Arbitrary and Capricious: The Dark Canon of the United States Supreme Court in Environmental Law

OLIVER A. HOUCK*

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INTRODUCTION

"In no other political or social movement has litigation played such an important and dominant role. Not even close."

David Sive[1]

At the dawn of modern environmental law, the Supreme Court played a significant role with decisions that stimulated new programs and affirmed those just

* Professor of Law and David Boies Chair in Public Interest Law, Tulane University. For further reference see www.oliverhouck.com.

1. Tom Turner, *The Legal Eagles*, THE AMICUS JOURNAL, Winter 1988 at 25, 27. Professor Sive, Senior Partner of a New York City law firm, represented plaintiffs in several administrative and environmental cases, including *Scenic Hudson Pres. Conference v Fed. Power Comm'n*, 354 F.2d. 608 (2d Cir. 1965).

under way, giving deference to what Congress had intended and done.[2] It was not to last. By the end of the 1970's, the Court was turning unmistakably hostile, creating a canon of jurisprudence that was not only negative but marked by questionable reasoning, mischaracterization of fact and law, and an evident bias against environmental programs and those who argued in their favor. The days of support or even fair consideration were over and, for some programs, had never arrived. The Court's 0 – 17 record on the National Environmental Policy Act alone speaks for itself.[3] Each of these cases had been decided otherwise by an appellate panel below, all responsible adults. One has better odds in Las Vegas.

Understandably, my students tend to accept these opinions as gospel; this is, after all, the Court speaking. They should not, but the reasons they should not are often not obvious. When I have asked them as an assignment to appeal the opinions to the Galactic Supreme Court, few did it well. Putting myself to the same task I realized that the problem did not rest with a few isolated cases, but rather in an entire body of law that had been building for the past 40 years. It seems time to call it to account.

With the assistance of colleagues, I have selected twelve Supreme Court decisions, using as criteria their use of fact and precedent, reasoning, and impact. This article begins the accounting with three such cases—each a chain of cases, really—that have had indelible consequences. The first, *Robertson v Methow Valley Citizens Association*,[4] reduced NEPA to a ritual, and the second,

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2. Early curtain raisers include *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Standard Oil Co.*, 386 U.S. 224 (1966) (extending the Refuse Act of 1899 to pollution discharges and prompting Congress to enact the Clean Water Act); 2: *E.I. du Pont de Nemours v. Train*, 430 U.S. 112 (1977) (ratifying an EPA standard-setting process that, although not in strict conformity with the statute, was found rational and in keeping with congressional goals); *Union Elec. Co. v. E.P.A.*, 427 U.S. 246 (1976) (rejecting consideration of economic and technological feasibility in EPA approvals of state clean air plans); *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd*, (D.C. Cir. Nov. 1, 1972) (affirming an EPA-created requirement that became the Prevention of Significant Deterioration Program); *Tenn. Valley Auth. v Hill*, 437 U.S. 153 (1978) (empowering the newly-minted Endangered Species Act); *Citizens to Preserve Overton Park*, 401 U.S. 402 (1971) (rigorously construing Section 4(f) of the Department of Transportation Act); and *Sierra Club v. Morton*, 405 U.S. 727 (1972) (opening the door for citizen standing to challenge government compliance with these and other laws). Notably, however, these opinions came early on with the majority justices nearing retirement; it is unlikely they would be so decided today. *See* Oliver A. Houck, *The Secret Opinions of the United States Supreme Court on Leading Cases in Environmental Law, Never Before Published*, 69 COLO. L. REV. 459 (1994). This Article is about what transpired instead.

3. *See* Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1510 (2012). Indeed, the author notes, until environment plaintiffs lost a case in 2008, "they had not received a single vote in their favor [on the merits] for more than thirty years. . . ." *Id.* at 1510–11. "I doubt", Professor Lazarus concludes, "there is any other field of law in which the Court has been so repeatedly and unanimously opposed to the arguments advanced by one set of parties." *Id.* at 1524.

4. 490 U.S. 332 (1989).

Lujan v Defenders of Wildlife,[5] led an all-out assault on citizen standing that has limited enforcement across the field. The third, *Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council Inc.*,[6] capped a string of opinions placing atomic power on a pedestal above safety and environmental law.

At the end of this article, we may reflect on why the Court has taken such a turn, but beforehand it is necessary to appreciate how far it has jumped the rails of reasonableness and sound jurisprudence. It will be a journey.

I. *METHOW VALLEY*: THE NEUTERING OF NEPA

"Quality of life is a factor not easily measured or captured in words, and yet the human feelings involved are of the utmost importance. For the people of the Methaw [sic] it is evinced in the atmosphere of intimacy and trust that exist [sic] here . . . in the peace of mind that the quiet of the valley encourages, in the privacy, in the freedom of movement amid the open, [sic] spaces. . . ."

Methow Valley Plan, addendum to the Okanagan County Comprehensive Plan (1976).[7]

Nothing about *Methow Valley* signaled where it would go and what it would do.[8] In 1978, a newly-formed corporation applied to the US Forest Service for a permit to build a "destination" ski resort on public lands above Methow Valley, a remote corner of northern Washington described by reviewing courts as "pristine[.]"[9] It seemed an ideal location for such an enterprise. Not everyone agreed, however, and when the ensuing litigation reached the Supreme Court, the Court would issue an opinion from which NEPA,[10] the seminal environmental program in America, may never recover.

The opening lines of a judicial decision often signal its outcome. The Court's opinion here begins by describing the Forest Service's promotion of commercial ski areas as an impressive enterprise with some "170 Alpine and Nordic" projects at the time of writing.[11] Indeed, it had identified the Methow site as having the "highest potential" of any in the state for a "major downhill resort. . . ."[12] The ski slopes would contain sixteen separate lifts and accommodate up to 10,000 skiers at a time.[13] The resort itself would occupy just under 4,000 acres of the Okanogan

5. 504 U.S. 555 (1992).

6. 435 U.S. 519 (1978).

7. METHOW VALLEY PLAN, AN ADDENDUM TO OKANOGAN COUNTY'S COMPREHENSIVE PLAN §1 p.7 (1976), cited in Brief for Respondent at 1, *Methow Valley Citizens Ass'n*, at 332.

8. *Methow Valley Citizen's Ass'n*, 490 U.S. at 332.

9. *Id.* at 337.

10. *Congressional Declaration of Purpose*, 42 U.S.C. § 4321 *et seq* (2012).

11. *Methow Valley Citizen's Ass'n*, 490 U.S. at 336.

12. *Id.* at 337.

13. *Id.* at 339. The project scale was subsequently modified to accommodate 8,200 skiers at a time. Brief for Petitioners at 11, *Methow Valley Citizens Ass'n*, 490 U.S. 332 (1989). By way of contrast the entire Valley, eighty miles long, held 3,900 residents in 1984, see Brief for the Respondent, *supra* note

National Forest and over 1,000 acres of the Valley floor.[14] It would "entice visitors to travel long distances[,] stay at the resort for several days at a time[,] and . . . stimulate extensive commercial and residential growth. . . ."[15] At this point we could be reading a brochure.

The impacts of the project were both predictable and acute. En route to transforming the valley into a tourist mecca, the air pollution from thousands of cars and busses in a region noted for atmospheric inversions would be significant.[16] Without mitigation, the area would "exceed ambient air quality standards by a factor of five and non-degradation standards by a factor of twenty."[17] The resort's impact was equally stark on wildlife, including the state's largest migratory deer herd, for which the valley served both as a "migration corridor" and "critical winter range[.]"[18] The Department of Game predicted a fifty percent reduction in mule deer numbers statewide, and likely more.[19] This was big game country. These losses mattered.

The Service was not blind to them. It had contracted for a study to assess them, concluding that while impacts on the Forest lands (e.g., ski runs, lifts) could be easily managed, those on the Valley floor could also be curbed via non-development zoning, environmental easements, tax incentives, and land acquisition (along with signs for deer crossings), none of which was further described.[20] The measures suggested for air pollution included alternative energy sources (unnamed), restricting fireplaces and wood stoves (the major source of heating for Valley residents), and vigorous enforcement that was equally hypothetical.[21] These shortcomings were identified, twice, in federal agency comments on the draft impact statement:

> "The offsite mitigation involves local zoning changes to protect important wildlife habitats in the Methow Valley. The final statement should discuss how and when these zoning changes would be made."
>
> United States Fish and Wildlife Service[22]

7, while the town at the base of the runs, Mazama, held fewer than two hundred, see *Mazama Population* (last visited September 25, 2020).

14. *Methow Valley Citizen's Ass'n*, 490 U.S. at 338.

15. *Id*.

16. *Id*. at 340 (the project "will have a significant effect on air quality during severe meteorological inversion periods" and "degradation will take place with each successive level of development").

17. Brief for the Respondent, *supra* note 7 at 3, notes 3–4.

18. *Methow Valley Citizen's Ass'n*, 490 U.S. at 342.

19. *Id*.

20. *Id*. at 344.

21. *Id*. at 340; *see* Brief for the Respondent, *supra* note 7, at 6. Wood stoves, for example, were not only highly popular, but the sole means of heating in remote areas of the Valley. One might well imagine the local resistance to this one measure alone.

22. UNITED STATES DEP'T AGRIC., UNITED STATES FOREST SERVICE, EARLY WINTERS ALPINE WINTER SPORTS STUDY at D–72 [hereinafter EIS]. The Study served as the environmental impact statement for this project and was referred to throughout the litigation both ways.

> "[T]he DEIS discusses mitigation largely in terms of measures which could and should be taken, not what commitments have been or are likely to be made, or what measures may require as contract condition for construction and operation of the ski area."
>
> United States Environmental Protection Agency[23]

Unfortunately, even by the time of final argument before the High Court, none of these recommendations had been adopted by local authorities,[24] nor were they ever likely to be adopted, since they would restrict the "extensive commercial and residential growth" behind local support in the first place. These rather germane issues unresolved, the Service finalized its environmental statement concluding that, with mitigation, the impacts would be "minor[,]" and permitted the project to move forward.

By the time the litigation reached the Supreme Court, it focused on three related questions: (1) whether reliance on mitigation for purposes of impact assessment required some assurance that it would actually occur;[25] (2) whether, if the chances of mitigation were doubtful, the government needed to disclose the consequences should it fail;[26] and (3) whether Service regulations requiring a formal mitigation plan should address off-site impacts that were, in fact, the gravamen of the case.[27] All three propositions seemed reasonable and in keeping with NEPA itself. The Court found otherwise, however, and, in resolving them, felt the need to declare with a rhetorical flourish that, once its impacts had been discussed, the development could bypass mitigation altogether and eliminate *all* the deer.[28] Which, extrapolated, meant that under NEPA any project could kill off anything in the country.

This conclusion might have stunned those members of Congress who had designed the statute to secure precisely the opposite result. It was a conclusion, however, towards which the Court itself had been trending for years, starting with gratuitous statements that had nothing to do with the cases before it. Step by step, fueled by its own dicta, it was eviscerating the Act and leaving the shell.

A. NEPA, CONGRESS, AND THE QUESTION OF SUBSTANCE

The National Environmental Policy Act of 1969 was not created in a vacuum. It was the product of more than a decade of studies and revelations about the decline of the planet, captured for the general public in the Ra voyages of Thor Heyerdahl and then Rachael Carson's *Silent Spring*, which topped the New York Times best-

23. *Id.*
24. Brief for the Respondent, *supra* note 7, at 8, 30–31.
25. *See Methow Valley Citizen's Ass'n*, 490 U.S. at 348–53 (Part II) (mitigation).
26. *See id.* at 354–56 (Part III) (worst case).
27. *See id.* at 357–60 (Service regulations).
28. *Id.* at 351; *see also* text *infra* at note 126.

seller list for more than a year.[29] A "killer smog" in London felled over 1,600 people, Lake Baikal was dying, a funeral was held for Lake Erie, oil washed up on the beaches of California, and the Cuyahoga River caught fire, soon followed by the Houston Ship Canal.[30] Species as charismatic as the Whooping Crane and the American Bald Eagle were near extinction,[31] air pollution in urban areas was killing the very young and the very old[32]—the headlines kept coming in. These phenomena had several things in common: they were urgent; government agencies were involved in them up to the hip, and there was little law to be found.

Congress got the message. The Senate Report behind NEPA was in effect an indictment, presenting in staccato phrases a shopping list of environmental failures.[33] It found "increasing evidence" that existing institutions were "not adequate" to deal with them,[34] and that they "must be faced while they are still of manageable proportions and while alternative solutions are still available."[35] Notably, the one thing they did not say was "more study."

The statute that emerged involved a bit of horse trading, but there was no doubt it was action-oriented. The final bill's lead sponsor, Senator Jackson, sharpened this point in a dialogue with Dr. Lynton Caldwell, a university professor and committee consultant who had written on environmental policy for years.[36] What was needed, Caldwell told Jackson's committee, was "not merely a statement of

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29. Thor Heyerdahl's raft voyages across the Atlantic Ocean described, with shock, the extent of pollution encountered and its effect on sea life. Originally published in National Geographic, the republications became best-sellers and opened American eyes. *See* THOR HEYHERHADL, THE RA EXPEDITIONS 209–10 (1971). *See also* RACHEL CARSON, SILENT SPRING (1962) (describing the effects of pesticides and kindling several responses in law, including NEPA).

30. *See* Christopher Klien, *The Great Smog of 1952* (Dec. 6, 2012); Thomas H Maugh and Lee Dye, *U.S. – Soviet Scientists Join in Attack on World Ecology Ills*, L.A. TIMES, Dec. 14, 1988 at 3 (Baikal); BARRY COMMONER, THE CLOSING CIRCLE; MAN, NATURE AND TECHNOLOGY 94–111 (1971); Summary of Santa Barbara Oil Spill (last visited September 25, 2020); Summary of Cuyahoga River Fire (last visited September 25, 2020).; In re Am. Oil Co., 417 F.2d 164 (5th Cir. 1969), *amended*, 419 F.2d 1321 (5th Cir. 1969) *(Houston ship channel)*.

31. *See* NATIONAL WILDLIFE FEDERATION, "ENDANGERED SPECIES" (undated publication, on file with author).

32. *See* CENTER FOR CHEMICAL PROCESS SAFETY, SAFE DESIGN AND OPERATION OF PROCESS VENTS AND EMISSION CONTROL SYSTEMS at 297–99 (2006) (air pollution incidents in US cities); Nathan Masters, *L.A.'s Smoggy Past, in Photos* (Mar. 17, 2011) (Los Angeles impacts). *See generally* COUNCIL ON ENVIRONMENTAL QUALITY, THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY TOGETHER WITH THE PRESIDENT'S MESSAGE TO CONGRESS, 1970 at 66 ("acute episodes of pollution in London, New York, and other cities have been marked by dramatic increases in death and illness rates"). With notable prescience, the Report also signaled the threat of climate change. *Id*. at 71.

33. SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, S. Rep. No. 296, 91st Cong., 1st Sess. 5 (1969) (citing as "evidence" fourteen categories of failure ranging from "incoherent rural and urban land-use policies" and "poorly designed transport systems" to "critical air and water problems[,]" the "proliferation of pesticides[,]" and the "degradation of unique ecosystems[.]") Lest the list seem inadequate, it added, "and many, many other environmental quality problems[.]"

34. *Id*.

35. *Id*.

36. *See Hearing Before the Committee On Interior and Insular Affairs on S. 1075, S. 237 and S. 1752, before the Senate Committee on Interior and Insular Affairs*, 91st Cong., 1st Sess. at 116 (April

things hoped for; it is a statement that will compel or reinforce or assist" the executive agencies, and "going beyond this, the Nation as a whole, to take that kind of action which will protect and reinforce" the life support system of the country.

Jackson concurred: "Otherwise, these lofty declarations are nothing more than that. It is merely a finding and statement but there is no requirement as to implementation. I believe this is what you were getting at."

Caldwell replied: "Yes. Exactly so."

The statute that emerged contained two primary sections to carry out the task. The first, Section 101, provided both policy and responsibilities. 101 (a) declared it "the continuing policy" of the federal government to use "all practicable means and measures" to "create and maintain conditions under which man and nature can exist in productive harmony" and fulfil the needs of future generations.[37]

Section 101(b) put meat on the bone. Its challenge was to articulate principles sufficiently broad to cover the range of problems at play, yet still to be effective. As a report to the Senate Committee on the Interior stated, the Act "must be a principle which can be applied in action[.]"[38] Accordingly, this Section declared that, in order to carry out this policy, it was the continuing *responsibility* of the government to use *all practical means*, consistent with other essential considerations of national policy, to improve federal plans, functions, and programs,[39] so that the nation would (in summary):

(1) fulfill the "trustee" duty of each generation to the next;
(2) assure safe, healthful, and aesthetically pleasing surroundings;
(3) attain beneficial uses without degradation;
(4) preserve important historic, cultural, and natural heritage;
(5) achieve a "balance" between population and resource use, and
(6) enhance renewable resources and approach the "maximum attainable recycling of depletable resources."[40]

1969). The colloquy that follows is taken from this source. For more detail, see also LYNTON KEITH CALDWELL, THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE (1998).

37. *Congressional Declaration of National Environmental Policy*, 42 U.S.C § 4331 (a) (2012).

38. Caldwell, *supra* note 36 (citing report, with Committee Counsel, prepared for Senate Committee in 1968, before drafting of statute).

39. 42 U.S.C. § 4331(b) (1970) (emphasis added).

40. *Id*. The complete text reads:

> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health of safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

As can be seen, while some of these requirements are more bright-line than others, each constitutes law to apply. "Recycling[,]" for example, was an issue first treated by the Court in a challenge to rulings that handicapped the carriage of scrap metal;[41] the "enhancement of renewables" has recently been contradicted by Administration decisions to suppress them in favor of non-renewables.[42]" Undue degradation" is a lynchpin standard in public lands management;[43] "historic preservation" was at the heart of (pre-NEPA) litigation against a 6-lane interstate highway across the Vieux Carre of New Orleans;[44] and the "trust" responsibility of our generation towards those to come is the underlying principle of the Public Trust Doctrine,[45] the essence of the "children's case" demanding a government response to climate change,[46] and a principal tenet of international environmental law.[47]

Taken singly or together these requirements, although qualified in terms of practicality (as are many environmental standards), are considerably more specific than the "public interest" standard of the Federal Power and Federal Communications Commission and the Sherman Act's jurisdiction over "restraints of trade,"[48] to say nothing of concepts like pornography and due process of law. Indeed, Section 101 could rightly be seen as legislated framework for environmental due process. While it is to be applied to the fullest extent "practicable" and in balance with other policies, so is constitutional due process itself. It may not apply in many cases, but as with much law the fact that it *could* has significant value.

Section 102 which followed was the bridge. It included of course the well-known 102(2)(C) process and elements for environmental impact review,[49] but

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41. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

42. *See* Exec. Order No. 13,868, 84 Fed. Reg. 15,495 (Apr. 15, 2019); *see also* Statement in Support of Trump's American Energy Executive Order, Press Release, Secretary Press Release, United States Department of the Interior, Secretary Zinke Statement in Support of President Trump's American Energy Executive Order (Mar. 28, 2017).

43. Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30 (D.D.C. 2003) (interpreting Federal Land Policy and Management Act provision prohibiting "unnecessary or undue degradation of the lands".)

44. *See* Oliver A. Houck, *The Vieux Carre Expressway*, 30 TUL. ENVTL L. J. 1 (2016).

45. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892) (seminal Court case adopting Public Trust Doctrine).

46. Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016). The tangled history of this case was still unfolding at the time of this writing.

47. *See* EDITH BROWN WEISS ET AL., INT'L ENVTL. LAW AND POLICY 53–74 (2d ed. 2006).

48. 15 U.S.C. §§ 1–7 (2018) (Sherman Act); 15 U.S.C. §§ 12–27 (2018) (Clayton Act); The Communications Act, 47 U.S.C. § 307 (2018) (licenses for "pubic convenience, interest or necessity). *See also* Federal Highway Act 23 U.S.C. § 138 (no "feasible and prudent alternative", and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). In each program, and others, the Courts have developed standards, some verbal and others numerical, for measuring compliance. *See generally* Note, *supra* note 48, at 753–56. For discussion of possible tests and standards for substantive review under NEPA, see *infra* note 136.

49. 42 U.S.C. § 4332(2)(C) (2018).

Congress began with another mandate that connected everything it had just said to everything federal agencies did. Section 102 provided a single command:

> "Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter."[50]

This is the link sought by Caldwell and Senator Jackson. Section 102(1) enforced 101(b). It was enacted to "insure" (sic) that "the policies enumerated in Section 101 are implemented," and to be aided in this by the procedures of 102 (2).[51] The wording of 102(1) is as clear as the English language permits. Its requirements are as mandatory ("fullest extent possible")[52] as those of the impact review process itself, a duty defended in the subsequent floor debate by the Senator who opened:

> "The basic principle of the policy is that we must strive, in all that we do, to achieve a standard of excellence in man's relationships to his physical surroundings. If there are to be departures from the standard, they will be exceptions to the rule."[53]

The notion that the procedures of 102(2) would eclipse the mandate of 102(1) occurred to no one. It would stand the statute on its ear.

B. NEPA AND THE COURTS: THE ROAD TO *METHOW VALLEY*

The first opinion to treat NEPA as a whole was *Calvert Cliffs*, a direct appeal to the D.C. Circuit from a licensing decision of the Atomic Energy Commission.[54] To set a context for the allegations in play, it opened by viewing the statute as a whole. Section 101 provided the Act's "basic substantive policy," including the principles mentioned above.[55] This policy is "a flexible one," it went on, leaving room "for a responsible exercise of discretion" and "may not require particular substantive results in particular problematic instances."[56] Left unsaid for was the implication that, while 101 "may not" require course correction in many cases, it might in other circumstances call for them quite clearly. To

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50. *Id*. at § 4332. The only intelligible meaning of this provision is that by "policies" Congress meant the entirety of Section 101, including the requirements of 101(b). For fuller discussion of the history and function of 102(1) see Bernard Cohen & Jacquelin Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. IND. & COM. L. REV. 685, 691–94 (1972); Nicholas C. Yost, *NEPA's Promise–Partially Fulfilled*, 20 ENV'T L. 533 (1990).

51. 115 CONG. REC. S40, 40416 (daily ed. Dec. 20, 1969) (statement of Sen. Jackson).

52. S. REP. NO. 91–296, at 19 (1969).

53. 115 CONG. REC. S19,009 (daily ed. July 10, 1969) (statement of Sen. Jackson).

54. Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971). This opinion followed a yet earlier opinion of the Fifth Circuit finding that NEPA expanded existing federal programs, see Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert denied*, 401 US 910 (1970).

55. *Id*. at 1111.

56. *Id*. at 1112.

bolster this conclusion the opinion pointed to 102, a "mandate" for federal decisions,[57] concluding:

> "The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, *unless* it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[58]

By contrast, it continued, the procedural duties set out in Section 102(2) were inherently inflexible and, where violated, "it is the responsibility of the courts to reverse."[59]

The first comprehensive analysis of NEPA, then, while confirming the strict-liability nature of procedural compliance, emphasized review under its substantive requirements as well, tinged by practicality in their application, but tightly entwined. As designed by Congress, both were necessary for the structure to stand.[60]

Their hands untied, federal courts began to review agency NEPA decisions under the "arbitrary" standard announced in *Calvert Cliffs*. The first treated water development projects of the Army Corps of Engineers, which already operated on a benefit-cost balance that the Supreme Court in an earlier era had held immune from judicial review.[61] Nonetheless, in 1972 the Eighth Circuit, following the D.C. Circuit, found it the responsibility of the courts under NEPA to review the "balance" of agency decisions on the merits.[62] Similar opinions followed.[63] By 1977 the President's Council on Environmental Quality Annual Report concluded:

> "[F]ive Circuit Courts . . . have explicitly adopted the position that NEPA imposes substantive requirements on federal agencies. All five rejected the argument that the declaration of national environmental policy consists only of vague goals; rather, NEPA's Section 101 presents sufficiently definite standards to permit meaningful judicial review."[64]

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57. *Id*. at 1115.

58. *Id*. (emphasis added).

59. *Id*.

60. For the perceived importance of §102(1) and substantive NEPA at this early juncture, *see* Cohen & Warren *supra* note 50, at 698 ("Unless Section 102(1) of NEPA is construed as incorporating the substantive policy and goals of Section 101, thereby requiring federal agencies to rebut a presumption in favor of the environment by clearly articulating considerations of essential national policy which justify environmentally adverse decisions, the act will fail in its overriding purpose.").

61. Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 528–30 (1941).

62. Envtl. Def. Fund v. U.S. Army Corps of Eng'rs, 470 F.2d 289, 300–01 (8th Cir. 1972).

63. *See* Conservation Council of N. Carolina v. Froehlke, 340 F. Supp. 222, 228 (M.D.N.C. 1972); South La. Envtl. Council, Inc. v. Sand, 629 F.2d 1005, 1011–12 (5th Cir. 1980).

64. 1978 COUNCIL ON ENVTL. QUALITY ANN. REP. 8, at 121., also citing Professor William H. Rodgers that three additional courts of appeal were providing this review de facto. *Id*. at 403–05.

By 1979 the number of federal appellate courts favoring substantive review on a wide range of agency decisions had increased to nine; only the Tenth Circuit to the contrary.[65]

Enter the Supreme Court.

The Court's first NEPA case, *SCRAP* (1973), was a challenge to a rate increase for recycled materials under consideration by the Interstate Commerce Commission.[66] Plaintiffs demanded an environmental impact statement under Section 102(2)(C). While the opinion veered off on standing, the majority alluded to the statute's "lofty purposes" and several responsibilities, foremost among them its EIS requirement, which it went on to enforce.[67] There was no discussion of other responsibilities. Nor was there mention of Sections 101 or 102(1), not even in dicta, much less a ruling.[68] All in all, this was a strange start for the Court's march on substantive NEPA.

The next step came with *Kleppe* (1976), which argued a need for a comprehensive impact statement for coal development in a four-state region of the northern great plains.[69] While conceding the point, the court added a series of crippling footnotes designed to limit the timing and contents of such a statement. One of these stated, entirely in passing, that the court's "only role" was "to insure (sic) that the agency has taken a 'hard look' at environmental consequences'; it was not to "interject itself within the area of discretion of the executive as to the choice of the action to be taken."[70]

What is striking about this statement is that it was both spontaneous and disingenuous. The issue had not been raised or briefed at any point in the litigation. Its only citations were to one case involving an entirely different statute,[71] and to another that, after imposing a rigorous view of alternatives, threw in the quoted statement, perhaps as a palliative, as "a final word."[72] No reference was made to the considerable body of precedent to the contrary, nor to the fast-disappearing Section 102(1). From here on this would become standard operating procedure.

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65. *See* Paula A. Kelly, *Judicial Review of Agency Decisions Under the National Environmental Policy Act of 1969—Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 10 B.C. ENVTL. AFF. L. REV. 79, 91 n.85–87 (1982).

66. United States v. SCRAP, 412 U.S. 669 (1973).

67. *Id.* at 693.

68. The only reference to Section 101(b) came in an opinion of Justice Douglas, cited to support his contention that scrap refuse was a major national problem entitling plaintiffs to an injunction on the procedural violation; he did not argue that 101 required the elimination of the rate increase.

69. Kleppe v. Sierra Club, 427 U.S. 390 (1976).

70. *Id.* at 410 n.21. It is worth noting, given the cases to follow, that the footnote did not speak to a situation where an agency's discretion was abused, see discussion *infra* notes 99–100.

71. Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 453 F.2d. 463 (2d. Cir. 1971) (applying the Federal Power Act).

72. Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972). This dictum came after the court had imposed a significant procedural burden (to consider alternatives even beyond the authority of the agency to implement), and one senses the court trying to deflect the impression that it was reaching too far.

The third case in line was *Vermont Yankee* (1978), like *Calvert Cliffs* a challenge to AEC impact statements on two nuclear plants, but facing a quite different bench.[73] At issue were the agency's treatment of energy conservation and waste disposal, both growing in importance at the time. The Court reversed the D.C. Circuit on each score, the first seen as an uncertain novelty[74] and the second as a matter well in hand[75] (neither of which proved to be correct). With a stiff head slap to the court below for thinking otherwise,[76] the opinion closed with a "further observation of some relevance to this case."[77] NEPA did set "significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural," citing again to the enigmatic *SCRAP*.[78]

One is again struck by the fact that this statement was extraneous to the case, neither briefed nor argued. The case below dealt uniquely with NEPA and administrative procedures. Of course, it's phrase "essentially procedural" left room for the *Calvert Cliffs* interpretation of NEPA, but the downhill train was in motion and this leeway, too, would not last.

Next up was *Stryker's Bay* (1980),[79] where the Court's previous dicta came home to roost. At issue was Housing and Urban Development ("HUD") funding for an "urban renewal" project on twenty square blocks of Manhattan that concentrated over two-thirds of its housing units onto one axis of the City.[80] It did not start out that way. Originally designed as a 70-30 percent mix of middle to low income residents, it now centered on a seventeen story high-rise for exclusively low-income tenants surrounded by existing low income residences.[81] The departure was inconsistent with the City's West Side Renewal Plan, which sought both racial and economic integration,[82] and in conflict with HUD's statute-imposed concern for "social environmental impact."[83] In short, HUD was funding a future slum.

The City was undeterred. After its initial plans had been rejected by the Second Circuit Court of Appeals and remanded for consideration of options more compatible with the HUD program (prior efforts were called "highly limited or non-existent"),[84] the City developed several alternatives superior in diffusing the

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73. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978). The case consolidated appeals from two D.C. Circuit decisions, neither of which had mentioned substantive review.

74. *Id*. at 556.

75. *Id*. at 558.

76. *Id*. at 557 (Circuit Court opinion "surely is 'judicial intervention run riot'").

77. *Id*.

78. *Id*. at 558.

79. Stryker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

80. *Id*. at 224 (Marshall, J., dissenting).

81. Karlen v. Harris, 590 F.2d 39, 43 (2d. Cir. 1978).

82. *Id*. at 41 (noting that the Plan's purpose was "integration, not concentration").

83. *Id*. at 44.

84. *Stryker's Bay Neighborhood Council*, 444 U.S. at 498. Prior consideration of alternatives was characterized as "either highly limited or nonexistent." Trinity Episcopal Sch. Corp. v. Romney, 523 F.2d 88, 94 (2d Cir. 1975).

racial/low income impact. Even the best of them was rejected, however, because of a possible delay in construction.[85] Neither the City nor HUD was budging.

Back to court again and up the chain, the Second Circuit found the warmed-over decision arbitrary and capricious, citing to the original Renewal Plan, HUD's own statute, and NEPA Section 101(b)(1) declaring each generation to be the "trustee" for the generations to come.[86] Given that this project would saddle new generations for most of the next century, a two year delay to fix it was "not to be regarded as an overriding factor."[87] For this particular agency mandated to support racial and economic diversity, such adverse factors as "crowding low-income housing into a concentrated area" should be given "determinative weight," particularly where "children would be involved."[88] This was the context of the court's reference to "determinative weight." In this one case it had gone over the line.

The Supreme Court made short work of the ruling. Such short work, in fact, that it decided the case without argument, per curiam.[89] "Determinative weight" was all it needed to hear to ring its bell and repeat the mantra from *Vermont Yankee*, which of course had not rendered a verdict of any kind on the subject.[90] On such a slender reed it declared that once HUD had "considered" environmental consequences, NEPA "requires no more."[91]

Justice Marshall dissented strongly. He among all of his brethren best understood the lives affected, and he said as much: "I cannot believe that the Court would adhere to [this] position in a different factual setting."[92] He could not agree either with limiting courts "to the essentially mindless task of determining whether an agency 'considered'" the environment.[93] Nor could he disagree with the Second Circuit's conclusion that HUD's elevation of time delay to controlling factor here was, indeed arbitrary.[94] These questions at least deserved a hearing.

The majority was apparently stung to reply. In a hastily appended footnote of its curt dismissal, it added:

> "If we could agree with the dissent that the Court of Appeals held that HUD had acted 'arbitrarily' in redesignating the site for low-income housing, we might also agree that plenary review is warranted. But the District Court expressly concluded that HUD had not acted arbitrarily and capriciously and

85. *Karlen*, 590 F.2d at 42.
86. *Id*. at 43–44.
87. *Id*. at 44.
88. *Id*.
89. *Stryker's*, 444 U.S. at 233.
90. *Id*. at 227 ("essentially procedural"), also citing *Kleppe* dicta.
91. *Id*. at 228 (thereby converting "essentially" procedural to "exclusively," no matter how unreasonably contrary to NEPA's standards a decision may be).
92. *Id*. at 231 (Marshall, J., dissenting).
93. *Id*.
94. *Id*. at 230–31.

> our reading of the opinion of the Court of Appeals satisfies us that it did not overturn that finding."[95]

Curiously, the Court of Appeals had to the contrary explicitly found HUD's decision *was* arbitrary, citing the Administrative Procedure Act[96] and providing its reasons. As curiously, was the Court of Appeals implying that if the decision *had* been arbitrary, it would have reversed? The President's Council on Environmental Quality ("CEQ"), to which the implementation of NEPA had been entrusted,[97] believed so and provided the following opinion to the Senate Committee on the Environment and Public Works:

> "[I]f the agency selects an alternative causing unusually significant environmental damage to obtain a particularly insignificant short-term gain, without substantial evidence in the record of legitimate countervailing considerations, such action may be modified or set aside by the reviewing court as constituting an abuse of discretion or an arbitrary or capricious action within the meaning of the APA and tested against the substantive goals and policies of NEPA's Sec. 101(b)."[98]

The Supreme Court in *Methow Valley* would provide a different answer.

C. *METHOW VALLEY*: DICTA BECOMES DOGMA

Methow Valley (1989) rose as we have seen from a challenge to an impact statement based on (highly speculative) mitigation, avoiding discussion of (highly probable) worst case impacts[99] and rejecting the application of Forest Service planning requirements to the impacts at issue in the case. The substantive NEPA question came in from left field, as an argument that no mitigation plan was required. This was not, however, what the plaintiffs had contended nor what the Circuit Court had held. Misconstruing the issue affected all that followed.

The trial court acknowledged that while NEPA served to inform decision making,[100] but because the contours of mitigation remained "speculative" they required less discussion.[101] Having thus lowered the bar, the mitigation section passed muster because it contained more than a "mere listing" of possibilities

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95. *Id*. at 228 n.2 (majority opinion).

96. 5 U.S.C. § 702 (2018).

97. 42 U.S.C. §§ 4342–44 (2018).

98. Letter from Nicholas C. Yost, General Counsel, Council on Environmental Quality, to Phillip T. Cummings, United States Senate, Committee on Environment and Public Works, Feb. 4, 1980, at 6, appended to Brief for Environmental Committee of the Boston Bar Association as Amicus Curiae, Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068 (1st Cir. 1980) (cited by Kelly, *supra* note 65). Per CEQ, substantive review post-*Stryker's Bay* was still alive.

99. *See supra* text accompanying notes 66–91.

100. Methow Valley Citizens Council v. Reg'l Forester, Pacific Nw. Region, Forest Service, 16 Envtl. L. Rep. 20,641 (1986) (case unreported in Fed Supp).

101. *Id*. at 16.

(although, as the court admitted, "not much more").[102] They would be fleshed out in a future plan (after the permit had been obtained), while the Service conducted an "extensive study" to offset damage to the deer herd and identified "measures to be studied and implemented" by the county.[103] Whatever they might turn out to be, the court was confident that they would "operate to prevent violation of applicable air quality standards".[104] For the same reasons as prior cases, the court approved delaying a worst case analysis to a later date and dismissed the case.[105]

The Ninth Circuit court saw the problem plain. NEPA required more than hypotheticals.[106] The Service had concluded that "with the implementation of mitigation measures" the impact on mule deer would be "minor,"[107] but these measures did not exist. They were not simply undeveloped, as the agency's own witness had testified the data for *developing* them were not even at hand.[108] Measures for air impacts, more dramatic and yet more certain to occur, had also not moved beyond the talking stage.[109] In order to perform its information function, reasoned the court, an EIS required more specificity before arriving at a conclusion that nothing serious would happen, especially where there was no assurance that the measures "would ever in fact be achieved" or even "designed," "let alone implemented."[110] In the alternative, a worst case analysis was required describing what bad could happen if and when they failed to materialize.[111]

This was the context in which the court concluded that inclusion of a mitigation plan and worst-case analysis was necessary. Particularly so if the EIS on them both to diminish the impacts and to reject less harmful alternatives.[112] As things stood the statement was not informing, it was deluding. Besides, the court noted, the Service's own regulations expressly required a "mitigation plan."[113] Case remanded.

The Solicitor General steered the Supreme Court off-track from the start, cherry picking a phrase ("fully developed mitigation plan") from its context, much as he had done in *Stryker's Bay* ("determinative weight"). The issue, he asserted, was whether such a plan was required.[114] Phrasing the question allowed

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102. *Id*. at 18 (discussion beyond "mere listing" but "not much more," *id*.).
103. *Id*. at 18, 20.
104. *Id*. at 20.
105. *Id*.
106. Methow Valley Citizens Council v Reg'l Forester, 833 F.2d 810 (9th Cir. 1987).
107. *Id*. at 817.
108. *Id*.
109. *Id*. at 818 (in addition, data on which the Service relied was also "egregiously incorrect," *id*.).
110. *Id*. at 820 (citing Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 860, 1055 (9th Cir. 1982)).
111. *Id*. at 819.
112. *See* Brief for the Respondents, *supra* note 7, at 10 (citing ubiquitous reliance on success of mitigation measures, and their role in rejecting lower-impact alternatives).
113. *Methow Valley*, 833 F.2d at 814 n.3.
114. Petition for a Writ of Certiorari, Robertson v. Methow Valley Citizens Council, April 14, 1988 at 1. By way of contrast, the Methow Valley brief in opposition framed the questions as whether NEPA

the government to drag in the otherwise irrelevant question of substantive NEPA. Since the statute required no particular results, he argued, it could require no mitigation of results either.[115] It was up to the agency to interpret the Service regulations, no matter the regulation's clarity or purpose.[116]

The Supreme Court justices—although they questioned the government closely in oral argument, even skeptically, on the likelihood of the mitigation measures ever taking place—ended up swallowing the package.[117] The opinion that followed took swings at mitigation, worst case analysis and the Service regulations, and missed all three times. It began by stating that NEPA required a discussion of "possible" steps toward mitigation,[118] which elided the clear language of Section 102(2)(C)(ii) to treat "any adverse environmental effects that *cannot be avoided*" to which the obvious corollary was that if harmful impacts *could* avoided they *would* be. It is difficult to give this phrase any other meaning.

The opinion then pronounced a "fundamental distinction" between a requirement that mitigation be described sufficiently to "ensure environmental consequences be considered," and the "substantive requirement" of an "adopted plan."[119] This twist of the Circuit's actual holding (it had only required mitigation if it were relied on to dismiss adverse impacts as minor), allowed the Court to cite its previous chain of dicta culminating in *Stryker's Bay*[120] (without noting that it was highly-qualified) and conclude that it did not matter whether the project

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requires agencies to "analyze" practical mitigation measures, whether they were required to "conduct an uncertainty analysis," and whether the permits were lawful without "mitigation plans required by Service regulations" . . . a formulation that more faithfully captured the opinion below. *See* Respondents Brief in Opposition to Petition for Writ of Certiorari, Roberson v Methow Valley Citizen's Council, June 1, 1988 at (1).

115. Petition for Writ, *supra* note 114, at 13.

116. *Id*. at 21–23.

117. The Court's questions were on point. Justice Scalia:

> They say here are some possibilities for mitigation. They didn't say whether the possibilities would work. They didn't say whether anyone would, would – some of them would have to be undertaken by the county or by the state. They just said here are some possibilities. . . . Now, why is that adequate?"

To which the Solicitor had little reply beyond "I think we're entitled to assume that local authorities will do their job, and to advert to mitigation accordingly in an appropriate way."

Official Transcript, Robertson v Methow Valley Citizens Council, Jan 9,1989 at 1. The oral argument in this case was consolidated with another from the 9th Circuit that dealt with the need for a supplemental environmental statement on the basis of newly discovered evidence of harm, Marsh v. Oregon Natural Resources Council, 390 U.S. 360 (1989), and the resulting colloquy often mixed the two together.

118. *Methow Valley Citizen's Ass'n*, 490 U.S. at 351–52.

119. *Id*. at 352. The opinion went on to find it "inconsistent" for a purely procedural statute to demand a developed plan, *id*. at 353, without explaining why the presence or not of such a plan was not crucial to evaluating environmental impact.

120. *Id*. at 350.

"killed 15 percent, 50 percent, or 100 percent of the deer."[121] How, of course, a decision maker could be "ensured" of knowing environmental consequences without knowing if and how they were going to be mitigated remained unexplained. On this point, the Solicitor General had stolen the show.

Unwilling to leave the matter there, the Court went on to find that, since local authorities would have the responsibility to implement whatever mitigation they might come up with, "it would be incongruous to conclude" that the Service had "no power to act" until they had come to final conclusions.[122] But why should this be so? The responsibility for a final statement vested in the federal agency and it would be flying information-blind on the only real issues of the case. Precisely what NEPA did *not* have in mind.

Lest its message be lost, however, the Court returned to hammer it in yet more deeply. NEPA did *not* require "that action be taken to mitigate the adverse effects of major federal actions," nor must EIS's include "a detailed explanation of specific measures which *will* be employed" for this purpose.[123] As seen earlier, everything in the statute pointed otherwise, as did the CEQ regulations and at least ten years of precedent in the federal courts below.[124] The Court had just crippled one of the most central elements of the NEPA process, and its success.[125]

The opinion's treatment of worst case impacts if mitigation were uncertain was also distracted, this time because CEQ had removed the label "worst case" from its regulations (because it sounded too scary) but kept the obligation to analyze worst case possibilities based on credible scientific evidence.[126] The problem in this case was that, under whatever label, the Service had performed no such analysis at all, postponing it, like mitigation, to the indeterminate future. To which the Court offered no more answer than that NEPA did not require that predicting serious harms "be addressed exclusively in this manner,"[127] whatever that sentence means.

Perhaps weary at this point, the Court's disposal of the Service's own regulations was yet more cursory, and impervious to their language and structure.[128] As their preamble explained, they had been enacted to "integrate the requirements of NEPA" with "other agency practice", and called for "measures and plans for the

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121. The 100-percent-kill example apparently stemmed from Justice Scalia in oral argument, asking why the Service couldn't simply say "we think this project is worth it, 50 black-tailed deer or whatever." This suggestion in effect dispenses with the need to consider mitigation at all. Transcript *supra* note 119.

122. *Methow Valley Citizen's Ass'n*, 490 U.S. at 352–53.

123. *Id*. at 353.

124. *See* National Environmental Policy Act of 1969 § 101(a), 102(1), and 102(2)(C)(ii) 833 F.2d. 819 (2012); *see generally* D MANDELKER, NEPA AND THE LAW, chapter 10, 109.

125. *See* Karin Sheldon, *NEPA in the Supreme Court*, 25 LAND & WATER L. REV. 83, 96 (1990).

126. 40 C.F.R. 1502.10 (re-labeled "Incomplete and Unavailable Information"). *See also Methow Valley Citizen's Ass'n*, 490 U.S. at 355 (agency opposition to "worst case" as "unnecessarily stigmatic").

127. *Methow Valley Citizen's Ass'n*, 490 U.S. at 356.

128. 40 U.S.C. § 1500.2 (2020) (preface to Forest Service regulations generally).

protection and rehabilitation of the environment" during all phases of the project.[129] They did not limit the environment affected. Neither did they distinguish between "on-site" and "offsite" impacts. Rather, they stated the permits shall contain"[t]erms and conditions which will . . . [m]inimize damage to esthetic values and fish and wildlife habitat and otherwise protect the environment."[130] Broad and compelling language, one would think.

Not compelling enough, apparently. In the Court's view there was "no basis", for concluding that the Service regulations "must be read in all cases" to include off-site mitigation measures.[131] Given that off-site impacts were the *only* issue of the litigation, whether this wasn't just such a case for considering them went unaddressed. Perhaps seeking some back-up, the opinion went on to assert that the regulations were "not based on the more direct congressional concern for environmental quality embodied in NEPA."[132] This assertion is strikingly incorrect. It is belied by the preamble just mentioned that explicitly tied them to NEPA, without having to enlist NEPA's studiously-ignored Sec 102(1) requiring (not simply recommending) that all agency regulations and actions be "interpreted and administered" in accordance with the principles of the Act.

All in all, the Supreme Court had had a very bad day.

D. *METHOW'S* WAKE

With this, the damage was done, and it was considerable. The Supreme Court had gone from dicta to dogma, dealing what may be the final blow to substantive meaning in NEPA.[133] As for NEPA's impact statement requirements — now by default the entirety of the statute — the court allowed the critical element of mitigation to float free from reality, and gave worst case analysis, under whatever name, a pass. Most lamentably the six principles of NEPA around which the statute had been constructed simply disappeared, repealed by no juridical process

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129. 36 U.S.C. § 1251.56(a)(1)(ii).

130. *Id.*

131. *Methow Valley Citizen's Ass'n*, 490 U.S at 358. The Court recognized that NEPA and CEQ regulations required "detailed analysis" of both on-site and off-site measures but balked at a "plan," no matter how plainly the regulations used the term.

132. *Id.* This could be the most anomalous statement in the entire opinion. Why else would the Service issue such a set of regulations if not out of concern for environmental quality?

133. The phrase "may be the final blow" because Sections 102(1) and 101(b) remain in the statute, unaddressed directly in any Supreme Court case. In the absence of (highly-unlikely) affirmative action by Congress, the possibility exists that a new President, with a duty to faithfully execute the laws of the United States, could issue an Executive Order on the implementation of these sections much like the one triggering the existing regulations on the EIS process under § 102(2)(C), Exec. Ord. No. 11,991, 42 Fed. Reg. 26967 (May 24, 1977), a suggestion made by Lynton Caldwell in 1998, see Caldwell, *supra* note 36, at 38. For a discussion of alternative standards for such review, see Note, *supra* note 48, at 734 (comparing benefit-cost standard of *Calvert Cliffs* to a least adverse alternative similar to that applied in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)). *See also* Cohen & Warren, *supra* note 50, at 698 (proposing a rebuttable presumption). Under any of these scenarios, environmental protection would not trump all, but it would only itself be trumped by significant and persuasive reasons.

other than fiat. They were not considered and rejected. No Supreme Court case has ever entertained briefing or argument on them. None of its decisions has even discussed them. Nor have they bothered to mention the mandate of Section 102 (1). The heart of what Congress wrote in NEPA and intended by what it wrote has yet to receive its day in court.

Methow Valley, predictably, has left a swirl of ripples beyond. Lower courts have run shy of even alluding to NEPA's principles, and instead wrestle with the adequacy of descriptions of impacts that the government is prone to deny, minimize or defend with the most tenuous of reasons.[134] Mitigation has become softer as well,[135] and one agency has recently eliminated it altogether as a condition of permitting on 250 million acres of public lands.[136] The dilution of worst-case analysis has also led to some particularly bad moments, most notably in the Deepwater Horizon blowout where "total loss of well control" was deemed (despite prior evidence to the contrary) a "black swan," a phenomenon occasionally mentioned but never seen.[137] Eleven men were killed on that rig alone. The cleanup fluids poisoned many more.

Supreme Court decisions have long arms.[138]

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134. Nothing in this article should be interpreted to question the importance of a robust and fully-enforced environmental impact statement process under § 102(2)(C). Agency and industry resistance to disclosing adverse impacts and better alternatives to what they want to do is legendary. The steering effect of NEPA disclosure has nonetheless led to a long record of better decisions. *See* Oliver A. Houck, *The U.S. House of Representatives Task Force on NEPA: The Professors Speak*, 15 ENVTL. L. REP. 10895, 10911–19 (describing 20 cases in which agency decisions were improved both environmentally and even economically in the NEPA process.) Some agencies, however, and some entire Administrations are impervious to disclosure and it is here that Sections 102(1) and 101(b) would serve particularly well. Indeed, there is little other reason for them to be in the statute.

135. *See supra* note 110, at 930 (identifying problem cases following the *Methow* mitigation ruling).

136. *See* Bureau Of Land Management, No. 201–018, Memorandum Related to Compensatory Mitigation (2018) ("Except where the law specifically requires, the BLM must not require compensatory mitigation from public land users. While the BLM, under limited circumstances, will consider voluntary proposals for compensatory mitigation, the BLM will not accept any monetary payment to mitigate the impacts of a proposed action.").

137. *See* Oliver A. Houck, *Worst Case and the Deepwater Horizon Blowout: There Ought to be a Law*, 24(1) TUL. ENVTL. L.J. 1, 8 (2010). The point here was that there was a law.

138. POSTSCRIPT: The Methow Valley Early Winters Ski Resort never came to pass. The Supreme Court opinion had been harsh on NEPA but less so on the Methow Valley Citizens Association and other project opponents . . . not for what it said, but for what it didn't say. While spiking both substantive NEPA and mitigation it left standing other difficult and unresolved aspects of the EIS such as air quality. *See* 879 F.2d. 705 (9th Cir. 1989). The Forest Service began drafting a supplemental environmental statement, but the process stalled and the project was taken over by other promoters, who ran into the same resistance and financial problems of their own. *See* SALLY PORTMAN, THE SMILING COUNTRY (1993). Meanwhile, the Arrowleaf Conservation Project, a local organization, and the Trust for Public Lands packaged the buyout of a key section of the Valley, leading to an agreement that scrapped the project's focus on alpine skiing in favor of low-impact cross country activity, year-round. The Trust For Public Land, https://perma.cc/8QWW-EMJE (last visited Sept. 25, 2020). The Citizens Council, for its part, has evolved into a force with considerable staying power, addressing a range of other Valley issues including hard-rock mining, water use, and sprawl. *See* Methow Valley Citizens Council, https://www.mvcitizens.org (last visited Sept. 25, 2020). In the end, then, the only remaining legacy of *Methow Valley* is indelibly bad law.

II. *LUJAN*: THE WEAPONIZATION OF STANDING

"I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing."

Justice Blackmun, dissenting, *Lujan v. Defenders of Wildlife*.[139]

This case was about extinction. The US Agency for International Development ("AID") was involved in projects abroad that threatened the existence of species already on the brink of life. Some killed them outright.[140] Others logged their forests, ran pipelines through their wetlands, or opened remote landscapes to mining.[141] Pivotal to this lawsuit were two dams inundating the heartland of species familiar to the world: the Asian Elephant, the Leopard, the Nile Crocodile.[142] All had been identified in the Endangered Species Act ("ESA") and the United Nations Red List as species at risk.[143] All played significant roles in the ecosystems around them. Nor were they inconsequential to human beings for research, ecotourism and, perhaps first to mind, the "Just So Stories" of Rudyard Kipling.[144] These facts were not at issue.

The legal question was likewise straightforward: whether the ESA required AID to consult with federal wildlife officials before committing itself to these projects. Given their potential impacts, consultation seemed a modest demand. It was also consistent with long-standing AID policy and regulations requiring consultation on these same projects under the National Environmental Policy Act ("NEPA").[145] When the Supreme Court subsequently reduced NEPA to a process

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139. 504 U.S. at 589, 606 (Blackmun, J., dissenting, joined by Justice O'Connor).

140. *See, e.g.*, Jim Davis, *War on Vampire Bats Just Routine for AID*, Corpus Christie Caller, Dec. 15, 1972; GARRY PAUL NABHAM, CONSERVING MIGRATORY POLLINATORS AND NECTAR CORRIDORS IN WESTERN NORTH AMERICA (2004) 36 (vampire bat eradication programs killing rare species as well); *see also From Tragedy to Action: USAID's Environmental Trajectory*, Frontline, USAID, Nov.–Dec. 2011 (lethal malathion project in Pakistan).

141. *See* Leslie A. Dierauf, *The United States' Endangered Species Act Internationally: Is it Well?*, https://perma.cc/EPG4-KZ3U; (US assistance to development projects abroad threatening endangered species); *From Tragedy to Action*, *supra* note 140 (timber project in Peruvian Amazon); *see also Pan American Highway* project, https://www.cntraveler.com/story/the-60-mile-darien-gap-leaves-the-pan-american-highway-forever-incomplete (strongly opposed stretch through tropical forest).

142. Defs. of Wildlife v. Hodel, 851 F.2d 1035, 1041–42 (8th Cir. 1988). Lesser-known endangered wildlife threatened by the dam in Siri Lanka included the purple-faced langur, toque macaque, red-face malkoha, Bengal monitor, mugger crocodile, and python, all "found in the project area." *Id.* at 1041. Beyond these two projects, Defenders also cited a US AID-funded forestry project threatening the endangered jaguar, uakari and Geoldi's marmoset. *Id.*

143. *See, e.g.*, "Asian Elephant", US Fish and Wildlife Service ("USFWS") (endangered, range several Asian countries); "Asian Elephant", Red List, International Union for the Conservation of Nature (IUCN) (same); "Nile Crocodile", USFWS (threatened", range North Africa), Red Book, IUCN (same). Notably, regarding the merits of this lawsuit, none of these ESA-listed species are found in North America.

144. RUDYARD KIPLING, JUST SO STORIES (1902), explaining the idiosyncrasies of, *inter alia*, the Whale (and its big throat), the Rhinoceros (and its tough skin), and most unforgettably "The Elephant's Child: How The Elephant Got Its Trunk". All three species are now endangered.

145. *See* 22 C.F.R. § 216. This regulation was prompted by an environmental lawsuit, reaching a settlement detailing the Agency's responsibilities under 43 U.S.C. Sec 1431 et seq. *See* Envtl. Def. Fund v. USAID, (Civ. Act. 75–0500, US. Dist Ct. D.C, Sirica, J.; settlement order filed Dec. 5, 1975). This

requiring no substantive outcomes,[146] however, this left the ESA standing alone. It did.

The Act itself was one of the most unequivocal in US law, prohibiting federal agencies from "jeopardize[ing]" the survival of wild species.[147] Originally labelled by pundits as the "pit bull" of environmental law,[148] it had since been amended to include an obligatory consultation process between action agencies and U.S. Fish and Wildlife Service (FWS) aimed at avoiding jeopardy through alternative measures (e.g., locations, construction methods, operating regimes) that would then green-light a project to proceed.[149] Virtually all consultations found a way.[150] Some found solutions that were not only more protective but more sustainable as well.[151] It all keyed on the consultations. They were what made the program work. When done in good faith, they gave rare species a fighting chance to survive.

As for the Act's application abroad, the original answer was yes. In 1978 the Carter Administration adopted regulations requiring consultation for US activities "in the United States, upon the high seas, and in foreign countries"[152] Although comments on the consultation process were numerous, no objection was made by any party to the inclusion of US activities in overseas. In 1986, however, the Reagan Administration amended the regulations to exempt projects abroad.[153] The exemption cited "the apparent domestic orientation of the consultation process", and "the potential for interference" with foreign sovereignty.[154] These were the regulations in play. The Defenders of Wildlife, an organization dedicated to the protection of endangered species, filed suit.

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compliance with NEPA was resisted by the Agency for the same interference-with-foreign-sovereignty-reasons that it would raise again with the ESA, *see* text *supra* notes 24–25.

146. *See* Robertson v. Methow Valley Citizens Ass'n, 490 U.S. 332, 351 (1989).

147. 16 U.S.C. § 1531, 1536 (a)(2) (1978). The original Act of 1973 admitted of no exception, 16 U.S.C. § 1536 (1976 ed.)

148. *See* Timothy Egan, *Strongest United States Environmental Law May Become Endangered*, NY TIMES, (Mar. 26, 1992), https://perma.cc/MG38-83S7 (quoting World Wildlife Fund Director Don Barry; Mr. Barry had been a former USFWS official).

149. 16 U.S.C. § 1536(b)–(c). The goal of these additions was to find "reasonable and prudent alternatives" (RPA's) to avoid "jeopardy". Only if none could be found were agencies allowed to apply for an exemption, under rigorously limited circumstances. This same device, under the rubric of "habitat conservation plans", was added to soften the prohibition on "takings" as well. *Id*. at §§ 1538–1539.

150. *See* Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993) (analyzing ninety-nine proposed "jeopardy" opinions and finding all but three resolved through RPA's, and those by other means). Overall, ESA conflicts have only reached the exemption process three times in the history of the Act, leading to one rejection of the petition, one rejection later reversed, and one resolved by additional compromise. The consultation process succeeded.

151. *Id*. at 320.

152. Interagency Cooperation – Endangered Species Act of 1973, 43 Fed. Reg. 870, 873–74 (Jan. 4, 1978) (codified at 50 C.F.R. pt. 402).

153. Interagency Cooperation – Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19926, 19930 (June 3, 1986) (codified at 50 C.F.R. pt. 402).

154. *Id*.

On the merits, Defenders prevailed in every forum they were heard.[155] Both the trial and appellate courts found that the 1986 regulations violated the Act's language (replete with references to international actions); its listing process (including many species found exclusively abroad); its consultation process (without geographic limits); it's jeopardy prohibition (likewise without limits); and its overriding purpose ("to protect species and the habitats on which they depend")[156] that the Supreme Court's seminal ESA opinion, *Tennessee Valley Authority v. Hill*, authored by a conservative Chief Justice, had found compelling and to be honored.[157]

When the ESA went back to the Court this time, however, these points went unheard. Instead, a splintered plurality of the justices threw the case out on standing. In its view the Defenders was not an "adversely affected" party. In so doing, the Court took to a new level one of the most contentious, malleable, and politicized concepts in American law: standing to sue.

A. ENVIRONMENTAL STANDING BEGINS

It was not always thus. The Supreme Court showed itself brutally rigorous in applying standing in early civil rights cases,[158] but in 1972 it opened the door to environmental litigants in *Sierra Club v. Morton*, contesting federal permits for a Disney Corporation resort in the Mineral King Valley of California, "a quasi-wilderness area largely uncluttered by the products of civilization."[159] The Club's involvement in the protection of these very mountains went back nearly a century.[160] On the merits, the case was convincing, the statutory and procedural

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155. The District Court originally dismissed the case on standing in *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43 (D. Minn. 1987), which was reversed on appeal and remanded for trial on the merits in *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988). On remand the District Court ruled in favor of Defenders on the merits in *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082 (D. Minn. 1989), which was affirmed by the Eighth Circuit in *Defenders of Wildlife v. Hodel*, 911 F.2d 117 (8th Cir. 1990).

156. 707 F. Supp. at 1085, *aff'd*, *Hodel*, 911 F.2d at 117, 122–23; *see also* 16 U.S.C. § 1531(b). The Circuit Court also referenced the fact that in the 1978 amendments, virtually an overhaul, Congress did not override the Carter regulations although several federal agencies were active in opposing them. 911 F.2d at 124.

157. 437 U.S. 153 (1978).

158. Three cases led the way. In *Warth v. Sedin*, 422 U.S. 490 (175), Justice Powell, writing for a 5-4 majority, denied standing to a fair-housing organization and several low-income residents claiming discriminatory zoning practices; their exclusion was attributed instead to "market forces". In *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), Justice Powell, writing for a 6-vote majority with two concurrences, denied standing to challenge revised tax regulations that allowed hospitals to receive federal benefits even if they refused to serve low-income and minority patients, and even though plaintiffs had submitted affidavits of refusal; their injuries were labelled a "generalized grievance". In *Allen v. Wright*, 468 U.S. 737 (1984), Justice O'Connor, writing for a 5-3 majority, found low income black plaintiffs lacked standing to challenge federal tax exemptions for segregated schools; white students would simply be removed to private "segregation academies". These opinions invented and solidified the element of "redressability in the Court's standing doctrine, the latter two explaining that there was no proof that the schools or hospitals would admit blacks, whatever the consequence. These decisions would be faithfully cited by Justice Scalia in his environmental standing opinions.

159. 405 U.S. 727, 728 (1972).

violations were clear.[161] On the question of standing, the majority found that Administrative Procedure Act ("APA")[162] provision for judicial review by any person "adversely affected" included, beyond traditional economic effects, recreational and "aesthetic" impacts as well.[163] Even if, it went on, these interests were "widely shared" by other Americans.[164] No member of the sitting Court disagreed with these conclusions.

The Sierra Club, meanwhile, while hailing the decision as "a massive victory disguised as a defeat,"[165] lost the principle for which it was litigating, its right as an organization to sue.[166] It had refused to plead injury to a club member when the opportunity was offered, and disavowed an amicus brief to the same effect.[167] Aside from a feeling of entitlement, individual plaintiffs, faces above the crowd, were inherently vulnerable in high-stakes contests, and the optics of pitting a lone hiker's pleasure versus the draw of a mega-ski resort are not favorable either in court or beyond. Three members of the Court agreed, dissenting from the majority's rejection of organizational standing … which would turn out to haunt the field.[168] No matter what qualifications would be required for such an organization (which have become the norm in jurisdictions from Europe to South America to China),[169] they would be nothing to the hyper-technical guessing game lying in wait for individuals such as those in *Defenders*.

Perhaps the most jarring position in *Sierra v. Morton* was that of the Solicitor General, who began with the unremarkable proposition that ours was not a "government by the Judiciary."[170] Both the executive branch and Congress had constitutional duties, he noted, and were "sworn to uphold the law" of the United

160. *Id*. at 737, n.8.
161. *Id*. (summarizing four causes of action).
162. Administrative Procedure Act § 10, 5 U.S.C. 702.
163. 405 U.S. at 738–39.
164. *Id*. at 738.
165. TOM TURNER, WILD BY LAW, 21 (1970).
166. *Sierra Club*, 405 U.S. at 738–39.
167. *Id*. at 735–36, n.8.
168. *Id*. at 741 (Douglas, J, dissenting); *id*. at 754 (Brennan, J, and Blackmun, J. separately dissenting).
169. *See* Oliver A. Houck, *Noah's Second Voyage: The Rights of Nature as Law*, 31 TUL. ENVT. L.J. 1, 30–31 (2017) (describing organizational standing in England, Italy, China and Latin America). In response to questions from the Court at oral argument on how an organization would be qualified, counsel for the Sierra Club suggested such criteria as age of the organization, demonstrated commitment to the issue, and its expertise to shape the litigation in a coherent and effective manner. *See* Response of Leland R. Selna, Jr. to Justice Stewart, Oral Argument, Sierra Club v. Morton, 405 U.S. 727 (1972) (No. 70–34), https://perma.cc/XH7K-JFJG. These criteria mirror those of other countries cited above.
170. 405 U.S. at 753 (attachment to Douglas dissent). The Solicitor General, Erwin Griswold, was formerly the Dean of Harvard Law School and a formidable force in the law. Deeply conservative on this issue, by coincidence his tenure overlapped the period when Justice Scalia was a student there. Given their academic accomplishments, it is inconceivable that they did not know each other.

States.[171] Those oaths were apparently dispositive for him. If agencies failed to obey them they were "subject to continuous check by the Congress."[172] Congress could "stop this development any time it wants to."[173]

The difficulties with this analysis should be apparent to anyone even faintly familiar with the Administration and Congress in recent years, the one quite reckless in "faithfully executing" the law and the other equally unwilling to correct it. In such instances, which unfortunately are not rare, it is the judiciary or no one. Even a Congress inclined to intervene in a particular case, furthermore, has no mechanism for adjudicating hundreds of other executive actions per year, even the most glaringly unlawful. Ours may not be a "government by the Judiciary", but neither is it a government *without* a judiciary. As for separation of powers requiring the judiciary to abstain, when courts hold bureaucrats to what the Congress enacted they are not treading on its powers, they are affirming what often took their sister branch years to accomplish through democratic debate and compromise. Last but not least, nothing in the Solicitor's argument seems to question judicial review on behalf of financial interests, which would come to play a major role in environmental litigation.[174] If strict separation were to apply, they too would be sent to Congress for relief. The oft-alleged "tyranny of the judiciary" runs both ways.

None of this would be relevant today, but for the fact that the Solicitor's views, warts and all, became the template for one High Court justice who made the elimination of public interest standing a crusade of his career. Through sheer persistence, rhetorical skill, and a caustic tongue for all who disagreed (including other justices), he exercised outsized influence on the field of administrative law.[175] His razor-thin plurality in Defenders was a capstone of these efforts, nullifying the decisions below favoring the ESA without even considering them. The opinion's author was Justice Antonin Scalia.

B. JUSTICE SCALIA AND STANDING

An insight into Justice Scalia's thinking is provided in his 1983 law review article "*The Doctrine of Standing as an Essential Element of The Separation of Powers*."[176] It was the Solicitor's earlier argument redux, the "over-judicialization" of government, the separation of powers doctrine as the cure.[177] Scalia's

171. *Id.* at 754

172. *Id.* at 755.

173. *Id.*

174. *See infra* note 217 and accompanying text. The rise of industry litigation is simple math: the costs of compliance outweigh the cost of lawyers, even if simply by delay.

175. *See* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1146 n.39 (quoting derogatory remarks by Scalia in ten cases, including several to his own colleagues).

176. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

177. *Id.*

solution was to bar both organizations and individuals, no matter how directly affected, unless they had a personal (i.e., financial) stake at risk or were part of a distinct minority for whom the laws were passed.[178] Since there were many environmentalists, and they claimed no financial injury, they were out of luck.[179]

The Justice's focus on environmental litigation is striking. His causa belli was the D.C. Circuit's decision in *Calvert Cliffs*[180] reviewing the Atomic Energy Commission's compliance with NEPA, which in Scalia's words "began the judiciary's long love affair with environmental litigation."[181] This was clearly an affair for which he had little appetite. Neither was the D.C. Circuit's focus on whether the Commission "failed to live up to a congressional mandate", nor its proclaimed "duty to see that important legislative purposes, hailed in the halls of Congress, are not lost or misdirected in the vast hallways of the bureaucracy."[182] Scalia's disapproval of these statements would be prelude to his sweeping assertion in *Defenders* that "vindicating the *public* interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the Chief Executive."[183] Exit, apparently, the third branch of government.

His antipathy toward environmental litigation did not rest there. Where courts enforce environmental mandates, Scalia continued, they will:

> [L]likely . . . be enforcing the political prejudices of their class. Their greatest success in such an enterprise — ensuring strict enforcement of environmental laws, not to protect particular minorities but for the benefit of all the people — met with approval in the classrooms of Cambridge and New Haven, but not in the factories of Detroit and the mines of West Virginia.[184]

Scalia continued:

> Does what I have said mean . . . that important legislative purposes, heralded in the halls of Congress, can be lost or misdirected in the vast hallways of the federal bureaucracy?' Of *course* it does — and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways and elsewhere.[185]

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178. *Id*. at 894.

179. *Id*. at 896 (given example: wrongful government action that affects 'all who breathe'").

180. Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

181. Scalia, *supra* note 176, at 884.

182. *Id*. (citing *Calvert Cliffs*, 449 F. 2d at 1111).

183. 504 U.S. at 576 (emphasis in original).

184. Scalia, *supra* note 176, at 896–97.

185. *Id*. at 897 (internal quotations and alterations omitted) (emphasis in original). Where Scalia's animadversion toward environmental law originated would be another study altogether, but it seems at the least coincident with the culture and faculty of the University of Chicago early in his teaching. The "Chicago School" of economics famously trumpeted unrestricted capitalism, and Professor Ronald Coase's well-known theorem found regulation unnecessary because victims could pay polluters not to

The shortcomings of Scalia's thesis compound those of the Solicitor before him. The most obvious is that Congress had already passed laws; why should those affected by agencies that break them have to back for more? If courts are free to allow agencies to break laws, further, indeed constitutionally *compelled* to do so, then the judiciary has itself violated separation principles by effectively repealing them. As for the "prejudices" of the "elites" for healthy air and toxin-free environments, they were widely shared by labor organizations during the enactment of pollution control laws that protected their lives and workplaces.[186] The Justice also ignored the fact that popular-but-diffuse interests, which he dismissed as "majoritarian,"[187] have little chance in the other two branches against the power of concentrated money, now aggravated by the Court's decision in *Citizens United*.[188] As Senator McCain said to his colleague Russell Feingold after attending the oral argument in this case, the Justices, "particularly Scalia, with his sarcasm," had "not the slightest clue" about campaign money and politics.[189] Either Scalia did not have a clue, or he very much did and the outcome was fine by him . . . if not intended. As one scholar recently observed, Justice Scalia "follow[ed] his nose, and often his nose did not like the environmental outcome."[190]

Scalia's separation of powers thesis has not prevailed. He was not able to rid the federal courts of environmental litigation wholesale through the judicial fiat, simply by denying its standing. Moreover, he could not deny that the APA's grant of standing to any person "adversely affected"[191] was intended to open the

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pollute, see *Coasian bargaining*, ENVIRONMENTAL JUSTICE ORGANISATIONS, LIABILITIES AND TRADE (last visited Sept. 25, 2020), of dubious applicability today's world of corporate power. Yet closer to home was Professor Richard Epstein who, on a grant from the Olin Chemical Company, published Richard Allen and Richard Allen Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) which, in his words, would undermine "the heralded reforms and institutions of the twentieth century" (another swipe at *Calvert Cliffs*), *id*. at 89. Scalia executed Epstein's property rights agenda with enthusiasm in a series of takings cases, culminating in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), yet another way to defeat environmental programs. Other probable influences included Dean Griswold, see *supra* note 39, and Professor of Government James O. Wilson at Harvard, see *infra* note 208. Justice Scalia also served in the US Department of Justice from 1972–74, at the receiving end of the first wave public interest environmental litigation under NEPA, which often prevailed. All the more reason to derail it.

186. For early alliance between environmental and labor interests, see Richard Leonard and Zack Nauth, *Beating BASF: OCAW Busts Union-Buster*, 1 LAB. RES. REV. 35, 40 (1990) ("[T]he most important of the Union's far-flung ties was Louisiana's grassroots environmental networking.") The alliance was a natural: pollution that contaminated workers also contaminated people beyond the fence line. Justice Scalia had simply created an alternate reality.

187. Scalia, *supra* note 176, at 894.

188. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (opening the door to unlimited campaign financing).

189. *See This American Life* Interview with John McCain and Russ Feingold (Mar. 15, 2012) (transcript available on National Public Radio) (McCain: the naivete "displayed by some of these justices, particularly Scalia, with his sarcasm, and the questions they asked, showed they had that, not the slightest clue" about political campaigning.).

190. Jeremy P. Jacobs, *How Scalia Reshaped Environmental Law*, E&E NEWS (Feb. 15, 2016), (quoting Todd Aagaard, Vice Dean and Professor, Villanova Law School).

courthouse doors. Nor could he ignore that Congress had likewise embraced citizen enforcement in more than a dozen statutes including the ESA, granting citizens the right to sue and incentivizing them with attorney's fees.[192] Instead, Scalia worked diligently, case by case, to develop criteria for standing that would serve the same purpose, resulting in a doctrine with a veneer of objectivity over a practice noted for its subjectivity and negativity instead. Largely through his influence the Supreme Court would convert standing into a gauntlet of obstacles, each requiring an ever-higher degree of proof.

As they evolved, there were three requisites for standing: (1) injury, (2) causation, and (3) remedy.[193] Easy to say, it is hard to imagine how tortuous these requirements could be made by agile minds. Two cases against the Secretary of Interior brought by the National Wildlife Federation and Defenders of Wildlife led the way. Both claimed procedural violations, traditionally the kind that the judiciary policed with rigor. Each was decided by a margin of 5-4, with Justice Scalia writing for the prevailing side. The second opinion, a fractured plurality, provoked Justice Blackmun to declare: "I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing."[194]

C. *LUJAN V. NATIONAL WILDLIFE FEDERATION*[195]

In the early 1980's, the Bureau of Land Management ("BLM") began to remove environmental protections from nearly 200 million acres of public lands. Over two centuries they had been dedicated to grazing and mining, but Congress had also authorized the President, in his discretion, to "withdraw" certain parts of the range from mineral development for "other public purposes."[196] This left a patchwork quilt of protected and unprotected areas.

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191. See supra note 159, at 738.

192. For a review of these provisions, see Michael Axline, Environmental Citizens Suits (1991). For those in pollution control statutes alone, see Jeffrey Miller, Citizen Suits: Private Enforcement of Federal Pollution Control Laws (1987).

193. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 474–75 (1982). While said to be constitutionally required under Article III, the Court added "prudential" requirements including that injuries not be "generalized grievances" and fall within a statute's "zone of interest," making law on its own. See also William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1989). Justice Scalia has defended this license as "grounded in the common law tradition," Scalia, *supra* note 176, at 886, note 9, and wielded it as a sword in his standing opinions, including the Lujan cases.

194. *See supra* note 139.

195. For a fuller analysis of this case, see Karin Sheldon, *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 ENV. L. REP. 10557 (1989).

196. The Department of Interior was mandated to regulate grazing under the Taylor Grazing Act of 1934, 43 U.S.C. § 315(f), which also authorized the Secretary to classify lands for retention or disposition. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 876 (1990). While prevailing mining laws provided for their disposition outright, others. This case led to a logjam over NEPA and, eventually, a new and comprehensive federal program. allowed the President to withdraw them from mineral development for other purposes. *Id*. at 875.

In 1976, prodded inter alia by an environmental lawsuit,[197] Congress enacted the Federal Land Management and Policy Act ("FLPMA")[198] which included several things of relevance to this case: (1) a declaration that public lands would remain public and subject to federal management;[199] (2) a land use planning process results of which would direct BLM decisions;[200] and (3) a mandate for BLM to review these withdrawals and a process for their revision, leading to recommendations presented to the President and Congress for their approval.[201] The framework for revisions provided was protective and subject to institutional checks.

In 1981, however, the incoming Solicitor of Interior issued a directive announcing that the rescission of previous withdrawals could be done directly by the Department, at the behest of any member of the public or the Department itself.[202] Under this purported authority BLM launched a "land withdrawal review program" with the objective of opening as many acres as possible for mineral development,[203] and the rescissions began in earnest. By mid-1985, BLM had reclassified or revoked outright some 814 withdrawals on 180 million acres of public land and counting[204] which prompted the National Wildlife Federation to sue.

The complaint alleged several violations, most of which were purely procedural and required no exercise of discretion: BLM's revocations were not based on the required land use plans; it had failed to submit recommendations for these actions to Congress as FLPMA required; it had not provided prior public notice as required by other FLPMA provisions; nor had it complied with NEPA with regard to the program it was operating, nor provided an opportunity for public review and comment.[205] As would become standard practice, the government challenged the plaintiffs' standing and, arriving at the Supreme Court, it found a champion at liberty to treat law and facts at will.

The early avalanche of standing challenges had not yet arrived, and NWF had supported its standing with the affidavits of two members alleging that they used and enjoyed lands in the vicinity of those covered by two of the revocations. One

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197. *See* Nat. Res. Def. Couns. v. Morton, 458 F.2d 827 (1972)*See also* Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases That Changed the American Landscape*, 70 TUL. L. REV. 2279, 2301–05 (1997) (describing NRDC lawsuit and logjam, leading to FLPMA).

198. Federal Land Policy and Management Act of 1976, 43 U.S.C. §1701.

199. *Id*. at § 1701(a).

200. *Id*. at § 1712.

201. *Id*. at § 1712(d); § 1714.

202. 497 U.S. at 879; *see also* Sheldon, *supra* note 225, at 69 (citing *BLM Organic Act Directive No. 81-11*, (June 18, 1981)).

203. Scalia, *supra* note 176.

204. NWF v. Burford, 699 F. Supp. 327, 332 (D.D.C. 1988). A list of 814 of these revocations complete with Federal Register citations was attached to the Wildlife Federation complaint, 497 U.S. at 880. This was not an abstract disagreement over federal policy.

205. 497 U.S. at 879–80.

site of 4500 acres was the only protected area within a two million acre range,[206] and the second was also a fragment of protection on a yet larger landscape.[207] The District Court found the affidavits sufficient and went on to grant NWF's motion for a preliminary injunction against further revocations as well.[208] The U.S. Court of Appeals for the District of Columbia affirmed.[209]

On remand, however, the district court faced standing issue again and this time in the guise of a government motion for summary judgement and, reversing itself after two years of trial preparation, this time granted it.[210] When the court prior to ruling requested NWF to file a supplemental memorandum on standing, NWF did so, attaching additional affidavits of other members including an NWF official stating that, as an educational organization, the absence of a NEPA statement[211] impaired his ability to inform its members and the general public.[212] They might as well not have been written. The judge rejected such affidavits in a single sentence as "untimely" and "in violation" of its previous request.[213] No further explanation was offered. Case dismissed.

The Court of Appeals disagreed, finding (again) that the two original affidavits had been sufficient (if they did not refer to the previously protected lands they would be "meaningless, or perjurious") and further that the trial court erred in not admitting the new ones.[214] Throughout the litigation, it noted, NWF's standing had been affirmed at every level and the group had no reason to file more. The new affidavits were important to the question, it went on, and they added no burden. On certiorari to the Supreme Court, Justice Scalia and four colleagues reversed . . . and went a league further to ensure that such case could not be filed again.

Its opinion began and effectively ended with the original affidavits that claimed injury in the vicinity of the now-unprotected areas, a fatal error apparently. Standing was "assuredly" (a beguiling phrase), Scalia stated, not satisfied by declarations that "one of respondent's members uses unspecified portions of an immense tract of territory" where mining "probably will occur" by the revocations.[215] The statement is deceptive. The revocation areas at issue were quite "specified" and hardly "immense;" the first of 4,500 acres (7.03 square miles)

206. *Id*. at 880, 886–87.

207. *Id*. at 866–67.

208. NWF v. Burford, 676 F. Supp. 271, 279 (D.D.C. 1985), *aff'd*, 835 F.2d 305, 307 (D.C. Cir. 1987).

209. NWF v. Burford, 835 F.2d 305, 307 (D.C. Cir. 1987).

210. NWF v. Burford, 699 F. Supp. at 327.

211. *Nat'l Wildlife Fed'n*, 497 U.S. at 881.

212. *Id*. at 898 (affidavit of NWF Vice-President Lynn Greenwalt, by coincidence a former Director of the USFWS).

213. NWF v. Burford, 699 F. Supp. 327, 328 note 2 (D.D.C. 1988).

214. NWF v. Burford, 878 F.2d 422, 434 (D.C. Cir. 1989); *accord* 497 U.S. at 904–14 (Blackmun, J., dissenting) (finding the exclusion an abuse of discretion).

215. 497 U.S. at 889.

was miniscule by western standards, and the only protected site within two million acres of range.[216] Given the open nature of this terrain, harm can be seen and heard from a considerable distance; one need not be standing on the spot. As for mining harm being only "probable" to occur, one takes pains to avoid probable injuries every day. More to the point, once protections were removed, mining would be accelerated by BLM (this was the purpose of the new rule) and proceed as a matter of legal right,[217] its resulting damage largely irreversible.[218]

The four additional affidavits met a quicker fate. They were not even considered. Per Scalia, their late submission was not "excusable neglect."[219] This conclusion was remarkably blind to the fact that re-litigation of standing, after over two years of motions, discovery and other commitments, came only after both the district and the appellate courts had explicitly found the initial affidavits sufficient, and that the trial court itself had explicitly requested NWF to file additional pleadings.[220] If "excusable" has any meaning this would be an excellent example.

Nor did the opinion stop here. Even had the affidavits been sufficient to provide standing, Scalia continued, it was "impossible" they would suffice "to challenge the entirety of petitioner's so-called land withdrawal review program."[221] But why would they *not* suffice? If the program itself was running on a process that violated clear procedural requirements of law, one would think that this is exactly what courts should review. The pieces were not individually the problem – the system was. Scalia attempted to shore up this conclusion by denying that it *was* a program, characterizing it instead as "1250 or so individual classification terminations and withdrawal revocations."[222] The disconnect with the facts was brazen; even BLM called it a program. Scalia's "individual" decisions were implementing a single system with a single process and a single acknowledged purpose: to open protected lands to mining. What *else* defines a program?

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216. The 4,500 acres computes to 7.03 square miles; one could walk it at a leisurely pace in two hours.

217. General Mining Act of 1872, 30 U.S.C. §§ 22–24, 26–30, 33–35, 37, 39–43, 47. still applicable to such minerals as copper, uranium and gold, proceeds from entry to exploration, discovery and patent (title), each step as a matter of right. *See also* Sheldon, *supra* note 195, at 10564 ("Once lands are legally available for mining, the government has no authority to preserve them unimpaired."). According to a government affidavit in evidence in this case, more than 7,200 such claims had been filed, 497 U.S. at 890 note 1. The popularity of these claims may reflect that they pay no royalties to the U.S. treasury. *See* Satchell *infra* note 218.

218. For the scope of impacts in the affected areas see Blackmun dissent, 497 U.S. at 890–91 and note 1; for their irreversibility see Michael Satchell, *The New Gold Rush*, U.S. NEWS & WORLD REP., Oct. 28, 1991 (describing wasted landscapes, poisoned rivers and Superfund clean-up sites bordering towns the size of Butte, Montana).

219. 497 U.S. at 894–98.

220. *See* 497 U.S. at 904–13 (Blackmun, J., dissenting).

221. *Id*. at 890.

222. *I*d. By denying the "program" Scalia manages to suggest it was not a "federal action" at all, and in the alternative, it was not ripe for review, until "its factual components" were "fleshed out". *Id*. at 891, finessing in this fashion (without saying so directly) even the requirements of NEPA.

At this point, as if the previous discussion had been a prelude, the Justice provided another reason to reject standing closer to his heart. He returned to separation of powers, this time without mentioning the term. Was the BLM system, however labelled, breaking the law? "Perhaps so", he (surprisingly) admitted:

"But respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. . . . It is at least entirely certain [a beguiling phrase] that many individual actions . . . cannot be laid before the courts for wholesale correction under the APA, simply because [it] adversely affects one of the respondent's members."[223]

Apparently, none of this was possible because he said so. Even if individual injury were found to meet the exigent criteria for standing, courts should step away from judging some of the most patently unlawful governmental endeavors in America. We, of course, have seen this statement before, starting with the Solicitor General in 1972, and with the same gaping lacunas. Asking the Department to correct itself is no more an answer today than it was then, nor asking Congress, but in Scalia's peculiar cosmos this is where the judiciary ends. The take-home from *National Wildlife* was, counterintuitively, the more widespread the violation, the easier it is to get away with it.[224]

As this saga closed, it is surprising that the four dissenters did not challenge their colleague on this most extravagant of his claims. The *Defenders* case that followed, however, would be a different story. They did.

D. *LUJAN V. DEFENDERS OF WILDLIFE*[225]

As seen earlier, the *Defenders* case was considerably narrower than the one preceding. It focused on a single regulation and its application to a discrete set of projects on well-defined sites around the world.[226] The alleged violation – the failure of the government to engage in consultation under the ESA – was likewise procedural. Defenders simply wanted AID to engage in a process designed to allow projects to go forward by minimizing harm to endangered species. The nature and importance of this process would be largely lost in the Supreme Court opinions to follow.

Both the district and appellate courts, after a skirmish over standing, found the Service to have violated the ESA.[227] In five fragmented opinions, however, a

223. *Id*. at 891, 892–93.

224. Sheldon, *supra* note 195, at 10566.

225. The Defenders of Wildlife was joined by the Friends of Animals and Their Environment, and the Humane Society of the United States in this action. For a fuller analysis of this case, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); *see also* Karin P. Sheldon, *Lujan v. Defenders of Wildlife: The Supreme Court's Slash and Burn Approach to Environmental Standing*, 23 ELR 10031 (1993).

226. *See supra* note 11.

227. The District Court initially dismissed on standing and was reversed by the Eighth Circuit Court of Appeals. The trial court then ruled for the plaintiffs on the merits, which the Eight Circuit affirmed. *Defenders of Wildlife*, 504 U.S. at 559.

majority of the Court rejected standing on various grounds. The most sweeping was that of Justice Scalia, whose qualified plurality found that the affidavits submitted by plaintiffs failed to establish injury, causation, or redress, and that ESA's explicit citizen suit provision was trumped by the Constitution.[228] A majority of Justices rejected his no-redress rationale,[229] some his dismissal of the citizen suit provision,[230] and two others rebutted all of the plurality's analysis point by point.[231] Justice Stevens went on further to find standing but dismiss on the merits instead.[232] From all of this, the only thing one can say with safety is that the plaintiffs lost.

In order to establish its interest in the case, two Defenders executives provided affidavits and testimonies concerning the species and the projects.[233] One declared that she had visited habitat of the elephant and the leopard in Sri Lanka and, unable to see them, intended to return for another try but, she continued, "[t]here is a civil war going on right now," so she was unable to fix a date.[234] The other averred that she had gone to the Nile Delta recently to see the crocodile, also missed, but likewise intended to return in order to observe it more directly in its habitat.[235] But no, she had not yet fixed an agenda nor purchased the airplane ticket.[236] Both alleged that the projects would reduce both these species' chance of survival and, hence, their own chance of observing them and other endemic species in their ecosystems.[237]

Justice Scalia, having hailed the virtues of the standing as a winnowing device, began with the conventional nod towards "case or controversy."[238] The affidavits at issue sufficiently claimed injury ("though," he doubted, whether the projects would threaten anything was "questionable"),[239] but they had failed to show that it was "imminent."[240] More particularly, they lacked "concrete plans," or indeed "any specification of *when* the 'some day' would occur."[241] This was, however, only the warm-up.

The opinion also found that the injury was not "fairly traceable" because, remarkably, even if the USFWS required consultation, AID was not bound to

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228. *Id.* at 557–71.

229. *Id.* at 556 (identifying only four Justices agreeing with Scalia on this issue).

230. *Id.* at 579–80 (Kennedy, J. and Souter, J., concurring); *id.* at 601–04 (Blackmun, J. and O'Connor, J., dissenting).

231. *Id.* at 589–606 (Blackmun, J. and O'Connor, J., dissenting).

232. *Id.* at 581–82 (Stevens, J., concurring).

233. *Id.* at 564 (affidavits of Joyce Kelly and Amy Skilbred).

234. *Id.* at 564 (affidavit of Joyce Kelly).

235. *Id.* at 563 (affidavit of Amy Skilbred).

236. *Id.*

237. *Id.* at 563–64.

238. *Id.* at 564. The Justice laid his groundwork once again with the three unfortunate civil rights cases dismissed on grounds of standing.

239. *Id.*

240. *Id.*

241. *Id.*

obey.[242] The Service had maintained that they *were* binding throughout the case, only to be reversed by the Solicitor General apparently in order to increase his chances of winning, was not acknowledged . . . until raised by dissenting opinions.[243] The commonly-known fact that agencies routinely follow High Court rulings and the regulations of other agencies without question (e.g. ESA jeopardy determinations, NEPA requirements) went unacknowledged as well.[244] Plaintiffs had not *proven* they would.

Nor were the injuries subject to judicial remedy, not only for the obedience problem but for the fact that all that was sought was consultation, in which the plaintiffs had no role and which might not change the projects at all.[245] Consultation, the heart of the 1978 ESA amendments, was hereby declared expendable, even fruitless.[246]

Having gone this far, the opinion made short work of related standing claims, including for those with a direct professional interest in particular species at risk. This would allow "anyone who is a keeper of Asian elephants in the Bronx Zoo" to sue, it explained, which "went to the outermost limits of plausibility."[247] It would be "pure speculation and fantasy [another beguiling phrase]" to conclude that those who study them are "appreciably affected" by a project in another country that eliminates a few.[248] Once again, we have argument by superlatives and mockery. Even within the byzantine labyrinth of standing such individuals seem qualified. Indeed, who would be *more* qualified? Someone who poached them, perhaps.

The opinion turned last to the ESA citizen suit provision allowing "any person"[249] to sue. This was seen as a "generalized grievance" too open-ended to survive.[250] Scalia's attempted analogies notwithstanding the claim was neither taxpayer standing nor a plea for "good government."[251] Congress had chosen to enlist a subset of the population with the interest and resources to assist in enforcing its law. It had no right to do this, apparently. To allow it to convert an "undifferentiated" grievance into an actionable right would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed'" under Article II.[252] This argument

242. *Id*. at 569–71.

243. *Id*. at 595–96 (Blackmun, J., dissenting).

244. Here the Court seemed to be endorsing a novel theory of "agency nullification." For Justice Scalia's enthusiastic support for this principal, see *supra* note 52.

245. *Id*. at 571 (reasoning that since US AID was providing only part of the funding for these projects, they might go forward anyway).

246. For evidence to the contrary, see *supra* note 17 and accompanying text.

247. *Defenders of Wildlife*, 504 U.S. at 566.

248. *Id*. at 567.

249. 16 U.S.C. § 1540(g).

250. 504 U.S. at 573–74.

251. *Id*. at 574–75.

252. *Id*. at 577. One has to admire the body-language of this phrase, the Congress and Chief Executive are capitalized but there is no mention of the Judiciary, merely "the courts." In this Justice

defies history.[253] Unless all citizen actions were unconstitutional, which *inter alia* would nullify Article 10 of the APA, Article II had nothing to do with standing.

The various concurring and dissenting opinions, taken collectively, made short work of the plurality's reasoning. Insisting on a return itinerary or plane ticket to establish injury was absurd,[254] as was the rejection of professional injury,[255] as was the assumption that other agencies would disobey USFWS regulations.[256] ESA consultation was indeed remediable; simply having it done led to results.[257] The Congress, further, has and should have the constitutional authority to go "beyond tort levels of responsibility" in order to allow private citizens to vindicate interests shared more broadly than those of single individuals and corporations.[258] The notion of "case or controversy" must move with the times, lest it lead to an unbalanced society.[259]

These were strong voices, but they were not enough to carry the day.

Scalia is being far too modest. As Justice Blackmun would note, he is in fact empowering courts to prevent Congress from achieving its aims both substantively and procedurally. *Id*. at 602 ("the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense – not of the courts – but of Congress.").

253. *See* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). Scalia's response to this precedent is that groups are not individuals, *Defenders of Wildlife*, 504 U.S. at 577, which is true, but under current doctrine they obtain standing through individuals.

254. *Defenders of Wildlife*, 504 U.S. at 592–93 (describing this requirement as "an empty formality").

255. *Id*. at 594–95.

256. *Id*. at 585 (Stevens, J., concurring) ("Certainly the Executive Branch cannot be heard to argue that an authoritative construction of the governing statute by this Court may simply be ignored by any agency head."). Justice Blackmun's dissent was more comprehensive on this issue: the plurality opinion was based on "executive lawlessness, ignorance of principles of collateral estoppel, unfounded assumptions about causation, and erroneous conclusions about what the record does not say." *Id*. at 601.

257. *Id*. at 595 (Blackmun, J., dissenting) ("AID's active role in this case demonstrates that, by complying [with the ESA] its projects would be affected, and consultation alone would have this effect") *id*. at 585; (Stevens, J., concurring) ("it is not mere speculation to think that foreign governments, when faced with the threatened withdrawal of United States assistance, will modify their projects to mitigate the harm to endangered species.").

258. *Id*. at 580 (Kennedy, J., and Souter, J., concurring) ("As Government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition", a very polite way of saying that tort law principles of injury should have little application in actions for the protection of public rights.). While this concurrence was unwilling to apply its admonition to the case at hand, it added that a statute that better defined those able to sue should succeed. Id. at 581. *See also id*. at 605 (Blackmun, J., dissenting) ("It is to be hoped that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm" that injury could be shown "just through the breach of that procedural duty.". Both were reaching out to mitigate the harshness of the decision.

259. *Id*.

E. BEYOND THE *LUJANS*

The *Lujan* decisions resolved little about standing, except that it depended increasingly on an infrastructure that was questionable and flexible at every joint. Standing law that followed has resembled a prize fight with no clear winners and an infinite number of rounds, in no venue more so than the High Court.

The year after its *Defenders* ruling the Court decided *Steel Company v. Citizens for a Better Environment*,[260] in which the plaintiffs sought penalties, a declaratory judgement, and injunctive remedies for the company's failure to file toxic release information as required by the Emergency Planning and Community Right-To-Know Act ("EPCRA").[261] The Seventh Circuit Court of Appeals had ruled in favor of plaintiffs on the merits, but the government petition for certiorari raised standing for the first time as well.[262] Although Citizens had alleged (without contest) that they regularly sought and used toxic release information in its environmental campaigns,[263] Justice Scalia, again writing for a fractured court, dismissed the case on standing for lack of "redressability."[264] Since the company had subsequently come forward with the information, he opined, there was nothing left to remedy.[265] A declaratory judgement of guilt against it would be "worthless to all the world", and because the civil fines would be paid to the US treasury, the plaintiffs would be no better off.[266]

As three justices pointed out to the contrary, a declaratory judgement could have significant consequences both with regard to the company and others like it, and the fact that fines went to the government missed exactly the same point: fines were not in the statute in order to pay plaintiffs, but to deter.[267] Justice Stevens went further to oppose the Court's hyper-focus on redressability, which he found "mechanistic," nowhere in "the text of the Constitution", and "a judicial creation of the past twenty-five years."[268] However persuasive these arguments were, the *Lujan* team won this round.

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260. 523 U.S. 83 (1998). In all, the case drew five separate opinions.

261. 42 U.S.C. § 11046(a)(1) he.

262. *Steele Co*., 523 U.S. at 88.

263. *Id*. at 104–05.

264. Id. at 105. Justice Scalia also questioned whether deprivation of EPCRA information was a "concrete injury" within the meaning of Article III, even though it was required by statute and plaintiffs had "a particular plan for its use". Perhaps fearing this question would draw an unwanted answer – the statute was called the "Community Right-To-Know Act" for a reason – the Justice chose to attack the remedy issue instead. Two Justices wanted to address the EPCRA merits issue instead precisely to avoid yet another constitutional decision stretching the meaning of standing. See id. at 111 (Breyer, J., concurring), and 112, 124 (Stevens, J., concurring in part).

265. *Id*. at 105.

266. *Id*. at 105–09.

267. *Id*. at 127–31 (Stevens, J., concurring in part).

268. *Id*. at 124. (Stevens concurring in part). Justice Stevens went on to criticize the Court's emphasis on standing as "mechanistic", "foreign to the text of the Constitution", and "a judicial creation of the past twenty-five years" that had never been applied in this fashion. *Id*. at 134.

Two years later came *Friends of the Earth v. Laidlaw Environmental Services*,[269] a straight-up Clean Water Act citizen suit rising from recurring discharge violations, nearly 500 of them involving mercury, a serious toxin.[270] Twenty-three violations had occurred after the filing of the complaint.[271] The District Court had found in favor of plaintiffs on standing and the merits, but the Fourth Circuit Court of Appeals reversed, largely on redressability, because the plant had shut down some years after the case was filed which mooted injunctive relief, and because, as in *Steel Company* the requested fines would go to the government.[272] Supreme Court Justice Ginsberg, writing for a majority of five colleagues with two supporting concurrences, found standing based on allegations that Friends members used and enjoyed the receiving waters without requiring precise dates and types of activities impaired.[273] Nor did they need to show harm to the river, only to themselves.[274] Nor did a penalty assessed by the State of North Carolina prevent federal penalties.[275] (Peeking behind the curtain it turned out to be a sweetheart deal).[276] Nor did the fact the plant had since closed moot the issue.[277] Nor did the plaintiffs have to prove redress beyond the fact that CWA fines were intended to change conduct, which benefited all putative users.[278]

All in all, to the open dismay of dissenting Justices Scalia and Thomas, *Laidlaw* constituted a rejection of much contained in the *Lujan* opinions and *Steel Company*.[279] As solid as a 7-2 verdict was, however, it was not the final word.

Perhaps the most consequential standing case since *Sierra v Morton* reached the Court in 2006 and provided a ring-side view of the chaos within its doctrinal requirements. In *Massachusetts v. EPA*, the state and a bevy of other states and environmental groups challenged the Agency's failure to regulate greenhouse gas emissions from the auto industry under the Clean Air Act.[280] A panel of the D.C.

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269. 528 U.S. 167 (2000). For a fuller treatment of this case, see William W. Buzbee, "The Story of *Laidlaw*, Standing and Citizen Enforcement," *Public Law & Legal Theory Research Paper Series*, No. 05–13, EMORY U. SCH. OF LAW (2005).

270. *Friends of the Earth*, 528 U.S. at 176 (noting 489 violations).

271. *Id*. at 178 (23 violations).

272. *Id*. at 173–74.

273. *Id*. at 183–84.

274. *Id*. at 181.

275. *Id*. at 176–77.

276. *Friends of the Earth*, 528 U.S. at 177, citing District Court opinion finding that Laidlaw, after plaintiffs notice to file suit was received, conspired with the State to file a suit and a quick settlement (for a small sum) in order to moot the case, and then drafted the documents, "filed the suit and settlement agreement against itself, and paid the filing fees". These shenanigans not only removed the CWA bar on citizen suits when the state was "diligently prosecuting," 33 U.S.C. 1365(b)(1)(B), but may well have colored the Court's view of the case. Laidlaw was not an ideal client.

277. *Id*. at 189–91.

278. *Id*. at 185–87.

279. *Id*. at 198.

280. 549 U.S. 497 (2006). For a thoughtful discussion of this case, see Jody Freeman and Adrian Vermeule, *Massachusetts v EPA: From Politics to Expertise*, 53 SUP. CT. REV. 51 (2007). For the impressive number of states, environmental organizations and industry associations involved, see 549 U.S. at 502. The importance of this case was evident to all.

Circuit Court of Appeals had split three ways on the merits and on plaintiff's standing to sue.[281] A five-justice majority of the Supreme Court found in favor of Massachusetts et. al. on both issues, each forcefully contested by four colleagues led by Chief Justice Roberts and, unsurprisingly, Justice Scalia who had largely claimed this territory as his own.

The Assistant Attorney General of Massachusetts had no sooner started on the standing issue when Scalia interrupted him, asking with not-unfamiliar sarcasm "when is the predicted cataclysm?"[282] The Justice followed rapidly with six additional questions, adding his own observation that there was "not a consensus" on how much climate change was attributable to human activity.[283] Skepticism about climate change and about standing to raise it went hand in hand.

Justice Stevens writing for the majority this time, began by tracing standing back to its Article III roots, "case or controversy", designed to assure the "adverseness which sharpens the presentation of [the] issues", not in the "rarified atmosphere of a debating society" but a factual context conducive to judicial decision making.[284] (That public interest groups with their expertise on given issues would provide this "adverseness" admirably had been recognized by Scalia from his earliest writings, steering him to his alternate separation of powers thesis that would exclude them on other grounds).[285] The dispute here was not of policy, Stevens explained, nor off limits as a "political question"; it was straight-forward application of law. Stevens was re-setting the baseline.[286]

Chief Justice Roberts, writing for the dissenters on this issue, began by setting his own baseline, separation of powers. Application of the Clean Air Act to climate change precursors was a "policy" matter, and "[T]his Court's standing jurisprudence" is that addressing it was "the function of Congress and the Chief Executive."[287] In one sentence he had in effect elevated his separation thesis to the taboo status of a "political question," despite the Court's recurring statements that because an issue involved politics did not put it off limits; rather, the question was the presence or absence of law to apply.[288] Nor did Roberts acknowledge that had industry been suing to *oppose* the Air Act's application, the separation of

281. Massachusetts v. EPA, 549 U.S. at 514–15.

282. *Official Transcript, Oral Argument*, Massachusetts v. Environmental Protection Agency, at 5 (2006).

283. *Id*. at 5–6.

284. *Massachusetts*, 549 U.S.at 516–17 (citing inter alia Justice Kennedy's concurrence in Defenders).

285. *See* Scalia, *supra* note 176, at 891–92 (providing the example of the NAACP Legal Defense Fund and ACLU).

286. *Massachusetts*, 549 U.S.at 516.

287. *Id*. at 535 (citing *Defenders of Wildlife*, where it was dicta for a plurality opinion based on Article III considerations instead).

288. *See Baker v. Carr*, 369 U.S. 186, 209 (1962) (redistricting involved politics but was not a "political question").

powers issue would magically disappear.[289]

Turning now to the oft-stated requirements of Article III, the chasm only widened. On the issue of injury, the Majority found Massachusetts entitled to separate consideration as an affected state,[290] citing Court jurisprudence going back to the opinion of Justice Holmes in *Georgia v. Tennessee Copper* (1907).[291] The harm was plain, the loss of its coastline, increased harm was certain.[292] It did not matter that this harm was "widely shared" by other states and individuals, that it existed was sufficient.[293] The Dissent disagreed on every count. The issue of standing afforded no special consideration for state interests.[294] The harm was futuristic and its degree "speculative."[295] It might be certain, but certainly not "imminent."[296] "Widely shared" injury was, by definition, not "particularized" as required.[297]

On the issue of causation, the Majority found that auto emissions were part of the problem,[298] and their impact was obviously "traceable"; they had in fact been quantified.[299] The Dissent saw the harm as a *de minimus* part of the whole, and for this reason not "fairly traceable."[300]

As for remedy, to the Majority even small reductions provided some relief,[301] and they would prompt other countries to act as well.[302] The Dissent argued that *de minimus* relief was no better than *de minimus* harm, and that the possible actions of third-party nations were irrelevant for purposes of standing.[303]

As the dust settled, under the same facts and the same legal requirements *Massachusetts v. EPA* ended in disagreement over every element of standing, starting with the constitutional basis itself . . . which makes its own statement about the doctrine. The Court's decision on the merits was sufficient at least to propel the EPA into climate change regulation, from which it has since been retreating.[304] It obviously failed, however, to solve the Rubik's Cube of environmental standing. The Court's next fling at the issue did no better, although it did afford Justice Scalia one last, highly-contested hurrah.

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289. *See* Scalia, *supra* note 176, at 889 n. 37 (as directly affected parties corporations would automatically have standing).

290. *Massachusetts*, 549 U.S.at 518–20.

291. 206 U.S. 230, 237 (1907).

292. *Massachusetts*, 549 U.S. at 522–23.

293. *Id*. at 522.

294. *Id*. at 536–38.

295. *Id*. at 545.

296. *Id*. at 542–43.

297. *Id*. at 541 (future), 542 (computer models uncertain).

298. *Id*. at 524 ("That a first step might be tentative" does not divest the court of jurisdiction).

299. *Id*. at 544 ("only a fraction of 4 percent of global emissions").

300. *Id*. at 535–36.

301. *Id*. at 545 (describing plaintiff's argument).

302. *Id*.

303. *Id*. at 545–46.

304. *See* Eric Larson, *Trump Team Sued Over Rollback of Obama-Era Clean Power Rule*, BLOOMBERG LAW, (Aug. 13, 2019), https://perma.cc/5AM3-SQ7C.

Summers v. Earth Island Institute,[305] decided in 2009, presented a by-now familiar scenario. Congress, responding to controversies over US Forestry practices, passed the Forest Service Decisionmaking and Appeals Reform Act[306] directing the US Forest Service to provide for public notice, comment and appeal on all of its projects and activities, another procedural duty.[307] The Service had a better idea, however, and adopted regulations exempting post-fire projects on areas under 4,200 acres, and salvage sales of 250 acres or less.[308] While seemingly small, the exemption mattered. Many of the burn areas retained high natural values, forest fires were increasing, and the sales were incentivized by splitting the proceeds between the timber companies and the Service itself.[309] With these dynamics the game could go on forever. The Agency had already held several thousand sales and intended to conduct thousands further "in the reasonably near future".[310] Earth Island alleged, and it was not contested, that with public involvement the adverse impacts of these activities could be reduced, or altogether avoided.[311] In another 5-4 decision, the case was dismissed on standing.

Plaintiffs had submitted two supporting affidavits, one for a single project in California and the other for projects across the country. Standing was not challenged on the first project, which ultimately settled, but the district court went on to review the underlying regulations, find them invalid, and enjoin them nationwide.[312] The Ninth Circuit agreed.[313] Justice Scalia and four colleagues did not, finding the first affidavit no longer served once its project dropped from the case,[314] and the second affidavit deficient for failing to "identify any particular site" and for relating only to past injury rather than an "imminent" future threat.[315] There might be "a chance" that the affiant's "wanderings" would bring him to an affected parcel, but no more.[316]

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305. 555 U.S. 488 (2009). For a fuller discussion of this case, see Bradford Mank, "Summers v. Earth Island Institute Rejects Probabilistic Standing, but a 'Realistic Threat' of Harm is a Better Standing Test," 137 *Faculty Articles and Other Publications*, (2010).

306. 16 U.S.C. § 1612.

307. *Earth Island Institute*, 555 U.S. at 490.

308. *Id*. at 490–91.

309. Timber receipts flowed directly into the Service's budget, which lead to sale-oriented management. *See* Paul Roberts, *Zero Cut*, SEATTLE WEEKLY, Nov. 4, 1992, at 12 ("How could the Service act so irresponsibly?: It gets paid to."); *see also* Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1026 (9th Cir. 2009) (Noonan, J., concurring) ("The financial incentive of the Forest Service" effectively makes it "the paid accomplice of the loggers").

310. *Earth Island Institute*, 555 U.S. at 501, 506.

311. *Id*. at 501, 504 (Breyer, J. dissenting) ("The majority assumes, as do I, that [salvage sales] might not take place if the proper procedures were followed.").

312. *Id*. at 492.

313. *Id*.

314. *Id*.

315. *Id*. at 495,499–500.

316. *Earth Island Institute*, 555 U.S.at 495. The plaintiffs had submitted further (and bullet-proof) affidavits after their standing had been challenged, which Scalia found no more tolerable than in *National Wildlife*, even though in both lawsuits they had no earlier reason to believe their first two were

Unfortunately, this description badly understated the record. The second affiant, a member of a forest watchdog organization, had "visited seventy national forests", some "hundreds of times", had commented on "probably thousands of projects" including salvage sales.[317] He had often visited the Allegheny Forest in particular where the Service was proposing twenty such sales at this moment, and intended to return; it was part of his job.[318] The opinion also slighted the allegation of the co-plaintiff Sierra Club that it had 700,000 members nationwide who regularly enjoyed the national forests, including "thousands of members in California" who used the Sequoia National Forest, another hotspot for salvage sales.[319] This, too, was found insufficient for failing to say which members, exactly when, and on what particular site.[320] In practice, the standing doctrine, as in *National Wildlife*, was serving to insulate some of the most facially-unlawful agency programs in America.[321]

To the four dissenters, the majority also misstated the law. Up to now, the Court had not required that future harm be "imminent", only that there be a "reasonable likelihood" of it recurring.[322] In this case, with the number of members and regular visits alleged, running into a sale site was inevitable.[323] *Massachusetts v. EPA* had accepted injury that, while certain, was at least decades away;[324] *Laidlaw*, it could have been added, found sufficient an allegation of future use and enjoyment on its face.[325] As Justice Breyer noted: "To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive."[326]

At some point, one may hope, common sense such as this will rejoin the law.

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deficient. *Id*. These harsh results were either a matter of misunderstanding this context, or deliberately ignoring it. Standing was an unforgiving God.

317. *Id*. at 507–08.

318. *Id*.

319. *Id*. at 502.

320. *Id*. at 499.

321. Justice Scalia recognized this fact in *National Wildlife*, stating that suing on each site, case by case, would be "understandably frustrating" to environmental groups but this was the "traditional" and remained the "normal" operation of the courts. 497 U.S. at 894. Apparently programmatic suits were now unconstitutional.

322. *Earth Island Institute*, 555 U.S. at 505 (citing two prior Supreme Court decisions using the "reasonable likelihood standard", particularly when the same harm had been inflicted on the same parties before). *See also* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 67 (1987), a CWA enforcement case in which Justice Marshall held that future injury would qualify as being "in violation" were there a "good faith belief" the violation was continuing. Summers fit either formulation like a glove.

323. *Earth Island Institute*, 555 U.S. at 506.

324. *Id*.

325. *See* 528 U.S. at 169.

326. *Earth Island Institute*, 555 U.S.at 508.

F. STANDING ON THE WRONG FOOT

It is stunning to consider the amount of time and energy now spent, at every judicial level, in preventing valid public law claims from being heard. One might think that Article III of the Constitution encouraged these claims, requiring only that they be "cases or controversies". One might think the APA empowered them more specifically by enabling any "adversely affected" person to sue. One might think that Congress, anticipating (correctly) inaction by the executive branch, had the constitutional power to authorize citizen suits in environmental cases, just as it had *qui tam* actions, to ensure that its statutes were implemented. One might think that judicial review of government failures complemented the power of Congress by enforcing laws it had enacted. One might think that by refusing review the Court was arrogating to itself the power to nullify these very laws (and, in Scalia's words, "a good thing too!").[327] One might even think it was being used by courts as an easy way to shuck unwanted claims.

One would not be the only person to think this, nor would this article be the only writing to suggest it. Leading administrative law scholars since the 1960's have welcomed citizen suits as a necessary check on government.[328] They have refuted the Court's treatment of standing as baseless in its claim to historical pedigree,[329] and wrong in its fabrication of elements that are both unnecessary and antagonistic to the rule of law.[330] They have also found its application insupportably whimsical, the Court reaching out on several occasions to accept cases it wished to decide on the basis of alleged injury that, for disfavored claimants, would never pass.[331] As a doctrine it is neither coherent nor consistent . . . as illustrated by the cases in this article alone.

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327. *See* Scalia, *supra* note 176, at 897 n. 48.

328. *See* Louis L. Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 633 (1971) ("The most significant development in . . . the whole field of Administrative Law, has been to enfranchise individual and organizational plaintiffs whose concern is not specifically economic or who represent in various forms what we might characterize as citizen interests."). *See also* Abraham Chayes, *The Role of the Judge in Public Interest Litigation*, 89 HARV. L. REV. 1281, 1285 (1976) (judicial duty to respond). Furthermore, at this same time the Internal Revenue Service was recognizing pubic interest environmental litigation as a charitable activity. *See* Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1419, 1443–54 (1984) (describing controversy over this proposal and subsequent IRS letter rulings).

329. *See* Sunstein *supra* note 225 at 170–79 (tracing early English and American roots, neither of which limit standing); Richard J. Pierce Jr., *Is Standing Law Or Politics*, 77 N.C. L. REV. 1741, 1764 (1999) (citing studies by Professors Berger and Jaffe).

330. *See* Mark V. Tushnet, *New Law of Standing a Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); Gene R. Nichol, *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L. REV. 1141, 1168 (1993) ("As courts whittle away the public litigation model, regulatory incentives become skewed."). Sunstein, *supra* note 225, at 191 ("Whether an injury is cognizable should depend on what the legislature has said . . . the Court should abandon the metaphysics of 'injury-in-fact' and focus on what rights have been conferred").

331. *See* Bennett v. Spear, 520 U.S. 154 (1987) (granting standing for landowner to challenge ESA critical habitat designation with no showing of imminent harm); Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59 (1978) (granting highly-attenuated standing to environmental organization in order to affirm the limitation of liability for nuclear power plants); Lucas v. South Carolina Coastal

Standing decisions are also marked by personal bias and political affiliation. One scholar writes that the Court's jurisprudence stems "not from a belief in judicial restraint in the abstract, but instead from hostility to suits brought by the beneficiaries of regulatory programs to ensure fidelity to the statute."[332] Several members of the Court have made no secret of this hostility to environmentalists and environmental plaintiffs,[333] as have their supporters in academia.[334] Whatever else moves them, it is more than logic. As the science reporter Shankar Vedantam's "Hidden Brain" reveals weekly: the human heart decides, the rationales come later. So, too, with standing.[335]

The connection to politics is yet more empirically plain. A suite of articles shows political party to correlate closely with standing decisions at appellate and Supreme Court levels.[336] This correlation, as the media and every lawyer in Washington D.C. knows, has both predictive and explanatory value.[337] Presidential campaigns have run on it. As the research also shows, this phenomenon is particularly true for Republican appointees, three of whom have yet to

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Comm'n, 505 U.S. 1003 (1992) (granting landowner to claim a taking without applying for a waiver as provided by statute.) In all three cases the Court simply wanted to make law.

332. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1480 (1988).

333. Lewis F. Powell, Jr., "The Memo," *Powell Memorandum: Attack On American Free Enterprise System* (1971) (depicting environmentalists as seeking "insidiously" to undermine American values and identifying Ralph Nader, author of *Unsafe at Any Speed* (1965), and Professor Charles Reich, author of *The Greening of America* (1970), as the prime instigators); Justice Scalia castigating environmental elites from "Cambridge and New Haven," see text *supra* at note 185, lamenting their "massive bargaining power," Laidlaw, *supra* note 269 at 209, and acting as "extortionist[s]" through citizen suits, *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Hous*., 532 U.S. 598, 618 (2001) (Scalia, J., concurring); Justice Rhenquist reprimanding environmental interveners, *Vermont Yankee Nuclear Power Corp*., 435 U.S. 553–54 ("unjustified obstructionism") (1978); then-Judge Clarence Thomas belittling NEPA in *Citizens Against Burlington v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991) ("NEPA is not a green Magna Carta").

334. *See* James Q. Wilson, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO It 282, 290 (1989) (decrying standing for "middle income feminists").

335. *See generally* Shankar Vedantam, *Hidden Brain*, NAT'L PUB. RADIO (last updated Sept. 14, 2020).

336. *See* Pierce *supra* note 329 at 1751–63 (reviewing five Supreme Court and 33 appellate standing cases, finding with a *99 percent level of confidence* that the political party of the judges was the best indicator of outcomes). *See also* Richard Revesz, *Environmental Regulation, Ideology and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (listing similar statistics throughout); Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 17 PACE ENV'T L. REV. 1, 10–12 (1999). *See also* Mark A. Graber, *How the Supreme Court Learned to Play Politics*, WASH. MONTHLY (Mar. 2019).

337. One may take judicial notice that media reports on recent or pending decisions routinely identify the judges by the President appointing them and not by accident, it contributes to an understanding of the opinion; ditto the front-and-center importance of Supreme Court appointments in the most recent Presidential campaign. *See also* Jamelle Bouie, *Mitch McConnell, Too, Welcomes Russian Interference*, N.Y. TIMES (June 13, 2013). In so doing, he went so far as to block consideration of a centrist Republican nominee of President Obama, for being too unreliable an ally. Ron Elving, *What Happened with Merrick Garland and Why it Matters Now*, NAT'L PUB. RADIO (June 29, 2018).

favor an environmental plaintiff on access to the courts.[338] Standing has become not only personal, but tribal. Neither speaks well for the American example of justice.

Unfortunately, current standing requirements provide perfect cover. Their elaborate geometry (e.g. not only "injury" but "immediate" injury to a "particular individual" and a "particular place") is flexible at every joint, which admits no end of mischief. The *Lujan* legacy should lead to a reexamination of this issue, starting with what "cases or controversies" means and requires. If crisp advocacy on genuine issues is the desideratum, environmental organizations are as able to provide it as the best corporate law firms to be found. If another constitutional principle should govern it is not the separation of powers for reasons earlier stated, and stated more authoritatively by others.[339] Rather it is to be found in the Equal Protection clause which, today more than ever, requires a level playing field for important public values.[340] A field where corporate parties have access at will, and public interests only through a game of Gotcha, and the grace of God is no one's idea of equal.

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338. *See* Oliver A. Houck, *Standing on the Wrong Foot*, 58 SYRACUSE L. REV. 1, n.157 (2007) (Justices Alito, Roberts and Scalia). Justice Scalia, for one, wore his politics on his sleeve. His 21-page defense of his failure to recuse himself from a case involving his friend Vice President Cheney, having recently flown with him on the presidential jet for a duck hunt and weekend in Louisiana while the case was pending, was more angry than persuasive. *See* Memorandum of Scalia at 916–22, *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913 (2004) (e.g. since Scalia flew back on a commercial flight the government lost no money, and since the case was not against a friend personally but rather for an official act, recusal was not in order, as if either mooted the conflict). His defense of the Court's 5-4 stay of the Florida recount in Gore v. Bush was also unpersuasive, finding irreparable harm in the possibility of a miscounted vote even though Florida only counted an ambiguous ballot if there were a "clear indication of the intent of the voter." *See Supreme Court's Decision to Halt the Florida Recount*, N.Y. TIMES (Dec. 10, 2000) presenting both Scalia and dissenting opinions in full). In the 5-4 opinion on the merits that followed, the five Republican justices presented the same rationale as a matter of equal protection, disenfranchising thereby 20,000 voters the great majority of whom, by demographics, had voted for the Democratic candidate. David Margolick, Evgenia Peretz, Michael Shnayerson, *The Path to Florida*, VANITY FAIR (Oct. 2004) (also describing the frantic effort of the Republican justices to find a plausible rationale). *Id.* Scalia later told a "colleague" that the equal protection rationale arrived at was "like we say in Brooklyn. . .a piece of shit", *id.* at 26. For what one may reasonably doubt was the first time, Scalia favored party over law.

339. *See* Nichol and Sunstein, supra note 330; *see also* LAWRENCE TRIBE ET AL., *Ways Not to Think About Plastic* Trees, *in* WHEN VALUES CONFLICT 61, 83–84 (1976)

340. Houck, supra note 338, at 1–40 (the breath of government misconduct and the pace of industry litigation – including thirty-three industry lawsuits against EPA water discharge regulations alone, *id.* at 2299 n. 122, makes countervailing public interest litigation on matters of this importance eligible for equal protection). *See also* John E. Bonine, *Private Public Interest Environmental Law: History, Hard Work, and Hope*, 26 PACE ENV'T L. REV. 465, 474–75 (2009) (comparing estimates of corporate environmental lawyers, 20–30,000, to those in government, 2,000, and environmental groups, 750). Balancing the scales was, likewise, the rationale of the IRS regulations declaring public interest litigation to be a charitable activity. *See* Houck *supra* note 338.

Looking back, the Supreme Court has been marching deeper and deeper into the standing swamp for fifty years.[341] Were one seeking to change course, obvious candidates abound.[342] If the *Lujan* cases and their progeny tell us anything it is that it is time to step back, appreciate where we are, and respond.[343]

III. *VERMONT YANKEE*: THE ADORATION OF THE ATOM

"Atomic Power, Atomic Power,
It was given by the mighty hand of God"
Hit song, 1946, following the bombing of Hiroshima[344]

In the 1950s, the atomic energy establishment strode the American landscape like a colossus, in many ways a government of its own. Nuclear power had won the war, cowing Japan into surrender, and a grateful public greeted the atom and those who developed it with awe. In its wake, the United States Congress created the Atomic Energy Commission (AEC) to promote further development of the atom,[345] and a Joint Committee on Atomic Energy consisting of nine members from each chamber to supervise the process.[346] "Atoms for Peace" was its slogan,

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341. It continues to do so. *See* Ctr. for Bio. Diversity v. EPA., 937 F.3d 533, 537–42 (5th Cir. 2019) (finding no standing for plaintiffs challenging weakened regulations for oil discharges into the Gulf of Mexico because (1) those alleging recreational injury could not precise where the pollution would be encountered, and (2) those seeking out the pollution to challenge it could not claim aesthetic injury because that was what they were looking for). Gotcha, indeed.

342. For remedial suggestions, see Pierce, *supra* note 329, at 1775–85. This author would add the rescission of the Court's early 4-3 denial of organizational standing, which would go a long way toward solving the problem. *See* discussion *supra* notes 166–69.

343. POSTCRIPT. The standing imbroglio will not be resolved soon, if ever. It is as new-idea resistant as any in law. While Justice Scalia and his particular animus are now gone from the Court, its new members have been chosen in part to continue his legacy. By presenting its doctrine as grounded in the Constitution, the Court has further limited the possibility of a legislated solution as well. On the other hand, it has also in certain cases loosened the binds of precedent to think anew. One can hope that it will do so here before intoning a catechism that *is*, because it *was*, no matter how derived, how disproportionate in impact, and how much it immunizes the very government that these same justices seek, as a doctrine of their own, to circumscribe.

344. *Atomic Power: The Buchanan Brothers*, SDA PILLARS (last visited Sept. 26, 2020, 5:00 PM),. It became an instant "hit" on the Billboard charts, and its composer was treated with a ride in President Truman's inaugural parade. One verse began: "Hiroshima, Nagasaki paid a big price for their sins when scorched from the face of earth their battles could not win." The Buchanan brothers later said they "hated the song. . . ." It became an instant "hit" on the Billboard charts, and its composer was treated with a ride in President Truman's inaugural parade. One verse began: "Hiroshima, Nagasaki paid a big price for their sin; when scorched from the face of earth their battles could not win". The Buchanan brothers later said they "hated the song." *Id.*

345. The Atomic Energy Act of 1946 created the AEC and transferred control of the atom from military hands to civilian hands; it further placed all information concerning atomic power under government control. CAMPBELL-MOHN, BREEN, FUTRELL SUSTAINABLE ENVIRONMENTAL LAW 886 1993. The Act was amended in 1954 to allow the Commission to encourage and license industry development, limited only by a finding that a license would be "inimical" to the "health and safety of the public." *Id.* at 889.

346. The Act of 1946 also created the Joint Committee, giving it plenary power over all aspects of nuclear power, including a veto on pending proposals. *Id.* Responding to the 954 amendments, the

and energy production its first objective, so that, in the words of the Commission's first chairman, "nuclear energy electricity would 'be too cheap to meter.'"[347]

A. THE ENTERPRISE

The Chairman's words were welcome news. Films in public schools and movie theatres showed children rushing to greet their fathers, home from the nuclear power plant, but of course, the narrator explains, he goes first to the sink to wash his hands and arms.[348] Reddy Kilowatt appeared, hand outstretched, leading Americans to an all-electric future.[349] Domestic electricity use doubled in less than a decade, and again the next.[350] Consumption was encouraged by promotional rates, the more you used, the less you paid, and electric gadgets soared.[351] Vice President Nixon, responding to the Soviet Union's recent space achievements, would counter with pride that we were ahead in developing color television. Atoms for Peace was on its way. [352]

Everyone caught the fever, first and foremost the Joint Committee itself which had virtually no expertise to supervise anything nuclear but did advance a suite of proposals that were, even now, somewhat dazzling. Operation Pluto would build a fleet of missiles not simply carrying atomic bombs, but propelled by them.[353]

Committee pronounced it "premature" to regulate a "non-existent industry," and aimed instead at "hastening the development of nuclear power." *Id*. Promotion dominated safety from the earliest days.

347. Vaclav Smil, *"Too Cheap to Meter" Nuclear Power Revisited*, IEEE SPECTRUM (Sept. 26, 2016), (quoting statement of AEC Chairman Lewis L. Strauss to the American Association of Science Writers in 1954). This enthusiasm was not unanimous, even at the highest levels of the nuclear establishment. In 1971 Dr. Alvin Weinberg, former Research Director of the Oak Ridge National Laboratory, labeled atomic power a "Faustian bargain", explaining that "the price that we demand of society for this magical source is both a vigilance and a longevity of our social institutions that we are quite unaccustomed to." Alvin M. Weinberg, *Social Institutions and Nuclear Energy*, 177 SCI. 27, 33 (1972). That same year, however, the new AEC Chairman predicted that nuclear reactors would generate nearly all the world's electricity by the year 2000. *See* Smil, *supra* note 347.

348. Author experience as a youth at Roosevelt Junior High School and the Rialto Theater, Westfield, N.J. These films were in all likelihood an inspiration for the popular television series featuring Homer Simpson home from the nuclear plant.

349. Vanessa Infanzon, *Whatever happened to Reddy Kilowatt?* ILLUMINATION (Mar. 30, 2017). Reddy was adopted by several utilities to promote increased use of electric power. *See Id*.

350. See U.S. Energy Info. Center, *U. S. electricity total sales to major end use sectors and direct use by all sectors*, Monthly Energy Review, Table 7.6. The nuclear power contribution was minimal, however, until the late 1960s after which it rose to just under twenty percent, where it stayed until a recent decline. *See* discussion, *supra* note 136.

351. *See The Public Utility Regulatory Policies Act*, NAT'L MUSEUM OF AM. HIST. (last visited Sept. 27, 2020), (describing promotional rates reducing prices for increased consumption); JOSEPH ETO, THE PAST, PRESENT, AND FUTURE OF U.S. UTILITY DEMAND-SIDE MANAGEMENT

PROGRAMS, 4–5 (1996) (Lawrence Berkeley National Laboratory LBNL–39931). *See also* CHARLES FISHMAN, ONE GIANT LEAP 13, 14 (2019) (describing the 1950's boom in electronic devices, primarily residential).

352. FISHMAN, *supra* note 351, at 36; *see also* President Eisenhower, "Atoms for Peace" Address to the United Nations, Dec. 8, 1953, https://perma.cc/6FVZ-HLPA.

353. H. PETER METZGER, THE ATOMIC ESTABLISHMENT 201–04 (1972).

When this proved infeasible, the proposal morphed into a nuclear fueled fleet of airplanes, said to be made safe through the use of aging crew members expected to die of natural causes before the radiation could kill them instead.[354] Operation Plowshare would use the bomb to dig waterways (including a new Panama Canal) and excavate caves for wastes,[355] while Project Chariot would bomb open a port on the coast of Alaska.[356] Though all of this showed the Joint Committee as more of a booster club than an overseer, it did serve to funnel bottomless sums of money (over the objections of Finance and other committees), and shield the AEC itself from criticism.

Universities, research facilities, and state governments caught the fever as well, fueled by contracts, new staff, subsidies, grants, and even free radioactive materials. A generation of highly skilled nuclear engineers was born. On the other hand, when skepticism and even protest over nuclear power development arose on campuses as prestigious as MIT and Cornell, a Commission member sent them letters threatening revocation of federal support.[357] One Ph.D. physicist had the distinction of being removed from the University of Alaska and then blackballed from hire at the University of Montana, both under AEC pressure.[358] For this and other reasons, serious issues with the program were late in reaching the public eye.

Another reason they were late is that the Manhattan Project which developed the atomic bomb was, perforce, born in secrecy, an achievement in and of itself.[359] Unfortunately, this insistence on secrecy carried over into the civilian establishment as it emerged, both the AEC and the Committee decreeing that information on nuclear energy was classified, automatically, unless expressly authorized.[360] That order was not lifted for years.

Coupled with this instinct to hide the ball was a second reflex, the denial of adverse information no matter how serious or well documented. This denial led to tragic results after atomic bomb tests in Nevada[361] and uranium mining in Utah that devastated Native American communities which went unrecognized and

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354. *Id*. at 205. The old-age solution was discussed "quite seriously." Id.

355. *Id*. 231–327 (describing several of such projects).

356. *Id*. at 257–58 (the proposal faltered when impacts on native communities were revealed).

357. *Id*. at 257 (Commissioner Costagliola had threatened to withdraw $400 million in research grants from Stanford and Harvard; he also, as a warning shot, wrote to Johns Hopkins and the University of Minnesota).

358. *Id*. at 257–59 (describing the research of Dr. Pruitt who was working under an AEC grant at the University of Alaska. When his findings displeased the agency the University declared them unacceptable; at the University of Montana, although he was the Zoology Department's "unanimous candidate," he was rejected by administrators after communication from an AEC official). The Commission also punished its internal critics, many of them demoted or terminated. *See* U.S. DEP'T OF ENERGY, CLOSING THE CIRCLE ON THE SPLITTING OF THE ATOM 82–83 (1995).

359. *Id*. at 882.

360. *Id*. at 883 (the information was "born classified").

361. *See* Norman Solomon, *50 Years Later, the Tragedy of Nuclear Tests in Nevada*, COMMON DREAMS (Jan. 5, 2001) (explaining high rates of leukemia and other cancers, about which a U.S.

uncompensated for decades.[362] This same response was on display with nuclear accidents and near misses, including the Fermi pilot project in Detroit,[363] the Damascus accident in rural Arkansas (threatening an intercontinental atomic war),[364] and series of staff and academic studies on radiation safety that were similarly buried or met with bland assurances that the problem was under control.[365] Following the reactor meltdown at Three Mile Island, "father of the hydrogen bomb" physicist Edward Teller authored a two-page Wall Street Journal advertisement titled "I Was The Only Victim of Three-Mile Island."[366] In the same vein, one expert explained in *The Tolerability of Risk from Nuclear Power Station* that "[i]f there is a Chernobyl-scale accident in this country [the U.K.], no one will die. We shall merely suffer some degree of life-shortening."[367]

Perhaps the most fundamental of the agency's problems was that it was directed both to promote nuclear power and to regulate its safety. Of the two, the Commission saw its first job as promotion, because safety measures would come "later in the process."[368] That this patent conflict took years to resolve is alone testament to the grip the nuclear enterprise held on all involved. It was finally addressed in 1974, three decades after the original Act, with legislation splitting the AEC into a regulatory body and another for promotion.[369] Faced with Commission objections that it had already separated these functions internally, the Chair of the sponsoring Senate Committee observed:

"While this arrangement may have been necessary in the infancy of the atomic era after World War II, it is clearly not in the public interest to continue this special relationship now that the industry is well on its way to becoming among the largest and most hazardous in the Nation."[370]

"In fact," the Chair added, "it is difficult now to determine . . . where the Commission ends and the industry begins."[371]

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congressional report concluded, "[a]ll evidence suggesting that radiation was having harmful effects, be it on the sheep or the people, was not only disregarded but actually suppressed").

362. See METZGER *supra* note 353 at 115–30 (describing mining deaths and denial on the Colorado plateau); Doug Brugge & Rob Gobel, *The History of Uranium Mining and the Navajo People*, 92 AM. J PUB. HEALTH 1410, 1410–19 (2002) (describing more deaths and denial).

363. *See* CAMPBELL-MOHN, *supra* note 345, at 893; JOHN G. FULLER, WE ALMOST LOST DETROIT 50–63 (1975).

364. *See* ERIC SCHLOSSER, COMMAND AND CONTROL 24–70 (2013). (describing accident at Titan Missile facility).

365. *See* METZGER, *supra* note 353 (*inter alia* an annotated description of ignored and denied reports).

366. *See* NEW WORLD ENCYC., *Edward Teller* (Last visited: Sept. 27, 2020).

367. Ann Barrett, *The Tolerability of Risk From Nuclear Power Stations*, Health and Safety Executive", Jan. 1989, cited in Punch magazine, Mar. 31, 1989 at 9.

368. *See supra* note 346.

369. *See* CAMPBELL-MOHN, *supra* note 345, at 880–81.

370. 120 Cong. Rec. 28129 (daily ed. Aug. 13, 1974) (remarks of Sen. Abraham Ribicoff).

371. *Id.*

The industry had technological issues as well. Its tolerances for "low-level" radiation exposure were considerably above those protecting public health,[372] its systems to control internal accidents were doubtful,[373] and its plans to dispose of high-level radioactive wastes as lethal as plutonium were non-existent, leading to high-risk temporary storage.[374] These problems continued to hinder rapid development of the industry, despite federal funding, joint ventures, government assumption of responsibility for long term wastes,[375] and the imposition of limits on civil liability for these same companies, no matter how widespread the harm.[376]

All this stood in the wings as the *Vermont Yankee* case came on. Americans in all walks of life had bought into atomic power, including those who would rise to the highest court in the land. The Joint Committee and the Commission still ran supreme, the conflict between promotion and regulation a latent secret, the AEC and industry a mutual dependency, and their practice of dismissing adverse information a matter of record. Several technological risks remained unresolved, most serious among them the increasing production of radioactive wastes with no place to go. At the same time, proposals to meet American energy demand in another fashion, by actually reducing it, were surfacing in academia and government.[377] Utilities themselves were starting to offer incentives for energy audits, insulation, and off-peak consumption.[378] These initiatives were hardly welcome to an establishment whose very existence rose from the opposite predicate, an ever-increasing spiral of supply and demand towards energy that, if no longer too cheap to meter, was too embedded to let go.

B. TWO LAWSUITS IN ONE

In a narrow sense, *Vermont Yankee* treated two discrete issues of nuclear power under NEPA, energy conservation, and spent fuel wastes.[379] It was not the

372. For the dangers and laxity of AEC radiation standards from two leading nuclear scientists at the time of *Vermont Yankee*, see JOHN W. GOFMAN, ARTHUR R. TAMPLIN, POISONED POWER 97–105 (1979) and in particular its appendix on the margin of safety. *See Id.* at 319–25. For more on low-level radiation, see ERNEST J. STERNGLASS, SECRET FALLOUT 22–25 (1972).

373. *See* CAMPBELL-MOHN, *supra* note 345. The Commission's attention to this issue was forced by the Union of Concerned Scientists and resulted in nearly two years of hearings before the standards were improved. See also MICHELLE ADATO, JAMES MACKENZIE, ROBERT POLLARD, ELLYN WEISS, THE UNION OF CONCERNED SCIENTISTS, SAFETY SECOND 4 (1987)

374. *See* CAMPBELL-MOHN, *supra* note 345 at 894–96, 905–08; *see also supra* notes 75–79 and accompanying text.

375. *See* Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10131 (1983) (codifying government responsibility).

376. Price Anderson Act of 1957, 42 U.S.C. § 2210 (2006 & Supp. V 2011) (2006). For criticism of these limitations, *see* Public Citizen, *Price-Anderson Act: The Billion Dollar Bailout for Nuclear Power Mishaps*, MONTHLY REV. (Sept. 2004). For litigation over its constitutionality, see *infra* note 402.

377. *See* discussion *infra* at notes 409–14.

378. ETO, *supra* note 351, at 5.

379. Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978).

Court's first brush with either the nuclear establishment or NEPA, however, and its jurisprudence could not have been more starkly clear. It had ruled consistently in favor of the first. It had never ruled in favor of the latter.

A law review article entitled *How, Why and When The United States Supreme Court Supports Nuclear Power*, analyzes fifteen cases in the field treating safety, environmental, and constitutional issues.[380] Of those, with the sole exception of state regulation on peripheral issues, the Court had found congressional endorsement of nuclear power to be determinative, expressed concern that judicial review might "impede technological progress", and showed "highly deferential to the lingering mystique of technical expertise born of A-bomb secrecy," deference the Court maintained even after the AEC no longer existed.[381] Among its environmental opinions were *International Union*, [382] allowing the Commission to defer safety review until after the plant had been constructed (and the die all but cast); *Colorado Public Interest Group*,[383] precluding the EPA from regulating radioactive discharges; *Metropolitan Edison*,[384] rejecting psychological trauma from NEPA consideration; and *Duke Power*,[385] reaching out to accept standing in a challenge to the federal legislation limiting industry liability, in order to find it constitutional (a conclusion described by Justice Stevens as judicial "statesmanship"). The high court had joined the establishment.

The Court's record on NEPA can be more briefly told: zero wins for environmental plaintiffs and counting.[386] The Court viewed citizen groups challenging

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380. Sheldon L. Trubatch, *How, Why, and When the U.S. Supreme Court Supports Nuclear Power*, 3 ARIZ. J. ENVTL. L. & POL'Y 1 (2012).

381. *Id*. at 2.

382. Power Reactor Dev. Co. v Int'l Union of Elec., Radio and Mach. Workers, 367 U.S. 396 (1969). Justices Douglas and Black dissented, calling the AEC position "a light-hearted approach to the awesome, the most deadly, the most dangerous process that man has ever conceived." *Id*. at 419. The AEC Chairman had overruled the opinion of his Advisory Committee on Reactor Safeguards declaring that there was "insufficient information" available to give assurance that the reactor could be "operated at this site without public hazard." *See* GOFMAN, *supra* note 372 at 19. The plant in question was the $120 million Fermi-1 reactor in Detroit which, during start-up, suffered a partial meltdown. *Id*. at 20.

383. Train v. Colo. Pub. Interest Research Grp., 426 U.S. 1 (1976). The case concerned discharges from the St. Vrain nuclear power plant and the Rocky Flats, which manufactured hydrogen bomb components from plutonium. The High Court found that the word "pollutant" to be ambiguous, and the testimony of the promotion oriented Joint Committee on Atomic Power was dispositive. Neither facility fared well. Chronic leaks and operational issues closed St. Vrain in 1989, and Rocky Flats in 2005, at which point it had become a notorious Superfund site. Trubatch *supra* note 380 at 4.

384. Metro. Edison v. People Against Nuclear Power, 460 U.S. 766 (1983) (concerning the restart of a nuclear reactor at Three Mile Island that had experienced near-catastrophic failure, terrorizing inter alia the neighboring community).

385. Duke Power v. Carolina Envt'l Study Grp., 438 U.S. 59 (1978). The Court expressly overcame its doubts about standing in order to reach and dispose of the issue in favor of the industry. *Id*. at 74. Justice Stevens concurred. *Id*. at 102–03 (judicial "statesmanship").

386. *See* David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 Envtl. Law 551 (1990) (a Department of Justice attorney defending the record as a necessary correction of lower court excesses). For a more recent and nuanced analysis (the Court's record having at this point reached 17–0), see Lazarus *supra* note 3.

atomic power plants with a particularly baleful eye. Justice Rehnquist had described that their claims in *Duke Power* "... verge[s] on the frivolous."[387] Justice Powell had noted with alarm, in a case concerning the death of nuclear lab technician Karen Silkwood, the "dramatic increase in public concern" over nuclear activities including "power plants designed to help insure the future of our civilization."[388] This opinion was joined by the Chief Justice and another colleague.[389] Its one citation was to an opinion-editorial in the Wall Street Journal. In this light, interveners in AEC licensing proceedings presented a threat to humankind.

The Court's record on a final issue of some relevance was also in play. *Vermont Yankee* rose from two decisions of the U.S. District of Columbia Circuit Court of Appeals, both favoring the plaintiffs and NEPA. Leading up to the seventies, this Circuit had adopted a far-reaching posture in criminal justice, mental health treatment, education, and other public issues.[390] Best known, however, was its view of administrative law requiring courts to take a "hard look" at agency decisions to ensure they had an adequate basis in fact and reason.[391] Theirs was, in the words of these judges, a "partnership" with federal agencies to accomplish congressional goals. This aspect of the D.C. Circuit's jurisprudence became a running conflict with the increasingly conservative Supreme Court,[392] similar to the current conflict between the 9th Circuit and the Court. What the D.C. Circuit saw as a "partnership" with agencies to make statutes work,[393] the High Court saw as "interference" with these same agencies, whatever the statute intended.[394] It was a timeless question: what were courts *for*?

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387. *Duke Power*, 438 U.S. at 102 n.2.

388. Silkwood v. Kerr McGee Corp., 464 U.S. 238, 282 n.12 (nuclear energy vital for the free world and unappreciated by those protesting it).

389. *Id*. at 258 (Justices Burger and Blackmun joining Powell's dissent).

390. See Roy W. Mcleese III, Note, *Disagreement in D.C.: The Relationship Between the Supreme Court and the D.C. Circuit and Its Implication for a National Court of Appeals*, 59 N.Y.U.L. REV. 1048 (1984).

391. Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972) ("So long as the officials and agencies have taken the 'hard look' at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken.") (footnotes omitted). For a recent analysis of the doctrine, see Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51 (1984).

392. See Mcleese *supra*, note 390. This tension was not abated with the appointment of Chief Justice Burger, from a position on the D.C. Circuit on which he was in frequent dissent.

393. *Morton*, 458 F.2d at 838 ("In this as in other areas, the functions of courts and agencies, rightly understood, are not in opposition but in collaboration, toward achievement of the end prescribed by Congress.") (footnotes omitted); *see also* Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV 509 (1974).

394. *See* discussion *infra* notes 456–59.

By coincidence, the first federal court of appeals case to treat NEPA rose in the D.C. Circuit and involved nuclear power. In *Calvert Cliffs*,[395] a unanimous panel invalidated AEC procedures for failure to include impact review of water quality impacts, and failure to treat environmental issues at all in the hearing process unless they were raised and presented by citizen interveners.[396] On the contrary, it ruled, the Commission was more than "an umpire calling balls and strikes"; it had an obligation to explore all relevant issues on its own.[397] Not only was the agency's scope of review found inadequate, its process was as well. Whatever fate this opinion would have faced in the Supreme Court will never be known, for the agency chose not to appeal. One can well imagine, however, that *Calvert Cliffs* was on the mind of at least some justices when *Vermont Yankee* arrived before them. It too concerned a nuclear power plant and raised issues of scope and process under NEPA.[398] No one reading the tea leaves just described could have bet on anything other than what ultimately happened.

Two D.C. Circuit opinions led to *Vermont Yankee*. In *Aeschliman*,[399] the environmental impact statement for the power plant discussed alternative methods of producing energy, but made no mention of measures for reducing consumer demand, an omission "forcefully pointed out" in comments by citizen interveners.[400] They did not rest with an abstraction. They went on to present seventeen conservation "contentions" to the Commission, including the elimination of promotional advertising and the reversal of promotional rates, to name two quite easily grasped.[401]

The Commission's first response to these requests was to find them "beyond our province."[402] It promoted nuclear energy and assured its safety, and conservation was neither. As it turned out, in proceeding for the Niagara Mohawk plant the Commission ruled to the contrary, leading to long delays until the Commission reversed course.[403] It now admitted that under NEPA conservation

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395. Calvert Cliffs Coord. Comm. v Atomic Energy Comm'n, 49 F 2d 1109 (D.C. Cir. 1971); *see also supra* note 54 and accompanying text.

396. *Id*. at 1116–17 (hearing process); *id*. at 1122 (water quality).

397. *Id*. at 1119 ("Its responsibility is not simply to sit back like an umpire. . . . rather it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation."). Interveners in the Consumer Power/Vermont Yankee cases that followed took this requirement at its word, as it turned out to their detriment." See *infra* notes 442–52 and accompanying text.

398. The Justices were also doubtlessly aware of a yet more recent D.C. Circuit opinion requiring the AEC to produce an EIS on its nuclear breeder reactor program. Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F. 2d. 1079 (D.C. Cir. 1973). Given their disposition, it may well not have pleased them either.

399. Aeschliman v. U.S. Nuclear Reg. Comm'n, 547 F.2d 622 (DC Cir. 1976).

400. *Id*. at 625.

401. *Id*. at n.6 (identified issues included promotional advertising and rate structure).

402. *Id*. at 626. The AEC Appeal Board affirmed, also stating that energy conservation was "implicitly" considered in the cost-benefit analysis, *id*., a highly dubious proposition, see *id*. at 629.

403. *Id*. at 626.

alternatives were germane[404] (it could not have ruled otherwise), but the *Aeschliman* interveners had not met an ad hoc "threshold test" demanding that such measures (1) fully replace the need for the plant, (2) be "reasonably available," and (3) be "susceptible" to proof.[405] Since the interveners had submitted no such evidence, the agency was free to ignore them.

The D.C. Circuit disagreed. It did not purport to decide which proposals were reasonable.[406] It was satisfied however, that they had been raised with specificity, and were in keeping with those of academics, government officials, and a report on nuclear energy by sixty-two energy experts (including industry) concluding: "Substantial savings can and should be made through energy efficiency improvements and a strong conservation program. Savings through voluntary action alone, although important, are likely to be limited."[407] This so, citizen interveners should not be burdened with proving that conservation would eliminate *all* energy demand, or that they provide convincing "evidence" of their effectiveness.[408] Under NEPA, they had signaled enough to put conservation measures into the game.

The D.C. Circuit went further to examine a report on the plant by the Commission's safety review board, written in techno-speak, admitting that serious questions remained and should be addressed.[409] This seemed an important document, and per the Joint Committee on Atomic Power itself, the public was entitled to understand it and its conclusions.[410] Rather than allowing interveners to cross-examine the board on it at this stage, the court remanded the issue to the Commission to address the matter further.[411]

That same day, the D.C. Circuit took up the question of waste disposal in *Natural Resources Defense Council*.[412] At issue was a construction license for the Vermont Yankee plant in southern Vermont, and a Commission ruling that, while other parts of the fuel cycle would be considered in the impact assessment and licensing process, the disposal of wastes would not.[413] For the moment, the AEC argued, the matter was too "speculative" (largely because it was unresolved) and would be better addressed when specific processes and storage sites were

404. *Id.*
405. *Id.*
406. *Id.* (citing Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972)).
407. *Id.* at 629 n.15.
408. *Id.* at 627 n.10. (reduce part of the demand); *Id.* at 628 (burden of proof).
409. *Id.* at 630 (including "roughly half a dozen design problems" and "[o]ther problems related to large water reactors").
410. *Id.* at 631–32(citing a Joint Committee on Atomic Energy report that "all concerned may be apprised of the safety or possible hazards of the facility.").
411. *Id.* at 632.
412. Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n, 547 F.2d 633 (1976)
413. *Id.* at 637.

known.[414] In the meantime, the Commission had held a "generic" hearing on the risks of waste disposal and found them to be "insignificant."[415]

The potential risks of these wastes more impressed the D.C. Circuit court than they apparently did the Commission. The Vermont Yankee plant would produce 160 pounds of plutonium over its 40-year life span, "among the most toxic substances known."[416] Inhalation of "a single particle" was thought sufficient to cause cancer. Given plutonium's extended half-life, it would have to be entirely isolated for 250,000 years (less high-level wastes for up to 1000 years), periods of time that numb the mind. With this at stake, the court focused on the generic hearing itself, in particular how it was conducted.

It was an unusual hearing, more like a town council meeting than a full-bore licensing proceeding that it effectively replaced. Although the AEC would allow witness testimony, it allowed neither discovery nor cross examination.[417] The D.C. Circuit approached the issue with deference. It was up to each agency, it began, to devise its own procedures for decisions of this type and many had decided on "hybrid" forms to accommodate rising questions of science and law, public interests, and outside expertise.[418] The role of a reviewing court, it continued, was to assure that whatever process was used, there were opportunities to participate, a "real give and take", and that the agency had "genuinely considered" the issues before it.[419]

In this particular proceeding, the government had produced only one witness on high level waste disposal, an AEC employee whose testimony, absent any form of corroboration, was in the court's words "vague, but glowing."[420] The quoted testimony was a recitation of failures and aspirations, we tried this and it didn't work, we tried again with the same result, now we're trying something else, and we could do something yet different instead.[421] There was no further information on what, how, risks, costs, nor any mechanism to obtain it.[422] As for the process itself:

"Not only were the generalities relied on in this case not subject to rigorous probing in any form but when apparently substantial criticisms were brought to

414. *Id*. at 639.

415. *Id*. at 638, 641.

416. *Id*. at 638–39. The data on plutonium that follows are taken from this source. *See also* GOFMAN, *supra* note 372, at 59–62.

417. *Morton*, 547 F.2d at 641–43.

418. *Id*. at 643.

419. *Id*. at 645 ("real give and take"); *Id*. at 646 (Where only one side of a controversial issue is developed in any detail, the agency may abuse its discretion by deciding the issues on an inadequate record."). *See also id*. at 643 and n.23 (citing a list of cases and scholarly articles favoring "hybrid rulemaking" for technical decisions of science and law). The government did not contest the principle but claimed the additional procedures requirement was met here. *Id*. at 643.

420. *Id*. at 648.

421. *Id*. at 647–50.

422. *Id*. at 648–49.

the Commission's attention. It simply ignored them, or brushed them aside without answer."[423]

How on this record one could evaluate the costs and impacts of radioactive waste storage was left to the imagination, but for an agency functionary's assurance that they would be "insignificant," words that in many languages have preceded many a disaster.

This time, the D.C. Circuit reiterated that it was mandating no particular procedure, and no particular measures within it.[424] Cross examination, it said, was an option, but not the only one. Written evidence was also an option, perhaps interrogatories, as well as those used by other agencies for similar decisions.[425] The concurring opinions, although one suggested more targeted guidance, held likewise.[426] What the decisions in both *Aeschliman* and *Natural Resources Defense Council* actually said and did should have mattered, but it was now the Supreme Court's turn.

C. THE SUPREME COURT RULES

As could be expected, the Solicitor General had framed the facts his way, including that the D.C. Circuit had "required" specific procedures beyond those in law, and that it had "substituted its judgement" for that of the AEC.[427] As just seen, neither characterization was accurate, but it prompted Justice Rehnquist to begin with a disquisition on the APA and its establishment of "minimum" measures for informal (notice and comment) rulemaking . . . that had since become the "maximum" measures the Court was willing to impose.[428] This was not to say that there were "no circumstances" that required more in–depth procedures, he continued, but they were "extremely rare".[429] Of course, the Senate Report on the APA had said this more broadly for "matters of great import", as did the American Administrative Conference in 1977 (for matters of "complex science and data"), and the Senate Committee on Governmental Affairs (endorsing

423. *Id*. at 653.

424. *Id*. ("We do not presume to intrude on the agency's province by dictating to it which if any, of these devices it must adopt to flesh out the record").

425. *Id*. (listing a range of potential options, none of them preclusive).

426. *Id*. at 655 (Judge Bazelon, urging more formal hybrid hearings); 658 (Judge Tamm, urging remand for better record).

427. *See* Questions Presented for Review, Brief for Petitioner Vermont Yankee Nuclear Power Corporation at 51, Vermont Yankee, (Nos. 76–419, 76–528), June 6, 1977, 1977 WL 189460. A brief submitted by twenty four states in support of NRDC pointed out, to the contrary, that the DC Circuit had *not* prescribed any process, but simply provided possibilities so as not to leave the agencies hanging, and that the hearing here was inadequate to address the key issues of the proceeding. Brief for 24 Named States as Amici Curiae in Support of Respondents at 10, Vermont Yankee (Nos. 76–419, 76–528), 1976 WL 181272 (1976).

428. *Vermont Yankee Nuclear Power Corp*., 435 U.S. at 523.

429. *Id*. at 524. In so saying, Justice Rhenquist conveniently overlooks that in his first citation for the APA, Wong Yang Sun v McGrath, 339 U.S.33 (1950), extra procedure was in fact granted beyond the bare minimum of the statute.

"hybrid" rulemaking), all cited in the respondent's brief,[430] but the Court's finger, having writ, moved on. Whether a generic and truncated hearing on a matter so critical to the national interest as safeguarding high–grade plutonium wastes for untold millennia wasn't just such a circumstance simply left the building, untouched.

The Court then turned to the waste management hearing and the pivotal finding that the risks of plutonium were "insignificant." In its view the AEC had afforded "abundant" opportunity for all views to be heard and then prepared an "Environmental Survey" it claimed as an "adequate data base for the regulation adopted."[431] The D.C. Circuit opinion, although it "refrained from actually ordering the agency to follow any specific procedures," left no doubt that its "ineluctable mandate" was that the process used was inadequate.[432] Setting aside whether this type of conclusion was a "mandate" at all, the Court found it a "serious departure" from the "basic tenet" that agencies were free to fashion their own procedures, overlooking for a second time that the APA specifically provided for "more elaborate procedures" in cases so complex and critical.[433] The Court, perhaps from its prior jurisprudence on nuclear power, was tone–deaf to the exigencies of the plutonium waste issue (which is described as "analytically indistinguishable" coal stack emissions)[434] and failed to perceive the flexibility the law allowed. The D.C. Circuit had seen an opportunity for agencies to accommodate this and ever more technical issues to come. The Court, instead, saw ill–treatment of an activity that, coincidence or not, it had long blessed with its favor.

The second issues to be treated were *Aeschliman's* insistence that energy conservation be considered in AEC environmental analyses, and that its safety report, riddled with unresolved questions, be returned to the agency for more work. True to form, the High Court rejected both of these as well.

It began by affirming the AEC's "*prime area of concern*": national security (which had expanded to the production of nuclear power), public health, and safety.[435] While NEPA had "*altered slightly*" the balance by requiring alternatives to be considered, they were bounded by "*some notion of feasibility*."[436] Stopping the music for a moment, the U.S. Senate would have been greatly

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430. *See* Brief for Respondent, at 49–50, Vermont Yankee (No.76–419) 1976 WL 181271(1976) (citing and quoting from Senate APA Report, Administrative Conference Report, and Senate Committee on Governmental Affairs Report).

431. Vermont Yankee Nuclear Power Corp'n v NRDC, 435 U.S. 519, 530 (1978).

432. *Id*. at 542.

433. *Id*. at 544.

434. *Id*. at 539. This analogy is disingenuous because, though pollution analysis of any kind measures toxicity, the toxicity of plutonium is orders of magnitude more serious. The statement that they are "analytically" similar says no more than both analyses measure the effects of pollution, not that plutonium as a toxin is comparable. The point thus elided is that, in this case, particularly–enhanced hearing measures were in order.

435. *Id*. at 550 (emphasis supplied in this and the succeeding notes).

436. *Id*. at 551.

surprised to learn that its efforts in NEPA, intended per its Committee Report to change "traditional policies and programs" while "alternatives remained available," played such a minor role.[437] The Court's reference to "some notion of feasibility" was in turn an insight into what Justice Rehnquist himself thought about the feasibility of energy conservation measures, and a tip–off on the rhetoric to come. This included:

- a discussion would not be wanting if it failed to include "every alternative device and thought *conceivable to the mind of man*"[438]
- nor if an agency failed to "ferret out" every possible alternative, "regardless of how *uncommon or unknown* that alternative may have been"[439]
- we now turn to "the *notion* of 'energy conservation'"[440] (a mere notion, and in quotes signaling bogus)
- the phrase conservation "suggests a *virtually limitless* range of possible actions"[441]
- and made more difficult if "requesting the agency to embark on an exploration of *unchartered territory*"[442]
- agency proceedings were not "a game or forum to engage in *unjustified obstructionism*" by making "*cryptic and obscure reference*" to matters that "ought to be" considered[443]
- if new hearings were required because "some new circumstance has arisen, some *new trend* has been observed" there would be no end[444] (new trend as in platform shoes)
- "nor should a court resolve "fundamental policy questions" under "the *guise* of" judicial review.[445]

Where does one begin? Perhaps by noting that the nouns and adjectives are openly derisive, and the phrases (e.g. "conceivable by the mind of man", "exploration of unchartered territory") are both highly exaggerated and for the most part patently untrue. Energy conservation was hardly unchartered; as noted earlier it was under consideration even in these years. The Saginaw interveners had in fact raised seventeen conservation issues with specificity sufficient for any adult to understand what they concerned and to inquire further. (What was "obscure"

437. *See* Senate Committee on Interior and Insular Affairs, National Policy Act of 1969, S. Rep. No. 91–296, at 4 ("The inadequacies of present knowledge, policies and institutions" is all around us. [list of specifics omitted] . . . Traditional policies and programs were not designed to achieve these conditions. But they were not designed to avoid them either. . . . These problems must be faced while they are of manageable proportions and *while alternative solutions are still available*.") (emphasis supplied).

438. Vermont Yankee Nuclear Power Corp., 435 U.S. at 551 (emphasis supplied).

439. *Id*. (emphasis supplied).

440. *Id*. at 552 (emphasis supplied).

441. *Id*. (emphasis supplied).

442. *Id*. at 553 (emphasis supplied).

443. *Id*. at 553–54 (emphasis supplied).

444. *Id*. *at 555* (emphasis supplied).

445. *Id*. at 558 (emphasis supplied).

about promotional rates?) The AEC had flatly refused to consider them at all, and when finally required to it, it dismissed them as not fully dispositive, nor "readily available," nor "susceptible to proof." Then again, neither was nuclear power and for quite a long time.

Perhaps the most demeaning of these statements concerned the interveners' "unjustified obstructionism" (for following to the letter the "balls and strikes" language of *Calvert Cliffs*, the governing law at that time), and the D.C. Circuit Court's "policy making" in false "guise." As seen earlier, the D.C. Circuit had been scrupulous to examine only the process and the adequacy of the record to support the AEC's "insignificance" finding that was at the least counter–intuitive, if not outright bizarre. This said, the High Court saw otherwise, and would return to it in its coup de grace.

Before closing, the Court took a final slap at the D.C. Circuit Court's remand of the AEC safety report which, worded in near–code by engineers, had left undescribed "other problems" to be resolved at a later date.[446] Public understanding, the Court stated, was not the purpose of the report, whatever its public impact.[447] In all, Justice Rehnquist concluded in almost can–you–top–this fashion, the D.C. Circuit Court's remand of the report was "judicial intervention run riot," bordering "on the Kafkaesque."[448]

Having thus dismissed reasonable arguments with the power of scorn, the Justice could not refrain from a "final word."[449] Nuclear power policy was the purview of Congress, and Congress had spoken. (As had the Court itself, no matter what the issue.) Administrative decisions should not be set aside "simply because the court is unhappy with the results reached."[450] (Nor should decisions below, one should think.) Particularly not, the opinion continued, "for a single alleged oversight on a peripheral issue" urged by parties who "never fully cooperated or indeed raised the issue below."[451]

All of which would be true, were it true. Then again one would have to believe that the D.C. Circuit, by insisting on full disclosure, harbored an insidious agenda against nuclear power, that energy conservation and plutonium waste management for that matter were peripheral issues, and that in their appearances before the Commission the interveners had not raised them and made them plain. To the

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446. *Id*. at 556.

447. *Id*. at 557.

448. *Id*. Beneath his carefully created aura, including gold–stripes on his gown, see Linda Greenhouse, *Ideas & Trends: The Chief Justice Has New Clothes*, N.Y. TIMES Jan. 22, 1995 (§ 4), at 4, Justice Rehnquist had a caustic streak for disfavored parties before the Court. *See* Evan Thomas, *supra* note 106 at 167–68 (characterizing migrants seeking public education as "wetbacks," and musing with Oklahoma prosecutor whether it wouldn't be cheaper to execute a criminal defendant in lieu of incarceration and psychiatric treatment). He had similar disrespect, it would seem, for nuclear power interveners.

449. *Vermont Yankee Nuclear Power Corp*., 435 U.S. at 558.

450. *Id*.

451. *Id*.

Supreme Court answers to all three were obviously yes, but there was still one more issue to go. It had left open whether the agency's conclusions on waste disposal safety were arbitrary and capricious, and remanded the matter to the court below. The case of *Baltimore Gas and Electric v. NRDC*,[452] in effect *Vermont Yankee* II, followed.

D. THE COURT RULES AGAIN

On the first go–round the D.C. Circuit had been skeptical of the AEC's "zero release" conclusion (hence, disposal risks were "insignificant"), based on assumptions that seemed shaky at best and, taken together, perilously so.[453] On rehearing, the assumptions did not improve. That, for example, an ideal site would be available despite the strong political opposition facing its one and only candidate (and which has blocked it to this day).[454] That the repository would remain suitable and stable for more time than proto–hominids had walked the earth.[455] That the risks posed by human error, accidents and even assaults during loading and unloading, waste transportation and containment at the site itself were negligible as well.[456] To the concurring justice from another circuit, unfamiliar with the atmospherics of this case, it was patently incredible that:

"Eleven million curies of high level radioactive waste per year for each of the presently licensed reactors will be temporarily stored, reprocessed, transported, and then buried and contained deep underground at some unascertained place in some undetermined stratum at some undetermined time without any release at all of toxic elements."[457]

He was not critiquing scientific findings. They were not even findings. They were highly–optimistic guesses softened by such qualifiers as "*the evidence, though tentative and general in nature . . . favors the view that suitable sites can be found*."[458] Would any sane person make an irrevocable life–threatening investment on such a basis? In the context of radioactive wastes this lethal and long–lasting, on assumptions so out of touch with reality, on evidence so slender in support, a "zero release" conclusion seemed arbitrary indeed. Unfortunately, however, the Supreme Court had all but decided the matter three years before. This would be the same bench.

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452. Baltimore Gas and Elec. Co. v. NRDC, 462 U.S. 87 (1983).

453. Nat. Res. Def. Council v. Nuclear Reg. Comm'n, 685 F.2d 459, 467 (D.C. Cir. 1983).

454. *Id.* at 481 (The Interagency Review Group on Nuclear Waste Management noted that the "institutional issues" may well be more difficult than the "technical ones", i.e. politics and local acceptance.).

455. *Id.* at 478.

456. *Id.* at 496–97.

457. *Id.* at 500 (Edwards, J., concurring).

458. *Id.* at 481.

To the surprise of few, then, the D.C. Circuit's decision was reversed, again in language that was both dismissive and elusive.[459] Announcing itself impressed by the "sheer volume" of the Commission's proceedings, the Court spent little time on their actual content. Instead, while recognizing that the data the agencies relied on was marked by "substantial uncertainties,"[460] and that the "risks from repository failure" were "uncertain" as well (but would be "for the most part resolved in the near future"),[461] the question of whether nuclear power "should proceed in the face of uncertainties" lay with Congress.[462] Which of course, was not the legal question. The cause of action, NEPA, had vanished.

As for the judicial role, Court went further to announce a new principle of super–deference: "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[463] One anomaly of this statement is that the Agency decision here was taken largely in the absence of science. Another is that the Court had gone from "hard look" to virtually "no look" without blinking an eye. A third is that in cases soon to come, particularly those involving the Environmental Protection Agency, this "super–deference" to scientific findings would disappear as quickly as it had come. The Court's new principle turned out to be simply a convenience for the case at hand.

E. FALLOUT

Taken together, the Court's opinions have had mixed effects. *Vermont Yankee*'s dismissal of energy conservation was quickly reversed by the market, which rushed to embrace it. Within the decade bracketing the opinion, energy efficiencies saved over $100 billion, while the economy was growing by thirty three percent; by contrast, net growth in energy consumption, despite AEC projections relied on by the Court, was zero.[464] On the other hand, the issue of radioactive wastes so artfully dodged in both cases remains unresolved, as canisters of highly toxic materials continue to pile up in temporary storage.[465] With electric utilities turning to other sources, the more germane question today is how nuclear plants can be dismantled and their wastes neutralized for unprecedented, almost unimaginable, periods of time.[466]

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459. 462 U.S. at 98.
460. *Id*.
461. *Id*. at 93.
462. *Id*. at 97.
463. *Id*. at 103.
464. Judy Christsup, *Energy Index*, HARPERS MAGAZINE, 1990 (citing sources, on file with author).
465. *See* U.S. NRC, "Backgrounder on Radioactive Waste," 2 (July 23, 2019), https://perma.cc/363G-UME9. The casks, many of them decades old, are certified for 40 years, with renewals available. *Id*.
466. See *Reactors are Closing*, BEYOND NUCLEAR, https://perma.cc/9lz5-7jcn (last visited October 2, 4:34 PM) (identifying six plants totally closed since 2013, and some twenty six in the process of

For agency decision making more broadly, the prospects for hybrid hearings were dimmed. The Court had approved, even for an issue of this consequence, something more akin to show–and–tell than a professional quest for information and truth. This was not a good augur for the ability of administrative law to meet what even then was obviously the future.[467]

And now, a "final word" of our own. The nuclear interveners in these cases did not prevail before the Supreme Court but they and others had significant impact on the safety of the nuclear enterprise, and on particular plants they challenged as well. Some of them, unable to meet higher standards, ended up yielding the field.[468] The interventions in *Calvert Cliffs* put NEPA on the map. At their instance the AEC was finally split in two, ensuring for the first time that production, at least overtly, did not trump safety and other concerns.[469] Through their initiatives as well permissible radiation releases were dramatically reduced,[470] thermal discharges were regulated,[471] and functional emergency core cooling systems were installed across the board.[472] Overall, the domestic industry has had close calls but so far, with good luck and no small push from this unique blend of scientists, lawyers and citizens, there has been no tragedy—an achievement for which players on all sides can take a bow.

As everyone know, however, it would only take one disaster and, for the moment, that knowledge may be the best safeguard of all.[473]

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decommissioning, several with multiple reactors). *See also* Bob Salsberg, *Risks, Rewards Accompany Speedier Cleanup of Closed Nukes*, PITTSBURGH POST-GAZETTE (May 21, 2019 7:21 PM).

467. *See* Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Law*, 91 HARV. LAW. REV. 1805 (1978); Joel Yellin, *High Technology and the Courts: Nuclear Power and the Need for Institutional Reform*, 94 HARV, L. REV. 489 (1981); Kathleen Taylor, *The Substantial Impact Test: Victim of the Fallout from Vermont Yankee?*, 53 GEO. WASH. L. REV. 118 (1985).

468. Following the Three Mile Island meltdown the NRC felt obliged to change its safety assessment criteria, and three subsequent projects were either converted to fossil fuel or abandoned altogether. Trubatch *supra* note 380, at n.39.

469. *See supra* text accompanying note 32. Surely the NRC was staffed, jot for jot, by former AEC employees who, as seen throughout this piece, were slow to shed their promotional mindset.

470. *See* Catherine Caulfield, MULTIPLE EXPOSURES: CHRONICLES OF THE RADIATION AGE 24 (1989) (history and remaining concerns of radiation exposure regulation); *see also supra* discussion at note 375.

471. *See* Entergy Corp. v. Riverkeeper Inc., 556 U.S. 208 (2009) (allowing costs to be included in power plant thermal discharge regulations). The effect of the decision was to require cooling towers for new plants, but allow water–quality based alternatives for existing facilities that would be considerably more difficult to monitor and enforce. Nonetheless, citizen litigation had advanced the issue and at least a partial resolution.

472. Existing AEC emergency measures were challenged in 1971 by the Union of Concerned Scientists, *see* sources cited *supra* note 374, leading to significant improvements. The same group also challenged the AEC's breeder reactor program under NEPA and likewise prevailed. *See* sources cited in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). This program was eventually cancelled by President Reagan as an austerity measure.

473. POSTSCRIPT. In December 2014 the Vermont Yankee power plant was shut down due to local opposition and failing economics. Aaron Larson, *Vermont Yankee Nuclear Power Plant Shuts Down for the Last Time*, POWER MAGAZINE (Dec. 29, 2014). At one point the source of 71% of electricity in the state, *Vermont Nuclear Profile September 2010*, U.S. ENERGY INFORMATION ADMINISTRATION (Apr. 26, 2012), it had also been the subject of litigation over its renewal license, and more litigation over state

REFLECTIONS

The three cases examined in this article hardly make a canon, but they do provide reason to inquire further. They show disturbing patterns of argument and attitude that do no neither the Court nor the environment any service, and foreshadow a darker legacy ahead. A question hovering over this inquiry as it proceeds is why the Court, starting in the late 1970s, would have taken such an abrupt turn to the rear—and remained there.[474]

Perhaps the most evident explanation is that, led by Chief Justices with little appetite for the field, the majority turned not only more conservative but for the most part intransigently so. What was said of Justice Scalia, that he "followed his nose," is true for others and for more than thirty years a Court majority has had little nose for environmental law. With the exception of Justice Kennedy, furthermore, there have been few crossover votes from that side. The nation's red–blue divide did not begin with the Court but, as noted almost daily, it has played out here as well.

A companion explanation is structural; these outcomes were for the most part preordained. In recent decades and with few exceptions, the only writs of certiorari granted for environmental cases have been those petitioned or supported by the Solicitor General, seeking reversal of decisions that had favored the environment below.[475] The last writ accepted from an environmental organization was in 1976.[476] Moreover, given the Court's record on the merits environmental litigants are reluctant even to seek review for the prospect of yet more adverse rulings. As much by accident as by design, the process is loaded to achieve the result it has achieved.

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authority as well. *See* State of Vermont Department of Public Service, *A Brief History of Vermont Nuclear Power*, VERMONT OFFICIAL STATE WEBSITE (last visited October 2, 2020) (describing litigation). The plant's parent company, Entergy, subsequently announced its abandonment of merchant nuclear power altogether. *See* Kelly Maize, *Entergy Sheds Uneconomic Merchant: Power Plants to Focus on Regulated Business*, POWER MAGAZINE (Mar. 31, 2016). The U.S. Department of Energy, however, is now promoting small, portable nuclear plants, see *Advanced Small Modular Reactors*, OFFICE OF NUCLEAR ENERGY (last visited October 2, 2020) and the Trump Administration has proposed federal subsidies to keep the nuclear industry (and the coal industry) afloat. *See* Tom Dechristopher, *Trump administration moves to keep failing coal and nuclear plants open, citing national security*, CNBC (June 1, 2018, 10:55 AM). Whether renewable sources will be encouraged, indeed even allowed, to provide a safer and more sustainable outcome remains to be seen. In this scenario the Supreme Court, despite its disavowal of policy–making, will doubtless play a continuing role.

474. There have been only two significant, decisions favoring the environment in the past forty years. Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001) (rejecting role of cost-benefit analysis in air quality standards); Babbit v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687 (1995) (endangered species). An average of one in twenty years speaks for itself.

475. *See* Lazarus, *supra* note 3, at 1523–24 (noting *inter alia* a more than 78 percent success rate for the Solicitor General as compared to zero for environmentalists).

476. *Id*. at 1511 n.12. Even this case was then mooted by the government, fearing a decision favoring NEPA. *Id*. at 1511 n.13.

In the end, it may be that balancing these scales is Mission Impossible.[477] Nonetheless, America is a society predicated on disclosure and there is the hope that calling the Court's environmental jurisprudence to account, not as one–offs but as a whole, is a step in the right direction.

477. One possibility, of course, is new elections providing, over time, more diversity of background and balance on the Court. Even for this purpose, a comprehensive look at its jurisprudence in this and related fields would be important.