question many of the most far reaching assertions made by Justice Scalia in *Lujan* and *Steel Co.*
- <sup>104</sup> 504 U.S. 555, 606 (1992) (Blackmun, J., dissenting). One of President Bush's nominees to the D.C. Circuit, John Roberts, represented the United States in *Lujan*. Although the views advanced as an advocate do not necessarily reflect the position one might take as a judge, it is important that the Senate scrutinize Mr. Roberts' view on standing to determine whether he would, as a judge, properly adhere to standing precedent or pursue an anti-environmental assault on the ability of citizens to vindicate their claims in court.
- <sup>105</sup> *Id.* at 566-67.
- <sup>106</sup> *Id.* at 567, n.3; *id.* at 584, n. 2 (Stevens, J., concurring).
- <sup>107</sup> *Id.* at 567, n.3.
- <sup>108</sup> *Id.* at 561-562.
- <sup>109</sup> 520 U.S. 154 (1997).
- <sup>110</sup> *Id.* at 576.
- <sup>111</sup> Sunstein, *supra* note 47, at 165.
- <sup>112</sup> 523 U.S. 83 (1998).
- <sup>113</sup> *Id.* at 124 (Stevens, J., concurring in the judgment) ('Redressability,' of course, does not appear anywhere in the text of the Constitution. Instead, it is a judicial creation of the past 25 years").
- <sup>114</sup> *Id.* at 107.
- <sup>115</sup> *Id.* at 109.
- <sup>116</sup> 528 U.S. 167 (2000).
- <sup>117</sup> *Id.* at 185-86.
- <sup>118</sup> *Id.* at 205 (Scalia, J., dissenting).
- <sup>119</sup> See *id.* at 198 (Laidlaw involved a question of judicial authority under Article III of the Constitution. While recognizing that "conformity of this legislation with Article II [which defines the power of the executive branch] has not been argued," Scalia quotes language from Article II and clearly implies that he would be sympathetic to limiting environmental litigation under this separate constitutional rubric.).
- <sup>120</sup> See Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999).
- <sup>121</sup> *Id.* at 1742-43.
- <sup>122</sup> For added confirmation of this assertion, see *Laidlaw*, 528 U.S. at 209-10 (citing Michael Greve, a non-lawyer who runs the far-right think tank Center for Individual Rights, for the proposition that environmental plaintiffs use citizen suit provisions to advance their "private interest").
- <sup>123</sup> See discussion of *Lucas v. South Carolina Coastal Council*, above.
- <sup>124</sup> Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg all were elevated to the Supreme Court from the D.C. Circuit.

<sup>125</sup> See Richard Revesz, *Environmental Regulation, Ideology and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997). Professor Revesz conducted an empirical study of the environmental decisions of the D.C. Circuit over the last decade to confirm that ideology influenced results in environmental cases. In his words, his “study provides empirical support for the theory that D.C. Circuit judges employ a strategically ideological approach to judging.” *Id.* at 1766. Professor Revesz suggests that his study provides “an argument against vesting in the D.C. Circuit exclusive venue over the review of important sets of environmental regulations.” *Id.* at 1771.

<sup>126</sup> 175 F.3d 1027 (D.C. Cir. 1999).

<sup>127</sup> *Appeals Court Blocks EPA Effort to Impose Stricter Air Standards*, Baltimore Sun, May 15, 1999, at 4A.

<sup>128</sup> See Environmental Protection Agency, *Fact Sheet, EPA's National Ambient Air Quality Standards: The Standard Review/Reevaluation Process*, July 16, 1997; see also, Margaret Kris, *Why the EPA's Wheezing a Bit*, NATIONAL JOURNAL, June 24, 1999, at 2166.

<sup>129</sup> See *American Trucking*, 175 F.3d at 1034-39.

<sup>130</sup> *Id.* at 1034.

<sup>131</sup> *Id.* at 1057 (Tatel, J., dissenting); see also 195 F.3d 4, 14 (1999) (Silberman, J., dissenting from denial of rehearing) (terming the panel's non-delegation ruling “rather ingenious, but \* \* \* fundamentally unsound”).

<sup>132</sup> See *American Trucking*, 175 F. 3d at 1057.

<sup>133</sup> See *id.*

<sup>134</sup> Margaret Kris, *supra* note 130, at 2166.

<sup>135</sup> Cass R. Sunstein, *When Conservative Judges Turn Activist*, SAN DIEGO UNION-TRIB., June 3, 1999, at B15.

<sup>136</sup> *Whitman v. American Trucking Association*, 121 S.Ct. 903 (2001).

<sup>137</sup> *Id.* at 913.

<sup>138</sup> Linda Greenhouse, *Clean Air Act Rules Upheld by High Court*, SAN DIEGO UNION-TRIBUNE, Feb. 28, 2001, at A1.

<sup>139</sup> 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995).

<sup>140</sup> 467 U.S. 837 (1984).

<sup>141</sup> *Id.* at 843.

<sup>142</sup> 16 U.S.C. § 1532 (19).

<sup>143</sup> 50 C.F.R. § 17.3 (c) (3).

<sup>144</sup> See *Sweet Home v. Babbitt*, 515 U.S. 687, 694 (1995) (citing *Neal v. Clark*, 95 U.S. 704, 708-709 (1878)).

<sup>145</sup> *Sweet Home*, 17 F.3d at 1465-66.

<sup>146</sup> Responding to the majority's application of *noscitur a sociis*, Judge Mikva explained that the “the term ‘harm’ is accompanied [in the ESA] by an assortment of words ranging from the precise and narrow ‘shoot’ to the expansive ‘harass.’ \* \* \* ‘harm’ is not a single elastic word among many ironclad ones but an ambiguous term surrounded by other ambiguous terms. Consequently, even if it is ever appropriate to measure an agency's construction of a statute against a seldom-used and indeterminate principle of statutory construction, this is not the place for *noscitur a sociis*.” 17 F.3d at 1475 (Mikva, C.J., dissenting).

<sup>147</sup> *Id.* at 1473.

<sup>148</sup> See *Sweet Home*, 515 U.S. 687.

<sup>149</sup> See *id.* at 701-02.

<sup>150</sup> *National Mining Ass'n v. United States Army Corps of Engineers*, 145 F.3d 1399 (1998).

<sup>151</sup> *Competitive Enter. Inst. (CEI) v. National Highway Traffic Safety Admin.* (NHTSA), 956 F.2d 321 (1992).

<sup>152</sup> *Harbor Gateway Commercial Property Owners Ass'n v. EPA*, 167 F.3d 602 (1999); *Tex Tin Corp. v. EPA*, 992 F.2d 353 (D.C. Cir. 1993).

<sup>153</sup> *American Petroleum Institute v. EPA*, 216 F.3d 50 (2000); *NRDC v. EPA*, 25 F.3d 1063 (1994).

<sup>154</sup> For example, in *Florida Audubon Society v. Bentsen*, 94 F.3d 658 (D.C.Cir. 1996) (*en banc*), the court dismissed a claim brought by environmental organizations to compel the Department of Treasury to assess the potential environmental impacts of a large tax credit proposed for the gasoline additive ETBE. The court denied environmentalists standing to sue in the case even though they offered detailed affidavits, expert testimony and numerous reports demonstrating that they could suffer injury to their use of wildlife habitat and to their drinking water supplies from the tax credit. According to Judge Sentelle, it is not enough for a plaintiff to show that he is “injured as is everyone else,” *id.* at 667 n.4, or even that he is “more likely to sustain injury” than others. *Id.* at 667. Responding to the dissent's charge that the court's opinion will make it “effectively impossible for anyone to bring a NEPA claim in the context of a rulemaking with diffuse impact,” Judge Sentelle answered so be it. *Id.* at 672. The flaw, according to Judge Sentelle, lies in “the nature of the plaintiff's claim” which alleged “diverse environmental impacts.” *Id.* at

666. Such claims are “too general for court action.” *Id.* at 667 n.4.

The position on standing taken by Judge Sentelle in *Animal Legal Defense Fund v. Glickman*, 130 F.3d 464 (D.C. Cir. 1997), was even more extreme. In Sentelle's words, “a regulation which permits third parties to engage in offensive behavior, but does not require them to do so, may fairly be said to cause an injury resulting from the behavior of the third parties.” *Id.* at 469 (emphasis added). This ruling was reversed by the full D.C. Circuit, see *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998), but three D.C. Circuit judges joined Judge Sentelle in dissenting from the *en banc* reversal. *Glickman* thus perfectly illustrates the stakes involved in President Bush's opportunity to fill three current vacancies on the D.C. Circuit. If Judge Sentelle's position in *Glickman* ever commands a majority, it will knock out of court the lion's share of citizens' litigation seeking to strengthen environmental regulations. Specifically, because EPA does not itself emit pollution, nor require polluters to do so, Judge Sentelle's approach would rule that affected citizens lack standing to challenge environmental regulations for undue laxity, or to sue to compel issuance of stronger regulations.

<sup>155</sup> Christopher H. Schroeder & Robert L. Glicksman, *Chevron, State Farm & EPA In the Courts of Appeals During the 1990s*, 31 ENVTL L. REP. 10371, 10392 (2001).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 10384.

<sup>158</sup> See, e.g., *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995).

<sup>159</sup> *Natural Resources Defense Council v. United States Emtl.*

*Protection Agency*, 824 F.2d 1146 (D.C. Cir. 1987).

<sup>160</sup> Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C.L. REV. 1741, 1760 (1999).

<sup>161</sup> Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L.REV. 1717, 1766 (1997).

<sup>162</sup> *Id.* at 1763.

<sup>163</sup> *Compare Environmental Defense Fund v. EPA*, 82 F.3d 451, 468-69 (D.C. Cir. 1996) (though conceding that EPA regulation allowed pollution in violation of Clean Air Act, court upheld regulation) with *Natl. Mining Assn. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) (striking down regulation designed to protect wetlands and other waters from destruction).

<sup>164</sup> 483 U.S. 825, 837 (1987).

<sup>165</sup> *California v. Montrose Chemical Corp.*, CV-90-03122-AAH (C.D.Ca.) (transcript of March 22, 1995 hearing), at 8.

<sup>166</sup> 130 F.3d 1041, 1064 (D.C. Cir. 1997).

<sup>167</sup> *Id.* at 1061.

<sup>168</sup> 45 F. Supp. 2d 368, 393 (S.D.N.Y. 1999).

<sup>169</sup> 245 F.3d 49 (2d Cir. 2001).

<sup>170</sup> 115 F.3d 367, 368-70 (6<sup>th</sup> Cir. 1997).

<sup>171</sup> 235 F.3d 256, 260 (6<sup>th</sup> Cir. 2000).

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## **ABOUT ALLIANCE FOR JUSTICE**

The Alliance for Justice is a national association of nearly sixty public interest organizations that advocate for civil rights, social justice, consumer, and environmental protection. Since 1979, the Alliance has worked with and on behalf of its members to safeguard the fairness of our public policy and judicial systems and to strengthen the progressive community's role in public debates. It helps to ensure that the concerns of ordinary Americans, and the voice of the public interest, receive a fair hearing in the nation's legislatures and courts of law. To advance that purpose, the Alliance works to: preserve fairness in the courts, strengthen public policy advocacy and train a new generation of public interest activists. For more information regarding the Alliance for Justice, visit [www.afj.org](http://www.afj.org).

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CRC is a public interest law firm based in Washington, D.C. that defends laws that make our communities healthier, more livable, and socially just. CRC has helped local governments around the country successfully defend land use and environmental laws that promote public health, combat suburban sprawl, and protect fragile ecosystems, historic structures, and open space. CRC also exposes and critiques anti-environmental judicial activism and the judicial lobbying by special interests that promotes this activism. For more information on CRC, go to [www.communityrights.org](http://www.communityrights.org).

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NRDC is a nonprofit environmental organization with over 500,000 members and contributors nationwide. Since 1970, NRDC's scientists, lawyers, and staff have been working to protect the world's natural resources and to improve the quality of the human environment. NRDC has offices in New York, Washington, D.C., San Francisco and Los Angeles. To obtain more information about NRDC online, visit [www.nrdc.org](http://www.nrdc.org).

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