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The Rehnquist Court and the Pollution Control Cases: Anti-Environmental and Pro-Business?

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The nearly physical revulsion many conservatives feel for environmental groups and values, and their reflex action to protect business being encroached upon, threaten to wipe out all the gains that preceded this Court. Raw political partisanship that sees the [Rehnquist] Court side with business interests is most apparent in environmental cases. The courts are in lockstep with the Right’s attempts, outside the courts, to weaken the enforcement of environmental laws.1

The above quote is but one of many that, with respect to the environment, serve as a damning indictment of the Rehnquist Court as an anti-environmental,2 pro-business3 Supreme Court, one that was openly hostile towards environmental statutes and regulations4 and biased against environmental plaintiffs, particularly environmental public interest groups that sought redress by filing citizen suits in federal court.5 Are

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2 See, e.g., Daniel A. Farber, Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law, 81 MINN. L. REV. 547, 568 n.101 (1997) (“Particularly during the Rehnquist Court, the Justices have sometimes seemed ‘out of sync’ with the general public, which has adopted environmentalism as a consensus value.”); Christine A. Klein, The Environmental Commerce Clause, 27 HARV. ENVTL. L. REV. 1, 4 (2003) (asserting after an evaluation of natural resources cases that “the modern Court has been consistently hostile to environmental regulation”); Richard J. Lazarus, Restoring What’s Environmental About Environmental Law in the Supreme Court, 47 UCLAL. L. REV. 703, 716-17 (2000) (“Chief Justice Rehnquist, for instance, has a reputation in the environmental community for being unsympathetic to environmental protection concerns. There is some basis for that reputation in many of his votes.”); Jeffery G. Miller, The Supreme Court’s Water Pollution Jurisprudence: Is the Court All Wet?, 24 VA. ENVTL. LR. 125 (2005) (noting in a critique of Supreme Court’s Clean Water Act cases that “[s]ome of my environmental colleagues have long lamented that the Supreme Court is anti-environmental.”).

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

4 See, e.g., Albert C. Lin, Erosive Interpretation of Environmental Law in the Supreme Court’s 2003-2004 Term, 42 Hous. L. REV. 565 (2005) (arguing that the environmental cases decided during the October 2003 Term of the Rehnquist Court “continue a trend in the gradual, but discernable, erosion of environmental law and of governmental authority to address environmental concerns”).

5 See LISA KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW 66 (2001) (criticizing the Rehnquist Court’s standing decisions in environmental citizen suit cases by concluding that ‘by skewing Article III in such a backward-looking manner, the Court stifies the evolution of environmental law so that it cannot deal effectively with the magnitude of modern environmental problems’).
such negative assertions, however, about the environmental record of the Rehnquist Court, and the troubling questions they raise concerning fairness by our court of last resort, accurate?

In an effort to answer this important question regarding the Supreme Court’s environmental jurisprudence, this Article examines a substantial segment of the Court’s environmental opinions – specifically, a number of the cases decided by the Court under the “pollution control” statutes during the leadership of William H. Rehnquist as Chief Justice. An assessment of every case decided by the Rehnquist Court under all federal environmental statutes is too much to consider in one article, but the cases decided under the pollution control statutes collectively form a manageable yet substantial part of the Supreme Court’s overall historical environmental record, since the Court during the Rehnquist era decided close to twenty-five cases where the underlying issues arose under one or more of these statutes. Thus the focus of this Article is the Rehnquist Court decisions arising from the pollution control statutes, in particular those primarily involving challenges by business interests and suits brought by environmental groups. By focusing on these cases I seek to answer the question initially posed and that is whether the Rehnquist Court is properly characterized as pro-business and anti-environmental.

My analysis of these key pollution control cases leads to the conclusion that the Rehnquist Court was not anti-environmental or pro-business nor was the Court during his tenure as Chief Justice, from 1986 to 2005, openly hostile towards environmental plaintiffs or the environmental regulatory structure. Despite the assertions to the contrary, the analysis I have conducted of important cases involving the construction and application of the pollution control statutes shows that the Rehnquist Court preserved

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these statutes against a number of aggressive attacks that, if successful, would have resulted in a significant blow to the very foundation of federal environmental protection. Instead, despite facing a number of challenges on a variety of grounds, it is because of the Rehnquist Court that these statutes remain intact and in full force today as an indispensable component of federal statutory-based environmental protection. As such, the analysis of the cases I present casts serious doubt on the proposition that the Rehnquist Court was clearly anti-environmental protection and pro-business in resolving cases arising under the pollution control statutes.

No analysis of the Rehnquist Court can ignore the new life that federalism found in the Supreme Court during his term as Chief Justice, and indeed federalism has relevancy to the Court’s treatment of cases arising under the pollution control statutes. Not only has federalism been implicated in some of the pollution control cases decided by the Rehnquist Court, but the rebirth of federalism during his tenure as Chief Justice also served to fuel the contention that the Rehnquist Court was an anti-environmental Court. Thus, Part I of this Article provides an overview of federalism in the Rehnquist Court and the significance of its reemergence to the pollution control cases and statutes. Part II focuses on several of the major pollution control cases decided by the Rehnquist Court and discusses how the Court’s decisions in those cases was influenced by federalism to achieve a balance between competing federal and state interests in not only pollution control but also corporate law and land use planning. Part III examines a principle closely tied to federalism, the doctrine of preemption, and analyzes how the Court rejected preemption challenges to state and local pollution control regulations to further maintain the delicate balance that exists between our dual sovereigns, the federal and state governments. Part IV discusses pollution control cases that implicated neither federalism nor preemption, and evaluates how through its approach to statutory interpretation the Rehnquist Court preserved critical aspects of pollution control statutes from statutory construction-based challenges.

INTRODUCTION

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

William H. Rehnquist served as the 16th Chief Justice of the Supreme Court for 19 of his 33 years on the Court until his death in 2005. Justice Thurgood Marshall who was in frequent disagreement with Rehnquist in a number of cases heard during the Rehnquist era, nonetheless, described him as “a great Chief Justice.” Rehnquist’s successor and former law clerk, current Chief Justice John G. Roberts, Jr., agreed with Justice Marshall,
and said in memoriam that “Chief Justice Rehnquist is a towering figure in American law, one of a handful of great Chief Justices.”12 Another of his former law clerks portrayed Chief Justice Rehnquist as a man who “treated everyone alike – the powerful and the ordinary. He knew the name of virtually every Court employee, and when he saw a new employee, he would introduce himself as ‘Bill Rehnquist.’ He always remembered that person’s name.”13

The era of the Rehnquist Court began on September 26, 1986,14 when Rehnquist, then an Associate Justice, took the oath to serve as the Chief Justice after the Senate voted 65 to 3315 to approve his nomination by President Reagan.16 This new era of the Supreme Court also roughly coincided with the completion by Congress of the full spectrum of the statutes that serve today as the foundation of federal statutory-based environmental protection.17 As a consequence of this confluence of a presidential nomination and a period of intense congressional legislative action, the Rehnquist Court, unlike any other in the history of the Supreme Court, was presented with the unique opportunity on multiple occasions from 1986 until 2005 to shape and guide federal environmental law through the Court’s approach to statutory interpretation and application of core constitutional principles to this new body of federal environmental legislation. And the

[16] Originally nominated to the Court by President Nixon, William H. Rehnquist was an Associate Justice for 14 years prior to becoming Chief Justice. See Thomas M. Keck, The Most Activist Supreme Court in History 115 (2004) (providing that Justice Rehnquist “took his seat on the bench in 1972”). As has been well-documented, the nomination by President Reagan of Rehnquist to serve as Chief Justice was quite controversial. See generally Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law 17–32 (2005). The 33 votes opposing his nomination were the highest number of negative votes that any nominee had ever received to serve on the Court as either an Associate Justice or Chief Justice, but was later surpassed in terms of negative votes by the 52 to 48 margin in the Senate when it barely confirmed Judge Clarence Thomas as an Associate Justice. Id. at 32.
Rehnquist Court did decide a rich diversity of cases under virtually every one of the pollution control statutes, including the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, CERCLA, the Emergency Planning and Community Right-to-Know Act and the Federal Insecticide, Fungicide, and Rodenticide Act.\(^\text{18}\)

True, federal environmental statutes did exist prior to the Rehnquist Court,\(^\text{19}\) however, it was only following a focused, intense period of congressional action, spanning two decades, that truly meaningful environmental statutes were enacted at the federal level.\(^\text{20}\) This wave of new federal environmental legislation required an independent federal agency to administer the nascent statutory regime through the development of implementing regulations and policy. This administrative need led to the creation of the Environmental Protection Agency (“EPA”), where for the first time a coordinated regulatory effort targeting environmental protection found a home in a single, stand alone federal agency within the Executive Branch.\(^\text{21}\)

The environmental statutes enacted by Congress, an entirely new and complex corpus of laws, coupled with the equally, if not more so, complicated body of regulations promulgated by the EPA,\(^\text{22}\) provided ample opportunities for tensions to develop between various constituencies subject to the new statutes and regulations, as well as public interest groups seeking to broaden the reach of federal environmental protection where it was perceived that Congress or the EPA fell short of adequately protecting or enhancing the environment. The tensions and competing interests that arose from the novel federal environmental statutes and their implementing regulations, of course, often resulted in the initiation of litigation in an effort to clarify and control the direction of environmental law on a scale never seen before in the federal courts. As a result of such litigation under this new body of laws and regulations, over time a number of these cases eventually found their way to the Supreme Court, and the Rehnquist Court had before it almost every term cases involving the meaning of a particular federal environmental statute or whether EPA action or inaction was consistent with congressional intent.

\(^{18}\) See cases cited supra, note 7.


\(^{21}\) Prior to the establishment of the EPA, to the extent that there were federal regulatory efforts focusing on environmental issues, such efforts were diffuse and spread among a variety of federal agencies. One goal in creating the EPA was to centralize efforts targeting environmental issues and relocate much of these efforts in a single agency. Ash Council Memo, Apr. 29, 1970, www.epa.gov/history/org/origins/ash.htm (last visited Feb. 22, 2007).

\(^{22}\) See E. Donald Elliot et al., Toward a Theory of Statutory Evolution: The Federalization of Environmental Law, 1 J. L. ECON. & ORG. 313, 317 (1985) (recognizing that the “network of national [environmental] statutes – together with a much larger body of implementing regulations promulgated by the Environmental Protection Agency – now constitutes one of the most pervasive systems of national regulation known to American law.”).
It is also true that the Supreme Court decided a number of truly historic environmental cases well before the Rehnquist Court, and in fact well before Rehnquist served on the Court as an Associate Justice. 23 Prior to the establishment of the federal statutory-based environmental protection regime, however, the environmental cases the Court was asked to decide were, by and large, federal common law-based claims and were not grounded in any particular environmental-focused statute or regulation. Thus at no other time in the history of the Court, until the Rehnquist Court, were the Justices regularly considering cases Term after Term that required the need to interpret federal environmental legislation.

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

B. The Power to Influence the Direction of the Court

Before delving into the specific key pollution control cases decided by the Rehnquist Court and analyzing why those cases do not support the claims that the Rehnquist Court was pro-business and anti-environmental, one preliminary question to ask is whether it is even proper to refer to the Supreme Court as the “Rehnquist Court” or otherwise denote the Court as being under the influence to any major degree of a particular Chief Justice. After all, the Supreme Court consists of the Chief Justice and eight Associate Justices and each member has one vote. That is, the Chief Justice’s vote counts for no more than any other member’s vote.24 The Associate Justices, moreover, just as the Chief Justice, have been nominated by the president, approved by a majority of the Senate and, perhaps most important in terms of susceptibility to influence, “shall hold their Offices during good Behaviour . . .”25 or as is more commonly asserted concerning members of the federal judiciary, they essentially serve lifetime appointments in their positions as judges or

24 See Theodore W. Ruger, The Judicial Appointment Power of the Chief Justice, 7 U. PA. J. CONST. L. 341, 349 (2004) (stating that “[t]he standard attitudinal model that has predominated until recently among empirical political scientists who study the Court ascribes no special weight to the Chief Justice’s vote, instead treating it as one of nine equal covariates for modeling purposes”).
justices. Thus, the ability of the Chief Justice to sway the other members of the Court to a particular point of view may appear quite limited.

The ability of the Chief Justice to influence the direction and decision-making of the Court, however, should not be underestimated,26 despite the fact the Court is composed of eight other independent legal thinkers. The specific powers that William Rehnquist as the Chief Justice would, and did, possess were well summarized during the deliberations in the Senate over his nomination to lead the Supreme Court:

The Chief Justice heads the third branch of our Government. He heads the judicial conference of the United States, composed of all Federal judges. He appoints committees which make policy for our federal courts. He chairs the board of the Federal Judicial Center, which does research, training, and education for our Federal courts. He literally manages the Supreme Court.

He presides over the Court sessions and decisionmaking meetings of the Court. When he is in the majority he assigns opinions to the Justice who is to write them. The Chief Justice serves as a symbolic head of the Federal court system. He holds the highest judicial office in our Nation. This is more than another judicial appointment.

He occupies the pinnacle of judicial power in our country.27

There are several ways that the Chief Justice can affect the direction of the Court and influence its members. Not only does the Chief Justice when in the majority determine who among his colleagues will author the Court’s opinion,28 but also “is expected to retain for himself some opinions that he regards as of great significance,”29 and certainly Chief Justice Rehnquist did pen a number of his era’s most significant opinions or was among the majority in such cases, and included among such opinions are a number of important pollution control cases.30

26 See Proceedings and Debates of the 99th Congress, 2d Sess., on the Nomination of William H. Rehnquist to be Chief Justice of the United States, 132 CONG. REC. 16, 22795 (Sept. 11, 1986) (“We are talking about the second most important person in America, heading one of the three coequal branches of the Government.”) (statement of Sen. Biden).
28 See id. at 22811 (recognizing that “[t]he role of assigning opinions gives the chief power over the other Justices, whose place in history once they ascend the Court is determined by when and what they write.”) (quoting Herman Schwartz, Chief Rehnquist?, THE NATION, Sept. 20, 1986).
In addition to the varied powers described above, the Chief Justice also has significant say concerning the very cases that the Court will consider by deciding which, out of the thousands of petitions received by the Court each year, will be the few petitions for certiorari that the Justices discuss at their weekly conferences while the Court is in session. Those “cert” petitions that are neither selected nor discussed are consequently denied, thereby upholding the determination by the courts below. Lastly, the Chief Justice holds a uniquely important symbolic position in our nation as well:

The Chief Justice not only serves longer than any President, but he and his colleagues exercise power limited only by their consciences and principles. The Chief stands as a metaphor for justice in our society more than any other individual, including the President of the United States of America, or any U.S. Senator or Congressman. The Chief symbolizes the guarantee of equal protection under law, equal justice under the law, for all Americans. And that is not just an arcane legalism. It is the embodiment of the fundamental purpose of our entire judicial system.

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

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31 See also Ruger, supra note 24, at 350 (“[T]he Supreme Court’s adjudicative function does not capture exclusively, or even primarily, the full extent of the modern Chief Justice’s power. Much of the Chief’s unique authority is administrative and bureaucratic . . . such as presiding over the Federal Judicial Conference.”).
32 See REHNQUIST, supra note 29, at 253-54. After reviewing the list of petitions for certiorari that the Chief Justice has selected the Associate Justices may also have other petitions added for consideration at conference. Id. at 265.
33 Id.
35 Id at 22799.
36 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).
37 See infra at part I.
C. The End of an Era

While the era of the Rehnquist Court ended with his death on September 3, 2005, given the confluence of the federalization of environmental law and his leading the Court for almost 20 years as Chief Justice, the legacy of the Rehnquist Court’s impact on environmental law and its development will undoubtedly leave its mark on the Court. The precedent and approach to deciding environmental cases established by the Rehnquist Court will guide and inform the hand of future Supreme Courts, including the John Roberts-led Supreme Court, as it faces the challenges attendant to cases that arise under the various federal environmental statutes, including the pollution control statutes.


A. The Renewal of Federalism

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

Once William H. Rehnquist ascended to Chief Justice, the new vigor that federalism enjoyed was perhaps predictable if one looked to his dissent as an Associate Justice in *Garcia v. San Antonio Metropolitan Transit Authority*. He asserted his strongly held federalism beliefs in *San Antonio Metropolitan Transit Authority* while vehemently disagreeing with the majority for overruling *National League of Cities v. Usery*, which only a few years earlier had held that the enforcement against the states of the minimum wage and overtime provisions of the Fair Labor and Standards Act “in areas of traditional governmental functions” was beyond the scope of powers granted to Congress under the Commerce Clause. Demonstrating the utmost self-assurance in his federalism convictions, as well as predicting the not too distant future direction of the Court, Rehnquist wrote “... *National League of Cities* ... recognized that Congress could not act under its commerce power to infringe on certain fundamental aspects of state sovereignty ... I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.” He thus boldly predicted in his dissent what would become a hallmark of the Court under his guidance as Chief Justice; namely, that the Court would not hesitate to assert its constitutional authority as a co-equal branch of government.

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49 *Id.* at 852.
50 *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579–580 (Rehnquist, J., dissenting). In another dissent written while an Associate Justice, Rehnquist also made plain his belief in federalism and the role of the federal courts as a limit on national power. *See Fry v. United States*, 421 U.S. 542, 553, 559 (1975) (“In this case ... the State is not simply asserting an absence of congressional legislative authority, but rather is asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressional asserted authority ... [s]urely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments.”) (Rehnquist, J., dissenting).
which readily stood by to serve as a check on the power Congress could assert against the states and their citizens.\(^{51}\)

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

> But the framers of the United States Constitution quite clearly had in mind something different than the British system: They wanted the judges to be independent of the president and of Congress, but in all probability they also wanted the federal courts to be able to pass on whether or not legislation enacted by Congress was consistent with the limitations of the United States Constitution.\(^{52}\)

He further wrote that:

> The framers of our system of government may indeed have built perhaps better than they knew. They wanted a Constitution that would check the excesses of majority rule, and they created an institution to enforce the commands of the Constitution . . . Two hundred years of experience now tell us that they succeeded to an extraordinary degree in accomplishing their purpose. We cannot know for certain the sort of issues with which the Court will grapple in the third century of its existence. But there is no reason to doubt that it will continue as a vital and uniquely American institutional participant in the everlasting search of civilized society for the proper balance between liberty and authority, between the state and the individual.\(^{53}\)

Having expressed these views in his book *The Supreme Court*, which was published shortly after he became Chief Justice, the role Rehnquist recognized of a proactive Judicial Branch that decided “whether or not legislation enacted by Congress was consistent with the limitations of the United States Constitution” was a role pursued by the Rehnquist Court with a new vigor unseen for decades in the Supreme Court.\(^{54}\)

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\(^{51}\) See Erwin Chemerinsky, *The Constitutional Jurisprudence of the Rehnquist Court, in The Rehnquist Court: A Retrospective* 197 (Martin H. Belsky ed., 2002) (“The most dramatic area of change in the law during the Rehnquist Court has been in the protection of federalism. Indeed, the Court has shown little deference to Congress in matters of federalism, and has aggressively protected the states from perceived federal encroachment.”).

\(^{52}\) REHNQUIST, *supra* note 29, at 306.

\(^{53}\) *Id.* at 319.

\(^{54}\) See Keck, *supra* note 16, at 2 (noting that with Rehnquist as Chief Justice the Court “has been the least deferential of any in the history of the U.S. Supreme Court, striking down thirty provisions of federal law from 1995 to 2001” and concluding that these statutes “ten years ago, would have been deemed perfectly constitutional without any serious question.”).
B. An Overview of the Rehnquist Court’s Federalism and the Implications for the Pollution Control Statutes

The revitalization of federalism by the Rehnquist Court, although perhaps predictable, was nonetheless surprising because the concept that there were truly enforceable constitutional limits on congressional power with respect to economic regulation was widely viewed as having been resolved many decades ago by the Supreme Court during the period of New Deal legislation.\(^{55}\) As a result of the evolution of cases challenging Depression era congressional action taken in the pursuit of President Roosevelt’s legislative agenda, it was long accepted constitutional doctrine that there was in effect few, if any, actual limits on congressional action involving economic regulation, so long as such action rested upon a rational basis.\(^{56}\) Through its revitalization of federalism as a viable constitutional doctrine the Rehnquist Court challenged this many decades old, conventionally accepted wisdom.

The constitutional sources of the limitations on congressional power recognized by the rebirth of federalism in the Rehnquist Court included the Commerce Clause,\(^{57}\) Tenth Amendment\(^{58}\) and Eleventh Amendment.\(^{59}\) The Court’s new found appreciation of federalism through each of these constitutional sources raised questions about the direction of the Court and, of particular relevance to this Article, concerns about the impact the reemergence of federalism could have on the validity of the pollution control statutes enacted by Congress.\(^{60}\)

\(^{55}\) See Wickard v. Filburn, 317 U.S. 111 (1942) (upholding application of the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat not sold nor purchased in interstate commerce.); United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act under the Commerce Clause); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (affirming the power of Congress under the Commerce Clause to authorize the NLRB to enjoin unfair labor practices.). See also W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wages for women and children against due process challenge.).

\(^{56}\) See, e.g., Hodel v. Indiana, 452 U.S. 314, 323–24 (1981) (“A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce or that there is no reasonable connection between the regulatory means selected and the asserted ends.”).

\(^{57}\) See, e.g., Percival, supra note 17, at 1165 (explaining that the Rehnquist Court is “rethinking basic principles of federalism, which ultimately could limit federal authority to protect the environment”); Revesz, supra note 17, at 557–58 (noting that “the Supreme Court’s recent federalism jurisprudence is likely to constrain the federal government’s regulatory authority”). See also Jamie Y. Tanabe, Comment, The Commerce Clause Pendulum: Will Federal Environmental Law Survive in the Post-SWANCC Epoch of “New Federalism”? , 31 ENVTL. L. 1051, 1053 (2001) (“In the past decade, however, the Supreme Court has taken a closer look at Congress’s exercise of its Commerce Clause power and has invalidated several federal laws for violating basic principles of federalism.”).

\(^{58}\) See, e.g., Vicki C. Jackson, Federalism and the Uses and Limits of Law: Printz and Principle? 111 HARV. L. REV. 2180, 2205 (1998) (noting that the effect of the Printz decision on the validity of a range of statutes, including several environmental statutes, was unclear.).

\(^{59}\) The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity . . . against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

1.  The Commerce Clause

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

Chief Justice Rehnquist quickly established the foundation for his Commerce Clause position in Lopez by quoting from the Federalist Papers: “As James Madison wrote, ‘the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.’” Rehnquist then went on to examine the nature of the power historically delegated to Congress under the Commerce Clause, and he found that Congress could regulate three types of activities: “[f]irst . . . the use of the channels of interstate commerce . . . [s]econd . . . the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . [and f]inally . . . those activities that substantially affect interstate commerce.” In light of those three categories of economic activities that Congress could regulate under the Commerce Clause, Chief Justice Rehnquist concluded that the Gun-Free School Zones Act was an effort by Congress to regulate within the third category of economic activity or an activity that substantially affects interstate commerce. Then considering the merits of the statute the majority, by a vote of 5 to 4,

63 Id. § 922(q)(1)(A).
64 Lopez, 514 U.S. 549, 561.
65 Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 SUP. CT. REV. 125, 128–29 (1995). According to Professor Lessig prior to Lopez the last time Court had struck down an act of Congress under the Commerce Clause was in Carter v. Carter Coal Company, 298 U.S. 238, 303–304 (1936), where the Court invalidated a statute regulating unfair labor practices in the coal industry as the regulation of “mining” and “production,” and not “commerce.” Id. at 129. See also DAVID L. HUDSON, JR., THE REHNQUIST COURT UNDERSTANDING ITS IMPACT AND LEGACY 60 (2007) (“The Lopez decision was a watershed as it was the first time in more than 60 years that the Court had invalidated a federal law as exceeding Congress’s commerce clause power.”).
67 Lopez at 558-59. (internal citations omitted).
68 Id. at 559.  Justice Rehnquist reasoned:
found that the Gun-Free School Zones Act was “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms,” and for the first time since the New Deal the Supreme Court held that a statute was beyond the Commerce Clause powers granted to Congress.69

*Lopez* caused immediate concern regarding the scope of its holding.70 With respect to the pollution control statutes, in particular, did Congress have the constitutional basis to establish and impose upon the states a federal environmental protection program, if Congress could not enact legislation to address situations where:

> [F]our percent of American high school students (and six percent of inner-city high school students) carry a gun to school at least occasionally . . . 12 percent of urban high school students have had guns fired at them . . . 20 percent of those students have been threatened with guns, and . . . in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools.71

Thus concerns were heightened following *Lopez* that the entire infrastructure of federal environmental protection was vulnerable to Commerce Clause challenges since Congress was powerless under the Commerce Clause to regulate guns near schools, despite the abundant evidence about the prevalence of guns and gun violence at or near schools.72

2. *The Tenth Amendment*

The Rehnquist-led Court also expanded the reach of federalism through the use of the Tenth Amendment73 as another means to establish that the Court was poised to assert its authority to protect states from what it believed were unwarranted intrusions by Congress upon the states as separate sovereigns. *Printz v. United States*74 illustrates this aspect of the Rehnquist Court’s new found federalism where local law enforcement officials claimed as unconstitutional under the Tenth Amendment the enforceability of certain

The first two categories of authority may be quickly disposed of: [The Gun-Free School Zones Act] is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can [it] be justified as a regulation by which Congress sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if [the Act] is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

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69 *Id.* at 561.
70 *Id.* at 630 (recognizing that one of the problems with the majority’s holding “is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled”) (Breyer, J. dissenting).
71 *Id.* at 619 (Breyer, J., dissenting) (internal citations omitted).
72 See Michel C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161, 2184 (2001) (finding that the decisions in *Lopez* and *Morrison* “threaten[] federal regulatory competence in areas of clear national importance—such as environmental protection . . .”).
73 The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend X.
Brady Handgun Violence Protection Act provisions. Writing for the majority Justice Scalia found that the statute “purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.” As such, he concluded that the challenged provisions of the Brady Act were an unconstitutional “federal commandeering” that violated the Tenth Amendment by requiring state officials to implement a federal program. Paying special reverence to the sovereignty of the states, Justice Scalia recognized:

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

Although Printz struck down a law not even remotely related to the pollution control statutes, a discussion of particular importance to the federal environmental regulatory scheme was included in the majority opinion where Justice Scalia observed that:

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

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76 Printz, 521 U.S. 898, 904. For a critique of Justice Scalia’s approach in Printz, see Jackson, supra note 58, at 2180 (arguing in part that the conclusion reached in Printz invalidating a portion of the Brady Act has little support as a matter of constitutional history).
77 Id. at 925. In finding a constitutional violation the Court relied heavily on New York v. United States, 505 U.S. 144 (1992), which found inconsistent with the Tenth Amendment a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 requiring states to either adopt legislation regulating the disposal of radioactive waste generated within a state or, in the absence of state regulations, to take title to the radioactive waste because it was an attempt to “compel the states to enact or administer a federal regulatory program.” Id. at 188.
78 Printz at 928 (internal citations omitted).
79 Id. at 925 (internal citations omitted).
Following so close on the heels of *Lopez*, Justice Scalia’s discussion in *Printz* of the early constitutional challenges faced by certain regulations adopted by the EPA in an effort to implement the mobile source provisions of the Clean Air Act raised additional concerns about the viability of at least some of the pollution control statutes under the Court’s expanding federalism jurisprudence. After *Printz* were there valid arguments under the Tenth Amendment that part or all of the pollution control statutes, with their heavy reliance on cooperative federalism, amounted to a prohibited commandeering of the states to implement a federal environmental regulatory program? By specifically referring to the prior constitutional threats to EPA air pollution control regulations was Justice Scalia signaling that the Court might provide a receptive audience to renewed challenges to certain environmental statutes or regulations based on *Printz*? Just how far would the Court go if presented with an argument that particular environmental statutes violated the Tenth Amendment? Given such uncertainties attendant to the revitalization of federalism, *Printz* served to further heighten concerns that federalism under the Rehnquist Court was growing in scope and might serve as the basis to attack at least portions of the federal environmental regulatory scheme.

3. *The Eleventh Amendment*

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

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

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80 See id. at 961 (questioning whether the majority opinion could lead to the invalidation of pollution control statutes, including the Clean Water Act and RCRA) (Stevens, J., dissenting).
81 The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by Citizens or subjects of any Foreign State.” U.S. CONST. amend. XI.
84 *Seminole Tribe of Fla. v. Fla.*, 11 F.3d 1016, 1019 (11th Cir. 1994).
85 *Seminole Tribe*, 517 U.S. 44, 72. The Court also found that the doctrine allowing suit in federal court against state officials to enjoin further violations of federal law espoused in *Ex parte Young*, 209 U.S. 123 (1908), did not provide an alternate basis to support the Seminole tribe’s suit. *Seminole Tribe* at 73–76.
As a result of the decisions by the Rehnquist Court in cases including _Lopez_, _Printz_ and _Seminole Tribe_,\(^8^6\) growing unease surrounded the breadth of the Rehnquist Court’s federalism including what it could mean for the pollution control statutes and the other federal statutes geared towards protecting the environment.\(^8^7\) Undoubtedly this apprehension concerning how far the Rehnquist Court would extend its newly found federalism lent support to the proposition that the Court during this time was anti-environmental and pro-business.\(^8^8\)

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\(^8^6\) One aspect important in terms of the pollution control statutes is that _Seminole Tribe_ expressly overruled _Pennsylvania v. Union Gas_, 491 U.S. 1 (1989), where only 5 years previously the Court had found that private parties could sue states under CERCLA, 42 U.S.C. §§ 9601–9675 (2000), to recover costs incurred in the cleanup of contaminated property because Congress had expressly waived the sovereign immunity of states under this pollution control statute. _See Seminole Tribe_, 517 U.S. at 66 (“We feel bound to conclude that _Union Gas_ was wrongly decided and that it should be, and now is, overruled.”). This aspect of the _Seminole Tribe_ decision is discussed infra part II.C.

\(^8^7\) _See supra_ note 57.

\(^8^8\) The politics in existence during the Rehnquist-era no doubt added to the perception that the Rehnquist Court was part of a federal government that had turned anti-environmental and pro-business. William Rehnquist had been nominated to the Court by Republican president Richard Nixon, _see supra_ note 16, and selected for Chief Justice by yet another Republican president, Ronald Reagan, _see id_. Rehnquist had served as Chief Justice for several years when the Republicans ultimately won majorities in both houses of Congress and proposed the party’s “Contract With America,” which among other government reforms focused on reducing regulations that were perceived as making businesses less competitive and more costly. _See_ John Cushman, Jr., _Republicans Plan Sweeping Barriers to New Rules_, _N.Y. Times_, Dec. 25, 1994, at 11 (reporting that pursuant to the Contract with America the newly elected Republican House majority planned to adopt legislation that would reduce dramatically the costs to business of complying with federal regulations.). This directly implicated federal environmental regulatory programs, and raised a concern that the Republican led Congress would rollback decades of environmental protection. _See id_. (noting that action taken to further the goals of the Contract with America “would fundamentally alter the workings of agencies like the Environmental Protection Agency”). It was also during the era of the Rehnquist Court that another Republican was elected president, George W. Bush, with a significant contribution towards his election by the Supreme Court’s decision in _Gore v. Bush_, 531 U.S. 98 (2000). The second President Bush almost instantaneously achieved a reputation as leading a pro-business, anti-environmental administration. _See, e.g._, Patrick Parenteau, _Anything Industry Wants: Environmental Policy Under Bush II_, 14 DUKE ENVT. L. & POL’Y F. 363 (2004) (“My view is that this administration has compiled the worst environmental record of any administration in history.”); John Bacon and Traci Watson, _EPA Plans to Ease Pollution Limits_, _U.S.A. TODAY_, Dec. 21, 2001, at 3A (“The Environmental Protection Agency is close to allowing scores of the nation’s oldest power plants and oil refineries to emit more air pollution . . . the Bush Administration claim[s] the regulation prevents refineries and power plants form doing routine maintenance”); Bruce Barcott, _Changing All the Rules: How the Bush Administration Quietly – and Radically – Transformed the Nation’s Clean-Air Policy_, _N.Y. Times_, Apr. 4, 2004, (Magazine), at 38, 40 (asserting that while the Bush Administration redefined federal environmental laws “[o]verturning new-source review . . . represents the most sweeping change, and among the least noticed.”); David L. Greene, _Bush Expected to Weaken Portions of Clean Air Act_, _BALT. SUN_, Dec. 23, 2001, at 1A (“President Bush has argued that some Clean Air Act rules stifle energy output and do little to protect the environment”); David E. Sanger, _Bush Will Continue to Oppose Kyoto Pact on Global Warming_, _N.Y. Times_, Jun. 12, 2001, at A1 (reporting that President Bush “tacitly acknowledged that the United State’s rejection of the Kyoto accord had estranged the United States from many nations which it has good relations with generally”); Katharine Q. Seelye, _Bush Team Is Reversing Environmental Polices_, _N.Y. Times_, Nov. 17, 2001, at 20 (“In the last two months the Bush Administration has proceeded with several regulations, legal settlements and legislative measures intended to reverse Clinton era environmental policies”).
II. FEDERALISM AND THE POLLUTION CONTROL CASES

Given that one of the hallmarks of the Rehnquist Court was the revitalization of federalism as a means to limit congressional action and to allocate power between the federal government and the states, how did this feature of the Rehnquist Court affect its decision-making in the pollution control cases? If the Court under Chief Justice Rehnquist was plainly anti-environmental and pro-business, as a number of commentators have concluded, then we should expect to find cases where the Court used federalism to invalidate pollution control statutes or regulations of the EPA. After all, the Rehnquist Court’s decision in _Lopez_ “ushered in a new era in which federal statutes fell at an amazing rate.”

It turns out, however, that instead of using federalism to strike down provisions of the pollution control statutes or the entire statutes themselves or EPA regulatory efforts, as some feared would occur with the revitalization of federalism, not a single provision of a pollution control statute or regulation was struck down on federalism grounds by the Rehnquist Court.

A. SWANCC

The clearest example where a pollution control statute survived a federalism challenge, specifically a Commerce Clause challenge, is seen in _Solid Waste Agency of Northern Cook County v. Army Corps of Engineers_ (SWANCC), where the Court considered whether the “migratory bird rule” allowed the Army Corps of Engineers (“Corps”) to assert jurisdiction under section 404 of the Clean Water Act over wetlands that were located wholly intrastate or isolated from interstate waters. The wetlands in dispute were located at a former sand and gravel pit that was acquired for a regional non-hazardous solid waste landfill. After initially declining to assert jurisdiction, the Corps was persuaded to reconsider and ultimately claimed jurisdiction but refused to issue the section 404 permit required for the project, despite the fact that it had been fully approved and permitted by state and local agencies including the Illinois Environmental Protection Agency, the Illinois Department of Conservation, Cook County and the Cook County Zoning Board of Appeals.

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89 Hudson, _supra_ note 65, at 60.
90 Admittedly the Rehnquist Court did strike down on federalism grounds portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 in _New York v. United States_, 505 U.S. 144 (1992), as incompatible with the Tenth Amendment. The statute at issue in that case, however, is not one of the traditional pollution control statutes.
92 Migratory Bird Rule, 51 Fed. Reg. 41, 217 (Nov. 13, 1986). The migratory bird rule in sum provided that the jurisdiction of the Corps extended to intrastate waters: 1) used as habitats by birds protected by migratory bird treaties or 2) which are or would be used habitat by other migratory birds crossing state lines. _Solid Waste Agency of N. Cook County v. Army Corps of Eng’rs_, 531 U.S. 159, 164 (2001).
93 Section 404 requires a permit from the Corps before the dredging or filling of a wetland can occur. 33 U.S.C. § 1344 (2000).
94 _Solid Waste Agency of N. Cook County_ at 162–63.
95 _Id._ at 165. The specific reasons given by the Corps for denying the permit included: 1) the failure to demonstrate that the proposed use was the “least environmentally damaging, most practicable alternative”; 2) the project presented a risk to drinking water supplies; and 3) the project’s impact was not subject to mitigation because the landfill could not be later developed into a forested habitat. _Id._ It should also be
Indeed the State of Illinois in its Solid Waste Management Act recognized that landfills “continue to be necessary,” that “landfill capacity is decreasing” and that addressing this dwindling capacity was “very difficult due to the public concern and competition with other land uses.” Yet despite this express recognition of competing land uses as a concern to the State of Illinois and its desire to address the projected diminishing landfill capacity with projects such as the one at issue in SWANCC, here was the federal government, through use of the migratory bird rule, prohibiting a local agency representing 23 suburban municipalities from developing a landfill responsive to the solid waste disposal needs of 700,000 local citizens within those municipalities. Chief Justice Rehnquist, however, writing for the majority in SWANCC held that the migratory bird rule was not entitled to Chevron deference and was beyond the grant of authority conferred to the Corps by Congress under section 404 of the Clean Water Act.

Important to the reasoning of Chief Justice Rehnquist in finding that the Corps lacked jurisdiction was the fact that, in his view, to extend the Corps jurisdiction to isolated, wholly intrastate wetlands through the migratory bird rule would “result in a significant impingement of the States’ traditional and primary power over land and water use.” Instead of readjusting the federal-state balance in such matters traditionally left to the states to regulate, Chief Justice Rehnquist found that under the Clean Water Act Congress chose to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources . . . .” The attempt by the Corps to claim jurisdiction over wholly intrastate wetlands was, according to Rehnquist, simply inconsistent with this express congressional recognition in the Clean Water Act.

pointed out that the Solid Waste Agency of Northern Cook County was well aware of the impact that the project could have on the wildlife that made the former abandoned sand and gravel quarry its habitat. In an effort to mitigate the impact, the agency had agreed to expend more than $17 million in mitigation costs. See Brief of Petitioner at *5, Solid Waste Agency of N. Cook County v. Army Corps of Eng’rs, 531 U.S. 159 (2001) (No. 99–1178), 2000 WL 1041190. The mitigation efforts would have included the creation of 17.6 acres of replacement wetlands, relocation of a heron rookery, phased in construction over a 15 year period to minimize impact and the acquisition of 258 acres adjacent to the site for a forested habitat. Id. at *4 n.2 (quoting Illinois Solid Waste Management Act, 415 ILCS 20/2(2), (3), (10)(b)).

Id. at *2–*3.


Solid Waste Agency of N. Cook County at 174.

Id.

Id. at 166–67 (quoting 33 U.S.C. 1251(b) (2000)). Another important consideration for Chief Justice Rehnquist in ruling against the Corps was the fact that the expansive jurisdiction that the Corps asserted under the migratory bird rule was inconsistent with how the Corps had previously interpreted the scope of its jurisdiction shortly after passage of the Clean Water Act. In this prior interpretation the Corps recognized that in establishing its jurisdiction under section 404 was the “water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.” Id. at 168 (quoting 33 C.F.R. § 209.260(e)(1) (1974)). Here the wetlands located at the isolated, abandoned sand and gravel quarry were not capable of use by the public for transportation or commerce, and there was “no persuasive evidence that the Corps mistook Congress’ intent in 1974.” Solid Waste Agency of N. Cook County at 168.
The SWANCC decision was assailed by many as reflective of the anti-environmental nature of the Rehnquist Court because the opinion was viewed as significantly lessening the protections afforded to wetlands since the majority opinion by Rehnquist struck down the migratory bird rule and thereby served to limit the Corps jurisdiction. One commentator stated, for example, that “Environmentalists are no strangers to disappointment in the U.S. Supreme Court, but the recent case of [SWANCC] . . . is particularly disappointing. First, it might be said that the impact of the opinion . . . may be the most devastating judicial opinion affecting the environment ever.” To reach the conclusion, though, that SWANCC demonstrates that the Court under Rehnquist’s leadership was anti-environmental simply misses the mark for at least two reasons.

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

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

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

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

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104 Brief of Petitioner, supra note 94, at *11 (emphasis added).
The Commerce Clause argument presented by the petitioner in SWANCC certainly could have found a sympathetic majority in light of the Rehnquist Court’s decisions in Lopez and Morrison, and Chief Justice Rehnquist did recognize in SWANCC that the petitioner’s argument raised “significant constitutional and federalism questions.” But the Chief Justice, while recognizing the importance of the Commerce Clause issues presented in SWANCC, ultimately concluded that the statute did not provide the Corps with jurisdiction over the isolated wetlands in question and thus exercised judicial restraint to avoid deciding the merits of the Commerce Clause argument out of the Court’s “prudential desire not to needlessly reach constitutional issues.”

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

Pointing to SWANCC as evidence of the Rehnquist Court’s anti-environmental persuasion also fails for a second reason because such a viewpoint misapprehends section 404 as conferring substantial federal protection over wetlands. That is in fact not what section 404 achieves. Section 404 of the Clean Water Act is not an environmental protection provision but is more accurately described as an environmental permitting provision, which allows applicants to obtain an individual permit that, once issued, allows the filling of the wetland described in the permit application or, alternatively, authorizes under the “nationwide” permitting system the filling of wetlands associated with a wide range of specified activities. Certainly the Corps can deny the sought after individual permit, as

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106 Solid Waste Agency of N. Cook County, 531 U.S. at 174.
107 Id.
108 33 U.S.C. § 1344 (2000). Section 404(a) authorizes the issuance of permits to “discharge of dredged or fill material into the navigable waters at specified disposal sites.” Id. § 1344(a). In addition to individual permits, the Corps is also authorized to issue nationwide permits as a matter of administrative convenience that allow the filling of wetlands in association with certain commonly encountered activities that “will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” Id. § 1344(e). A number of activities are covered by nationwide permits and, to name but a few, include the placement of navigation aids, outfall construction and maintenance, construction and repair of utility lines, and associated structures, bank stabilization projects and the construction of single family homes and related structures such as garages, driveways,
it did in SWANCC, or EPA may object to the issuance of a permit by the Corps authorizing the filling of wetland, but permit denials by the Corps or permit objections by EPA are by far the exception rather than the rule. Those who point to SWANCC as a decision that resulted in substantial environmental harm by excluding wholly intrastate wetlands from federal protection ignore that in practice, by an overwhelming margin, the Corps regularly authorizes under section 404 the filling of wetlands. The undeniable fact is that the Corps routinely grants individual permits to discharge dredged or fill material into wetlands, which calls into question any increased adverse environmental impact arising from the Supreme Court’s opinion in SWANCC, along with the very premise of section 404 as providing any significant, meaningful level of federal protection for wetlands.

What the Court’s opinion in SWANCC did accomplish was to preserve section 404 from an attack on Commerce Clause grounds and served to protect the balance between federal regulation of interstate wetlands and state control over wholly intrastate wetlands. It does not follow, though, that because wholly intrastate wetlands are no longer subject to federal jurisdiction that they are completely devoid of environmental regulation. What SWANCC in essence concluded was that wholly intrastate wetlands were not subject to federal agency permitting prior to the discharge of dredged or fill material but are subject to the level of regulation deemed appropriate by state and local governments. That is, the Court found that wetlands located wholly intrastate were not subject to regulation under the migratory bird rule by a federal agency, but left the regulatory decision in the hands of state and local governments, which as a matter of tradition have always assumed responsibility within their borders for land use regulation, land use planning and development. This result is consistent with the statutory scheme Congress established

storage sheds and septic systems. Each nationwide permit is subject to specific terms and conditions, as well as to general terms and conditions. Issuance of Nationwide Permits; Notice, 67 Fed. Reg. 2020–01 (Jan. 15, 2002).

109 Under section 404(c), the EPA can object to the “specification . . . of any defined area as a disposal site” for dredged or fill material. 33 U.S.C. § 1344(c) (2000).


111 In fact, it is arguable whether the federal government through the Corps is more effective at the preservation and protection of wetlands than were existing state or local regulatory programs. See Jonathan Adler, Swamp Rules: The End of Federal Wetland Regulation?, 22 Reg., Summer 1999, available at http://www.cato.org/pubs/regulation/regv22n2/swamprules.pdf, noting that well before the federal government’s regulatory intervention through section 404 that a number of states were regulating and conserving wetlands. Id. at 13–14. Adler also contends that the quality and importance of wetlands varies greatly within a region and that as a result “[w]hich wetlands are vital to protect in a given area is information that is more readily available at the state and local level.” Id. at 14. See also Paul S. Weiland, Federal and State Preemption of Environmental Law: A Critical Analysis, 24 HARV. ENVTL. L. REV. 237, 244–46 (2000) (recognizing that the four benefits of state and local environmental regulation compared with federal regulation include: 1) more effective solutions to “place-specific” environmental problems; 2) increased flexibility; 3) greater innovation and 4) increase responsiveness between state and local governments and their citizens).

under the Clean Water Act as reflected in SWANCC.\textsuperscript{113} This result is, of course, also entirely consistent with the delicate balance of power between the federal and state governments that underlies federalism, and in particular the cooperative federalism of environmental protection.\textsuperscript{114}

\textbf{B. \textit{Bestfoods}}

Although not expressly involving a federalism challenge, another example of the Rehnquist Court’s willingness in a pollution control case to protect states from federal intrusion in areas that are traditionally matters of state law is provided by \textit{United States v. Bestfoods},\textsuperscript{115} where the EPA sought to recover under CERCLA\textsuperscript{116} response costs incurred in the clean up of a former chemical production facility in Michigan. Due to the insolvency of the subsidiary that once owned and operated the site, the EPA included among the defendants the one time parent corporation of the polluting subsidiary as a party to the CERCLA cost recovery action. The competing issue of state and federal law that arose was whether the traditional state law area of corporations served to protect a parent corporation from the reach of CERCLA’s onerous strict liability scheme.

Writing for a unanimous court Justice Souter took note of the fact that “[i]t is a general principle of corporate law deeply ‘ingrained in our economic and legal systems’ that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries.”\textsuperscript{117} He went on to write that “nothing in CERCLA purports to reject this bedrock principle, and . . . the congressional silence is audible.”\textsuperscript{118} The Court consequently found that a parent corporation was not automatically subject to CERCLA liability by virtue of the acts of its subsidiary.

Does not the fact that the Court in \textit{Bestfoods} construed CERCLA in a manner that limited the ability of the EPA and the Department of Justice to pursue parent corporations in cost recovery actions serve to establish the anti-environmental, pro-business nature of the Rehnquist Court? Indeed one might argue that by limiting the ability of the government

\textsuperscript{113} Id. see Clean Water Act, 33 U.S.C. § 1251(b) (2006) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.”).
\textsuperscript{114} For a discussion of the local politics involved in the SWANCC case, see Thomas W. Merrill, The Story of SWANCC: Federalism and the Politics of Locally Unwanted Land Uses, in ENVIRONMENTAL LAW STORIES 283–319 (Richard L. Lazarus & Oliver A. Houck eds., 2005). Ironically, after many years of litigation that ultimately secured the ability to construct the landfill on the site, the property was sold to the State of Illinois and private developers for residential and industrial uses. \textit{Id.} at 312–17.
\textsuperscript{115} 524 U.S. 51 (1998).
\textsuperscript{117} \textit{Bestfoods}, 524 U.S. at 61.
\textsuperscript{118} \textit{Id.} at 62. This is a reflection of the long recognized principle of shareholder limited liability that is elementary to traditional corporate law. \textit{E.g.}, 1 WILLIAM MEADE FLETCHER ET AL., CYCLOPEDIA OF THE LAW OF CORPORATIONS § 14 (rev. ed. 2006) (“[T]he shareholders of a corporation are ordinarily not liable for the corporation’s obligations, liabilities, or debts.”).
to recover against the former parents of polluting subsidiaries then the substantial costs to remediate the contaminated sites would fall upon the taxpayers, which is exactly the result one would predict from a pro-business, anti-environmental Court.

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

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

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119 Whether to pierce the corporate veil and hold shareholders liable for what otherwise would be corporate obligations, is a matter of state law, and a number of factors are considered by courts in reaching this determination, including “fraud, illegality, contravention of contract, public wrong, inequity, and whether the corporation was formed to defeat public convenience.” FLETCHER ET AL., supra note 117, at § 41 (footnote omitted).
120 Bestfoods, 524 U.S. at 62.
121 Id. at 65.
122 Id. at 72–73 (discussing that an employee of the parent corporation was actively involved in environmental matters at the subsidiary’s chemical plant and that these findings were sufficient to raise a question on remand as to whether the parent could be held liable for the EPA’s response costs as an operator under section 107 of CERCLA.).
One would simply not expect a Supreme Court that was purportedly, with respect to environmental cases, pro-business and anti-environment, to provide in a unanimous opinion what amounted to a litigation strategy for how the EPA and the Department of Justice could recover the government’s cleanup costs under section 107 of CERCLA against parent corporation defendants. One would also certainly not expect the opinion to conclude that the record before the Court strongly suggested parent corporation liability. To the contrary, the decision one would expect in Bestfoods from a Court that was truly hostile towards the environment and demonstrably pro-business in its approach to environmental cases would be nothing short than a pronouncement that CERCLA did not under any circumstances provide a cause of action to seek costs from parent corporations for the hazardous substance sins of their subsidiary corporations.

C. Seminole Tribe Revisited

The rebirth of federalism did result in the Court overruling123 Pennsylvania v. Union Gas,124 which had held that private parties could use CERCLA to seek response costs from states if a state agency caused or contributed to a release of hazardous substances.125 Since the Seminole Tribe decision, however, did not invalidate a single provision of CERCLA, one of the key pollution control statutes used to compel the remediation of sites with contaminated soil and groundwater, it is not a federalism-based decision that is suggestive at all of an anti-environmental attitude by the Rehnquist Court. In overruling Union Gas the difficulty found by the Court was not with the cost recovery scheme established by Congress under section 107(a) of CERCLA. Rather, what the Court found problematic was that the plurality decision in Union Gas had “. . . created confusion among the lower courts that have sought to understand and apply the deeply fractured decision.”126 Thus Union Gas, in practice, because of its inconsistent and opaque plurality decision, proved difficult for the lower courts to make sense of and apply, as well as for litigants to follow.

Admittedly, Seminole Tribe foreclosed, based upon Eleventh Amendment sovereign immunity, the ability of private parties to bring suit against states under the cost recovery provisions of CERCLA. But it must be pointed out that, to the extent a state is deemed a potentially responsible party under CERCLA’s liability provisions, the statute still exists as a robust enforcement tool because the EPA, which is the lead agency at the vast majority of so-called “Superfund” sites, may still include the state as a defendant in a cost recovery action or otherwise compel the state to take appropriate action to address the release or threatened release of hazardous substance.127

125 Id. at 23.
126 Seminole Tribe, 517 U.S. at 63–64.
127 See, for example, section 101(21) of CERCLA, 42 U.S.C. § 9601(21), which includes under the definition of “persons” who may incur liability as including among others a “State, municipality, . . . political subdivision of a State, or any interstate body.” See also United States v. Stringfellow, No. CV-83-2501 JMI, 1995 WL 450856, at *5 (C.D. Cal. 1995) (finding the State of California responsible under
III. **Preemption: Further Defining the Environmental Regulatory Roles of the Federal, State and Local Governments**

A. **Summary of the Federal Preemption Doctrine**

Doctrinally preemption is closely tied to federalism, and preemption was raised by litigants as a basis to challenge state and local regulatory efforts in several of the pollution control cases heard by the Rehnquist Court. As a constitutional doctrine preemption is rooted in the Supremacy Clause, which provides in part that “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” Under the Supremacy Clause, since *McCulloch v. Maryland*, “it has been settled that state law that conflicts with federal law is ‘without effect.’”

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

To determine whether a particular state or local law survives a preemption challenge, the Court first and foremost looks to the intent of Congress, and if it is the “clear and manifest purpose of Congress” in enacting a federal statute that it preempts state or local law, then the state or local statute should have no effect as a result of the express intent of Congress. Express preemption is not the only way that a state or local regulatory effort may be found ineffective, since preemption may implicitly occur when a federal statute

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128 To the extent that preemption also serves to allocate legislative power between the federal and state governments, perhaps it is rightfully also another aspect of the Rehnquist Court’s revitalization of federalism. See Ernst A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 3–4 (2004) (including in an analysis of the Rehnquist Court as far as “what counts as a ‘federalism case’” those Supreme Court decisions involving claims of state law preemption by federal law).

129 U.S. CONST. art. VI, cl. 2. See also *Gade v. Nat’l Solid Waste Ass’n*, 505 U.S. 88, 108 (1992) (“[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’”) (internal citations omitted).


132 See *id.* at 518 (“First, . . . we must construe these provisions in light of the presumption against the pre-emption of state police power regulations.”).

133 *Id.* at 516.

134 *Id.*
“so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the states to supplement it.’”\textsuperscript{135} A state or local statute may also be subject to preemption if necessary to avoid a conflict with federal law.\textsuperscript{136}

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

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

\textit{1. International Paper}

In one of the first pollution control cases encountered by the Court with Rehnquist as its Chief Justice, the International Paper Company defended a nuisance action brought by Vermont residents against a facility located on the New York side of Lake Champlain by arguing that the claim based on Vermont common law was preempted by the comprehensive nature of the Clean Water Act.\textsuperscript{137} Recognizing that Congress plainly intended to occupy the field of water pollution control,\textsuperscript{138} the Court did find that the Clean Water Act “precludes a court from applying the law of an affected State against an out-of-state source,” which prohibited application of Vermont common law as a means of controlling offensive discharges from the International Paper Company’s New York facility. In reaching this conclusion, Justice Powell was mindful of the importance of maintaining a balance between not only the federal government and the states but between the respective states too:

\begin{footnotesize}
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\item \textsuperscript{135} \textit{Id.} (citing Fid. Fed. Sav. \& Loan Ass’n v. de la Cuesta, 458 U.S. 141 (1982)).
\item \textsuperscript{136} \textit{See} Gade v. Nat’l Solid Waste Ass’n, 505 U.S. 88, 98 (“Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field preemption, where the scheme of federal regulation is ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ and conflict pre-emption, where ‘compliance with both federal and state regulations is a physical impossibility.’”) (internal citations omitted). \textit{See also} Weiland, \textit{supra} note 111, at 252 (“The Supreme Court has developed a tripartite typology of preemption: express preemption, field preemption and conflict preemption.”).
\item \textsuperscript{137} Int’l Paper Co. v. Ouellette, 479 U.S. 481 (1987). The specific question before the Court was “whether the [Clean Water] Act pre-empts a common law nuisance suit filed in Vermont under Vermont law, when the source of the alleged injury is located in New York.” \textit{Id.} at 483.
\item \textsuperscript{138} \textit{See}, \textit{e.g.}, City of Milwaukee v. Illinois, 451 U.S. 304, 318 (1981) (finding that when Congress amended the Clean Water Act in 1972 it “established an all-encompassing program of water pollution control” that preempted federal common law).
\end{itemize}
\end{footnotesize}
If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State . . . If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, at a minimum [International Paper Company] would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability. In suits such as this, an affected-state court could also require the source to cease operations by ordering immediate abatement. Critically, these liabilities would attach even though the source has complied fully with its state and federal permit obligations. The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly – regulate the conduct of out-of-state sources.  

While foreclosing application of the Vermont common law, the Court in International Paper Company, however, did not conclude that the Clean Water Act preempted all state-based common law remedies targeting water pollution. The Vermont residents’ suit could proceed, so long as the court below applied the common law of the discharger’s state, or specifically in International Paper Company New York common law, instead of Vermont common law. Through this result the Court preserved the permitting scheme established by Congress under the Clean Water Act, and avoided subjecting dischargers to another state’s common law. At the same time, in a balance of competing federal and multi-state interests, the Court fashioned a state-based legal remedy for those who were adversely impacted by discharges occurring in another state.

2. **PUD No. 1 of Jefferson County**

In considering a challenge to the State of Washington’s authority to impose certain requirements protective of its water quality, the Court in PUD No. 1 of Jefferson County v. Washington Department of Ecology broadly construed the power of states to impose conditions under the section 401 water quality certification process of the Clean Water Act. The specific condition at issue required a proposed hydroelectric power project to

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139 *International Paper*, 479 U.S. at 495. *See also* Illinois v. City of Milwaukee, 731 F.2d 403, 414 (7th Cir. 1984) (“[I]t seems implausible that Congress meant to preserve or confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I by applying the statutes or common law of State II. Such a complex scheme of interstate regulation would undermine the uniformity and state cooperation envisioned by the [Clean Water] Act. For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless.”).


142 33 U.S.C. § 1341. In sum, section 401 requires a water quality certification from a state before a federal license or permit is issued for any activity that may result in a discharge into navigable waters, and also authorizes a state to impose limitations and monitoring requirements on such discharges to ensure that state water quality standards and effluent limitations are met and maintained. *Id.*
maintain a minimum stream flow that the state mandated to protect aquatic life. One of the arguments rejected by the Court in this challenge to the state’s section 401 authority was that the limitation might conflict with the Federal Energy Regulatory Commission (“FERC”) licensing conditions for the hydroelectric project and thus was preempted. In concluding that neither FERC’s licensing authority nor the Federal Power Act limited the state’s section 401 authority, the Court broadly construed the power of the states’ to impose a wide range of conditions as part of the water quality certification process:

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

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

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

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

143 PUD No. 1 of Jefferson County, 511 U.S. at 709.
144 When the minimum stream flow condition was initially challenged at the administrative level the Washington Pollution Control Hearings Board found that the condition was preempted by the Federal Power Act. This finding was reversed on appeal to the state courts and affirmed by the Washington Supreme Court. Washington v. PUD No. 1 of Jefferson County, 849 P.2d 646 (1993). The Washington Supreme Court found that “there is neither an express nor an implied indication of any congressional intent to occupy the field so as to preclude states from exercising their obligations under the Clean Water Act,” and that with respect to conflict preemption “there is no actual conflict between Ecology’s action and the [Federal Power Act].” Washington v. PUD No. 1 of Jefferson County, 849 P.2d at 655.
145 PUD No. 1 of Jefferson County, 511 U.S. at 722.
146 See section 101(b) of the Clean Water Act, 33 U.S.C. § 1251(b), providing in part that “It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution . . . .”
147 PUD No. 1 of Jefferson County, 511 U.S. at 718.
Another noteworthy aspect of the Court’s opinion in *PUD No. 1 of Jefferson County* is the express affirmation by the Court of the importance of water quality standards under the Clean Water Act:

> Petitioners also assert more generally that the Clean Water Act is only concerned with water “quality” and does not allow the regulation of water “quantity.” This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quality in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution.\(^\text{148}\)

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

3. **Wisconsin Public Intervenor**

One can see a further balancing of competing regulatory interests through the rejection of other preemption challenges in later pollution control cases before the Rehnquist Court when it considered attacks against state and local regulation of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”).\(^\text{149}\) In the first of two such cases that appeared before the Rehnquist Court, *Wisconsin Public Intervenor v.*

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\(^{148}\) *Id.* at 719. This observation in the majority opinion by Justice O’Connor was in response to an alternative argument raised by petitioners attacking the limitation on stream flow. This alternative argument was that the Clean Water Act only allowed the regulation of water quality and not water quantity. *Id.* In addition to this argument and the one based on preemption by the FERC licensing process, the petitioners also argued that the effort by the State of Washington to regulate under section 401 was invalid because: 1) the water quality use designation was too vague and the Clean Water Act only authorized the enforcement of specific and objective water quality criteria and 2) enforcement of water quality use designations rendered the criteria component of water quality standards superfluous. *Id.* at 715–16. The Court also rejected these arguments in upholding the ability of the states to impose conditions protective of water quality standards as part of the section 401 water quality certification process. *Id.* Justices Thomas, joined by Justice Scalia, dissented and would have found in part that the Federal Power Act preempted the ability of states to also impose minimum stream limits on FERC licensed hydroelectric projects. *Id.* at 732–34 (“Today, the Court gives the States precisely the veto power over hydroelectric projects that we determined in [prior cases] they did not possess.”) (Thomas, J., dissenting) (internal citations omitted).

\(^{149}\) Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2000). As its title suggests, FIFRA establishes a comprehensive regulatory program administered by EPA governing the registration, labeling and use of pesticides, which are defined as “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest” or “for use as a plant regulator, defoliant, or desiccant and any nitrogen stabilizer.” *Id.* § 136u.
Mortier, a local ordinance imposed a permit requirement as a precondition to the application of pesticides on certain properties. In a unanimous decision reversing the Wisconsin Supreme Court’s conclusion that FIFRA preempted the local pesticide permitting ordinance, the Court noted that “we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress.” Finding no support in the text of FIFRA for the position that Congress had expressly preempted local regulation of pesticides, coupled with insufficient evidence of implied or field preemption, the Court upheld the local permitting ordinance regulating pesticide use.

The Court found that, unlike the Clean Water Act’s far reaching statutory scheme that was at issue in Milwaukee v. Illinois and International Paper v. Ouellette, FIFRA was not “a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the States.” Thus the states and local units of government were left free to impose additional regulatory requirements beyond those established by FIFRA.

The preemption cases serve to further belie the argument that the Rehnquist Court represented an era where the Supreme Court was especially unsympathetic towards environmental litigants. Instead of an anti-environmental Court, we see in the preemption cases a Court wrestling with complex issues of competing federal, state and local regulatory interests in the pollution control arena. In response to this struggle, the Court fashioned opinions in the preemption area that preserved the rights of citizens to assert state common law-based claims in response to offensive discharges. The Rehnquist Court’s preemption cases arising under the pollution control statutes also maintained the ability of states and municipalities to impose regulations to address unique local environmental concerns, be it flow quantities in a river sufficient to protect aquatic life or additional regulations deemed necessary by local authorities to ensure proper application of pesticides.

The preemption cases also serve to undermine the view that the Rehnquist Court was pro-business in deciding pollution control cases. A genuinely pro-business Rehnquist Supreme Court would not have allowed the residents of Vermont to proceed even using New York nuisance law, the law of the so-called source state, and instead would have used International Paper Company as an opportunity to limit all state-based common law claims against industrial dischargers by conveniently holding that the Clean Water Act,

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151 Id. at 605 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)).
153 See also Bates v. Dow Agrosciences LLC, 544 U.S. 431, 450–53 (2005). This case involved a subsequent FIFRA preemption challenge to state law heard by the Rehnquist Court, where an herbicide manufacturer claimed that FIFRA preempted state law claims grounded in product liability, breach of warranty and deceptive trade practices asserted by farmers who alleged the herbicide damaged crops. This preemption claim, too, was rejected by the Court, for reasons similar to those articulated by the majority in Wisconsin Public Intervenor, and the Court’s decision in Bates served to preserve the state law claims, despite the existence of a broad federal regulatory program enacted pursuant to FIFRA.
due to its comprehensive nature, preempted not only federal common law claims but all state common law remedies as well. Further, if the Rehnquist Court were indeed a pro-business court, it would have used preemption to construe FIFRA in a manner that struck down local and state efforts to impose additional pesticide regulations, along with the ability to hold pesticide manufacturers responsible under liability theories grounded in state law, and thereby reduce the regulatory burdens and potential liabilities faced by businesses. The Court, however, rejected preemption challenges in the two FIFRA cases heard during the Rehnquist era, and the holdings of the Court in these cases further erodes the notion of the Rehnquist Supreme Court as one that was blatantly pro-business in deciding environmental cases and in particular pollution control cases.

4. **Engine Manufacturers Association**

In response to the argument that the Rehnquist Court rejected preemption challenges targeting state and local pollution control efforts, one might argue that the Court’s decision in *Engine Manufacturers Association v. South Coast Air Quality Management District* undercuts the position that the Rehnquist Court’s use of the preemption doctrine was hospitable towards state and local pollution control regulation. After all, as pointed out in the lone dissent by Justice Souter, the majority in *Engine Manufacturers Association* used the preemption doctrine to forbid “one of the most polluted regions in the United States from requiring private fleet operators to buy clean engines that are readily available on the commercial market.”

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

> No State or political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new

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156 Id. at 259 (Souter, J., dissenting).

157 The six Fleet Rules that were adopted as one of the measures to improve air quality in the only region of the country designated as extreme non-attainment for ozone by the EPA under the Clean Air Act. See Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 158 F. Supp. 1107, 1109 (C.D. Cal. 2001). In addition to targeting emissions of ozone precursors from motor vehicle exhaust, the rules also sought to address emissions of particulate matter associated with diesel engines. Id. The rules covered practically every type of vehicle that a fleet could operate, including street sweepers, passenger cars, public transit vehicles and urban buses, light-duty trucks, medium duty vehicles, garbage trucks, airport passenger transportation vehicles (shuttles and taxi cabs) and heavy-duty on-road vehicles. See Engine Manufacturers Association, 541 U.S. at 249.
motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as a condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, vehicle engine or equipment.  

According to the logic of the district court the vehicle purchase restrictions imposed by SCQAMD were not preempted by section 209(a) for two reasons. First, they were not preempted because “The Rules regulate the purchasing and leasing, not the sale, of vehicles by fleet operators.” Second, preemption was inapplicable since “...the Fleet Rules do not set a 'standard relating to the control of emissions.'” In a short, two paragraph order the Ninth Circuit affirmed the district court “for the reasons stated in its well reasoned opinion. . .”

In its 8 to 1 vote reversing the Ninth Circuit the Supreme Court found that “treated sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense. The manufacturer’s right to sell federally approved vehicles is meaningless in the absence of a purchaser’s right to buy them.” Importantly, the Court did not find that the application of the Fleet Rules was preempted under all circumstances. In another effort to maintain a semblance of balance between the federal government and state governments in the environmental regulatory arena Justice Scalia wrote for the majority that “It does not necessarily follow, however, that the Fleet Rules are pre-empted in toto.” The case was accordingly remanded for a determination as to whether, among other issues, the Fleet Rules were valid if construed as imposing restrictions only on state purchase decisions and not those of private fleet operators.

An argument that the Engine Manufacturers Association decision was anti-environmental and pro-business because the Court used preemption to negate the ability of SCAQMD to regulate the types of vehicles that fleet operators could purchase is misdirected as aimed at the Rehnquist Court. The Court’s holding is simply too well-grounded in the plain language of section 209(a) of the Clean Air Act for such criticisms to have merit. Given that provision, which expressly preempted states from regulating emissions from automobiles and engines, the Court had little choice but to respect the unambiguous

\[160\] Id.
\[161\] Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 309 F.3d 550, 551 (9th Cir. 2002).
\[162\] Engine Manufacturers Association, 541 U.S. at 255.
\[163\] See id. at 258.
\[164\] See, e.g., Rebecca Noblin, Comment, Engine Manufacturers, Association, et al. v. South Coast Air Quality Management District, et al., 28 HARV. L. REV. 571, 575 (2004) (asserting that the Court’s analysis of the preemptive effect of section 209(a) was “textually weak and runs contrary to both legislative intent and prior EPA interpretation).
\[165\] Even Professor Lazarus who is generally critical of the Supreme Court’s rulings in environmental cases found that the statute supported the Court’s decision in the Engine Manufacturers Association case. See Richard J. Lazarus, The Nature of Environmental Law and the U.S. Supreme Court, 35 ENVTL. L. REP. (ENVTL. LAW INST.) 10503, 10511 (2005) (noting in analyzing the Engine Manufacturers Association decision, among other environmental cases from the Court’s October 2003 Term, that “[t]he plain meaning of the statute provides ample support for the result.”).
language of the statute and conclude that the SCAQMD Fleet Rules were preempted. To hold otherwise would have required the Court to completely ignore the clear statutory language in section 209(a) prohibiting any efforts by the states to impose emission standards or from requiring any other approval relating to vehicle or engine emissions as a condition of sale.

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

The reasons given for the enactment of the pre-emption provision can be summarized as follows: to protect the manufacturer against having to build engines which would comply with a multiplicity of standards; to protect the vehicle owner from having to deal with different standards in each state in which he drives; to avoid the unnecessary duplication of federal standards; to avoid unnecessary expense to the owner; and generally to avoid chaos and confusion.\textsuperscript{167}

Had the Engine Manufacturers Association decision affirmed the ability of SCAQMD to impose the challenged vehicle purchase restrictions, undoubtedly a number of states would have followed California’s lead and adopted a similar regulatory approach, and manufacturers and consumers conceivably would have faced countless but dissimilar emissions-related standards to consider in the manufacture, sale and purchase of vehicles. This scenario would have presented owners of multi-jurisdictional fleets and automotive and engine manufacturers with a difficult regulatory quandary, as they attempted to purchase and manufacture compliant vehicles and engines. Highly mobile consumers, too, likely would have confronted compliance issues as they traveled or relocated from one state to another, and regulators would have faced difficult enforcement issues as they sought to determine whether, for example, an automobile purchased in Illinois met the emissions requirements of its owner’s new state of residence. The decision in Engine Manufacturers Association rightfully avoided these practical difficulties and respected the express will of Congress that efforts to regulate mobile source emissions properly lies with the federal government and not with state or local units of government for sound public policy reasons.

\textsuperscript{166} Because California adopted automobile emissions limits well before Congress did so, the Clean Air Act does provide a waiver to section 209(a) preemption for: 1) California mobile emissions standards that were in effect at the time of the adoption of the federal standards and 2) those states that adopt existing California mobile source emission limits. See 42 U.S.C. §§ 7507 and 7543(b) (2000).

\textsuperscript{167} See California ex rel. State Air Res. Bd. v. Dept. of Navy, 431 F. Supp. 1271, 1285 (N.D. Cal. 1977), aff’d 624 F.2d 885 (9th Cir. 1980)(internal citations omitted).
IV. STATUTORY CONSTRUCTION AND THE POLLUTION CONTROL CASES

There are several pollution control cases decided by the Rehnquist Court that implicated neither of the constitutional-based doctrines of federalism or preemption. This line of cases required the Court to apply principles of statutory construction to particular provisions of the pollution control statutes. While of course the Supreme Court has interpreted statutes throughout its history, one of the notable aspects of the Rehnquist Court relevant to this Article is that the pollution control cases raising issues of pure statutory interpretation, even more so than those where constitutional issues such as federalism or preemption arose, unmistakably demonstrate that the Rehnquist Court was not anti-environmental or pro-business. In part this is because one of the most significant challenges to a pollution control statute during the Rehnquist era, specifically the threat to certain provisions of the Clean Air Act presented by *Whitman v. American Trucking Associations*,\(^\text{168}\) was brought by powerful business interests where, if the challenge had been successful on the merits, it would have been perhaps the most significant victory for business interests before the Court in the history of environmental law.\(^\text{169}\) The Court rejected this challenge and protected the Clean Air Act from this serious assault by business. To side against the arguments raised by such powerful interests is not the outcome one would expect from a Court that supposedly sided with commerce over regulatory efforts to protect the environment.

In addition to the *American Trucking Associations* case brought on behalf of influential business interests, two of the cases raising issues of pure statutory construction were brought by well-recognized public interest environmental groups. If the Rehnquist Court were so clearly predisposed to exhibit hostility against environmentalists, the Court should have ruled against the environmental plaintiffs but that was not the outcome in either *City of Chicago v. Environmental Defense Fund*\(^\text{170}\) or *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*\(^\text{171}\) By ruling in favor of the environmental groups in both these cases the Rehnquist Court once again defied the stereotype that it was overtly anti-environmental.

A. The Rehnquist Court’s Methodology of Statutory Interpretation

The Rehnquist Court’s approach to interpretation of the pollution control statutes reflects one of the other guiding principles that, in addition to the federalism revolution, emerged during Rehnquist’s reign as Chief Justice. This guiding principle is the controversial position that legislative history is completely ignored as one of the tools that the Court should consider in its efforts to decipher what Congress intended by its use of a particular


word, phrase or provision in a statute. Justice Scalia without a doubt has been the primary proponent of this negative view of legislative history in the context of statutory construction, and his position that the Court should not look to legislative history as an aid in statutory analysis arises from a belief that it is only legitimate for the Court to examine the text of the statute in question, with perhaps at most a reference to a dictionary, to divine the plain meaning of the words used by Congress. The refusal by Justice Scalia to rely upon any aspect of a statute’s legislative history is premised in part upon a skepticism that congressional committee reports and other traditional sources of legislative history have any value in determining the meaning of statutes and that such extra-statutory sources may indeed mislead the Court.

Not all members of the Court during Rehnquist’s tenure as Chief Justice agreed with the view that legislative history has no place in statutory interpretation. While still the Chief Judge of the First Circuit Justice Breyer wrote:

[O]ne should recall that legislative history is a judicial tool, one judges use to resolve difficult problems of judicial interpretation. It can be justified, at least in

172 See, e.g., Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 616–23 (Scalia, J., concurring) (expressing the view that as a statutory interpretation tool congressional committee reports were unreliable “not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction” and contending that the extensive use of legislative history by the Court was a recent phenomenon and not historically practiced by the Court); Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 79 (1998) (concluding that Title VII of the Civil Rights Act of 1964 also encompassed same-sex sexual harassment and noting that “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed”).

173 See Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court, 39 AM. U. L. REV. 277, 281 (1990) (noting that the use of legislative history was under assault from within the Supreme Court and that the “movement’s spiritual leader is Justice Scalia”).

174 See, e.g., Thomas W. Merrill, Chief Justice Rehnquist, Pluralistic Theory, and the Interpretation of Statutes, 25 RUTGERS L.J. 621, 660 (1994)(Remarking about Justice Scalia’s approach to statutory interpretation that “Most importantly, all forms of legislative history are out of bounds, in part because of the danger of manipulation . . . In contrast, other interpretive aid, such as contemporary dictionaries and usage reflected in other contemporary statutes, may be freely consulted”); William D. Popkin, An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation, 76 Minn. L. Rev. 1133, 1136 (1992) (“Moreover, in Justice Scalia’s view, placing legislative intent before the text constitutes a ‘backwards’ method of statutory interpretation because one can determine legislative purpose only by examining the language that Congress used”).

175 See Mortier, 501 U.S. at 621 (Scalia, J., concurring) (In remarks directed towards the legislative history of FIFRA Justice Scalia noted “All we know for sure is that the full Senate adopted the text that we have before us here, as did the full House, pursuant to the procedures prescribed by the Constitution; and that the text, having been transmitted to the President and approved by him, again pursuant to the procedures prescribed in the Constitution, became law. On the important question before us today, whether that law [FIFRA] denies local communities throughout the Nation significant powers of self-protection, we should try to give the text its fair meaning, whatever various committees might have had to say – thereby affirming the proposition that we are a Government of laws, not of committee reports.”).

176 See id. at 610. In response to Justice Scalia’s position questioning the value of legislative history in the Court’s work, Justice White writing for the majority commented: “As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it . . . Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent.” Id.
part by its ability to help judges interpret statutes, in a manner that makes sense and that will produce a workable set of laws. If judicial use of legislative history achieves this kind of result, courts might use it as part of their overarching interpretive task of producing a coherent and relatively consistent body of statutory law, even were the rational member of Congress a pure fiction, made up out of whole cloth.\footnote{177}

The approach of the Court and its position on the use of legislative history as a statutory interpretive tool did evolve as the composition of the Court changed while Rehnquist was Chief Justice. Consider, for example, one of the first pollution control cases decided during the Rehnquist era, \textit{Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation},\footnote{178} where in writing the majority opinion Justice Marshall relied heavily on legislative history to support the conclusion that section 505 the Clean Water Act\footnote{179} did not confer upon citizen plaintiffs the right to seek redress for wholly past violations.\footnote{180} In contrast, moving forward near the end of the Rehnquist era, we see the influence that Justice Scalia’s position concerning the inappropriateness of looking to legislative history as a guide in interpreting statutes had on the Court. In \textit{Whitman v. American Trucking Associations},\footnote{181} decided almost 15 years after \textit{Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation}, there is absolutely no mention of legislative history in the majority opinion as a means of either determining congressional intent or in support of the Court’s holding.\footnote{182} In a starkly different approach to Justice Scalia’s negative view of the validity of legislative history as a tool of statutory interpretation is Justice Breyer’s concurrence in \textit{Whitman v. American Trucking Associations}, which is grounded almost in its entirety upon the legislative history of the Clean Air Act.\footnote{183}

Although not accepted by every Justice, over time Justice Scalia’s view that legislative history was not a reliable tool for use in the construction of statutes gained wide support in the Court during the Rehnquist era, and is reflected in the Court’s approach to interpreting pollution control statutes during this period. The disdain for legislative history influenced the Rehnquist Court’s later decisions in several pollution control cases where the majority made no mention or use of the legislative history materials readily

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177 Stephen J. Breyer, \textit{On the Uses of Legislative History in Interpreting Statutes}, 65 S. CAL. L. REV. 845, 867 (1992). By no means did the Chief Justice necessarily agree with Justice Scalia’s position concerning the supposed impropriety of turning to legislative history as a means of assisting the Court in its interpretation of statutes. See Merrill, supra note 174, at 653 (commenting that “there is little evidence that Chief Justice Rehnquist shares or is even sympathetic to Justice Scalia’s strong allergy to legislative history” and contending that when Chief Justice Rehnquist avoided using legislative history in opinions it was only reflective of an effort to garner a majority without separate opinions and thus for these reasons he “apparently agreed to drop the erstwhile obligatory discussion of legislative history”).


180 \textit{Gwaltney of Smithfield}, 484 U.S. at 61–63.


182 See id. at 462–486.

183 \textit{Id.} at 491–496.
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available and relevant to the statute in question. Nonetheless, this controversial approach to statutory construction did not result in any interpretive missteps in the pollution control cases and lends no support for the view that the Rehnquist Court interpreted pollution statutes in a manner inconsistent with their ultimate goal of environmental protection.

B. Rejection of Statutory Interpretation-based Challenges to the Applicability of Pollution Control Statutes

1. Whitman v. American Trucking Associations

The Rehnquist Court was presented in Whitman v. American Trucking Associations with a challenge concerning the process used by EPA to establish national ambient air quality standards (“NAAQS”) under the Clean Air Act. The challenge arose when EPA promulgated revised NAAQS for ozone and particulate matter because new scientific data showed that the existing standards were not protective of human health, with an adequate margin of safety, as mandated by Congress in section 109 of the Clean Air Act.

This challenge in American Trucking Associations was undoubtedly an uphill struggle for the coalition of powerful business interests that filed suit seeking to invalidate the newly promulgated ozone and particulate matter NAAQS since one of the central issues presented – whether EPA was required to consider costs when it established or modified NAAQS, had long ago been raised before the Court of Appeals for the District of

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

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


188 Reflecting the cumbersome NAAQS process, to date, EPA has set NAAQS for only a handful of pollutants: sulfur oxides, nitrogen oxides, carbon monoxide, lead, ozone and particulate matter. See 40 C.F.R. §§ 50.4–50.12. (2006). The pollutants that EPA has established NAAQS for are commonly referred to as the “criteria pollutants.” MARK S. SQUILACE and DAVID R. WOOLEY, AIR POLLUTION 74 (3d ed. 1999).
Columbia in *Lead Industries Association, Inc. v. EPA*[^1] and was rejected. The renewed attack on the NAAQS process in *American Trucking Associations* was of particular importance, nonetheless, because it questioned for the first time before the Supreme Court one of the central underpinnings of the Clean Air Act: the ability of EPA to establish ambient air quality standards uniformly applicable throughout the country without requiring consideration by the agency of the costs that such standards would impose on regulated entities. Put another way, the challengers in *American Trucking Associations* sought to impose a cost-benefit analysis obligation upon the NAAQS setting aspect of EPA’s regulatory authority under the Clean Air Act.[^2]

Success before the Court by industry in its efforts to require EPA to justify the NAAQS on the basis of a cost-benefit analysis would have had profound implications for the fundamental regulatory scheme that underlies the Clean Air Act. If the interpretation of section 109 of the Clean Air Act offered by business interests were accepted by the Court in *American Trucking Associations* it would have subjected the NAAQS process to endless rounds of litigation featuring battling economists and other financial experts opining on the costs of complying with the standards compared to the benefits or lack thereof that the standards provided. Based upon such a cost-benefit analysis requirement, given the unpredictable nature of litigation, it is conceivable that a court might have invalidated certain NAAQS. The result of requiring the consideration of costs and benefits in the NAAQS calculus also would have served to increase the administrative burden the agency would face in the development or modification of the NAAQS, an already cumbersome regulatory process, since new found economic expertise would have

[^1]: Lead Indus. Ass’n, Inc. v. EPA, 647 F.2d 1130 (C.A.D.C. 1980), cert. denied, 449 U.S. 1049 (1980). In *American Trucking Associations* the challengers argued that the *Lead Industries Association* case was wrongfully decided for two reasons. First, it was asserted that the express language of section 109, which required EPA to set the NAAQS at levels that were protective of the “public health,” implicitly required EPA to consider costs because “‘[p]ublic health’ was, of course, a well-established profession in 1970” when Congress enacted the NAAQS provisions, and “[t]he discipline [public health] then, as now, is practiced through a synthesis of medical and social sciences, with a significant emphasis on economics.” Brief for Cross-Petitioner at 35, *American Trucking Associations*, 531 U.S. 457 (2001) (No. 99-1426), available at 2000 WL 1014021. Accordingly, since the public health profession included economics in its considerations of what was beneficial to the overall health of the public, EPA was therefore required to consider costs as part of its rulemaking deliberations in setting the NAAQS. *Id.* Second, it was argued that because other provisions of the Clean Air Act imposed a consideration of costs, the court in *Lead Industries Association* should have interpreted section 109 to also require EPA to consider costs associated with the NAAQS. Brief for Cross-Petitioner, *supra*, at 38–41.

[^2]: See *id.* at 33 (asserting that there were three alternatives under which EPA could set NAAQS and that the third alternative required a cost-benefit analysis but that such an approach was “precluded by *Lead Industries*”). The challengers added that “[o]nly the third of these options – a systematic weighing of pros and cons based upon rejection of Lead Industries – c[ould] be squared with this Court’s precedents . . . As this Court has noted, it is generally ‘unreasonable to assume that Congress intended to give [an agency] the unprecedented power over American Industry’ to ‘impose enormous costs that might produce little, if any, benefit.’” *Id.* at 30–33 (internal citations omitted). *See also* Schroeder, *supra* note 169, at 331–40 (pointing out the importance to industry of imposing a cost-benefit analysis requirement on the EPA in setting NAAQS and noting that given the significant costs associated with Clean Air Act compliance that “the benefit-cost principle is the Holy Grail of the regulatory reform for business and industry”).
to play a key role in NAAQS development. Lastly, a ruling in favor of industry in *American Trucking Associations* would have made other pollution control statutes vulnerable to claims either in court or before Congress that the costs associated with compliance far exceeded the benefits, thus potentially calling into question significant portions of the federal environmental regulatory apparatus.

However, concerning the argument that EPA was required to account for the costs imposed on businesses and industries when issuing new or revised NAAQS, Justice Scalia turned to the express command of Congress in section 109(b) that required EPA to establish NAAQS on the basis “. . . of which . . . are requisite to protect the public health” with an “adequate margin of safety,” and recognizing that costs were not mentioned as a factor for EPA to weigh under the statute concluded that “Were it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards.” Justice Scalia rightfully concluded that “The text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost consideration from the NAAQS setting process” and thus the Court overwhelmingly rejected the challenge by industry. In doing so, the Court reaffirmed the District of Columbia Circuit’s much earlier groundbreaking decision in *Lead Industries Association, Inc. v. EPA*. In the end, the NAAQS process established by section 109 of the Clean Air Act survived the industry challenge when the Rehnquist Court rejected without a single dissent both the non-delegation argument and the position that *Lead Industries Association, Inc.*

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191 Sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408, 7409 (2000), set out the statutory requirements for EPA to adopt NAAQS, and the detailed regulations that EPA follows in establishing these standards are found at 40 C.F.R. Part 50.

192 See Schroeder, supra note 169, at 322–23 (“[I]f the regulated community could succeed here, the same legal theories would almost certainly ripple outwards to impact other aspects of national environmental law and policy as well. Thus there was a tremendous amount at stake in *American Trucking*.’’); Cass R. Sunstein, *Is the Clean Air Act Constitutional?*, 98 Mich. L. Rev. 303, 310 (1999) (commenting on the Court of Appeals for the District of Columbia’s decision in *American Trucking Associations* and noting that “[o]n its face the *American Trucking* decision would seem to draw into serious constitutional question not only EPA’s ozone and particulate regulations, but also a wide range of decisions by many other agencies involved in the protection of health and welfare”).


194 Id. at 471 (emphasis added).

195 Id. *See also* Lead Indus. Ass’n, Inc. v. EPA, 647 F.2d 1130, 1148 (C.A.D.C. 1980) (holding that “economic considerations play no part in the promulgation of ambient air quality standards under Section 109”).

196 The challengers also raised a constitutional argument in their vigorous assault upon section 109 of the Clean Air Act. While the District of Columbia Circuit in *American Trucking Associations* rejected the argument that EPA was required to consider costs in setting the NAAQS, the Court of Appeals surprisingly did agree with the industry challengers that EPA’s interpretation of its authority under section 109 to set NAAQS violated the rarely invoked non-delegation doctrine. *Am. Trucking Ass’ns v. Whitman*, 175 F.3d 1027, 1034 (D.C. Cir. 1999). The nondelegation doctrine arises from Article I of the Constitution, which provides in part that “[a]ll legislative Powers herein shall be vested in a Congress of the United States,” and is “rooted in the principle of separation of powers.” *Mistretta v. United States*, 488 U.S. 361, 371 (1989). “The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity.” *Loving v. United States*, 517 U.S.
was wrongly decided more than 20 years before American Trucking Associations. The Court interpreted the Clean Air Act so that the costs associated with compliance continue to play no role in the NAAQS setting efforts of EPA. Once a pollutant is listed under section 108 of the Act by the administrator, the obligation to establish a NAAQS specific to that pollutant at a level that is “requisite to protect the public health” and that provides “an adequate margin of safety” are the criterion that guide EPA’s decision, and the costs that are imposed on industry to achieve those goals are not a determinative factor. As a result of the Court’s decision other pollution control statutes were also spared facing similar arguments that would have been made in an effort to derail their regulatory impact by asserting that the costs simply outweighed the benefits had industry prevailed in American Trucking Associations.

2. City of Chicago v. Environmental Defense Fund

Another pollution control decision contrary to the assertions of the Rehnquist Court’s abundant anti-environmentalism is City of Chicago v. Environmental Defense Fund, where the Court agreed with the statutory interpretation offered by several prominent environmental groups that the subtitle C hazardous waste requirements of RCRA applied to the more than 100,000 tons of waste ash that were generated annually by a municipal

748, 758 (1996). Nevertheless, it is certainly allowed and indeed required for effective government that Congress have the ability to delegate certain actions to the numerous agencies that play such a crucial role in the administration of the federal government’s programs and policies. To do so, however, the Supreme Court has consistently held that Congress must “lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.” See American Trucking Associations, 531 U.S. at 472 (citing J.W. Hampton, Jr. Co. v. United States, 276 U.S. 394, 409 (1928)). Acceptance of the non-delegation doctrine argument was an especially unexpected decision by the Court of Appeals because the non-delegation doctrine, on the few instances when invoked, was rarely successful and, in fact, had only been successful twice before the Supreme Court as an argument to invalidate congressional action. See American Trucking Associations, 531 U.S. at 473 (responding to the argument that EPA’s interpretation of section 109 violated the non-delegation doctrine because Congress failed to provide an “intelligible principle” by which to guide EPA’s NAAQS decision-making authority and noting that “[i]n the history of the Court we have found the requisite ‘intelligible principle’ lacking in only two statutes”). See also Sunstein, supra note 192, at 332 (highlighting that the last time the Supreme Court found an act of Congress invalid under the non-delegation doctrine was in 1935, where the Court struck down part of the National Industrial Recovery Act in Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and later struck down the entire National Industrial Recovery Act in A.L.A. Schecter Poultry Co. v. United States, 295 U.S. 495 (1935)). Not surprisingly, the Supreme Court reversed the non-delegation doctrine conclusion of the District of Columbia Circuit in American Trucking Associations and found that the EPA’s application of section 109 was entirely consistent with the non-delegation doctrine. American Trucking Associations, 531 U.S. at 474. The discretion provided to EPA by Congress in setting NAAQS was “in fact well within the outer limits” of the Court’s prior non-delegation cases. Id. For a critique of the Court’s historic approach to non-delegation cases, see David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 83 MICH. L. REV. 1223 (1985).

197 See 42 U.S.C. § 7408 (2000) (requiring EPA to list any pollutant that: 1) causes or contributes to air pollution; 2) may reasonably be expected to endanger public health; 3) is from numerous and diverse source and 4) has no existing air quality criteria). Once listed under section 108, the obligation to establish a NAAQS for the listed pollutant is mandatory. Natural Res. Def. Council v. Train, 411 F. Supp. 864 (S.D.N.Y. 1976), aff’d’ 545 F.2d 320 (2d Cir. 1976).

198 See 42 U.S.C. § 7409(b).

199 See id.

household waste to energy facility operated by the City of Chicago. The city asserted that the waste ash was not subject to RCRA regulation as a hazardous waste because of a provision expressly exempting waste to energy facilities or “resource recovery” facilities from RCRA subtitle C regulation so long as such facilities only incinerated non-hazardous wastes.

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

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

Thus RCRA was construed by the Court to impose upon the City of Chicago and similarly situated municipalities operating waste to energy or resource recovery facilities the obligation to dispose of the resulting ash as hazardous wastes at dramatically higher

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201 RCRA subtitle C, 42 U.S.C. §§ 6921–6939e (2000), imposes stringent requirements on the generation, treatment, storage and disposal of hazardous wastes. “Hazardous wastes” as used in RCRA and its implementing regulations is a term of art and encompasses wastes that have been specifically designated or listed as hazardous wastes by EPA, see, e.g., 40 C.F.R. §§ 261.11, 261.30–261.35 (2006), or wastes that exhibit one or more of the four defined RCRA hazardous characteristics including ignitability, corrosivity, reactivity or toxicity. 40 C.F.R. §§ 261.20–261.24 (2006).

202 City of Chicago v. Envtl. Def. Fund, 511 U.S. at 334. The particular exemption relied upon by the City of Chicago for its position that the ash was beyond the purview of the RCRA hazardous waste regulations provides in part that:

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

42 U.S.C. § 6921(i).

203 See City of Chicago v. Envtl. Def. Fund, 511 U.S. at 330. Toxicity is one of the four defined characteristics of a hazardous waste. See supra note 201. Under EPA’s regulatory approach to determining toxicity, a waste material is toxic, and hence a hazardous waste, if the level of one or more specified constituents meets or exceeds regulatory limits as determined through an analytical test referred to in the RCRA regulations as the “toxic characteristic leaching procedure.” 40 C.F.R. § 261.24. (Date).
costs than if it were treated as exempt from RCRA hazardous waste regulation. This is another result that is inconsistent with the purported anti-environmental leanings of the Rehnquist Court, and is also an example where the Rehnquist-led Supreme Court interpreted a pollution control statute in a manner that resulted in providing greater environmental protection and rejected an interpretation that would have resulted in less protection for the environment. Importantly, in reaching this conclusion, the Court sided with one of the country’s most visible pro-environment groups, the Environmental Defense Fund,204 which is entirely inconsistent with the view that the Rehnquist Court was openly hostile to environmental groups.

3. *Friends of the Earth, Inc.*

In yet one more pollution control case running counter to the assertion that the Rehnquist Court was anti-environmental and pro-business, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*205 involved whether environmental groups could file suit under the citizen suit provision of the Clean Water Act206 against an industrial discharger for longstanding permit violations. The Fourth Circuit Court of Appeals had determined that the suit became moot when, following initiation of litigation, the defendant arguably achieved compliance with its NPDES permit limits.207 Consequently the Fourth Circuit vacated the district court’s order assessing a $405,800 penalty.208

If one accepts the position that the Rehnquist Court was anti-environmental and pro-business, one would have anticipated that the decision of the appeals court below would have been overwhelmingly affirmed, given the Rehnquist Court’s supposed bias towards business interests over those who promote environmental causes. Any such prediction, however, that the case would result in a ruling exonerating the industrial defendant from culpability for violating the Clean Water Act would have widely missed the mark, since in a 7 to 2 decision, joined by Chief Justice Rehnquist, the Court ruled in favor of the environmental groups, and the Fourth Circuit’s decision mothing the citizen’s enforcement action was reversed.

The industrial challenger, of course, urged the Court to affirm the court below. It argued that the environmental groups lacked standing, which had presented a significant hurdle that citizen plaintiffs in environmental cases were finding increasingly difficult to clear,

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204 The Environmental Defense Fund was founded in 1967 after a group of scientists prevailed in obtaining a ban on the use of the pesticide DDT. Environmental Defense Fund: Origin and History, www.environmentaldefense.org/aboutus.cfm?tagID=362 (last visited Jan. 15, 2007). According to the Environmental Defense Fund its efforts to ban the use of DDT resulted in “the birth of modern environmental law.” *Id.* It further boasts that it is “one of America’s most influential environmental advocacy groups, now with over 500,000 members and more Ph.D. scientists and economists on staff than any similar organization.” *Id.*


207 Under section 402 of the Clean Water Act, 33 U.S.C. § 1342, the discharge of a pollutant to waters of the United States is prohibited without a national pollutant discharge elimination system permit or “NPDES” permit.

but the standing argument was quickly dispensed with by the Court. In perhaps the most important aspect of the Court’s decision, it expressly rejected that plaintiffs in citizen suit proceedings had to present evidence of cognizable environmental harm to have standing; rather, the majority found that injury to the plaintiff would suffice to meet the standing requirements of injury in fact as articulated by the Court in prior cases. In so doing, the Court explicitly recognized the deterrent effect of civil penalties obtained through successful citizen suit litigation and thus realized the important contribution such suits provide as a critical aspect of environmental enforcement. The holding of the Court in Friends of the Earth concerning standing was even more significant because it reaffirmed the ability of environmental groups to file suit under not only the Clean Water Act but pursuant to the citizen suit provisions of other federal environmental laws, an ability that many believed as a result of the Rehnquist Court’s earlier environmental standing jurisprudence, namely the decisions in Lujan v. National Wildlife Federation and Lujan v. Defenders of Wildlife, had been severely eroded if not functionally eliminated.

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

210 Id. at 189. The standing doctrine arises from the Article III limitation of the exercise of federal judicial power to cases and controversies. U.S. CONST. art. III, § 2, cl. 1. In order to satisfy the standing requirement of Article III a plaintiff must show: 1) an injury fact that is (a) concrete and particularized and (b) actual or imminent; 2) that the injury is fairly traceable to the actions of the defendant and 3) that it is likely, and not speculative, that the injury will be redressed by a favorable decision of the court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–562 (1992).

211 Id. at 187.

212 See e.g., Hudson P. Henry, Note, A Shift in Citizen Suit Standing Doctrine: Friends of the Earth, Inc. v. Laidlaw Environmental Services, 28 ECOLOGY L.Q. 233 (2001) (recognizing that the decision in Friends of the Earth increases access to courts for citizen suit plaintiffs), Kristen M. Shults, Comment, Friends of the Earth v. Laidlaw Environmental Services: A Resounding Victory for Environmentalists, Its Implications on Future Justiciability Decisions, and Resolution of Issues on Remand, 89 GEO. L.J. 1001 (2001); Kelly D. Spragins, Note, Rekindling an Old Flame: The Supreme Court Revives Its “Love Affair With Environmental Litigation” In Friends of the Earth v. Laidlaw Environmental Services, 37 HOU. L. REV. 955, 956 (2000) (“For over a decade, the United States Supreme Court, has misdirected the will of Congress by seriously impairing citizens’ standing to sue suspected polluters. That trend, however, appears to be changing with the Court’s decision in Friends of the Earth v. Laidlaw Environmental Services.”).

213 See, e.g., Clean Air Act, 42 U.S.C. § 7604; RCRA, 42 U.S.C. § 6972; CERCLA, 42 U.S.C. § 9659. Each cited section is an example that authorizes citizens to act as private attorneys generals and initiate civil actions against those who are in violation of these environmental statutes and their corresponding regulations.


216 See, e.g., Richard Pierce, Jr., Is Standing Law or Politics?, 77 N.C. L. REV. 1741 (1999) (arguing that in light of the Court’s standing cases, including Lujan v. Defenders of Wildlife, that personal politics play a key role in determining who has access to the courts more than any truly cognizable doctrine of standing); Cass R. Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III, 91 MICH. L. REV. 163 (1992) (criticizing Lujan v. Defenders of Wildlife as having no basis in Article III and contending
The retreat from the *Lujan* decisions by the Rehnquist Court in *Friends of the Earth* is significant because Justice Scalia’s views as expressed in the two *Lujan* cases concerning what was required for standing in citizen suit litigation reflected a complete lack of understanding about the type of harm that noncompliance with the pollution control statutes can cause.\(^{217}\) The nature of the violations alleged in the typical citizen suit – the discharge of pollutants in excess of a few milligrams more than allowed in an NPDES permit issued under the Clean Water Act\(^{218}\) or emissions greater by a few thousand pounds per day over permitted limits in a Clean Air Act Title V permit\(^{219}\) or the failure to report chemical releases at or above the reportable quantity threshold as required by CERCLA and the Emergency Planning and Community Right-to-Know Act\(^{220}\) – rarely, if ever, cause demonstrable, concrete environmental harm. If Justice Scalia’s position on what was required for environmental plaintiffs to meet the injury in fact requirement of standing prevailed in *Friends of the Earth* it would mean that, absent a fish kill or Bhopal type of environmental disaster, citizen suits under the various environmental statutes simply could never proceed since the plaintiffs usually would lack the injury in fact element required for standing. The virtually impossible to meet and impractical element of citizen standing as expressed by Justice Scalia in the *Lujan* opinions and in his *Friends of the Earth* dissent, of course, is not at all surprising in light of his well-documented and overtly negative view towards standing in citizen suits.\(^{221}\)

But fortunately for the future of citizen suits under the federal environmental laws, an aspect of enforcement that Congress has clearly deemed an important component of environmental protection, since virtually every pollution control statute contains a citizens suit provision,\(^{222}\) Justice Scalia’s unprecedented views concerning standing were

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\(^{217}\) Justice Scalia, who wrote both *Lujan* opinions, joined by Justice Thomas, did author a biting dissent in *Friends of the Earth*. While agreeing with the majority’s conclusion on the mootness issue, Justice Scalia predictably and vehemently opposed the majority’s determination that the plaintiffs had standing. Justice Scalia stood by his position as articulated in the *Lujan* decisions and made it plain that, absent a showing of actual harm to the environment, the plaintiffs failed to meet the injury in fact element required for standing. *See Friends of the Earth v. Laidlaw Envtl. Serv. (TOC)*, 528 U.S. 167, 199 (“Typically, an environmental plaintiff claiming injury due to discharges in violation of the Clean Water Act argues that the discharges harm the environment, and that the harm to the environment injures him. This route to injury is barred in the present case, however, since the District Court concluded after considering all the evidence that there had been ‘no demonstrated proof of harm to the environment.'”). *See also* Garbus, *supra* note 1, at 185 (“Scalia and Thomas ridiculed the [majority], first arguing there was no proof that the illegal release of mercury and other pollutants into the waterway actually harmed the environment. They also claimed that citizen suits should not be allowed at all, that only the individuals damaged could bring suit.”).

\(^{218}\) *See*, e.g., 33 U.S.C. § 1342.

\(^{219}\) *See*, e.g., 42 U.S.C. §§ 7661 to 7661b.

\(^{220}\) *See*, e.g., 42 U.S.C. §§ 9603 and 11004.

\(^{221}\) *See*, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (positing the thesis that courts must become more demanding of the injury in fact requirement of standing to avoid encroaching upon the prerogatives of the electorate).

rejected by a clear majority, including Chief Justice Rehnquist, in *Friends of the Earth*. Without diligent state or federal enforcement and a clear showing that violations could not recur, after *Friends of the Earth* those who cannot comply or refuse to do so with federal environmental statutes and regulations remain subject to enforcement actions brought by environmental groups acting as private attorney generals, even if violators achieve compliance after suits are initiated.\(^{223}\)

C. Countervailing Cases: *Gwaltney* and *Steel Company*?

One might assert that even with the *Friends of the Earth* decision and its rejection of standing as defined in the *Lujan* line of cases that the Rehnquist Court still had a negative impact on citizen suit enforcement as a result of its construction of the pollution control statutes. Those taking such a position readily could point to the Rehnquist Court decisions in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*\(^ {224}\) and *Steel Company v. Citizens for a Better Environment*\(^ {225}\).

Without dissent\(^ {226}\) in *Gwaltney of Smithfield* Justice Marshall writing for the Court found that the natural reading of the “to be in violation” language of the citizens suit provision of the Clean Water Act\(^ {227}\) imposed a requirement that plaintiffs must allege “a state of either continuous or intermittent violation” in order to proceed.\(^ {228}\) Thus after the *Gwaltney* decision, Clean Water Act citizen suits were expressly limited to instances where violations were ongoing, and consequently citizen suits were no longer an available remedy to enforce wholly past violations of the statute. After *Gwaltney of Smithfield* if a violator of the Clean Water Act achieved compliance before the citizen suit was filed, then the prior violations are deemed wholly past violations and a citizen plaintiffs’ suit was foreclosed.\(^ {229}\)

Similarly in the *Steel Company* decision the Court faced the question of whether a citizen suit under the Emergency Planning and Community Right-to-Know Act (“EPCRA”)\(^ {230}\) could proceed to enforce wholly past violations arising from the failure to file certain

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\(^{223}\) Gene Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142 (1993) (critiquing Justice Scalia’s opinion in *Lujan v. Defenders of Wildlife* and finding that “[t]he decision is difficult to square with the language and history of Article III” or in other words that the *Lujan* decision has little if any support in the Constitution.).

\(^{224}\) *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987).


\(^{226}\) Justice Scalia, joined by Justice Stevens and Justice O’Connor, wrote a concurring opinion. See *Gwaltney of Smithfield*, 484 U.S. at 67–71.

\(^{227}\) 33 U.S.C. § 1365.

\(^{228}\) *Gwaltney of Smithfield*, 484 U.S. at 57.

\(^{229}\) While pre-litigation compliance may foreclose a citizen suit from proceeding based on *Gwaltney*, the violator is still open to potential enforcement by the federal or state environmental regulatory authorities for wholly past violations. See id. at 58 and 33 U.S.C. § 1319(a), which expressly confers upon the EPA the authority to bring enforcement actions for wholly past violations.

\(^{230}\) 42 U.S.C. §§ 11001–11050. Among its provisions EPCRA establishes a network of state, regional and local agencies that serve as repositories of information concerning a wide range of facilities that store specified “toxic chemicals” and that can provide emergency response in the event of a release of toxic chemicals above certain threshold levels. See, e.g., 42 U.S.C. §§ 11001–11003, 11021–11023.
required annual reports detailing the presence and release of specified hazardous chemicals. Writing for the Court Justice Scalia found that the plaintiff failed to meet the redressability requirement of Article III standing because the alleged violations had been corrected prior to the filing of the suit. As a result, the declaratory judgment sought from the district court that the defendant had indeed violated EPCRA was “not only worthless to the respondent, it is seemingly worthless to all the world.” Likewise none of the other relief sought by the respondent provided any remedy targeted at any other alleged injury required for standing.

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

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

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231 Under section 313 of EPCRA industries within certain SIC Codes are required to annually submit “Form R’s” that detail the manufacture, use or processing of a wide range of “toxic” chemicals above designated threshold amounts. 42 U.S.C. § 11023.
232 Steel Co., 523 U.S. at 104–109
233 See id. at 106. Justices Stevens, Souter and Ginsburg concurred in the judgment of the Court but would have avoided the constitutional question altogether by following Gwaltney to find that a citizens suit under EPCRA was unavailable as an enforcement mechanism for wholly past violations. See Steel Co., 523 U.S. at 112–134 (Stevens, J. concurring).
234 See id. at 109–110.
235 Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49, 57. See also 33 U.S.C. § 1365(a), which provides in part that any citizen may commence a civil action against any person “alleged to be in violation” of an effluent standard or EPA issued order.
236 See id. at 61–62 (“The legislative history of the Act provides additional support for our reading of § 505. Members of Congress frequently characterized the citizen suit provisions as ‘abatement’ provisions or as injunctive measures.”).
237 As mentioned earlier the Gwaltney decision does not entirely foreclose enforcement for wholly past violations. Federal and state enforcement remains a distinct possibility for wholly past violations.
ability of citizens to sue for ongoing violations of the Clean Water to also encompass wholly past violations.

The Steel Company decision also is problematic as a basis to support an argument that it demonstrates the pro-business attitude of the Rehnquist Court over environmental interests. One must be mindful of the fact that the Steel Company case was decided by the Court several years before, what is perhaps the most significant environmental citizens suit case decided by the Rehnquist Court, Friends of the Earth.238 In defending against the citizen suit in Friends of the Earth the defendant also asserted that the reasoning in Steel Company precluded suit due to a lack of standing, but the Court rejected that position and refused to extend Steel Company to the situation where compliance is achieved only after suit is filed.239 If the Rehnquist Court were clearly pro-business and clearly biased against environmental interests the Court should have been responsive to the opportunity in Friends of the Earth to broaden its Steel Company holding by also foreclosing citizen suits even if compliance was achieved post-initiation of litigation, but the Court did not do so. In fact, quite the contrary, the Court used the Friends of the Earth decision to draw back from the near impossible standing requirements plaintiffs in environmental citizen suits faced after the Lujan decisions.

CONCLUSION

At the outset of this Article I asked whether the depiction of the Rehnquist Court as an anti-environmental, pro-business Court was an accurate characterization. My analysis of the significant pollution control cases decided during the era of William H. Rehnquist as the 16th Chief Justice of the United States Supreme Court does not support the proposition that the Rehnquist Court represented a period in the Court’s history where it was inhospitable towards environmental groups and clearly favored business interests over environmental protection efforts. The pollution control cases analyzed in this Article demonstrate no bias in favor of business interests to the detriment of the pollution control statutes enacted by Congress, the associated implementing regulations adopted by EPA or the citizen suits brought by environmental groups to promote compliance.

Surely if the Rehnquist Court were truly an anti-environmental and pro-business Court one should see within the significant body of pollution control cases decided by the Court decisions clearly reflecting this bias. If the claims concerning the anti-environmental, pro-business nature of the Rehnquist Court were indeed correct, then one would expect to find multiple cases where the Court reached decisions favorable to business interests and inapposite to the positions of both EPA and environmentalists. What the opinions arising from the pollution control statutes do show is a Court that on a number of instances accepted the litigation positions offered by EPA or citizens and environmental groups in

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238 See discussion supra Part IV.B.3 of the Friends of the Earth decision.
239 Steel Co., 528 U.S. at 187–188 (“In short, Steel Co. held that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations, but our decision in that case did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred.”).
their labors to further environmental protection and rejected arguments brought by business interests challenging key aspects of pollution control statutes.

As historians and scholars contemplate the Rehnquist Court, part of its overall legacy will no doubt include the renewed vigor federalism suddenly enjoyed during this period after many decades of absence from the Court, with its attendant limitations on congressional power and recognition of the states as clearly distinct sovereigns. The Rehnquist Court’s legacy concerning its environmental jurisprudence should not include, however, the view that he led an anti-environmental and pro-business Court. There is simply no foundation for those assertions in the cases arising before the Court under the pollution control statutes during the close to 20 years that William H. Rehnquist served as its 16th Chief Justice of the Supreme Court.