Utility Air Regulatory Group v. Environmental Protection Agency: the Apotheosis of Implicit Bias in the Supreme Court of the United States of America Against Environmental Interests and Their Advocates

Jason W Jutz, University of Hawaii at Manoa

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UTILITY AIR REGULATORY GROUP v. ENVIRONMENTAL PROTECTION AGENCY: THE APOTHEOSIS OF IMPLICIT BIAS IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA AGAINST ENVIRONMENTAL INTERESTS AND THEIR ADVOCATES

BY JASON W. JUTZ

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I. INTRODUCTION: SETTING THE STAGE FOR IMPLICIT BIAS

“So confident am I in the intentions, as well as wisdom, of the government, that I shall always be satisfied that what is not done, either cannot, or ought not to be done.”¹ While I have a rather great respect for Thomas Jefferson, on this occasion, I do not share his view . . . . I take particular note of the epic failure by the Supreme Court of the United States to uphold the law and, subsequently, aid or vindicate environmental interest in the efforts to protect the health, safety, and welfare of citizens of the United States, choosing instead to favor business and national security interests to the detriment of the environment — our habitat and home. Scholar and author, Dan Farber, describes this as a conflict between “tree huggers” and bean counters[.]”²

This note argues that the Supreme Court decision in Utility Air Regulatory Group v. Environmental Protection Agency ("UARG"), 134 S. Ct. 2427 (2014), propagates a culture of


implicit bias, focusing on the bias of the United States Supreme Court against environmental interests and their advocates; a bias that results in a “stacked deck.” This stacked deck takes the form of narrowed access to the court and heightened standards for environmental interest advocates once they enter the arena, and lowered standards for states or business interests to combat environmental interest groups, even the Environmental Protection Agency.

This note attacks this implicit in four methodical steps, each in the form of a discrete section. The first section reviews the UARG decision. The second section briefly discusses the history of the EPA highlighting its evolution. The third section discusses the impacts of the UARG decision on today’s environmental interests, including implications on the State of Hawai‘i, a unique state regarding environmental issues, both in the state’s unique relationship with the environmental and how the courts have reacted to cases involving environmental interests. The final section attempts to suggest some options for addressing the issue of implicit bias against environmental interests, such as creating Federal Environmental Courts.

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3 See generally Erik Figlio, Stacking the Deck Against “Purely Economic Interests”: Inequity and Intervention in Environmental Litigation, 35 GA. L. REV. 1219 (2001).
Before moving forward, it is important to contextualize the societal stigmas that are stereotypically applied to environmental interests and their advocates, because, as this article will argue, it is these stigmas that lead to the implicit bias against environmental interests. It is well established that environmental interests are stigmatized and labeled; even courts appear to unconsciously use these labels for environmental advocates — despite the gross mis-categorization of the individuals that comprise the environmental groups. In a University of Toronto survey conducted on 400 Americans, it was found that there is negative opinion of political activist, including environmentalists. When people were asked about their feelings towards activists, they referred to environmentalists as “tree-huggers” and “hippies.”

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5 Christopher D. Stone, Is Environmentalism Dead?, 38 ENVTL. L. 19, 44 (2008) (“[S]ome share of the public probably connects the [environmental interests] movement to the sixties and seventies, and this to flaky hippies and impractical, preachy idealists. But there is considerable evidence undercutting claims that environmental activism is associated with markers of 'elitism,' such as income and education. Support for environmental causes appears to be strikingly broad and populist.”).

6 Adkins, supra note 4.

7 Adkins, supra note 4 (“The findings have been published in the European Journal of Social Psychology.”); see Nadia Y. Bashir, et. al,
The researchers reported that negativity 'plays a key role in creating resistance to social change.'\(^8\) The experts also found that a majority of participants were not in favor of either associating themselves or adopting the behavior of "typical" activists, as they are considered "militant" and "eccentric."\(^9\) This has an even greater impact on society; impacting how we pursue public policy and dictating the prioritization of environmental needs. As renowned political scientist Lynton Caldwell wrote:

> Americans . . . have seldom seen environment . . . as an expression of anything in particular. They have seldom thought of it as a general object of public policy. Their readiness to control the environment for particular purposes has not been accompanied by recognition of a need for comprehensive environmental policies.\(^{10}\)

**II. Utility Air Regulatory Group v. Environmental Protection Agency: An Exercise of Judicial Activism Against Environmental Interests**

Everyone has an interest in protecting the environment,\(^{11}\) including the EPA. In an effort to meet its mandate under the

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The ironic impact of activists: Negative stereotypes reduce social change influence, 43-7 European Journal of Social Psychology 614 (Dec. 2013). These findings were based on a survey of a relatively small sample of 400 Americans.

\(^8\) Bashir, supra note 7.

\(^9\) Id.


Clean Air Act ("the Act"), the EPA implemented a series of agency actions between 2009-2010.\textsuperscript{12} These actions were designed to regulate greenhouse gas ("GHG") emissions under the Act.\textsuperscript{13} The Act specifies that sources of pollution must obtain permits based on the volume of pollutants they emit.\textsuperscript{14} Unfortunately, GHGs are emitted at a "much greater volume[ ] than conventional air pollutants."\textsuperscript{15} Consequently, a discrepancy emerged between regulation of GHG emissions, which, at the levels required by the Act, "would have increased the number of permitted sources at least a hundredfold."\textsuperscript{16} To address the discrepancy, the EPA implemented the "Tailoring Rule" to adjust the "statutory permitting thresholds set out in [the Act]."\textsuperscript{17} The impetus for the UARG controversy was the implementation of the Tailoring Rule.\textsuperscript{18}

\textsuperscript{12} Utility Air Regulatory Group v. Environmental Protection Agency ("UARG"), 134 S. Ct. 2427, 2437 (2014).

\textsuperscript{13} Id.

\textsuperscript{14} 42 U.S.C. § 7545.


\textsuperscript{16} Id.

\textsuperscript{17} Id.

\textsuperscript{18} UARG, 134 S. Ct. at 2438.
a. Background – the Clean Air Act and Why the EPA Acted

The EPA, acting in accordance with the Act, recently established standards for emissions of GHGs from motor vehicles. Greenhouse gases are substances that contribute to global climate change. Congress adopted the Act to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population”.

In UARG, the Court was presented with the question of whether it was permissible for the EPA to determine that motor-vehicle GHG regulations automatically triggered permitting requirements under the Act for stationary sources that emit GHGs. That is, whether the same permitting requirements for motor vehicle GHG emissions could be applied to industrial facilities.

As the Court notes, the Act “imposes permitting requirements on stationary sources, such as factories and powerplants.” The “Prevention of Significant Deterioration” (“PSD”) provisions “make it unlawful to construct or modify a

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20 UARG, 134 S. Ct. at 2438.
21 Id. § 7479.
22 Id. § 7401(b)(1).
23 UARG, 134 S. Ct. at 2427.
24 Id.
major emitting facility ("MEF") in any area to which the PSD program applies without a permit."^{25} An MEF is a stationary source of pollutants that has the potential to emit at least 250 tons of any air pollutant per year.\(^{26}\) For certain types of pollutants the threshold drops to 100 tons per year.\(^{27}\)

To qualify for a PSD permit, facilities must "comply with emissions limitations that reflect the best available control technology for each pollutant subject to regulation under the Act."\(^{28}\) Facilities seeking to qualify for a PSD permit must comply with emissions limitations that reflect the "best


\(^{26}\) Id. § 7479(1) ("The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.").

\(^{27}\) Id.

\(^{28}\) UARG, 134 S. Ct. at 2427 (internal quotation marks omitted).
available control technology” (“BACT”) for “each pollutant subject to regulation under [the Act]”. In addition, Title V of the Act makes it unlawful to operate any “major source,” wherever located, without a permit. A “major source” is a stationary source with the potential to emit 100 tons per year of “any air pollutant.”

In response to the Supreme Court’s landmark decision in Massachusetts v. Environmental Protection Agency (“Mass v. EPA”), the “EPA promulgated [GHG] emission standards for new motor vehicles, and made stationary sources subject to the PSD program and Title V on the basis of their potential to emit greenhouse gases.”

It recognized, however, that requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs and render them unadministrable. So EPA purported to “tailor” the programs to accommodate greenhouse gases by providing, among other things, that sources would not become newly subject to PSD or Title V permitting on the basis of their potential to emit greenhouse gases in amounts less than 100,000 tons per year.

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30 Id. § 7661a(a).
31 Id. §§ 7661(2)(B), 7602(j).
33 UARG, 134 S. Ct. at 2431.
34 Id.
The Court pronounced four substantive holdings. First, GHG emissions cannot be the sole basis for subjecting an industrial facility to permitting requirements under PSD or Title V of the Act. Second, adjusting established GHG emission levels from the Act at which stationary source’s become subject to permitting requirements is not within the EPA’s authority. Third, the EPA “may not treat [GHGs] as pollutants for purposes of defining [an MEP].” Finally, the “EPA’s decision to require BACT for [GHGs] emitted by sources otherwise subject to PSD review is . . . a permissible interpretation of the statute under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).”

b. The Upshot of the Decision: SCOTUS Recognizes the EPA’s Authority to Regulate Greenhouse Gases

Some scholars argue the decision marked a small victory for the EPA. Despite striking down the EPA’s regulatory solutions, “UARG is a significant victory for the EPA”:

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35 Id. at 2449.
36 Id.
37 Id.
38 Id.
39 Id. at 2431.
40 See Oakes, supra note 15 at 56-57 (2014) (“In Utility Air Regulatory Group v. Environmental Protection Agency, the Supreme Court struck down the EPA’s regulatory solution. Nonetheless, UARG is a significant victory for the EPA—both because the Court recognized the Agency’s authority to regulate GHGs in the first place, and because it ultimately allowed the EPA to regulate ninety-seven percent of the GHG
because the Court recognized the Agency's authority to regulate GHGs in the first place, and because it ultimately allowed the EPA to regulate ninety-seven percent of the GHG emissions the Agency had proposed to control under the EPA's Tailoring Rule. To obtain this result, however, the Court took an approach that has some troubling implications. In UARG, the Court held that GHG emissions could not trigger certain permitting requirements because GHGs are not properly considered “air pollutants” in the context of some programs under the Act. The Court's analysis focused on congressional intent, even though Congress itself did not expressly contemplate GHG regulation when it passed [the Act]. In trying to determine what Congress intended in an unanticipated factual setting, the Court created an interpretive precedent that is not meaningfully constrained. This Essay analyzes that precedent and its implications. First, I discuss the meaning of the term “air pollutant,” as used in [the Act] and as interpreted by the EPA and the Court's previous jurisprudence. Next, I critique the Court's use of FDA v. Brown & Williamson Tobacco Corp. to justify its reinterpretation of “air pollutant” in UARG. Finally, I argue that in imposing this reinterpretation on the EPA, the Court overstepped the boundaries of its role.

However, the Court’s restriction on the powers of the EPA, which contradicts the underlying purpose of the agency, undermines the checks and balances built into the U.S.

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41 Id. at 57.
Constitution “in a very disturbing way.” All of this appears to be in the name of spite, as the decision is one in a long line of decisions involving regulations designed to protect the environment—in this case, requiring permitting to ensure those emitting substantial [GHGs] are doing so under the supervision of regulatory authorities (i.e., the EPA) and that they are taking appropriate steps to minimize the detrimental impact on the environment—that defies logic and reason and controverts precedent, simply to undermine environmental interests, choosing instead the interests of business.

c. The Role of Massachusetts v. E.P.A.

“The Court's majority has made clear its solid support for the landmark Massachusetts v. EPA decision authorizing EPA to regulate [GHGs].” In Mass. v. EPA, states, local governments, and environmental organizations brought suit against the EPA regarding an order “denying a petition for rulemaking to regulate [GHG] emissions from motor vehicles under the Act.” In that case, a group of private organizations (later joined by the state of Massachusetts) petitioned the EPA to regulate gas

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42 See Oakes, supra note 15 at 56-57 (2014).


emissions from cars, specifically in coastal areas to protect against climate change.\textsuperscript{45}

In an opinion written by Justice Stevens, the Supreme Court held that the Act authorized the EPA to regulate [GHG] emissions from cars.\textsuperscript{46} In order to do so, the EPA must first form a scientific judgment “that such emissions contribute to climate change.”\textsuperscript{47} Additionally, the Court held that the EPA could “avoid taking further [regulatory] action [regarding GHG emissions] only if it determines that [GHGs] do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”\textsuperscript{48}

d. **The Applicable Part of the Clean Air Act**

The Act states that “[n]o MEF on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies[.]”\textsuperscript{49} There are two notable exceptions.\textsuperscript{50} The first exception involves permitting requirements.\textsuperscript{51} Subsection one (1) states an MEF may be

\textsuperscript{45} *Id.* at 497, 508.
\textsuperscript{46} *Id.* at 528.
\textsuperscript{47} *Id.*
\textsuperscript{48} *Id.* at 533.
\textsuperscript{49} 42 U.S.C. § 7475.
\textsuperscript{50} *Id.*
\textsuperscript{51} *Id.*
constructed in a protected area if “a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part[.]”\textsuperscript{52} The second exception is the BACT exception.\textsuperscript{53} Under subsection four (4), a proposed facility may be constructed in a protected area, if it “is subject to the best available control technology for each pollutant subject to regulation under [the Act] emitted from, or which results from, such facility[.]”\textsuperscript{54}

The statute also specifies that “[a]fter the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source, a major source, any other [enumerated] source . . . , or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator . . . which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter."\textsuperscript{55} The Administrator is also empowered to

\begin{enumerate}
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} Id. \textsuperscript{\textsection} 7661a.
\item \textsuperscript{55} Id. (some parentheticals omitted).
\end{enumerate}
“promulgate regulations to exempt one or more source categories (in whole or in part) from [these] requirements . . . if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.”\(^56\)

An MEF is defined as a “stationary source[ ] of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant[.]”\(^57\) Covered stationary sources include:

- fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input,
- coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing

\(^{56}\) Id.

\(^{57}\) Id. § 7479.
The statute also covers “any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant.”  Major emitting facilities do not include state-exempted facilities, whether new or modified, used for nonprofit health or educational institutions.

Additionally, the statute uses the word “commenced,” as applied to construction of a MEF, to mean “the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations[.]” It also indicates that the owner has either “begun, or caused to begin, a continuous program of physical on-site construction of the facility[.]” Alternatively, the owner may have simply “entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.”

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58 Id.
59 Id.
60 Id.
61 Id. § 7479(A)(2).
62 Id.
63 Id.
Other pertinent terms include: “necessary preconstruction approvals or permits”, which means “those permits or approvals, required by the permitting authority as a precondition to undertaking [previously enumerated activities]”; and “construction”, which includes the modification of any source or facility (“when used in connection with any source or facility”).

III. A NOTE ON THE ENVIRONMENTAL PROTECTION AGENCY

The Reorganization Plan of 1970 established the U.S. Environmental Protection Agency (EPA). The EPA was established in the Executive branch as an independent Agency, effective December 2, 1970. The EPA has been criticized for its lack of progress towards environmental justice. Implementation of environmental protection policies has been difficult and controversial. Under the Bush administration, the Office of Inspector General concluded that “the EPA has not developed a clear vision or a comprehensive strategic plan, and has not established values, goals, expectations, and performance

64 Id. § 7479(B).
65 40 C.F.R. § 1.1; see Norman J. Vig & Michael E. Kraft, Environmental Policy in the 1990’s 3 (2d ed. 1994).
66 40 C.F.R. § 1.1.
68 Vig & Kraft, supra note 65.
measurements for integrating environmental justice.\textsuperscript{69} The EPA has received criticism, but the judicial system has made it equally difficult or nearly impossible for citizens to file an environmental justice case.\textsuperscript{70}

According to Professor Tseming Yang, former Deputy General Counsel of the EPA:

Environmental justice is an issue that ought to be of concern not only to the kind-hearted and socially conscious. Its concerns go to the heart of democratic governance and what it means to live in a just society. As a result, environmental justice concerns cannot be considered only in the narrow context of environmental regulation and its goals, as the attempts to fit it within the existing environmental regulatory system have sought to do. And its goals, although most visibly identified as that of fighting environmental racism, do not stop with the eradication of what the U.S. Supreme Court has legally defined as intentional discrimination—actions intended to disadvantage or harm members of racial minority groups based on a racial animus.\textsuperscript{71}

Yang challenges environmental regulators “to look up from their desks” and environmentalists “to come out of the wilderness” and to relate environmental protection efforts to broader social agendas.\textsuperscript{72} “A failure to live up to the challenge will not only


\textsuperscript{70} Id.

\textsuperscript{71} Yang, supra note 67 at 31-32.

\textsuperscript{72} Id.
leave environmentalism weaker as a compelling ideal, but also poorer as a moral force.”73

IV. EXAMPLES OF CASES OR CONTROVERSIES INVOLVING ENVIRONMENTAL INTEREST THAT SUPPORT AN ARGUMENT THAT IMPLICIT BIAS EXISTS IN THE SUPREME COURT

This section provides snapshots of some cases that lend weight to the argument that implicit bias against environmental interests exists in our judicial system. This bias is effectuated by narrowing access to the judicial system and manipulating standards so that, once an environmental claim enters the system, the deck is essentially stacked against them.

Jarvis argued that courts have extended exceptions for businesses and states beyond functional necessity and, as a result, that “courts have over-protected the government and its discretionary functions.”74 The first two supplemental cases explore the duty to warn. As Jarvis points out, “over-protection is partially enacted through the Court’s willingness to classify the EPA's failure to warn of ascertained environmental hazards as within the discretionary function exception.”75 The weight of this argument is based on the

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73 Id.
75 Id.
imbalance between “purely economic interest compared to environmental interests in environmental litigation.”  

The other substantial problem is establishing standing to bring the claim in the first place. The subsequent subsections briefly explores landmark cases regarding the process of establishing standing for environmental interest groups and advocates in the federal judiciary, contrasting that with more sympathetic states, like Hawai‘i, which have embraced a more environmentally conscious public policy and ideology. The final subsection peaks into an area of research that explores the disparate impact on environmental interest groups compared to businesses when arguing before the federal judiciary.

a. Relaxing the Duty to Warn: Lack of Enforcement and Willful Negligence; Lowering the Standards for Government Interests

Two recent cases show how courts have reached different results when applying the discretionary function exception to a governmental failure to warn citizens of detected environmental hazards.  

1. **Lockett v. U.S.**

In Lockett v. United States, the EPA played a different role than in Mass. V. EPA or in UARG. The EPA was sued by

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76 See Figlio, supra note 3.

77 See Oakes, supra note 15 at 60.

78 Jarvis, supra note 74 at 549-50.
neighbors of a scrap reclamation operation for failing to warn them that PCB levels exceeded acceptable levels.  “The EPA had known for eight years that the level of PCBs exceeded safe levels.”

In 1981, a state inspector, acting on behalf of the EPA, visited the Carter Industrial, Inc. scrap reclamation site to test PCB levels on the property. The inspector found PCBs at a level of 560 ppm, over ten times the accepted level, in an oil puddle on the property. After being notified of these results, the EPA concluded that there was insufficient evidence of contamination of the site and took no action. In 1984, the Carter site was tested again for PCB contamination. The results showed a range of contamination on and around the site. The results including levels of 31 and 167 ppm from ground surrounding old transformers, 131 ppm from the main driveway of the property, and 2,340 ppm—almost 47 times the accepted level established by the EPA—taken from an alley just off the property. A local EPA project officer received notice of these findings, but again the EPA decided the evidence of contamination was insufficient to take any action upon the site. Instead, the EPA ordered only further monitoring of the site. After additional testing in 1986 that revealing PCB levels as high as 90,000 ppm, the EPA ordered an emergency cleanup and issued advisory notices to the local media and the residents of the area surrounding the Carter site.

80 Jarvis, supra note 74 at 550.
81 Jarvis, supra note 74 at 550.
The plaintiffs’ 1988 suit accused the EPA of negligently failing to warn them of the PCB levels on the Carter site and that the EPA had “fail[ed] to exercise reasonable care to prevent or at least decrease the risks from continued exposure to PCBs” after the 1981 test of the site.

The district court granted the government’s motion for summary judgment “based on the discretionary function exception.” According to the district court, the EPA's conduct was “based on economic, social and political policy considerations within the discretionary function exception, and not solely on scientific considerations.” Citing Berkovitz v. United States, 486 U.S. 531 (1988), Jarvis notes “the EPA's decision not to warn was the type of discretion that the exception protected.”

The decision was upheld by the Sixth Circuit on appeal. The court of appeals specifically rejected the argument that the EPA had a duty to warn after detecting PCB hazards, even where

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82 Lockett, 938 F.2d at 632.
83 Id.
84 Id.
85 Id. at 639.
86 Jarvis, supra note 74 at 551.
87 Lockett, 938 F.2d at 639.
they could potentially affect persons in the area. 88 As Jarvis notes:

The court claimed that the relevant statutory and regulatory scheme involving PCB hazards granted the EPA discretion, providing the EPA with a range of action following the detection of an environmental hazard. Specifically, the court found this discretion in a portion of the Toxic Substance Control Act (TSCA), which governs the use of PCBs, and which instructs the EPA administrator to consider “the environmental, economic, and social impact” of action taken under the Act. 89

Additionally, “since the EPA had discretion in its response to the tests at the Carter site, the EPA's response was the type of discretion the exception intended to protect.” 90

Dissenting, Judge Edwards “disagreed with the court's holding that notifying the public of the hazard was a matter of choice for the EPA.” 91 Edwards supported additional regulatory language stating that the EPA “will seek stringent penalties in any situation in which significant dispersion of PCB's occurs due to a violation.” 92 Jarvis interprets Judge Edwards' dissent as claiming that, “even if the government does have discretion to warn the public, the type of discretion the EPA exercised was not grounded in political, economic, or social policy, as

88 Id.
89 Jarvis, supra note 74 at 551.
90 Id.
91 Id.
92 Lockett, 938 F.2d at 641 (Judge Edwards dissenting).
required by Berkovitz, and therefore was not protected by the exception.” In sum, Judge Edwards believed that the EPA had failed to introduce sufficient evidence that public policy considerations justified its failure to warn.

2. Dube v. Pittsburg Corning

A similar factual situation led to a different result in Dube v. Pittsburgh Corning. In Dube, the daughter of a Navy shipyard worker contracted mesothelioma after exposure to asbestos fibers carried home on her father's work clothes. The claims was settled with the asbestos manufacturer, and the plaintiff then sought damages from the U.S. government “for failing to warn” the workers and their families of the asbestos hazards in the work environment. The district court found the government had assessed the risk and, in fact, negligently failed to warn the workers and their families of the asbestos dangers. Additionally, the district court found the negligence proximately caused the daughter's injury, but held the

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93 Jarvis, supra note 74 at 552.
94 Id.
96 Id. at 792.
97 Id.
98 Id. at 791-92.
government immune from liability under the discretionary function exception.\(^9\)

On appeal, the First Circuit reversed the district court, concluding “that the Navy's failure to warn domestic bystanders of the risks associated with exposure to asbestos dust is not of the nature and quality that Congress intended to shield from tort liability.”\(^10\) The court rejected the argument that naval regulations mandated a governmental duty to warn the workers and their families, but held that the government had negligently failed to warn of the danger.\(^11\) “The discretionary function exception did not protect this negligent discretion.”\(^12\)

According to the First Circuit, the discretionary function exception is a narrow exception applicable only to actual decisions based on public policy.\(^13\) A public policy decision never existed in Dube.\(^14\) “The government never decided to forgo warning domestic bystanders”.\(^15\) The government “simply failed

\(^9\) Jarvis, supra note 74 at 552.

\(^10\) Dube, 870 F.2d at 801.

\(^11\) Id.; see Jarvis, supra note 74 at 553.

\(^12\) Jarvis, supra note 74 at 553.

\(^13\) Berkovitz v. United States, 486 U.S. 531 (1988); see Jamon A. Jarvis, The Discretionary Function Exception and the Failure to Warn of Environmental Hazards: Taking the "Protection" Out of the Environmental Protection Agency, 78 Cornell L. Rev. 543, 553 (1993);

\(^14\) See Jarvis, supra note 74 at 553.

\(^15\) Dube, 870 F.2d at 796.
to do so."\textsuperscript{106} The court concluded "it is difficult to imagine
the Navy justifying a decision not to issue a simple warning to
domestic bystanders of such potentially devastating danger,
based on economic or other policy grounds."\textsuperscript{107} IN Jarvis' words,
"[t]hese two cases illustrate the confusing and ambiguous line
plaintiffs must walk when seeking to hold the government liable
for failing to warn of environmental hazards."\textsuperscript{108}

Both cases appear to present situations in
which the government negligently failed to
warn affected parties, an action not clearly
based upon any policy issue. Both cases,
however, reached different results through
similar application of the discretionary
function exception.\textsuperscript{109}

In a Seventh Circuit case, Cisco v. United States, the
court also held that the EPA had broad discretion.\textsuperscript{110} In that
case, a claim was brought against the EPA for failure to warn
members of several households that dirt used as residential
landfill had been contaminated with dioxin.\textsuperscript{111}

\textsuperscript{106} Id. (internal parenthetical omitted).
\textsuperscript{107} Id. at 800.
\textsuperscript{108} Jarvis, supra note 74 at 553.
\textsuperscript{109} Id.
\textsuperscript{110} Cisco v. U.S., 768 F.2d 788 (7th Cir. 1985)
\textsuperscript{111} Id.
b. Standing: Making it Nearly Impossible to Advocate for Environmental Interest; *Lujan v. Defenders of Wildlife* & *Sierra Club v. Morton*

There is a litany of cases that illustrate the door is closing on environmental interests. It appears that the main thrust of the narrowing is to limit environmental interest groups’ ability to establish standing to make the claim. As discussed above, *Mass v. EPA* has a significant effect on the holding in UARG.\(^{112}\) *Mass v. EPA* essentially opened the door for states to challenge environmental regulations.\(^{113}\) Other cases have made it more difficult for environmental interest groups to achieve standing.\(^{114}\)

One of the more impactful decisions regarding standing was *Lujan v. Defenders of Wildlife*, 504 U.S. 555.\(^{115}\) In that case, a group of organizations dedicated to wildlife conservation filed suit against the Secretary of the Interior, seeking declaratory judgment that a “new regulation erred as to [the] geographic scope [of a specific provision of the Endangered Species Act] and an injunction requiring the Secretary of the Interior to

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\(^{112}\) UARG, 134 S. Ct. 2427

\(^{113}\) Mass v. EPA, 549 U.S. at 536-37.


\(^{115}\) See Id. at 303-07.
promulgate a new rule restoring his initial interpretation.”

The Court held that “respondents lack[ed] standing to bring [the] action.” The Court stated that:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’”. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

The Court went on to reason that:

Respondents' claim to injury [was] that the lack of consultation with respect to certain funded activities abroad “increas[ed] the rate of extinction of endangered and threatened species.” Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. But the ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by

117 *Id.* at 578.
118 *Id.* at 560 (internal citations omitted).
funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their "'special interest' in th[e] subject." 119

The effect of the Court’s holding was to limit access to the courts for environmental interest advocates who did not suffer a direct and concrete injury. 120 Warshaw and Wannier note there is actual flexibility in the standing doctrine. 121 More interestingly are their findings on the disparate treatment of directly regulated parties and parties that are 'merely' adversely affected:

We found little empirical support for the conventional wisdom that directly regulated parties . . . and those adversely affected by regulatory action although not its addressees rarely encounter standing difficulties, while beneficiaries, like the Lujan plaintiffs, who seek to make regulatory systems have more bite, have often encountered difficulty establishing standing. 122

Another case of note regarding standing for environmental interest advocates is Sierra Club v. Morton, 405 U.S. 727. 123

The controversy sprung from a permit issued for development of a

119 Id. at 562-63.
120 See Warshaw & Wannier, supra note 114 at 316.
121 Id.
122 Id. at 320 (internal brackets and quotation marks omitted).
123 See Sierra Club v. Morton, 405 U.S. 727, 742 (1972) (claimants lacked standing despite clear impact on natural game refuges and forests)
Walt Disney Enterprises project near Sequoia National Park.\textsuperscript{124}

The Sierra Club argued it had standing based on its “special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country.”\textsuperscript{125}

The Court found that the Sierra Club lacked standing because it:

failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.\textsuperscript{126}

As Warshaw and Wannier point out,

\begin{quote}
[d]espite the fact that it rejected the Sierra Club's standing argument, the Court's requirement of an injury in fact established a very modest barrier for plaintiffs. The Court stated that the Sierra Club could have established an injury in fact by showing that some of its members used the area around the proposed park for recreational purposes.\textsuperscript{127}
\end{quote}

The Court noted that Sierra Club members may have been able to successfully argue they suffered an injury that reflected “aesthetic, conservational, and recreational as well as economic values” due to the construction of the park.\textsuperscript{128} (Apparently after

\textsuperscript{124} Id. at 727.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 735.
\textsuperscript{127} Warshaw & Wannier, supra note 114 at 292.
\textsuperscript{128} Sierra Club v. Morton, 405 U.S. at 738.
the ruling, the Sierra Club amended and resubmitted its complaint alleging its members “used the area near the planned park for recreational purposes, and the Club was granted standing.”\(^{129}\)

One of the most resounding repercussions of the decision was Justice Douglass dissent.\(^{130}\)

The critical question of ‘standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing?—Toward Legal Rights for Natural Objects, 45 S.Cal.L.Rev. 450 (1972). This suit would therefore be more properly labeled as Mineral King v. Morton.\(^{131}\)

Nonetheless, the reality is that the doctrine of standing remains “the irreducible constitutional minimum” of proving an injury in fact, which is concrete and particularized, and actual

\(^{129}\) Warshaw & Wannier, supra note 114 at 292.

\(^{130}\) Christopher T. Burt, Procedural Injury Standing After Lujan v. Defenders of Wildlife, 62 U. Chi. L. Rev. 275, 277 (1995) (“Justice Douglas aptly characterized the ambiguity that has traditionally surrounded the law of standing when he warned in 1970 that “[g]eneralizations about standing to sue are largely worthless as such.”).

\(^{131}\) Sierra Club v. Morton, 405 U.S. at 741-42.
or imminent, “a causal connection between the injury and the conduct complained of”, and the likelihood “that the injury will be redressed by a favorable decision.”132 While these elements of standing are widely accepted, it is clear that the rigid adherence and application restricts accessibility to the courts, especially for environmental interest groups, regardless of the merits of the claim.133 Based on the disparate impact, this alone supports a strong argument that there is implicit bias against environmental interest advocates.

c. Standing for Environmental Interest in Hawai‘i: Looking through the Lens of the Hawai‘i Superferry EIS Case

During 2004–2007, the State of Hawai‘i attempted to establish inter-island travel in cooperation with Hawai‘i Superferry, Inc. (“HSF”).134 The Department of Transportation (“DOT”) approved plans to move ahead with the HSF project, despite concerns about environmental impact,135 especially concerns about mid-ocean collisions with humpback whales,136 when it declared improvements to the Kahului harbor facility fell

132 Lujan, 504 U.S. at 560.
133 See generally Burt, supra note 130.
within a categorical exemption under Hawai'i Administrative Rules § 11-200-8(a).\textsuperscript{137}

The Sierra Club (amongst other groups) brought suit against the DOT and HSF for failure to require an environmental impact assessment, let alone carry one out.\textsuperscript{138} Specifically, the Sierra Club was seeking injunctive relief to prevent the project from moving forward pending an environmental assessment.\textsuperscript{139} A substantial part of the decision hinged on the Sierra Club’s ability to establish standing.\textsuperscript{140}

Hawai'i has a unique perspective on standing in cases pertaining to environmental concerns.\textsuperscript{141} Hawai'i has adopted a three part test to determine if the injury may be addressed by the court.\textsuperscript{142} The court describes this as a shift, easing

\textsuperscript{137} Haw. Admin. R. § 11-200-8 ("Chapter 343, HRS, states that a list of classes of actions shall be drawn up which, because they will probably have minimal or no significant effect on the environment, may be declared exempt by the proposing agency or approving agency from the preparation of an environmental assessment provided that agencies declaring an action exempt under this section shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption. Actions declared exempt from the preparation of an environmental assessment under this section are not exempt from complying with any other applicable statute or rule.").

\textsuperscript{138} Sierra Club v. Dep't of Transp., 115 Haw. 299, 304 (2007).

\textsuperscript{139} Id. at 312.

\textsuperscript{140} Id. at 318-21.

\textsuperscript{141} Id. at 320 (noting "the appellate courts of [Hawaii] have generally recognized public interest concerns that warrant the lowering of standing barriers in ... cases ... pertaining to environmental concerns").

\textsuperscript{142} Id.
standing requirements for cases involving environmental concerns:

this court's opinions have (1) moved from 'legal right' to 'injury in fact' as the ... standard ... for judging whether a plaintiff's stake in a dispute is sufficient to invoke judicial intervention, (2) from economic harm ... to inclusion of 'aesthetic and environmental well-being' as interests deserving of protection, and (3) to the recognition that a member of the public has standing to ... enforce the rights of the public even though his or her injury is not different in kind from the public's generally, if he or she can show that he or she has suffered an injury in fact.143

In the HSF case, the Hawaiʻi Supreme Court found that the Sierra Club had established standing; that they “suffered both threatened injuries under either a traditional injury-in-fact test or procedural injuries based on a procedural right test.”144 Implementing such a test at the national level would likely go a long way to correcting for implicit bias and explicit barriers to environmental interest claims in the federal judicial system.

143 Id. (internal citations, parentheticals, quotation marks, and brackets omitted).

144 Id. at 328 (“The threatened injury in fact is due to DOT's decision to go forward with the harbor improvements and allow the Superferry project to operate at Kahului harbor without conducting an EA. Similarly, the procedural injury is based on the various interests Appellants have identified that are threatened due to the violation of their procedural rights under NEPA. Appellants have also demonstrated that the threatened substantive injuries and procedural injuries were caused by Appellees and may be redressed by this court.”).
The holding in the HSF case illustrates unique values in Hawai‘i. Under the state Constitution,

> [e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.\(^{145}\)

In drafting the state constitution, the legislature clearly valued the environment.\(^{146}\) The legislature went out of its way “to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.”\(^{147}\) These are some of the values that make Hawai‘i special. There is a strong argument that the rest of the nation should follow suit.

\(^{145}\) HAW. CONST. art. XI, § 9.

\(^{146}\) Id. (“[T]he quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.”).

\(^{147}\) HAW. REV. STAT. § 343-1.
In summary, the cases discussed above are merely the tip of the iceberg. The litany of cases continues. For a more complete catalogue of environmental interest cases, see Restoring What’s Environmental About Environmental Law in the Supreme Court.\textsuperscript{148} For a more detailed assessment of the Hawai‘i Superferry, see The Environmental Assessment: Issues Surrounding the Exclusion of Projects Significantly Affecting Hawai‘i’s Fragile Environment.\textsuperscript{149}

d. The Disparate Impact of Restricted Access to the Courts: Weighing Environmental and Business Interest

Focusing again on the national plane and the federal judiciary, there is apparent “doctrinal malleability” in standing for business cases as compared to environmental cases.\textsuperscript{150} “Many scholars have argued” and at least one study has shown that ideology has a significant impact on the implementation of the standing doctrine between these two classes of cases.\textsuperscript{151}

\textsuperscript{148}Richard J. Lazarus, Restoring What’s Environmental About Environmental Law in the Supreme Court, 47 UCLA L. Rev. 703 (2000).


\textsuperscript{150}Warshaw & Wannier, supra note 114 at 317-18.

\textsuperscript{151}See generally Warshaw & Wannier, supra note 114.
The strict standing doctrine as applied in *Lujan* became a
“procedural weapon that gave judges a new tool for eliminating
cases they did not like.”\(^{152}\) Conversely, the doctrinal
malleability has led to a split “in the outcome of standing
cases for business plaintiffs.”\(^{153}\) The split hinges on panels
with Democratic and Republican majorities.\(^{154}\) Prior to the
*Lujan* decision, courts dismissed almost exactly the same
percentage of business cases due to lack of standing.\(^{155}\) After
*Lujan*, Democrat-dominant panels increased their rate of
dismissal compared to Republican panels, which “kept their rate
of standing dismissals relatively unchanged.”\(^{156}\) This data, and
Warshaw and Wannier’s ultimate conclusion is that the strict
standing doctrine has not affected the ability of environmental
interests to “get their day in court.” However, this conclusion
is contradicted by evidence from cases such as the Hawai‘i
Superferry case, where judicial ideology or public policy has
strongly influenced the court. The HSF case provides an example
of a court that is more lenient and permits environmental

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\(^{152}\) Warshaw & Wannier, *supra* note 114 at 317.

\(^{153}\) *Id.*

\(^{154}\) *Id.*

\(^{155}\) *Id.*

\(^{156}\) *Id.*
interest groups to make their case. Nationally, the trend is in the opposite direction.\textsuperscript{157}

While it is not directly related to the judiciary, this tension between business and environmental interests is evidenced in the political arena. Of particular note is the tightrope that politicians have to walk when discussing environmental issues. For instance, in Virginia’s recent gubernatorial race, one candidate was heard calling climate change “a scientific fact” in the same speech in which they stated that EPA regulations to curtail emissions “go too far.”\textsuperscript{158} This contradiction “highlights the increasingly narrow line [politicians] must walk to satisfy environmentalists and campaign donors without alienating business interests.”\textsuperscript{159} These statements seem analogous to the line judges have to walk in determining the permissibility of environmental cases.

V. REPERCUSSIONS OF UTILITY AIR REGULATORY GROUP V. ENVIRONMENTAL PROTECTION AGENCY: THE ENVIRONMENTAL PROTECTION AGENCY’S RESPONSE; WHAT TO EXPECT IN THE FUTURE REGARDING ENVIRONMENTAL INTERESTS

\textsuperscript{157} WRIGHT & MILLER § 8413 Prudential Considerations, 33 FED. PRAC. & PROC. JUDICIAL REVIEW § 8413 (1st ed.).


\textsuperscript{159} Id.
Having explored the general narrowing of accessibility to the courts, and the unique perspective of the Hawai‘i state courts, this section turns to the implications of the UARG decision. It focuses on the implications of overly restricting the EPA’s ability to regulate on the behavior of state governments and the EPA’s reaction to the holding in UARG.

a. The Effects of Replacing the EPA’s Statutory Interpretation

One of the criticisms of the EPA which the Court stated in its opinion was that the EPA had “promulgat[ed] a rule that would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.” The Court then “proceeded to enact an interpretation with similarly dramatic implications of its own accord and without clear doctrinal benchmarks.” In Questioning the Use of Structure to Interpret Statutory Intent: A Critique of Utility Air Regulatory Group v. EPA, Matthew Oakes argues that the decision may have deleterious effects and that it was an abuse of the Court’s power in violation of the “system of checks and balances established by the Constitution.”

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160 UARG, 134 S.Ct. at 2432.
161 See Oakes, supra note 15 at 62.
162 Id.
According to Oakes, there are two substantive reasons we should be wary of the Court's decision.\textsuperscript{163} The first concern, Oakes argues, is the justification for the interpretation that the Court chose:

Justice Breyer argued that narrowing the meaning of MEFs was the most sensible approach, given that it did less violence to the statutory structure. Justice Scalia disagreed, and argued that EPA must instead interpret the term “any air pollutant” to “denote less than the full range of pollutants covered by the Act-wide definition.” There may be still other options that the Agency and the Justices have not explored. Under Chevron, where statutory ambiguity exists, the Court's role is to strike down impermissible statutory interpretations advanced by agencies, not to interpret congressional intent itself. In Brown & Williamson, the Court could at least rely on unusually extensive legislative history in departing from this well-established rule. But in UARG such a history was missing. Instead, the Court somewhat arbitrarily selected an interpretation of its own.\textsuperscript{164}

The second reason to be wary is that it’s unclear that the Court's interpretation should have won out in UARG.\textsuperscript{165} According to Oakes, the UARG Court had four options when reviewing the Tailoring Rule.\textsuperscript{166} First, the Court could “force EPA to follow [the Act]'s unworkable numerical limits, thereby putting

\textsuperscript{163} Id. at 61.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 60.
pressure on Congress to amend the framework it created[.]”\textsuperscript{167} Second, it could “recognize the EPA’s administrative authority to adjust explicit numerical limits consistent with the Agency’s interpretation of congressional intent[.]”\textsuperscript{168} The third option was to “review the statutory framework and other indicia of congressional intent and, if appropriate, invalidate [the] EPA’s approach without establishing a single path forward, leaving it to [the] EPA to propose an alternative[.]”\textsuperscript{169} The final alternative was to “conclusively interpret the statute, foreclosing other potential Agency interpretations.”\textsuperscript{170} The Court ultimately “seemed to conclude that the absurd results flowing from regulation based on the statutory language were analogous to statutory ambiguity, and that some interpretation was therefore appropriate.”\textsuperscript{171}

\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 61.
b. Atlas’ “Race to the Bottom”: Incentivizing Non-Conformance to the Clean Air Act and the EPA’s Inability to Enforce its own Regulations

As mentioned above, politicians and arguably judges are impacted and influenced by these economic interests. This tension essentially equates to a war of interests:

Some scholars have argued that the interests of state environmental enforcers have diverged from those of the EPA because they are more vulnerable to pressures from elected officials or interest groups, pleas of economic hardship from violators, enforcement budget constraints, and too-close relationships between regulators and regulated entities. States have an “inherent economic interest in creating a hospitable business climate compared to other states.” Consequently, “a state might use weaker environmental enforcement to make itself more attractive to industry” at the expense of environmental concerns. Atlas’ fear was that, without a primary theoretical rationale for federal environmental regulation, states might ‘race-to-the-bottom’ in environmental standards.”

Atlas’ “Race-to-the-bottom” refers

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172 See supra § IV(d) – “The emerging law of climate change is becoming clearer.”
174 Atlas, supra note 173 at 942.
175 Id.
176 Id.
to a progressive relaxation of state environmental standards, “likely motivated by interstate competition in order to attract industry, reducing social welfare below levels that would exist otherwise.”\(^{177}\)

According to one study, states were considering imposing smaller penalties on environmental law violators “to encourage industries to locate in their states.”\(^{178}\) The EPA even reported that “states were hesitant to take strong enforcement actions against violators for fear of losing business.”\(^{179}\) Atlas goes on to state:

although states must periodically report information to EPA on their enforcement programs--such as numbers of inspections, violations identified, and penalties assessed--this does not eliminate the information imbalance that facilitates state agents' shirking. The thoroughness of inspections matters at least as much as their mere numbers in assessing the quality of enforcement efforts. In addition, the quantities of violations and penalties do not necessarily indicate how many should have resulted from adequate enforcement, as low numbers could reflect either lackluster enforcement or stringent enforcement that deterred violators or serious offenses. EPA also has very limited resources to monitor possible shirking by state enforcers. Under EPA guidelines, only a few percent of state inspections of regulated facilities are

\(^{177}\) Id.

\(^{178}\) Id. (based on a “substantial percentages of small survey samples of various government and interest group officials claimed that”).

\(^{179}\) Id. at 942.
followed up annually by EPA inspections of the same facilities to check the accuracy of the state's findings.\textsuperscript{180}

Atlas concludes by noting that the EPA is drastically understaffed as it is and that it lacks credibility to enforce its own regulations.\textsuperscript{181}

In the wake of the UARG decision, lax standards, accompanied by lax enforcement strongly indicates that violations of the Act are liable to increase, negatively impacting our environment and going against the very purpose and intent of the Act. If Atlas is correct, then states will continue to incentivize interests that are completely contrary to preservation of the environment, solely in the name of economics.

\textbf{c. The EPA's reaction}

In reaction to the UARG decision, the EPA issued a memorandum.\textsuperscript{182} The memorandum noted the issues addressed by the Supreme Court, including the “Tailoring Rule” and the “Timing Decision.”\textsuperscript{183} It also noted that the Court held the EPA may not

\begin{itemize}
\item[\textsuperscript{180}] Id.
\item[\textsuperscript{181}] Id.
\item[\textsuperscript{183}] Id.
\end{itemize}
treat GHGs “as an air pollutant for purposes of determining whether a source is a major source required to obtain a [PSD] or title V permit.”¹⁸⁴ The EPA expressed its commitment to examining the implications of the Supreme Court’s decision, “including how the EPA will need to revise its permitting regulations and related impacts to state programs.”¹⁸⁵

The memorandum indicated that the EPA intended to act consistently with its understanding of the decision, that it would continue with a modified application process for permits under the Tailoring Rule “Step 2”, and provided “preliminary guidance in response to several questions regarding ongoing permitting requirements for ‘anyway sources’.”¹⁸⁶

d. The emerging law of climate change is becoming clearer.

Ultimately, scholars seem to concur that, if nothing else, the UARG decision is making it easier to predict how courts will treat cases or controversies involving environmental interests.¹⁸⁷ According to one such scholar:

The U.S. Supreme Court's series of climate change and other Clean Air Act decisions authorize the EPA to advance its standards-setting process, and provide general deference to EPA's implementation of [the Act] and other statutory programs. The Court is sending a clear message . . . to restrain judicial

¹⁸⁴ Id.
¹⁸⁵ Id.
¹⁸⁶ Id.
¹⁸⁷ See generally Learner, supra note 43.
Likewise, federal and state courts are opening the door for plaintiffs to assert state common law tort remedies.\textsuperscript{189}

As Howard Learner notes, the picture is becoming clearer for "litigators, federal and state environmental regulatory agencies, businesses, . . . and . . . economic and environmental interests, environmental and public health advocates, and the broader public."\textsuperscript{190} It seems to be clear that the door is shutting on environmental interests and wide open for states and business interests to challenge the EPA or other regulatory groups working on behalf of environmental interests.\textsuperscript{191}

\textbf{VI. Possibilities for Minimizing Implicit Bias Against Environmental Interests}

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{188} Learner, supra note 43.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Cf. Learner, supra note 43 (arguing that the Court has given deference to the EPA: "In UARG, the Court did hold that EPA overreached and exceeded its discretion in one particular respect on the [GHG] emission standards. Rare are the cases like UARG, however, in which EPA's interpretation rises to the level of multiplying by a very large factor a number that is clearly stated in the statute. The Court granted certiorari on only that one limited issue among the array sought by petitioners who were dissatisfied with the D.C. Circuit's opinion in Coalition for Responsible Regulation, Inc. v. EPA. In that decision, the D.C. Circuit, among other things, upheld EPA's Endangerment Finding on the harmful health impacts of [GHG] emissions and upheld EPA's Tailpipe Rule setting [GHG] standards applicable to motor vehicles. In UARG, the Court stated that it "granted six petitions for certiorari but agreed to decide only one question: Whether EPA permissibly determined that its regulation of [GHG] emissions from new motor vehicles triggered permitting requirements under [the Act] for stationary sources that emit [GHGs].")
\end{footnotesize}
\end{flushleft}
Perhaps the strongest argument for correcting the implicit bias against environmental interests in the federal judiciary is the creation of federal environmental courts. Other nations and states have implemented environmental courts. The benefits of these courts are that it alleviates pressure from civil and criminal courts and allows all of the affected courts to focus more keenly on the areas of law in which they would practice. Consequently, all officers of the court end up being better suited, zealous advocates for their clients or for the establishment in general. A couple of prime examples of whether this has been effective are Australia and New Zealand.

Throughout a legislative process to “introduce planning measures and development conditions designed to ensure adaptation to climate change impacts,” many cases have come before environmental courts. “The decisions in these cases contribute to a growing body of climate change law dealing with the permissible scope of adaptation strategies at the local level.”

Because the cases are environmental in nature, the environmental courts are better suited to hear them. An

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194 Id.
195 Id.
example of an environmental case is in Australia is Charles & Howard Pty Ltd v Redland Shire Council, which involved “an application to fill land that was approved by the Redland Shire Council subject to a condition requiring works to be undertaken only in an area above the 1-in-100-year flood level.”

Specialized courts are not a new phenomenon. The United States Tax Court is a prime example of a specialized court that has been successful. Additionally, such a court facilitates the expertise alluded to above. Additionally, such a court would provide for uniformity and consistency in the decisions.

Whitney’s comparative study focuses on the successes and failures of the tax court. He concedes that “[e]nvironmental issues are probably more complex and specialized than tax issues, and hence courts having special expertise appear to be highly desirable, if not absolutely necessary.” Additionally, as Whitney notes, we have reached a point of crisis based on workload, “which could be relieved to some extent by assigning the large and increasing volume of uniquely time-consuming environmental cases to these special courts.”

\[\text{\textsuperscript{196} Id.} \]
\[\text{\textsuperscript{197} Scott C. Whitney, The Case for Creating a Special Environmental Court System, 14 WM. \& MARY L. REV. at 476.} \]
\[\text{\textsuperscript{198} Id.} \]
\[\text{\textsuperscript{199} Id. at 477.} \]
\[\text{\textsuperscript{200} Id. at 486.} \]
\[\text{\textsuperscript{201} Id.} \]
\[\text{\textsuperscript{202} Id. at 522.} \]
\[\text{\textsuperscript{203} Id.} \]
importantly to the instant matter is that the courts would then be able to focus on purely environmental issues and deliberate over and adjudicate the matters purely in the interests of law to the exclusion of any form of bias.

One final, but very important point from Whitney’s article is that “Supreme Court review should be narrow”. While Whitney claims this is “so as to reduce the workload and assure expertise”, SCOTUS’ role really needs to be minimized because they are probably the biggest part of the problem when it comes to implicit bias against environmental interest groups. Whitney’s proposed structure would also “likely avoid the conflicting decisions . . . which presently exist to a serious degree in environmental matters.” Such a system of environmental courts would be likely to function more expeditiously than regular courts and maximize public confidence in the soundness and promptness of environmental decisions.”

VII. Conclusion

This note has attempted to highlight behavior of the federal judiciary that indicates there is implicit bias restricting the access of environmental interest groups to federal courts. Most recently, this bias was evidenced by the
Supreme Court of the United States in the UARG decision, which manipulated the statutory interpretation doctrine known as the *Chevron* test. Effectively, UARG highlights how bias in the judiciary narrows access to the courts and stacks the deck against environmental interest groups.

Even if the groups’ claims pass the threshold test of standing and are heard, there is a theme throughout the judiciary, especially at the Supreme Court, to hold in favor of business or national security interest at the expense of our environment—often without reason. The courts appear to be willing to manipulate legal doctrines purely for the sake of spite.

Much of this bias may be due to sociological, ideological, or political factors. As sociological studies have indicated, environmentalists and environmental groups are often associated with labels or stigmas such as “hippies” and “tree-huggers.” Despite being a mis-categorization, these stigmas in turn likely hinder the efforts of the advocates. Additionally, there is a strong argument that ideology plays a distinct role in pre-determining the outcome of a case. Finally, judges, like politicians, are susceptible to the political winds.

The cases at issue brought to light the strict standard for standing that is applied nationally and contrasted it with the more lenient standard in Hawai‘i—another illustration of the
effects of ideology on the outcome of cases. There are many more cases that show the same recurring themes.

Finally, this note attempted to highlight a plausible alternative to the current system that might help resolve the issue of implicit bias against environmental interest groups in the federal judiciary. Implementation of a federal environmental court system would allow for even-handed, unbiased adjudication of cases and controversies arising from environmental disputes. It would facilitate more expertise in the area, while alleviating pressure on the other courts.

While this appears to be a solid solution, the state of Hawai‘i seems to have achieved sound balance in adjudicating environmental matters simply based on its constitutional provisions and under the guidance of the legislature. A shift in ideology may be all we need to eradicate the implicit bias against environmental interest groups.