

The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains

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The Supreme Court has decided seventeen cases arising under the National Environmental Policy Act (NEPA) and the government has not only won every case, but won almost all of them unanimously. Commentators routinely cite the drubbing that environmentalists have received in NEPA cases as evidence of the Court's hostility toward environmental law and environmentalism. But a close look at the cases, extending beyond what appears in the U.S. Reports, suggests a very different and more nuanced story. First, as revealed by the written briefs and oral arguments of the advocates and by the internal deliberations of the Justices in those cases, the government's "perfect record" came at a significant cost: the Solicitor General abandoned many lower court arguments and made major concessions about NEPA's requirements. Consequently, the Court's rulings frequently included language that favored environmentalists in future litigation. Indeed, in some instances, the NEPA plaintiffs won more than they lost. Second, the NEPA cases underscore the difference that skilled advocacy makes on either side of the lectern—by the advocates before the Court and by the Justices during the Court's own internal deliberations. The significance of a Court opinion turns on the particular wording of its reasoning far more than on whether it ends with an "affirmed" or "reversed." And the better advocates before and within the Court are exceedingly effective at shaping that reasoning. In NEPA cases, the Solicitor General has generally outlitigated NEPA plaintiffs, and, within the Court, no Justice was more influential than Justice, and later Chief Justice, William Rehnquist. NEPA's story before the Supreme Court is, therefore, not a happy one for NEPA enthusiasts, but the story is not nearly as dismal as routinely supposed. The Justices may have been unappreciative of NEPA's potential, but they have not been systematically hostile to its requirements. To the extent, moreover, that NEPA precedent has been less rather than more favorable to NEPA plaintiffs, much of this is best explained by the Solicitor General's comparative strategic and expertise advantage before the

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Court and Chief Justice Rehnquist's heightened skills on the bench compared to those, like Justice William Douglas, who were more sympathetic to NEPA's mandate.

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INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)¹ has long been trumpeted as environmental law’s “Magna Carta” in the United States, with its sweeping declarations about the need to safeguard the natural environment for future generations.² NEPA requires federal agencies to prepare environmental

1. 42 U.S.C. §§ 4321–4347 (2006).
2. See Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act’s Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245, 245 (2000); Daniel R. Mandelker, *Thoughts on NEPA at 40*, 39 ENVTL. L. REP., NEWS & ANALYSIS 10640, 10641 (2009); Kenneth S. Weiner, *NEPA and State NEPAs: Learning from the Past, Foresight for the Future*, 39 ENVTL. L. REP., NEWS & ANALYSIS 10675, 10675 (2009); see also WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 9.1, at 801 (2d ed. 1994) (“The National Environmental Policy Act of 1969 is . . . the most famous statute of its kind on the planet.” (footnote omitted)).

impact statements (EISs) whenever they propose major federal actions that would significantly affect the quality of the human environment. NEPA's simple admonishment that government planners should in effect "look before they leap" has prompted the preparation of approximately 34,000 draft and final EISs and successfully prevented at least hundreds, and likely thousands, of actions from causing unnecessary damage to the nation's environment.³ As many as half of the states have, in turn, enacted their own NEPA programs modeled upon the federal statute.⁴ And approximately 160 other countries have done the same, making NEPA the nation's most successful international export in the field of environmental protection law.⁵

NEPA's reception before the United States Supreme Court, however, tells a different story. The Supreme Court has decided seventeen NEPA cases on the merits since the statute's enactment.⁶ In all seventeen cases, NEPA plaintiffs had won in the lower courts and opposed High Court review. The federal government petitioned for review in fifteen of the cases and industry alone petitioned in the other two, with the government filing in support of industry on the merits after the Court granted the industry petition.⁷ The Court has not once granted a petition filed by a NEPA plaintiff and then heard the case on the merits.⁸ Instead, in every one of the 111 occasions when NEPA plaintiffs have sought the Court's review of a lower court loss, the Court has ultimately denied plenary review.⁹ By contrast, the Court has denied federal government NEPA petitions only three times in more than forty years.¹⁰

Even more strikingly, the federal government has won every single NEPA case the Court has decided. It has a perfect 17–0 record. Indeed, until environmentalists lost *Winter v. Natural Resources Defense Council, Inc.*¹¹ in 2008, NEPA

3. See *infra* note 66 and accompanying text.

4. See *infra* note 73 and accompanying text.

5. See *infra* note 75 and accompanying text.

6. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Balt. Gas & Electric Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983); *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776 (1976); *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289 (1975); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

7. See *infra* note 82 and accompanying text.

8. See *infra* section II.A.

9. See *infra* section I.C.1.

10. See *id.*

11. 555 U.S. 7 (2008).

plaintiffs had not received a single vote in their favor in more than thirty years¹² in any of the NEPA cases decided after plenary review on the merits.¹³ And, the only Justice dissenting before 1976 was Justice William Douglas, in two NEPA cases. But even that sole dissent can fairly be discounted. Justice Douglas always voted for environmentalists, sometimes seemingly regardless of the actual merits.¹⁴

The purpose of this Article is to explore and explain NEPA's seemingly anomalous experience before the Supreme Court during the four decades since President Richard Nixon signed NEPA into law. To date, commentators have routinely suggested that the Court's treatment of NEPA is best understood as evidencing the Court's hostility to NEPA in particular or to environmentalism more generally.¹⁵

A close examination of the records of the seventeen cases granted review and heard by the Court and the more than one hundred cases for which review was instead denied tells a far more nuanced and ultimately more interesting story about NEPA in the Supreme Court. The story's significance extends, moreover, beyond NEPA and environmental law, to the nature of Supreme Court advocacy and the dynamics of decision making within the Supreme Court. Unlike earlier commentary, which essentially just speculated about possible causes, this Article closely examines the record in the cases. This includes the actual arguments made by counsel in written and oral presentations and, even more revealingly, what was happening in chambers and during the conferences when the Justices deliberated whether to grant review in individual cases and, when review was granted, how to resolve each case on the merits. These internal deliberations have been disclosed by the personal papers of former Justices, including Justices William Douglas,¹⁶ Thurgood Marshall,¹⁷ Lewis Powell,¹⁸

12. The last case in which a Justice voted for NEPA plaintiffs was *Kleppe v. Sierra Club*, 427 U.S. 390, 415–23 (1976) (Marshall & Brennan, JJ., concurring in part and dissenting in part). As described below, *see infra* note 210 and accompanying text, Marshall also filed a lone dissent from the Court's per curiam summary reversal in *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980), but because that ruling was reached without the benefit of oral argument and briefing on the merits, Marshall's dissent does not break the thirty-two-year string of unanimous losses from NEPA cases subject to "plenary review."

13. As described below, *see infra* notes 126–31 and accompanying text, the extent of the government's success before the Court is underscored by the discovery that the Solicitor General managed to moot a case in the one instance in the early 1970s when the Court did in fact grant a petition filed by an environmental group in a NEPA case. The government's tactic effectively ended the case before oral argument and thereby avoided the possibility of NEPA precedent adverse to the government. *Id.*

14. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 724–25 (2000); *see* BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 455 (2003) ("I'm ready to bend the law in favor of the environment and against the corporations," Justice Douglas reportedly told one law professor in the early 1970s).

15. *See infra* notes 91–101 and accompanying text.

16. The papers of William O. Douglas, Professor of Law, Securities and Exchange Commissioner, and Associate Justice of the Supreme Court, were given to the Library of Congress by Justice Douglas in three installments, with the first installments arriving during the 1960s, and the final installments bequested to the Library in 1980 and arriving in 1980, 1985, and 1997. The papers are contained in

William Brennan,¹⁹ and Harry Blackmun.²⁰ As described in more detail below, these papers include notes on what Justices said at their private conferences with the other members of the Court, handwritten notes by Justices, in-chambers memoranda between law clerks and their respective Justices, correspondence between chambers of different Justices, and draft opinions circulated among chambers. The upshot is a historical assessment of the Court's NEPA rulings that differs in significant respects from what has been the conventional wisdom about the rulings and presents a surprisingly clear picture of the internal workings of the Court behind the curtains.

This Article is divided into three parts. Part I describes the unusual legislative and judicial origins of NEPA's status as a significant law and then documents the Court's seemingly skewed treatment of NEPA during the past four decades. This includes the Court's decisions to grant or deny review as well as its decisions on the merits. Part II then undertakes a closer look at individual cases in an attempt to provide a clearer picture of the Court's experience with NEPA. This discussion proffers an assessment of the Court's NEPA precedent that is far less hostile to the statute's requirements than most commentators have long advanced. It demonstrates that the government's perfect record and the Court's unanimity were achieved at significant costs: the Solicitor General's abandon-

about 1800 boxes, and the Library of Congress has a finding aid for the collection. See MANUSCRIPT DIVISION, LIBRARY OF CONGRESS, WILLIAM O. DOUGLAS: A REGISTER OF HIS PAPERS IN THE LIBRARY OF CONGRESS (2000) (last revised 2008). The papers are referred to hereinafter as "The Douglas Papers."

17. The papers of Thurgood Marshall, lawyer, judge, Solicitor General, and Associate Justice of the Supreme Court, were given to the Library of Congress by Justice Marshall in 1991. The collection consists of approximately 500 boxes of materials, and the Library of Congress has a finding aid for the collection. See MANUSCRIPT DIVISION, LIBRARY OF CONGRESS, THURGOOD MARSHALL: A REGISTER OF HIS PAPERS IN THE LIBRARY OF CONGRESS (2001) (last revised 2004). The papers are referred to hereinafter as "The Marshall Papers."

18. The papers of Lewis F. Powell Jr., lawyer and Associate Justice of the Supreme Court, were given to the Washington and Lee School of Law by Justice Powell and first opened to researchers in 1994. Researchers must receive permission in advance to review the papers. The collection consists of approximately 363 cubic feet, and Washington and Lee has a finding aid for the collection. See WASHINGTON AND LEE UNIVERSITY, A GUIDE TO THE LEWIS F. POWELL JR. PAPERS 1921-1998 (2002). The papers are referred to hereinafter as "The Powell Papers."

19. The papers of William J. Brennan, Jr., lawyer, judge, and Associate Justice of the Supreme Court, were given to the Library of Congress by Justice Brennan from 1967 to 1998. The collection consists of approximately one-thousand boxes of materials, and the Library of Congress has a finding aid for the collection. See MANUSCRIPT DIVISION, LIBRARY OF CONGRESS, WILLIAM J. BRENNAN, JR.: A REGISTER OF HIS PAPERS IN THE LIBRARY OF CONGRESS (2001) (last revised 2004). The papers are referred to hereinafter as "The Brennan Papers."

20. The papers of Harry A. Blackmun, lawyer, judge, and Associate Justice of the Supreme Court, were given to the Library of Congress by Justice Blackmun in 1997, with the understanding that they would not be made generally available to researchers at the Library of Congress until five years after his death. The papers became available in March 2004. See Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES (Mar. 4, 2004), <http://www.nytimes.com/2004/03/04/politics/04BLAC.html?hp>. The Library of Congress has a finding aid for the collection. See MANUSCRIPT DIVISION, LIBRARY OF CONGRESS, HARRY A. BLACKMUN PAPERS: A FINDING AID TO THE COLLECTION IN THE LIBRARY OF CONGRESS (2004) (last revised 2010). The papers are referred to hereinafter as "The Blackmun Papers."

ment of arguments made in lower courts, significant government concessions on NEPA's requirements, narrow fact-bound rulings, and significant Court dicta favorable to environmentalists. Finally, Part III advances broader lessons to be learned about the nature of Supreme Court decision making, relevant both to those litigating before the Court and to those purporting to glean the significance of the Court's rulings for NEPA in particular and environmental law more generally. These lessons include the extraordinary effectiveness of William Rehnquist, first as Associate Justice and then as Chief Justice, in influencing the Court's decisions as well as the comparative ineffectiveness of Justice Douglas in his final years on the Court. NEPA's experience in the Supreme Court also demonstrates the effectiveness of the Solicitor General as an advocate before the Court. The Court records underscore how the Solicitor General was able to frame, and reframe, the legal issues raised in the NEPA cases in a manner that either succeeded in diminishing the statute before the Court or at least promoted the consistent appearance of a government "victory" in the aftermath of the Court's ruling in a NEPA case.

I. NEPA: ORIGINS, SIGNIFICANCE, AND THE SUPREME COURT

NEPA is a fascinating law, but this is not the occasion to repeat in full its rich and unlikely history. Instead, this section reviews the statute's history only insofar as it is necessary for the topic at hand. This discussion includes NEPA's unlikely origins, its transformation by lower federal courts into a much more significant law than its original sponsors anticipated, and, finally, the law's far different treatment by the Supreme Court.

A. NEPA'S ORIGINS

NEPA resulted from a confluence of environmental visionaries, ranging from members of Congress to academic scholars.²¹ Senator Henry "Scoop" Jackson and his committee staff are widely credited for promoting the central insight that better environmental results could be achieved by merging the holistic teachings of what was then dubbed "ecosystem ecology" with "systems analysis" for more rational, systematic governmental decision making.²² By focusing on the need for federal legislation that emphasized planning and conceived of the natural environment as a complex, integrated system, Jackson famously clashed with another environmental political icon of that era, Senator Edmund Muskie, who sought to craft legislation that addressed pollution through a series of distinct, focused regulatory regimes organized by specific environmental

21. See A. Dan Tarlock, *The Story of Calvert Cliffs: A Court Construes the National Environmental Policy Act To Create a Powerful Cause of Action*, in ENVIRONMENTAL LAW STORIES 77, 83–86 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

22. See PAUL CHARLES MILAZZO, UNLIKELY ENVIRONMENTALISTS: CONGRESS AND CLEAN WATER, 1945–1972, at 122–25 (2006).

media such as air and water.²³

We now know, of course, that Congress ultimately embraced both approaches in a series of ambitious legislative enactments during the 1970s, some of which trumpeted planning and others media-specific, pollution-control regulation.²⁴ But Jackson's NEPA was where the modern era of environmental law began, signed into law with great fanfare by President Richard Nixon on January 1, 1970.²⁵ Much of NEPA's greatness is reflected in the soaring rhetoric found in its first section, extolling the nation to move in bold new directions. Section 101 of NEPA formally "declares that it is 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"²⁶ The Act announces that it is the "continuing responsibility of the Federal Government to use all practicable means[] consistent with other essential considerations of national policy" to achieve a series of stated objectives,²⁷ including to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations,"²⁸ to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,"²⁹ and to "attain the widest range of beneficial uses of the environment without degradation[or] risk to health or safety"³⁰

Section 102, however, is where NEPA finds its potential substantive and procedural bite. NEPA's potential substantive mandate is contained within the few words set forth in § 102(1), where "Congress authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA]."³¹ The next clause, § 102(2), contains NEPA's procedural mandate and limits that mandate to agencies of the federal government. It directs that, "to the fullest extent possible, . . . all agencies of the Federal Government" must prepare what have come to be known as "environmental impact statements" "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment"³²

NEPA's procedural mandate has its own fascinating history. It was the brainchild of Dr. Lynton Keith Caldwell, a political scientist from Indiana University and a formal consultant to Senator Jackson's Senate committee whose salary was paid for by an environmental think tank, the Conservation

23. *Id.* at 125–31.

24. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 67–97 (2004).

25. *Id.* at 68; National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

26. 42 U.S.C. § 4331(a) (2006).

27. *Id.* § 4331(b).

28. *Id.* § 4331(b)(1).

29. *Id.* § 4331(b)(2).

30. *Id.* § 4331(b)(3).

31. *Id.* § 4332.

32. *Id.*

Foundation.³³ In his testimony before the Senate Committee, Caldwell explained why he thought it was essential for NEPA to be more than merely hortatory and have “an action-forcing, operational aspect,” such as a formal requirement that federal agencies consider the environmental impacts of their actions as part of their planning process: “For example, it seems to me that a statement of policy by the Congress should at least consider measures to require the Federal agencies, in submitting proposals, to contain within the proposals an evaluation of the effect of these proposals upon the state of the environment.”³⁴ As a direct result of Caldwell’s recommendation, NEPA § 102, as ultimately enacted, included the formal requirement that agencies prepare EISs for major federal actions significantly affecting the quality of the human environment.³⁵

What was noticeably missing from NEPA’s language, however, was any suggestion that its mandate was subject to judicial enforcement through litigation. NEPA contains no hint of such an enforcement mechanism in either the language of the law or its accompanying legislative history. There is no direct reference to the availability of a private right of action to enforce NEPA or even any indirect reference that might suggest that Congress had at least contemplated the possibility. NEPA’s drafters, including Caldwell, apparently believed that the primary enforcement mechanism of NEPA’s EIS requirement would not be lawsuits but dialogues among agencies within the executive branch or between the executive branch and Congress.³⁶ Congress does not appear to have contemplated the kind of heightened judicial role in the enforcement of NEPA subsequently embraced by the federal judiciary.³⁷

B. EARLY NEPA CASE LAW AND REGULATORY EXPANSION

Precisely because Congress apparently never contemplated a significant role for NEPA in litigation, the dramatic rise of NEPA in the courts in the early 1970s was a surprise to many, including its principal legislative sponsor, Senator Jackson.³⁸ Some commentators have suggested that Jackson may well have even regretted his sponsorship of NEPA as a result of the unexpected way that NEPA became the basis of so many lawsuits against the federal government.³⁹ While it is no doubt unduly simplistic to focus on one judge and one case to account for NEPA’s surprising role in environmental litigation, it would

33. Tarlock, *supra* note 21, at 84–85.

34. *National Environmental Policy: Hearing on S. 1075, S. 237, and S. 1752 Before S. Comm. on the Interior and Insular Affairs*, 91st Cong. 116 (1969) (statement of Lynton K. Caldwell, Professor of Government, University of Indiana).

35. See Tarlock, *supra* note 21, at 86–88.

36. See *id.* at 87–88.

37. See *Calvert Cliffs’ Coordinating Comm., Inc. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971); see also *infra* section I.B (discussing the rise in NEPA litigation following the decision in *Calvert Cliffs*).

38. See Tarlock, *supra* note 21, at 82–83.

39. See *id.*; see also Oliver A. Houck, Book Review, *Is That All? A Review of The National Environmental Policy Act, An Agenda for the Future*, by Lynton Keith Caldwell, 11 DUKE ENVTL. L. &

not be much of a stretch to propose that Judge Skelly Wright in his opinion for the United States Court of Appeals for the District of Columbia Circuit in *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*⁴⁰ served just such a historical function.⁴¹

At issue in *Calvert Cliffs* was whether the Atomic Energy Commission (AEC) had complied with NEPA in instituting its procedures for licensing nuclear power plants. The AEC had recently promulgated NEPA compliance rules, which delegated to AEC staff and license applicants the responsibility for the preparation of EISs and did not require consideration of the contents of the statements during the Commission's decision-making process.⁴² Environmentalists deliberately chose the AEC as a test case to challenge federal agency compliance with NEPA because they felt that the AEC's conduct was so egregious in ignoring the new law.⁴³ Judge Wright did not disappoint. In addressing the validity of the AEC's compliance rules, Judge Wright eschewed any pretense of writing narrowly and instead embraced the opportunity to write as broad and sweeping an opinion on the new law as possible.⁴⁴

The beginning of his opinion was a harbinger of what followed. "These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment," Judge Wright wrote.⁴⁵ What is most striking is how Wright took the notion of a "flood" and turned it from a negative into a positive.⁴⁶ In the context of litigation, a "flood" is normally treated as something to be avoided—it is common to argue that a particular legal theory should be rejected because its embrace would "open the floodgates of litigation." But, in the context of NEPA, *Calvert Cliffs* suggested litigation is instead something good that the new law "promises."⁴⁷ Wright also forthrightly made clear the court's view of the laudable nature of NEPA's goals—"the commitment of the Government to control, *at long last*, the destructive engine of material 'progress'" and, in the context of the "judicial role," "our duty" to ensure that NEPA's "important legislative purposes . . . are not lost or misdirected in the vast hallways of the federal bureaucracy."⁴⁸

To achieve that end, however, Judge Wright drew a sharp distinction between what he described as NEPA's "general substantive policy," outlined in § 102(1),

POL'Y F. 173, 183 n.38 (2000) (speculating that legislators would not have passed NEPA had they understood how it would be interpreted in cases like *Calvert Cliffs*).

40. 449 F.2d 1109 (D.C. Cir. 1971).

41. See Tarlock, *supra* note 21, at 94–106.

42. *Id.* at 93.

43. *Id.* at 88–90.

44. See *id.* at 94–100.

45. *Calvert Cliffs*, 449 F.2d at 1111.

46. See *id.*

47. See *id.*

48. *Id.* (emphasis added).

and its “procedural” mandate, set forth in § 102(2).⁴⁹ Wright’s opinion described NEPA’s substantive policy as a “flexible one,” in contrast to its procedural requirements, which Wright described as “not highly flexible” and “establish[ing] a strict standard of compliance.”⁵⁰ Wright further declared that NEPA’s “requirement of environmental consideration ‘to the fullest extent possible’ sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing *courts*.”⁵¹

The language of § 102(1) could have supported a stronger reading of NEPA’s substantive import, especially in its express “authoriz[ation] and direct[ion] that . . . 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.”⁵² And, to a certain extent, Wright’s opinion appears to try to hedge the flexible vision of the substantive provisions he otherwise advances. It did not suggest that the substantive mandate has no teeth whatsoever but rather stated that NEPA “*may* not require *particular* substantive results in *particular problematic* instances.”⁵³ Wright’s opinion also did not say that reviewing courts cannot reverse an agency’s substantive decision, but rather that they “*probably* cannot . . . *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*.”⁵⁴

Finally, even while drawing the procedure–substance distinction, Wright’s *Calvert Cliffs* opinion, echoing Senator Jackson’s statement to Congress,⁵⁵ made clear that, following NEPA’s enactment, a federal agency such as the AEC could no longer validly claim “that it had no statutory authority to concern itself with the adverse environmental effects of its actions.”⁵⁶ Citing to the express language of § 102, the court concluded that NEPA “not only permitted, but compelled . . . the [AEC] and other agencies to *consider* environmental issues just as they consider other matters within their mandates.”⁵⁷

In the aftermath of *Calvert Cliffs*, there was an explosion of federal court litigation, especially because many federal agencies, like the AEC, that had historically paid little attention to environmental considerations, delayed before deciding to take seriously *Calvert Cliffs*’ admonition of strict procedural compliance.⁵⁸ No doubt because of Wright’s characterization of NEPA’s procedural mandate as inflexible, other courts looked mostly to those procedural require-

49. *Id.* at 1112.

50. *Id.*

51. *Id.* at 1114 (emphasis added).

52. 42 U.S.C. § 4332 (2006).

53. *Calvert Cliffs*, 449 F.2d at 1112 (emphasis added).

54. *Id.* at 1115 (emphasis added).

55. 115 CONG. REC. 14346–47 (1969) (statement of Sen. Jackson).

56. *Calvert Cliffs*, 449 F.2d at 1112.

57. *Id.*

58. See FREDERICK R. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 247–65 (1973); Tarlock, *supra* note 21, at 102–07.

ments rather than trying to ground their rulings in the statute's substantive provisions. Accordingly, courts reversed federal agency decisions not to prepare EISs at all, rejecting agency claims that their actions were not major, federal, or lacked significant environmental impacts.⁵⁹ Courts also faulted federal agencies for failing to take seriously NEPA's requirement that agencies consider a range of alternatives to their proposed actions.⁶⁰ The courts created, in effect, a virtual "common law" of detailed NEPA procedural requirements, remarkable for its lack of direct ties to § 102(2)'s specific statutory language.⁶¹

The President's Council on Environmental Quality (CEQ), which was created by NEPA and charged with its administration,⁶² emboldened NEPA further by promulgating a comprehensive set of regulations that effectively codified the demanding set of detailed procedural requirements originally established by the federal courts, frequently beyond the statutory language. The CEQ regulations "became the bible for the federal establishment and for reviewing courts. They became NEPA."⁶³ CEQ, therefore, undermined the efforts of federal agencies that were skeptical, or even hostile, to NEPA's procedural mandate. Moreover, CEQ's formal action undercut the argument that NEPA's requirements were merely the product of unchecked judicial activism by giving them the imprimatur of the Executive Office of the President.

As NEPA entered its second decade during the 1980s, commentators began to debate the practical reach of NEPA's procedural requirements,⁶⁴ but it was clear that NEPA was now significant and settled law.⁶⁵ Federal agencies routinely began to complete EISs, preparing 17,714 draft and final EISs from 1970 through 1979.⁶⁶

The EISs themselves were significant. They provided nongovernmental orga-

59. See Tarlock, *supra* note 21, at 105.

60. See ANDERSON, *supra* note 58, at 217–21; RICHARD A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 169–71 (1976).

61. See *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J., concurring in part and dissenting in part) ("[T]his vaguely worded statute seems designed to serve as no more than a catalyst for development of a 'common law' of NEPA. To date, the courts have responded in just that manner and have created such a 'common law.'").

62. 42 U.S.C. § 4342 (2006) (creating CEQ).

63. Houck, *supra* note 39, at 184.

64. See, e.g., SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM 80–82 (1984); Wesley A. Magat & Christopher H. Schroeder, *Administrative Process Reform in a Discretionary Age: The Role of Social Consequences*, 1984 DUKE L.J. 301, 320–21; see also Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973) (analyzing the practical operation of NEPA in the context of airport expansion).

65. See J. WILLIAM FUTRELL ET AL., ENVTL. LAW INST., NEPA IN ACTION, ENVIRONMENTAL OFFICES IN NINETEEN FEDERAL AGENCIES (1981) (detailing the structure and function of the environmental offices that NEPA caused to be created in various federal agencies).

66. See Council on Env'tl. Quality, *Number of EISs Filed 1970 to 2007* (2008), http://nepa.gov/nepa/EISs_by_Year_1970_2007.pdf. Federal agencies prepared about the same number from 1979 to 2007, totaling nearly 34,000 draft and final impact statements. *Id.* The number of statements was highest in the 1970s and then leveled off at between five and six hundred per year since 1985. *Id.*; see also Council on Env'tl. Quality, *Calendar Year 2008 Filed EISs* (2009), http://nepa.gov/nepa/Calendar_Year_2008_Filed_EISs.pdf (listing the EISs filed in 2008).

nizations with information on agency actions they never could have produced on their own. Based on that new information, environmentalists could determine what restrictions other environmental-protection laws might impose on the proposed federal agency activity and notify agency officials of the need for compliance with those restrictions.⁶⁷ Moreover, NEPA's procedural requirement that EISs be prepared for major federal actions significantly affecting the human environment has had at least two significant substantive—even if indirect—effects on agency action. First, agencies can seek to avoid preparing an EIS by agreeing to mitigate environmental impacts as necessary to reduce the impact of the proposed action below the “significant” threshold.⁶⁸ Agencies prepare approximately 50,000 environmental assessments each year.⁶⁹ Although no EIS results, the environmental impact is reduced, which is NEPA's ultimate goal. This has been dubbed the “tourniquet effect.”⁷⁰ Second, the process of preparing EISs can itself change agency behavior. It is one thing to resist expending resources to acquire information about adverse environmental impacts. It is quite another to ignore such information once it is available and part of the decision-making record. It is the rare government official who would do the latter, especially because NEPA also had the effect of prompting agencies to change the background and expertise of those hired and appointed to include agency personnel more knowledgeable about environmental impact.⁷¹ In many respects, there-

67. See JAMES RASBAND ET AL., *NATURAL RESOURCES LAW AND POLICY* 282 (2004) (“NEPA has achieved a great deal. Talk to NGO litigators about NEPA and many say it is critical in providing data on agency actions they could not otherwise obtain or use. In addition to providing the public with the agency's environmental analysis, NEPA serves an important additional purpose as a kind of clearing-house for information required by other relevant laws.”); Charles M. Kersten, Note, *Rethinking Transboundary Environmental Impact Assessment*, 34 *YALE J. INT'L L.* 173, 190 (2009) (“Though NEPA itself does not constrain agencies' discretion, an EIS can reveal violations of other laws whose substantive provisions are mandatory. In tandem, these laws create a comprehensive legal framework with both procedural and substantive components.”).

68. See COUNCIL ON ENVTL. QUALITY, *THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS*, 19–20 (Jan. 1997) (“While preparing EAs [environmental assessments], agencies often discover impacts that are ‘significant,’ which would require preparation of an EIS. Agencies may then propose measures to mitigate those environmental effects. If an agency finds that such mitigation will prevent a project from having significant impacts on the environment, the agency can then conclude the NEPA process by issuing a FONSI [Finding of No Significant Impact], rather than preparing an EIS. The result is a ‘mitigated FONSI.’ The 1992 CEQ survey and informal opinions of U.S. EPA officials responsible for reviewing NEPA analyses indicate an increase in the number of mitigated FONSIs.”); see also Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 *COLUM. L. REV.* 903, 932–42 (2002) (discussing “mitigated FONSIs”).

69. Lois J. Schiffer, *The National Environmental Policy Act Today, With an Emphasis on Its Application Across U.S. Borders*, 14 *DUKE ENVTL. L. & POL'Y F.* 325, 326 (2004).

70. See Michael B. Gerrard, *The Effect of NEPA Outside the Courtroom*, 39 *ENVTL. L. REP., NEWS & ANALYSIS* 10615, 10615–16 (2009).

71. See COUNCIL ON ENVTL. QUALITY, *supra* note 68, at 13, 18 (describing examples of NEPA's impact on government decision makers); Stark Ackerman, *Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making*, 20 *ENVTL. L.* 703 (1990) (describing how the Forest Service integrated NEPA into its decision making); Paul J. Culhane, *NEPA's Impacts on Federal Agencies, Anticipated and Unanticipated*, 20

fore, it is “the NEPA *process* that makes a difference, far more than the NEPA *documents* themselves.”⁷²

Nor is NEPA’s sphere of influence limited to the actions of federal agencies, even though NEPA by its own terms is so limited. Inspired by the federal example, as many as thirty-two states have enacted their own state NEPA, known as “SEPA,”⁷³ some of which are broader than the federal law inasmuch as they extend to *private* action significantly affecting the environment and include a substantive mandate.⁷⁴ NEPA had a similar effect internationally. Although early efforts to apply NEPA extraterritorially fell short, other nations have enacted their own environmental-assessment laws, modeled largely after NEPA. At present, approximately 160 countries have such laws, as do international organizations such as the World Bank.⁷⁵ Indeed, commentators have sometimes described NEPA as this nation’s most significant environmental law export.⁷⁶ NEPA’s transformative legacy is the product of far more than its statutory language: ambitious early judicial rulings provided the trigger, detailed agency regulations codified and furthered those rulings, and state legislatures

ENVTL. L. 681 (1990) (describing the impact of NEPA on agency decision making); Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 25–26 (2009) (“In its thirty-five year history, NEPA unquestionably has increased federal agency sensitivity to environmental concerns during the policymaking process. Numerous proposed federal actions that would have had serious environmental consequences have been modified, or in some cases even abandoned, as a result of the NEPA process.” (footnotes omitted)); Mary H. O’Brien, *NEPA as It Was Meant To Be: NCAP v. Block, Herbicides, and Region 6 Forest Service*, 20 ENVTL. L. 735 (1990) (describing the positive impact on NEPA of the Forest Service’s development of a regional plan).

72. Weiner, *supra* note 2, at 10681.

73. There is some uncertainty regarding the precise number of SEPA’s, probably because the number shifts over time. See, e.g., COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY: 25TH ANNIVERSARY REPORT 49 (1995) [hereinafter CEQ 25TH] (“NEPA has to date served as a model for over 25 states . . .”); COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY: 22ND ANNUAL REPORT 373 (1992) [hereinafter CEQ 22ND] (listing sixteen states, Puerto Rico, and the District of Columbia); RASBAND ET AL., *supra* note 67, at 253 (listing nineteen states); Noah D. Hall, *Interstate Environmental Impact Assessment*, 39 ENVTL. L. REP., NEWS & ANALYSIS 10667, 10668 (2009) (“A recent survey indicated that 32 states have some form of an environmental impact assessment policy modeled after NEPA.”); *State Environmental Planning Information*, COUNCIL ON ENVTL. QUALITY, <http://nepa.gov/nepa/regs/states/states.cfm> (last updated Dec. 4, 2011) (listing sixteen states and the District of Columbia, Puerto Rico, and Guam).

74. EDWARD ZIEGLER, JR. ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 9.2 (4th ed. 2011) (characterizing some SEPA’s as “more ambitious or global” than their federal counterpart); Hall, *supra* note 73, at 10668 n.24 (describing states with SEPA’s that include substantive requirements); Weiner, *supra* note 2, at 10677–78 (describing state NEPA laws that include substantive mandates and that apply to private development activities).

75. See Nicholas Robinson, *NEPA at 40: International Dimensions*, 39 ENVTL. L. REP. 10674 (2009); Schiffer, *supra* note 69, at 326–27 (noting the World Bank’s law). But, as with counting states, there is a clear lack of precision in counting countries as well. See CEQ 25TH, *supra* note 73, at 49 (counting “nearly” 90 countries); A. RASBAND ET AL., *supra* note 67, at 253 (noting that 130 countries have such laws); *International Environmental Impact Assessment (EIA) Agencies*, NEPANET, <http://nepa.gov/nepa/eia.html> (last visited Feb. 7, 2012) (listing links to thirty-three nations’ laws).

76. Kersten, *supra* note 67, at 176–78 (“The Act has proven to be one of the United States’ most widely imitated statutes.”).

and other countries ultimately magnified NEPA's reach by applying its teachings to their own respective jurisdictions.

C. NEPA BEFORE THE SUPREME COURT: REBUFF AND REJECTION

In sharp contrast to the embrace of NEPA by lower federal courts, state legislatures, and other nations, the Supreme Court has displayed no similar interest in promoting NEPA during the past forty years. Just the opposite. The Court has never reversed a lower court ruling on the ground that the lower court failed to apply NEPA with sufficient rigor. Indeed, as described at the outset, the Court has not even once granted review to consider the possibility that a lower court erred in that direction and then heard the case on the merits. The Court has instead reviewed cases only when NEPA plaintiffs won below, and then the Court has reversed, typically unanimously.

There are two significant decisions that the Supreme Court makes in considering a case. The first occurs at the jurisdictional stage, when the Court considers whether to hear a case and to decide the case on the merits. With a few discrete exceptions inapplicable to NEPA, the Court enjoys discretionary jurisdiction and exercises its discretion to hear and decide cases relatively infrequently. For instance, during October Term 2010, the Court granted review in ninety cases out of 7,868 petitions for review, amounting to a 1.1 percent grant rate.⁷⁷ The second significant decision occurs when the Court decides the case on the merits, after full briefing and oral argument. The number of cases decided on the merits that result in full opinions is invariably smaller still than the number of petitions for review initially granted, because some cases are consolidated, some are dismissed after the initial grant due to intervening events, and some are decided on a per curiam basis without plenary review. In October Term 2010, the Court's grants resulted in a total of eighty-two signed opinions.⁷⁸ Discussed below is NEPA's record at the jurisdictional and merits stages, followed by a summary description of scholarly treatment of that record.

1. NEPA at the Jurisdictional Stage

As summarized in the accompanying chart, the Supreme Court has received petitions for plenary review in approximately 155 NEPA cases during the past forty years. On behalf of federal agencies, the Solicitor General has filed twenty-one of those petitions seeking reversal of a lower court ruling that the federal agency had violated NEPA. Environmentalists, concerned citizens, state and local governmental bodies, and other entities have filed 110 petitions seeking reversal of a lower court ruling that in their opinion failed to apply NEPA with sufficient stringency. Seeking to reverse environmentalist victories, business interests have filed petitions in twenty-five cases on their own and at least seven times when supported by parallel petitions filed by the Solicitor

77. *The Supreme Court, 2010 Term—The Statistics*, 125 HARV. L. REV. 362, 369 (2011).

78. *Id.* at 362.

NEPA Jurisdictional Decisions: October Terms 1970–2010

October Term of the Jurisdictional Decision	Total Number of Petitions Raising NEPA Questions	Number Granted and Decided on the Merits	Number of Petitions Where the U.S. Was a Petitioning Party [†]	Number Granted and Decided on the Merits	Number of Petitions Asking the Court To Construe More Broadly NEPA's Requirements (Industry Petitions in Parentheses) [‡]	Number Granted and Decided on the Merits	Number of Non-U.S. Petitions Asking the Court To Construe More Narrowly NEPA's Requirements	Number Granted and Decided on the Merits
1970–1979	65	7	8	6	50 (11)	0	7	1
1980–1989	32	5	6	5	19 (2)	0	7	0
1990–1999	25	1	1	1	21 (2)	0	3	0
2000–2010	32	4	4	3	20 (4)	0	8	1
Totals (including percentages)	154	17 (11%)	19	15 (78.9%)	110 (19)	0	25	2 (8%)

[†] Any case where the United States was a petitioning party is placed in this category and is not included in any other category.

[‡] This category is not synonymous with petitions representing “environmental interests,” or even “the interests protected or promoted by NEPA.” A substantial number of petitions in this category were made by industry or economic interests seeking to avoid or delay regulations, including explicitly environmental regulations. *Wyoming v. Kleepe* [sic], 426 U.S. 906 (1976), is counted as an industry petition despite Wyoming being the petitioner because Wyoming was seeking to use NEPA to preclude EPA from preventing use of a pesticide. *See Wyoming v. Hathaway*, 525 F.2d 66, 66 (10th Cir. 1975).

General, which were granted.⁷⁹ The number of Solicitor General petitions was highest by far during NEPA's first two decades (eight and six petitions, respectively, followed by one and four petitions in the two most recent decades), while the number of environmental petitions was highest by far during the first decade (thirty-nine petitions), then dropped off sharply by one-half and has remained fairly constant ever since.

However, with three isolated and limited exceptions, only one party's petitions have been granted: those filed by the Solicitor General on behalf of federal-agency defendants seeking a less stringent reading of NEPA. The three exceptions include one petition filed by environmentalists, which the Solicitor General opposed, and two filed by industry, which the Solicitor General opposed but the federal Nuclear Regulatory Commission supported in one of those two in-

79. Industry filed petitions parallel to the petitions filed by the Solicitor General in seven cases. *See* *Balt. Gas & Electric Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776 (1976); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289 (1975); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

stances. Although the Court initially granted the environmentalists' petition,⁸⁰ the Court subsequently remanded at the suggestion of the Solicitor General that the case had become moot.⁸¹ With regard to the two industry petitions that the Solicitor General opposed at the jurisdictional stage, the Solicitor General aligned the government in support of the industry petitioners on the merits after the Court decided to hear the cases.⁸² The Court has granted fifteen of the Solicitor General's nineteen petitions (more than seventy-eight percent).⁸³ When it comes to the Supreme Court, NEPA cases rarely get past the gate—and when they do, it is almost always at the Solicitor General's request.

2. NEPA on the Merits

The Court's NEPA decisions on the merits are no less lop-sided than its decisions to grant petitions for review. The Court has ruled in favor of the Solicitor General in every NEPA case the Court has decided after briefing and oral argument. This is an extraordinary statistic. Without a doubt, the Court rules more frequently for petitioners than for respondents. The Court in recent decades has generally reversed between sixty and seventy-five percent of the time, with the reversal rate being on the higher end in the past few years.⁸⁴ But, even those higher percentage rates are markedly different than one hundred percent.

It is, moreover, not just the outcomes but the voting margins that environmentalists have understandably found unsettling. After the *Sierra Club*, in 1976, lost *Kleppe v. Sierra Club*,⁸⁵ from which Justices Marshall and Brennan dissented in part,⁸⁶ environmentalists did not obtain a single vote from a single Justice in a NEPA case decided after plenary review for more than thirty years. They lost ten cases, all by unanimous votes.⁸⁷ Not until the Court decided *Winter v.*

80. See *Upper Pecos Ass'n v. Peterson*, 406 U.S. 944 (1972).

81. See *Upper Pecos Ass'n v. Peterson*, 409 U.S. 1021 (1972); Memorandum for the Respondents Suggesting Mootness, *Upper Pecos Ass'n*, 409 U.S. 1021 (No. 71-1133).

82. The two cases in which the Court granted industry petitions in the absence of a petition filed by the government are *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) and *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010). For *Vermont Yankee*, see: Petition for a Writ of Certiorari, *Vermont Yankee*, 435 U.S. 519 (No. 76-419); Petition for a Writ of Certiorari, *Consumers Power Co. v. Aeschliman*, 435 U.S. 519 (1978) (No. 76-528); Brief for the Federal Respondents, *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528). For *Monsanto*, see: Brief for the Federal Respondents in Opposition, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (No. 09-475); Brief for the Federal Respondents Supporting Petitioner, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (No. 09-475).

83. The Court denied Solicitor General petitions in *United States Forest Service v. Earth Island Institute*, 549 U.S. 1278 (2007); *Clark v. Southern Oregon Citizens Against Toxic Sprays, Inc.*, 469 U.S. 1028 (1984); *Morton v. Wilderness Society*, 411 U.S. 917 (1973); and *Federal Power Commission v. Greene County Planning Board*, 409 U.S. 849 (1972).

84. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 244-45 tbl.3-6 (4th ed. 2007).

85. 427 U.S. 390 (1976).

86. *Id.* at 415 (Marshall & Brennan, JJ., concurring in part and dissenting in part).

87. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992); *Marsh v. Or. Natural*

*Natural Resources Defense Council, Inc.*⁸⁸ in November 2008, when two Justices dissented in full (Justice Ruth Bader Ginsburg joined by Justice David Souter)⁸⁹ and two others dissented in part (Justice Stephen Breyer joined by Justice John Paul Stevens),⁹⁰ was the ruling against the environmentalists not unanimous. I doubt there is any other area of law in which the Court has been so repeatedly and so unanimously opposed to the arguments advanced by one set of parties.

3. Traditional Explanations for the Court's Lopsided Treatment of NEPA

The Court's lopsided NEPA record has not gone unnoticed. Beginning in the mid-1980s, legal academics began to take note of the Supreme Court's apparent "disdain" for the Act.⁹¹ And, by NEPA's twentieth anniversary in 1990, environmental law's leading commentators were practically universal in their characterization of the Court's NEPA precedent as exhibiting a singular "hostility" to the law.⁹² As William Rodgers argues, "[i]n few walks of legal life has the Court demonstrated such a decided tilt in its choice of prevailing parties."⁹³

As the environmentalists' streak of High Court NEPA losses extended during the 1990s, the academic rhetoric denouncing the Court increased in its own disdain for the Court. "It is hard to imagine a venue more hostile to NEPA—to any aspect of NEPA—than the Supreme Court has proven to be," wrote one legal academic.⁹⁴ Another academic surveying the Court's NEPA case law asserted that "the Supreme Court is to NEPA as Joseph Hazelwood [the ship's

Res. Council, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Balt. Gas & Electric Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983); *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981); *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

88. 555 U.S. 7 (2008).

89. *Id.* at 43.

90. *Id.* at 34 (Marshall & Brennan, JJ., concurring in part and dissenting in part).

91. See Daniel Farber, *Disdain for 17-Year-Old Statute Evident in High Court's Rulings*, NAT'L L.J., May 4, 1987, at 22; see DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION: THE NATIONAL ENVIRONMENTAL POLICY ACT § 1:05* (1984) ("Neither has the Court been sympathetic to NEPA. Its decisions have diluted NEPA's environmental decision making responsibilities.").

92. Donald N. Zillman & Peggy Gentles, *NEPA's Evolution: The Decline of Substantive Review*, 20 ENVTL. L. 505, 506 (1990) (describing the "Court's almost invariable hostility to the 'environmentalist' position" in NEPA cases); see also Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 346-47 (1989) (characterizing Supreme Court precedent, including NEPA cases, as evidencing the Court's hostility toward environmental-protection law).

93. William H. Rodgers, Jr., *NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 ENVTL. L. 485, 497 (1990) ("The most impressive of these is an unbroken string of twelve Supreme Court decisions consistently rejecting interpretations advanced by environmental groups and accepting the narrower accounts espoused by the government as the NEPA defendant. In few walks of legal life has the Court demonstrated such a decided tilt in its choice of prevailing parties." (footnote omitted)); Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENVTL. L. 533, 549 (1990) ("[T]he United States Supreme Court has undone much of the promise of NEPA.").

94. Houck, *supra* note 39, at 185.

captain] is to the wreck of the Exxon Valdez.”⁹⁵ A third referred to the Court as having “conducted an unrelenting campaign against NEPA” and added that “NEPA has been the subject of particular—and unrelenting—judicial hostility.”⁹⁶ Finally, a leading practitioner, who was himself intimately involved in the drafting of the Council on Environmental Quality’s influential NEPA regulations, understandably described how he could “[n]ot be anything but grieved . . . by the consistently crabbed interpretations given NEPA by the Supreme Court.”⁹⁷

By NEPA’s fourth decade (2000–2010), the Court’s striking antipathy toward NEPA had become settled wisdom: “[The Court] has ‘never decided a case, or for that matter a single issue in a case, in favor of a NEPA plaintiff.’”⁹⁸ For this reason, it was not surprising that, when the Court handed down its most recent NEPA ruling, *Monsanto Co. v. Geertson Seed Farms*,⁹⁹ in June 2010, reversing a federal court of appeals ruling in favor of the environmental plaintiffs,¹⁰⁰ the immediate academic reaction in the environmental-law-professor community understandably characterized the Court’s ruling as “expected.”¹⁰¹

II. NEPA IN THE SUPREME COURT: A REAPPRAISAL

The basic statistics are certainly overwhelming. As a practical matter, only the Solicitor General’s petitions are ever granted, and then the Solicitor General always wins, almost always unanimously, with the Supreme Court reversing a lower court NEPA decision favorable to environmentalists. But these statistics do not tell a full or sufficiently accurate story. Despite the numbers, a closer look at the Court’s actions challenges the notion that the Court has been systematically hostile and unreceptive to NEPA. First, this Part reexamines

95. RODGERS, *supra* note 2, at 838 (“The popular account, which is close enough to the truth to bear repeating, is that the Supreme Court is to NEPA as Joseph Hazelwood is to the wreck of the Exxon Valdez. Twelve times the Court has taken NEPA cases and twelve times has decided in favor of the government. The decisions, collectively, are known as the NEPA ‘Dirty Dozen’ although a closer account shows not twelve but twenty-two NEPA issues have been subject to judicial pruning in these cases.”).

96. Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547, 561, 567 (1997).

97. Yost, *supra* note 93, at 539. The most notable exception to the notion that the Court’s hostility toward NEPA best explained NEPA plaintiffs’ loss streak was supplied by an article written by a career Department of Justice attorney who expressed the contrasting view that the government’s winning record was better understood as reflecting the Solicitor General’s careful selection of cases to be heard by the Court and NEPA plaintiffs’ reluctance to seek the Court’s review. See David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551, 555–57 (1990).

98. Jason J. Czarnezki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 STAN. ENVTL. L.J. 3, 10 (2006) (quoting Shilton, *supra* note 97, at 553); see MANDELKER, *supra* note 91, § 1:05 (“Neither has the Court been sympathetic to NEPA. Its decisions have diluted NEPA’s environmental decision making responsibilities.”).

99. 130 S. Ct. 2743 (2010).

100. *Id.* at 2749.

101. Law faculty posting to envlawprofessors@lists.uoregon.edu (June 21, 2010, 11:30 AM) (on file with author).

NEPA's success at the jurisdictional level, revealing the early embrace of NEPA by some Justices and exploring how factors beyond the Court's supposed hostility hurt NEPA's chances at review. Section B explains how the Court's decisions on the merits, while indisputably unfavorable to NEPA, often involve government litigation concessions or favorable dicta that complicate the picture. To be sure, the Court's treatment has been far from balanced in its results, and it has wholly eliminated the potential for substantive NEPA review, but there nonetheless has been significantly more nuance and balance in the Court's consideration of NEPA than has routinely been supposed.

A. JURISDICTIONAL STAGE

One threshold statistic missing from analyses of the Court's treatment of NEPA at the jurisdictional stage is the many NEPA petitions filed by business interests. NEPA petitions are not limited to those filed either by the Solicitor General or environmentalists. Business and economic-development interests also filed many petitions that, like those filed by the Solicitor General, argued that the lower courts had erred by applying NEPA too stringently.

What is striking, however, is that, with two limited exceptions, the only times those petitions have ever been granted were when the Solicitor General was also petitioning for review on behalf of a federal agency.¹⁰² Of the twenty-four occasions when business or other nonenvironmental interests have petitioned for NEPA review seeking a narrower construction of NEPA¹⁰³ and the Solicitor General did not support certiorari, the Supreme Court has granted review only twice, and, as described above,¹⁰⁴ those were hardly full-fledged government oppositions to the Court's review. In the first case, *Vermont Yankee*, the Solicitor General did not formally petition for certiorari, but rather notified the Court in a brief filed on behalf of the federal respondents that the Nuclear Regulatory Commission (but not the United States) favored the Court's granting of re-

102. See *Balt. Gas & Electric Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776 (1976); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289 (1975); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

103. Notably, the forty-two business NEPA petitions fall into two categories: two-thirds are cases in which business-development interests were seeking review of a lower court case that had ruled in favor of environmental plaintiffs and one-third are cases in which the business interests were themselves the NEPA plaintiffs, suing a federal agency for an alleged NEPA violation. The latter type of case may sound somewhat counterintuitive, but especially in NEPA's early years before federal courts started rejecting such business NEPA plaintiff suits on standing grounds, business interests often tried to invoke NEPA to challenge the legality of government action that might favor a business competitor. See, e.g., *Clinton Cmty. Hosp. Corp. v. S. Md. Med. Ctr.*, 510 F.2d 1037 (4th Cir.), cert. denied, 95 S. Ct. 2666 (1975). The Court, however, never granted certiorari on any of these business NEPA plaintiff cases.

104. See *supra* note 82 and accompanying text.

view.¹⁰⁵ In the second, more recent instance, *Monsanto Co. v. Geertson Seed Farms*, decided in 2010, the government did not similarly file split briefs at the jurisdictional stage, but the Solicitor General's opposition to plenary review was substantially hedged and made clear the depth of the lower court's error in ruling in favor of the environmental plaintiffs.¹⁰⁶ In both cases, as soon as the Court granted review, the government quickly sided with industry on the merits.¹⁰⁷ At least from the narrow perspective, therefore, business has been more (but not far more) successful at the jurisdictional stage than environmentalists. If the Solicitor General advises the Court that a government loss is not certworthy, the Court is extremely unlikely to grant a separate petition filed by industry.¹⁰⁸

With that said, the environmental and business petitioners are not similarly situated because the latter have enjoyed the benefits of the seven times that the Solicitor General petitioned along with them and review was granted. Still, the Court's consistent record of denying business NEPA petitions on almost every other occasion is inconsistent with the notion that the Court has been consistently hostile to NEPA. While it is certainly harder to persuade the Justices to grant review in cases where the federal agency with the most immediate stake opposes review even after losing in the lower courts, it is not insurmountable. In October Term 2008, for instance, the Court did just that twice, granting review in two Clean Water Act cases in which business interests petitioned for review and the Solicitor General opposed review although the federal agency had been aligned with the business interests in the lower court and lost.¹⁰⁹ Business went on to win both cases on the merits.¹¹⁰ For the same reason that the Court's granting of review in the Clean Water Act cases over the Solicitor General's

105. See Brief for the Federal Respondents on Petitions for Writs of Certiorari at 5–10, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (Nos. 76-419, 76-528, 76-548, & 76-745).

106. Brief for the Federal Respondents in Opposition at 10–16, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (No. 09-475).

107. See Reply Brief for the Federal Respondents Supporting Petitioner at 5–19, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (No. 09-475); Reply Brief for the Federal Respondents at 1–10, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978) (Nos. 76-419 & 76-528).

108. See, e.g., Cert Pool Memorandum at 1, *Sun Exploration & Prod. Co. v. Lujan*, 489 U.S. 1012 (1989) (No. 88-865) (Feb. 9, 1989) (on file with the Library of Congress, in *The Blackmun Papers*, *supra* note 20) (“Nothing in here would change anyone’s mind, since the SG says not to take the case, even though the Govt lost.”); Cert Pool Memorandum at 11, *Gen. Pub. Utils. Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096 (1981) (No. 80-382) (Nov. 13, 1980) (on file with the Library of Congress, in *The Blackmun Papers*, *supra* note 20) (concluding no review was necessary because the NRC was not seeking certiorari: “The Commission apparently believes that it can live with this decision, perhaps hoping that the CA will limit it or overrule it en banc in a future case”).

109. See Brief for the Federal Respondents in Opposition, *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009) (Nos. 07-984 & 07-990); Brief for the Federal Respondents in Opposition, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) (Nos. 07-588, 07-589, & 07-597).

110. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009); *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009). Even more striking, the petitioning businesses were merely

opposition is fair evidence of the Court's heightened interest in cutting back on that Act's requirements, the Court's failure over forty years to do so routinely in NEPA cases is fair evidence of the lack of such unqualified zeal.

A close look at the Court's jurisdictional NEPA rulings is also revealing in another significant respect. What has gone unnoticed in the scholarship is that the Court's initial reception of NEPA was not so uniformly unsympathetic to the new law. Almost immediately after NEPA passed and when it was first being implemented, several Justices proactively sought to boost NEPA's stature in a manner not unlike that achieved by Judge Skelly Wright in *Calvert Cliffs* and ultimately by CEQ. But those Justices repeatedly fell just shy of the votes necessary to do so. Moreover, long forgotten is the fact that the very first NEPA case the Court accepted for plenary review was a case brought to the Court by *environmentalists* and, were it not for intervening events that prompted the Court not to reach the merits, the Court's first opinion on the merits might well have broken a very different jurisprudential pathway.

The first NEPA-related case to come before the Court was *San Antonio v. Texas Highway Department*,¹¹¹ decided in 1970 before NEPA was even a year old. The case involved a challenge to federal funding of two segments of a highway in Texas. Although the case primarily related to the Secretary of Transportation's compliance with § 138 of the Federal Highway Act, the case also raised issues of compliance with NEPA because the Secretary had approved the funding in August 1970, eight months after NEPA's effective date, without any assessment of the related environmental impacts as required by NEPA. The Court denied the petition for a writ of certiorari before judgment, with three Justices dissenting in two separate opinions: one authored by Justice Hugo Black, which Justices Douglas and Brennan joined,¹¹² and the other authored by Justice Douglas, which Justices Black and Brennan joined.¹¹³

Justice Black's dissent described how the "case disturb[ed him] greatly" and elaborated upon the importance of NEPA as part of newly enacted "coordinated legislation designed to protect our Nation's environment from destruction by water pollution, air pollution, and noise pollution."¹¹⁴ The dissent by Justice Douglas was even more forceful. He stated that he "d[id] not think [the Court would] have a more important case [that] Term"¹¹⁵ and that NEPA's legislative history makes clear "that Congress has resolved that it will not allow federal agencies nor federal funds to be used in a predatory manner so far as the environment is concerned."¹¹⁶ In words prophetic of what Judge Skelly Wright

interveners in the lower courts. See Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 91–93 (2009), <http://yalelawjournal.org/2010/01/24/lazarus.html>.

111. 400 U.S. 968 (1970).

112. *Id.* at 968–72 (Black, J., dissenting).

113. *Id.* at 972–78 (Douglas, J., dissenting).

114. *Id.* at 968, 971 (Black, J., dissenting).

115. *Id.* at 977 (Douglas, J., dissenting).

116. *Id.* at 978.

would write a few months later in *Calvert Cliffs*, Justice Douglas admonished that the Court should “let the bureaucracy know that [NEPA] § 102(2)(C) is the law of the land to be observed meticulously.”¹¹⁷ With only three votes for certiorari, however, the Court denied review.¹¹⁸

A few months later, in *2,606.84 Acres of Land in Tarrant County, Texas v. United States*,¹¹⁹ Justices Douglas and Black again sought to inject NEPA into a case pending on petition for a writ of certiorari, but they lacked the four votes necessary for plenary review. The legal issue decided by the lower courts pertained to whether the federal government’s action exceeded the congressional grant of eminent domain authority by condemning more property than necessary for the construction of a dam. In dissenting from the Court’s denial, Justices Douglas and Black both complained that NEPA may have been violated and appended a copy of § 102(2)(C).¹²⁰

What the early NEPA cases reveal, moreover, is more than just several Justices vigorously dissenting from denials of certiorari. They reveal a Court—not just a few isolated Justices—taking seriously both NEPA and the concerns of environmentalists. Two cases in particular offer counterexamples to the conventional notion that the Court has consistently been hostile to NEPA.

In the first case, *Committee for Nuclear Responsibility, Inc. v. Schlesinger*,¹²¹ environmentalists applied to the Court in November 1971 for an injunction based on an alleged NEPA violation. Injunctive relief is always considered extraordinary, but the nature of this request far exceeded even the normal bounds of what is considered extraordinary. The environmental applicants sought to enjoin the Atomic Energy Commission (AEC) from detonating a nuclear device offshore from Alaska on the ground that the AEC had violated NEPA. The request was made on a Thursday, most of the Justices did not even see the papers until Friday morning, and the AEC was scheduled to explode the

117. *Id.*

118. It was plainly a close question whether certiorari would be granted in this case. It takes four Justices to grant review and four Justices—Black, Douglas, Brennan, and Marshall—dissented from the Court’s decision on December 18, 1970, to vacate the stay of the lower court’s mandate that the Court had previously granted. *See* *San Antonio Conservation Soc’y v. Tex. Highway Dep’t*, 400 U.S. 968 (1970); *San Antonio Conservation Soc’y v. Tex. Highway Dep’t*, 400 U.S. 939 (1970). The papers of Justice Blackmun also further reveal that Blackmun’s law clerk recommended in favor of Court review. Clerk Memorandum on Certiorari at 7, 400 U.S. 968 (1970) (No. 1101) (on file with the Library of Congress, in *The Blackmun Papers*, *supra* note 20). Nothing in those papers indicates why the Justice voted against review. The papers of Justice Douglas also demonstrate the particularly keen interest Douglas harbored in the case. Douglas’s files for *San Antonio* included a cut-out article from the *New York Times*, dated December 14, 1970, the same day the certiorari petition was filed, on NEPA and how some believed that the executive branch was undermining the law’s ability “to achieve the act’s purpose of making the Federal Government, in its own undertakings a protector of the environment rather than a contributor to its impairment.” E.W. Kenworthy, *U.S. Environment Law Attacked*, N.Y. TIMES, Dec. 14, 1970 (on file with the Library of Congress, in *The Douglas Papers*, *supra* note 16).

119. 402 U.S. 916 (1971).

120. *Id.* at 920–22 (Douglas, J., dissenting).

121. 404 U.S. 917 (1971).

bomb on Saturday afternoon.¹²² The Court did not, however, just deny the request in a peremptory fashion. The Justices instead took the unusual step of scheduling oral argument on Saturday morning for the Solicitor General and the environmental counsel.¹²³ After hearing argument, the Court denied the request by the slimmest of margins—a four-to-three vote.¹²⁴ Three Justices (Douglas, Brennan, and Marshall) published dissents.¹²⁵

In the other case, *Upper Pecos Ass'n v. Peterson*,¹²⁶ the Court granted the environmentalist petition for certiorari with the intent to issue an opinion of the Court following briefing and oral argument. This was in fact the first NEPA case that the Court ever accepted at the request of any party, and it was an environmentalist petition, not a government petition. It is simply not true, therefore, that the Court has never granted a cert petition filed by environmentalists seeking to overturn a lower court ruling that failed to find a NEPA violation. The environmentalists' petition faulted the lower court for failing to require a federal agency to prepare an EIS prior to making a grant for the construction of

122. The Papers of Justices Brennan, Douglas, and Blackmun reveal what happened during the Court's deliberations. Justice Brennan's Papers include the most detailed account, including his chambers' suggestion that the Chief Justice might have deliberately delayed circulation of the filings in the case to prejudice the chances of the applicants obtaining an injunction, because his law clerks prepared a formal summary of what happened in their end-of-term summary of significant developments during the Term. See October Term 1971 Case Summaries, No. A-483—Committee for Nuclear Responsibility v. Schlesinger, CXI-CXII (on file with the Library of Congress, in The Brennan Papers, *supra* note 19).

123. *Id.* at CXI. The arguing counsel for the environmental applicants was David Sive, who had a long and distinguished career in environmental law and is frequently described as the “grandfather” or “father” of modern environmental law. See, e.g., *Biography of David Sive*, PACE LAW SCH., http://www.pace.edu/page.cfm?doc_id=29839 (last visited Feb. 7, 2012); *Environmental Law Program*, UNIV. OF HAW. SCH. OF LAW, <http://www.hawaii.edu/elp/brochure/elpfaculty.html> (last visited Feb. 7, 2012); *Careers*, SIVE, PAGET & RIESEL P.C., <http://www.sprlaw.com/careers/index.shtml> (last visited Feb. 7, 2012). Interestingly, when questioned at argument, Sive declined to press a substantive NEPA argument and instead limited himself to NEPA's procedural mandate. He stated that the environmental plaintiffs were not asking the Justices themselves “to weigh the impact of the proposed detonation upon the environment” because “[t]hat's no business of the Court,” and that “the merits of the case go to the legal sufficiency of the impact statement under Section 102(c) of the Act.” Transcript of Oral Argument at 20–21, *Comm. for Nuclear Responsibility*, 404 U.S. 917 (No. A-483). The rushed nature of the argument showed: the Solicitor General, Erwin Griswold, could not recall the name of CEQ and had to be prompted, according to the official Supreme Court transcript, by “A Voice.” See *id.* at 46 (“The Environmental—what is Mr. Train's? It's got a Q in it. . . . A Voice: Council on Environmental Quality.”).

124. The conference notes prepared by Justices Douglas and Blackmun both detail the comments made by the seven Justices present during the deliberations and confirm that the final vote was four-to-three in favor of denying the injunction. See Harry A. Blackmun, Conference Notes, *Comm. for Nuclear Responsibility*, 404 U.S. 917 (No. A-483) (Nov. 6, 1971) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20); William O. Douglas, Conference Notes, *Comm. for Nuclear Responsibility*, 404 U.S. 917 (No. A-483) (Nov. 6, 1971) (on file with the Library of Congress, in The Douglas Papers, *supra* note 16). At the time, there were only seven Justices on the Court because Justices John Harlan and Hugo Black both retired in September 1971.

125. *Comm. for Nuclear Responsibility*, 404 U.S. 917 (Douglas, J., dissenting); *id.* at 930 (Brennan & Marshall, JJ., dissenting).

126. 406 U.S. 944 (1972).

a road through a national forest.¹²⁷

The reason the case is long forgotten, and why environmentalists have never won a NEPA case on the merits, is that six months after granting review, the Court, at the suggestion of the Solicitor General, vacated the lower court judgment and remanded the case for consideration of whether the case had become moot.¹²⁸ The Solicitor General filed the mootness suggestion after petitioner filed its brief on the merits and instead of responding on the merits to petitioner's brief.¹²⁹ The Court, accordingly, never heard oral argument in the case. The grounds for mootness, moreover, were tantamount to a confession of error because the Solicitor General confirmed that the federal agency had since decided to prepare the EIS sought by the environmental petitioners and would not contest NEPA's applicability in the future.¹³⁰ Environmentalists were therefore denied a favorable Supreme Court opinion, ironically, only because their case was so strong on the merits that the federal government in effect surrendered rather than file an opposing brief on the merits. The Court's decision to remand therefore hardly evidences judicial hostility. For all practical purposes, the environmental petitioners won the *Upper Pecos* case. The first NEPA case granted review by the Supreme Court therefore was an environmental win, not a loss.¹³¹

It was in the aftermath of these first few years that the now-established pattern of denying certiorari to environmental NEPA petitions began. With Justice Black's departure from the Court, Justice Douglas was left alone in dissenting from the Court's denials of NEPA petitions. None of the other Justices on their own initiative displayed a similarly heightened interest in ensuring that NEPA was stringently applied to federal agency action. And, especially during his final years on the Court, Justice Douglas proved to be anything but effective in persuading other Justices to share his concern. Because of his exceedingly erratic behavior, he so lacked credibility with the rest of the Court that his alignment with environmentalism and NEPA at the very least

127. Brief for the Petitioner at 4–6, *Upper Pecos Ass'n*, 406 U.S. 944 (No. 71-1133).

128. *Upper Pecos Ass'n*, 409 U.S. 1021 (1972).

129. See Memorandum for the Respondents Suggesting Mootness, *supra* note 81.

130. *Id.* at 4–5 & n.3.

131. There is no doubt a back story on what led to the government's effective confession of error and suggestion of mootness after initially opposing unsuccessfully the petition for certiorari. Six days before certiorari was granted, CEQ issued a memorandum that expressly addressed some of the legal issues raised in the then-pending *Upper Pecos* petition in a manner seemingly favorable to the environmental petitioners. See *id.* at 7–8 (reproducing, in an appendix, the CEQ memorandum of May 16, 1972). In their opening brief, the environmental petitioners subsequently cited and quoted at length from the CEQ memorandum in support of their contention that the lower court had erred. Brief for the Petitioner, *supra* note 127, at 24–25. The government's suggestion of mootness, filed three months later, was based on the CEQ memorandum. See Memorandum for the Respondents Suggesting Mootness, *supra* note 81, at 4–5. It is even possible that the CEQ memorandum was then-Chair Russell Peterson's attempt to undermine the legal arguments that the Solicitor General was making in the case. If so, the memorandum was exceedingly effective in the short term, although the longer term cost may well have been a potentially favorable Supreme Court NEPA opinion soon after the statute's enactment. See *infra* notes 351–54 and accompanying text.

undermined his advocacy in favor of environmental-protection concerns and may have even discredited the environmentalists' positions in the cases.¹³² Justice Douglas may have sought to champion environmental concerns, but he was far from a champion in actual impact on the Court's jurisprudence. As discussed below,¹³³ his sponsorship may instead have been counterproductive.

The environmental NEPA petitions also suffered from inherent features that made favorable jurisdictional determinations exceedingly unlikely without an effective champion on the Court. In particular, as revealed by the memoranda prepared by the law clerks in considering whether to recommend granting environmental NEPA petitions, the Solicitor General was invariably successful at characterizing such petitions as presenting either little more than unimportant, fact-bound applications of NEPA or questions that would soon become effectively moot.

There are structural reasons endemic to NEPA litigation that render NEPA petitions filed by environmental plaintiffs especially susceptible to these modes of opposition by the Solicitor General. First, as a practical matter, NEPA cases almost only arise in the context of case-by-case application. There are few, if any, nationwide rule makings purporting to implement NEPA, as regularly occurs with laws like the Clean Air or Clean Water Acts. Questions about NEPA tend to arise in site-specific circumstances like the expenditure of federal funds for a project, the issuance of a federal permit, license, or lease for an activity, or a federal agency's implementation of a program. And most NEPA-related legal issues present questions of degree—for example, whether impacts are “significant” or whether there is a reasonable “range” of alternatives—rather than the kind of sweeping, threshold jurisdictional questions more likely to attract the attention of the Justices. An environmentalist petition is thus especially susceptible to being characterized as little more than a “fact-bound” application of NEPA.¹³⁴

132. Cf. MURPHY, *supra* note 14, at 481–95 (describing Justice Douglas's medical problems and behavior in his final year on the Court).

133. See *infra* section III.B.1.

134. See, e.g., Clerk Memorandum on Certiorari to Justice Thurgood Marshall, Vill. of Los Ranchos de Albuquerque v. Barnhart, 498 U.S. 1109 (1991) (No. 90-783) (Feb. 11, 1991) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17) (“[T]his petn. essentially disputes the application of law to facts.”); Cert Pool Memorandum at 6, Portland Audubon Soc’y v. Lujan, 494 U.S. 1026 (1990) (No. 89-931) (Mar. 8, 1990) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (recommending denial of certiorari because of, inter alia, the “fact specific holding”); Cert Pool Memorandum at 4, Dickison v. Goldschmidt, No. 80-464 (Nov. 3, 1980) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (noting in handwriting that “I am troubled about the factual correctness . . . Nonetheless, the case is purely factual”); Cert Pool Memorandum at 5, Save the Bay, Inc. v. U.S. Corps of Eng’rs, 449 U.S. 900 (1980) (No. 80-171) (Sept. 26, 1980) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (“In any event, petr has offered no convincing argument for review by this Court of the essentially factual issues presented here.”); Cert Pool Memorandum at 9, Life of the Land v. Brinegar, 416 U.S. 961 (1974) (No. 73-1088) (Apr. 10, 1974) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (handwritten note characterizing as a factual issue the degree of interested party participation in the drafting of an EIS); Clerk Memorandum on Certiorari to Justice William O. Douglas, Citizens Envtl.

Second, environmental NEPA petitions are less likely to look significant to the Justices (and their clerks) for the simple, albeit seemingly unfair, reason that the environmentalists lost in the lower courts, and therefore no extraordinary relief has been granted to stop an activity of allegedly national import. When environmentalists have won in the lower court, the Solicitor General will typically be able to point out how the lower court judgment is enjoining a significant, ongoing federal agency action. A lower court entering the extraordinary remedy of an injunction to prevent executive branch action makes a case seem more important. It is natural that the Justices would feel more inclined to intercede in those circumstances to ensure that the lower court has acted correctly. But when environmentalists have lost, they can of course make no comparable claim. There is nothing equally extraordinary about the absence of an injunction and no clearly compelling, immediate reason not just to wait for the next case.¹³⁵ Moreover, precisely because the challenged impact statement is inadequate, there is invariably less in the record before the court to document the significant environmental damage that may occur without an injunction. Consequently, the impact statement's inadequacy perversely makes it harder for the environmental plaintiffs to make the showing of irreparable injury needed to obtain equitable relief.

The third reason revealed by the cert pool memos as to why environmental NEPA petitions are systematically disadvantaged at the jurisdictional stage relates to the dynamic nature of NEPA litigation. The primary purpose of NEPA, of course, is to ensure full consideration of significant environmental impacts

Council v. Brinegar, 416 U.S. 936 (1974) (No. 73-943) (Mar. 27, 1974) (on file with the Library of Congress, in The Douglas Papers, *supra* note 16) (noting that the case “would seem to be principally a factual matter not warranting review”); Cert Pool Memorandum at 13, New York v. U.S. Dep’t of Transp., 465 U.S. 1055 (1984) (No. 83-770) (Feb. 21, 1984) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (characterizing question whether environmental assessment is sufficient as “highly fact specific”); Cert Pool Memorandum at 7, Fugate v. Arlington Coal. on Transp., 409 U.S. 1000 (1972) (No. 72-218) (Oct. 20, 1972) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (summarizing the Solicitor General’s claim that the case was fact-bound).

135. See, e.g., Cert Pool Memorandum at 6, Indiana v. Scottsdale Mall, 434 U.S. 1008 (1978) (No. 76-1609) (June 30, 1977) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (suggesting that “little harm would be done by letting [the] issue percolate in the [courts of appeals] for a while”); Pool Memorandum, Application for Recall and Stay of CA 8 Mandate at 3, Minn. Pub. Interest Research Grp. v. Sec’y of Agric., 429 U.S. 935 (1976) (No. A-339) (Oct. 28, 1976) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (“This is the sort of case where the irreversible nature of the damage would normally justify a stay, despite what appears to be a weak case on the merits. However, I do not think it is good policy to allow ‘public interest’ groups to tie up governmental action indefinitely with this kind of legal strategy.”); Cert Pool Memorandum at 6–7, Evtl. Def. Fund v. Stamm, 416 U.S. 974 (1974) (No. 73-1179) (Apr. 17, 1974) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (“The Court will want to clear up the standard of review matter at some point, but I am not convinced this case is the one in which to do it.”); Cert Pool Memorandum at 7, Nat’l Helium Corp. v. Morton, 416 U.S. 993 (1974) (No. 73-1120) (Apr. 10, 1974) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (suggesting that though the substantive issue of NEPA “must ultimately be faced by the Court, this is probably not a good case in which to do so”).

before a federal agency has decided on a course of action. For that same reason, once a federal agency has made a decision, NEPA's power has already begun to diminish. A court can require an agency to go back and decide again, but that is plainly not as meaningful as having the agency take into account environmental consequences from the outset. Moreover, once the agency decision-making process has advanced beyond the formal decision to actual agency action implementing that decision, the practical significance of a court's requiring NEPA consideration diminishes rapidly.¹³⁶

The reason that this dynamic prejudices environmental NEPA petitions is that environmentalists, for obvious reasons, petition only when they have lost in the lower court, which means they have been unable to secure an injunction barring the planned federal agency action. Accordingly, by the time the case reaches the Supreme Court, the agency has invariably gone far beyond the decision-making stage and has at least begun, if not completed, its planned activity. Both the practical significance of requiring compliance with NEPA and the odds of a court being willing to issue an injunction are sharply curtailed in such circumstances. Of course, a Solicitor General NEPA petition does not present similar problems of diminishing significance over time. Indeed, just the opposite is often the case. The Solicitor General can use the rising costs of delay associated with a lower court injunction as an exigency favoring Supreme Court review.

Of course, the reasons for environmentalists' abysmal record at the NEPA jurisdictional stage do not change the numerical bottom line: not one grant of certiorari that has led to a decision on the merits in more than forty years. But the structural reasons, including certain endemic features of NEPA litigation, suggest a different, fuller, and fairer understanding of the role of the Supreme Court and the Justices in producing such a record than the simple antipathy toward NEPA often claimed.

136. See, e.g., Cert Pool Memorandum at 10, *Pub. Citizen v. Office of U.S. Trade Representative*, 510 U.S. 1041 (1994) (No. 93-560) (Dec. 27, 1993) (on file with the Library of Congress, in *The Blackmun Papers*, *supra* note 20) ("The case is moot—NAFTA's been passed."); Cert Pool Memorandum at 7, *Town of Huntington v. Marsh*, 494 U.S. 1004 (1990) (No. 89-781) (Jan. 18, 1990) (on file with the Library of Congress, in *The Blackmun Papers*, *supra* note 20) ("[T]he Corps' new EIS is nearly done. While the case is not technically moot, this makes the issue of whether pets are entitled to suspension of the dumping somewhat less urgent."); Cert Pool Memorandum at 6, *Gee v. Boyd*, 471 U.S. 1058 (1985) (No. 84-1062) (Apr. 2, 1985) (on file with the Library of Congress, in *The Blackmun Papers*, *supra* note 20) (acknowledging a circuit conflict and disagreeing with the Solicitor General that the conflict was merely a "semantic quibble," but noting that "the project at issue . . . ha[d] been substantially completed," raising a threshold question of mootness); Cert Pool Memorandum at 4, *Tex. Comm. on Natural Res. v. Bergland*, 439 U.S. 966 (1978) (No. 78-485) (Oct. 31, 1978) (on file with the Library of Congress, in *The Blackmun Papers*, *supra* note 20) ("With regard to whether an EIS should have been issued for clear-cutting prior to the development of the land management plans, that issue is timebound since those plans must be developed as of this month."); Cert Pool Memorandum at 6, *Citizens Envtl. Council v. Brinegar*, 416 U.S. 936 (1974) (No. 73-943) (Mar. 23, 1974) (on file with the Library of Congress, in *The Blackmun Papers*, *supra* note 20) (acknowledging that the case presented a potentially certworthy issue, but suggesting that it "hardly seems like an appropriate vehicle" because the Court was presented "with a fait accompli").

B. MERITS STAGE

As with the Court's jurisdictional rulings, the bottom line is unshakeable—the environmental plaintiffs lost all seventeen NEPA cases decided by the Supreme Court on the merits. In each case, the environmentalists secured a favorable judgment in the lower courts and then lost that favorable judgment in the Supreme Court. That basic proposition cannot be gainsaid.

But in the world of environmental litigation, as in the world of litigation generally, not all losses on the merits are created equal. A litigation result is not, at the end of the day, truly susceptible to binary analysis as simply a “win” or a “loss.” To understand the significance of a court's ruling, one must consider the scope of legal issues before that court, the full panoply of related legal arguments made, the concessions extracted during the course of the litigation, the unfavorable and favorable dicta included in the opinion, and the practical effect of the rulings on the parties, including the opportunities left to the non-prevailing party on remand or in future litigation.

For instance, the government may achieve a “victory” in the Supreme Court only after first conceding or otherwise abandoning a significant legal argument that they had vigorously pressed in the lower courts.¹³⁷ Or, while technically ruling in favor of the government by reversing a lower court judgment won by environmental plaintiffs, the Supreme Court may reject the most significant legal arguments advanced by the government, which were often what made the case potentially important in the first place.¹³⁸ Or the Supreme Court opinion, though again reversing a judgment that environmental plaintiffs had favored, may include dictum that environmental plaintiffs can effectively exploit in future cases.¹³⁹ Favorable dictum in a court opinion, especially a Supreme Court opinion, can sometimes prove to have a more meaningful judicial half-life than a narrow holding in the longer term. Therefore, there is sometimes truth to the paradoxical notion that one can win by losing.

A more probing, in-depth analysis of the Court's NEPA cases reveals instances of each of these phenomena, challenging the conventional wisdom that the Court's rulings reveal a one-sided antipathy to NEPA from virtually all of the Justices (since Justice Douglas left the Court). The Court repeatedly rejected legal arguments that would have narrowed NEPA's mandate to a much greater extent than accomplished by the Court's final opinion.¹⁴⁰ The government's victories were sometimes produced only because the government had effectively conceded legal arguments that it had pressed unsuccessfully in the lower courts.¹⁴¹ Within the Court's opinions, even in the course of reversing a judgment favorable to environmentalists, there are descriptions of NEPA's reach

137. See, e.g., *infra* notes 178–82 and accompanying text.

138. See, e.g., *infra* note 157 and accompanying text.

139. See, e.g., *infra* notes 170–72 and accompanying text.

140. See, e.g., *infra* note 157 and accompanying text.

141. See, e.g., *infra* notes 178–82 and accompanying text.

and mandate that promote, rather than undercut, the statute's significance. Indeed, in some cases it was only because of the narrowness of the ruling, the rejection of broader arguments, and the government's concessions and abandonments of lower court arguments, and only after much negotiation and disagreement among the Justices, that the unanimity evident in the final product was possible. Hence, rather than reflecting either antipathy or apathy, unanimity was sometimes the result of active and sustained engagement by the Justices, including some who were supportive of NEPA's goals.

To be sure, the losses outweigh the gains achieved in the High Court. NEPA would almost certainly be more powerful today had the Court never granted review in a NEPA case. But the fuller picture is more accurate than the conventional wisdom and presents a less skewed view of the Court's treatment of NEPA. Such a reappraisal also, as more fully elaborated upon in Part III, provides an opportunity for a far better understanding of the decision-making process within the Court more generally.

To provide that fuller picture in support of the proffered reappraisal, the Court's seventeen NEPA cases are revisited below. A closer look at the decisions provides a fuller context for evaluating the Court's rulings and the overall impact of its opinions. Such a look reveals important environmental victories hidden among the obvious losses.

1. *United States v. Students Challenging Regulatory Agency Procedures* (1973) (*SCRAP*).¹⁴²

In *SCRAP*, the federal government challenged a ruling by a three-judge panel of the District Court for the District of Columbia that enjoined the Interstate Commerce Commission (ICC) from permitting railroads to collect a proposed surcharge on the ground that the ICC had violated NEPA by failing to consider adequately the adverse impact of the surcharge on recycling.¹⁴³ The Court reversed. Justice Potter Stewart wrote the opinion for the Court, which was joined in full by Justices William Brennan and Harry Blackmun, in part by Justices Douglas and Thurgood Marshall, and in other parts by Chief Justice Warren Burger and Justices Byron White and William Rehnquist. The Court held that NEPA did not authorize a judicial injunction in these circumstances because Congress had, in another statute, deliberately extinguished the judicial power to issue an injunction against the ICC and vested exclusive jurisdiction in the ICC to suspend rate increases pending a final determination of their lawfulness.¹⁴⁴ NEPA, the Court explained, "was not intended to repeal by implication any other statute."¹⁴⁵ Five Justices dissented from different parts of the opinion, but there was always a majority for each part.

142. 412 U.S. 669 (1973).

143. *Id.* at 681–82.

144. *Id.* at 690–91.

145. *Id.* at 694.

But notwithstanding the Court's reversal of the lower court's NEPA-based injunction, *SCRAP* is widely credited as the Court's high water mark for environmental citizen-suit standing. The Court held that the environmental plaintiffs possessed standing even though their allegations of injury turned on an extraordinarily attenuated causal chain—allegations that the rates charged by railroads for freight would indirectly discourage recycling, which would in turn promote waste disposal that would adversely affect the forests, rivers, and mountains used by *SCRAP* members. The ruling effectively reduced standing barriers for citizen suits for decades until *Lujan v. National Wildlife Federation*¹⁴⁶ in 1990.

In contrast to its broad standing ruling, the Court's NEPA ruling was extremely narrow. It was expressly linked to a peculiar aspect of law limited to the ICC and its authority to suspend railroad rates. There is also reason to believe that it was only because of that narrowness and the expansive view on standing that Justice Stewart had a majority. Justice Brennan at conference apparently voted to affirm.¹⁴⁷ Justice Blackmun at conference reportedly complained that “agencies [were] dragging their feet,”¹⁴⁸ and his personal notes about the case further asserted that the case concerned “a new stat[ute and] a new [and] recognized problem” that sought to promote “a profound policy.”¹⁴⁹ Indeed, Justice Stewart's original draft opinion for the Court indicated that “while sufficient injury to individual interests ha[d] been alleged, it [was] doubtful whether the allegations [could] be proved,” and that “substantial individual injury must be proved to justify equitable relief.”¹⁵⁰ It was only after Justice Blackmun threatened to dissent on that ground, thereby denying Justice Stewart his majority, that Justice Stewart agreed to take out the language in order “that the deletions [he had] made [would] enable [Blackmun] to join the opinion *in toto*.”¹⁵¹

146. 497 U.S. 871 (1990).

147. William O. Douglas, Conference Notes at 1, *SCRAP*, 412 U.S. 669 (No. 72-523) (Mar. 2, 1973) (on file with the Library of Congress, in The Douglas Papers, *supra* note 16) (“WJB: There is standing under *Sierra Club* case . . . affirm.”).

148. *Id.* at 2.

149. Harry A. Blackmun, Handwritten Notes at 1, *SCRAP*, 412 U.S. 669 (Nos. 72-535 & 72-563) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20). These same case notes, which it was his custom to prepare before argument and conference, show Blackmun first writing that the railroads “cannot prevail” on the merits and then seeming to cross out the “cannot.” *Id.* at 2.

150. Clerk Memorandum to Justice Harry A. Blackmun at 2, *SCRAP*, 412 U.S. 669 (No. 72-523) (May 17, 1973) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

151. Letter from Justice Potter Stewart to Justice Harry A. Blackmun, *SCRAP*, 412 U.S. 669 (No. 72-523) (June 6, 1973) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20); *see also* Letter from Justice Harry A. Blackmun to Justice William J. Brennan, Jr., *SCRAP*, 412 U.S. 669 (No. 72-523) (June 6, 1973) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

2. *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures* (1975) (*SCRAP II*).¹⁵²

In *SCRAP II*, the federal government challenged a ruling by a three-judge panel of the District Court for the District of Columbia vacating an ICC investigation into the lawfulness of railroad-freight-rate increases and ordering the agency to prepare a new EIS, hold hearings, and reconsider its decision to permit the rate increases.¹⁵³ Before the district court, *SCRAP* had successfully contended that the underlying rate structure, coupled with the rate increase, would adversely affect recycling.¹⁵⁴ The Court reversed in an opinion written by Justice White, which was joined in full by Chief Justice Burger and Justices Brennan, Stewart, Marshall, Blackmun, and Rehnquist. Justice Powell did not participate in the decision. The Court held that the ICC had prepared an adequate EIS not to declare unlawful a general rate increase that was neutral on its face.¹⁵⁵ The Court also rejected the conclusion that the ICC had to start administrative proceedings from the beginning after it decided to prepare a formal impact statement.¹⁵⁶

Nevertheless, the Court's holding was exceedingly narrow, concluding only that, in light of the ICC's discretion to delay discrimination claims arising in general-revenue proceedings and the ICC's ongoing exploration of environmental issues in other proceedings, the ICC's EIS was adequate. In reaching that ruling, the Court rejected broader arguments made by petitioners, including the railroad's argument that there was no district court authority to review the ICC decision in the first instance. The Court also expressly limited its holding to nonfinal, facially nondiscriminatory decisions made in general revenue proceedings, and intimated that a more thorough EIS would be required of the ICC in "answering challenges to rates on individual commodities or categories thereof . . . which may raise the most serious environmental issues."¹⁵⁷

The Justices and their clerks were aware of the narrowness of the ruling and relied upon that narrowness in agreeing to join the opinion. Justice Blackmun noted that the petitioners "seem to accept some measure of substantive review."¹⁵⁸ His clerk, upon reviewing Justice White's draft opinion, noted that the opinion "would be rendering a distinctly limited holding," in a manner not unlike that which the clerk had previously informed the Justice would be a fair basis for reversing.¹⁵⁹ Justices Marshall and Brennan had originally indicated

152. 422 U.S. 289 (1975).

153. *Id.* at 303-04.

154. *Id.* at 302-04.

155. *Id.* at 322-23, 326.

156. *Id.* at 319-20.

157. *Id.* at 317, 322-24, 326.

158. Harry A. Blackmun, Pre-Argument Notes at 4, *SCRAP II*, 422 U.S. 289 (Nos. 73-1966 & 73-1971) (Mar. 25, 1975) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

159. Clerk Memorandum to Justice Harry A. Blackmun, *SCRAP II*, 422 U.S. 289 (Nos. 73-1966 & 73-1971) (June 6, 1975) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

their intent to dissent and only at the very end of the process decided to join Justice White's opinion.¹⁶⁰ Justice Douglas alone dissented when the Court's opinion was finally announced, and, because of Douglas's rapidly deteriorating health, he was incapable of lobbying effectively for his position.¹⁶¹

3. *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma* (1976).¹⁶²

In *Flint Ridge*, the federal government challenged a Tenth Circuit decision requiring the Department of Housing and Urban Development (HUD) to issue an EIS before allowing developers' disclosure statements to become effective.¹⁶³ The Court reversed in an opinion by Justice Marshall, which was joined in full by Chief Justice Burger and Justices Brennan, Stewart, White, Blackmun, Rehnquist, and Stevens. Justice Powell did not participate in the case. The Court held that "preparation of an impact statement is inconsistent with the Secretary's mandatory duties under the Disclosure Act" to make disclosure statements effective within thirty days of filing.¹⁶⁴

This case is one of the best illustrations of the fact that not all Supreme Court losses are created equal. Justice Marshall reversed on narrow grounds with virtually no precedential effect while maximizing the amount of dicta favorable to environmentalists. Significantly, Marshall declined to embrace the broader arguments advanced by the federal government. First, he did not accept the Solicitor General's contention that the administrative burdens associated with NEPA compliance should be a reason to read the law's requirements more

See also Clerk Bench Memorandum to Justice Harry A. Blackmun at 19, *SCRAP II*, 422 U.S. 289 (Nos. 73-1966 & 73-1971) (Mar. 19, 1975) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("The Court might hold, narrowly, that this particular impact statement under these circumstances constituted compliance with NEPA. I would recommend, therefore, reversing the court below.").

160. After White circulated his opinion, Marshall circulated his intent to dissent before changing his mind. *Compare* Letter from Justice Thurgood Marshall to Justice Byron R. White, *SCRAP II*, 422 U.S. 289 (Nos. 73-1966 & 73-1971) (June 6, 1975) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("In due course I will circulate a dissent in this case.") with Letter from Justice Thurgood Marshall to Justice Byron R. White, *SCRAP II*, 422 U.S. 289 (Nos. 73-1966 & 73-1971) (June 18, 1975) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("Dear Byron: Please join me.").

161. Justice Douglas suffered a severe stroke in the final weeks of 1974 and literally broke out of his hospital to attend arguments during the week *SCRAP II* was argued. MURPHY, *supra* note 14, at 481–85. He invited reporters to his office but proved essentially incoherent. *Id.* at 486–87. The notes of Justice Blackmun on the conference discussion held by the Justices following the oral argument in *SCRAP II* indicate that when it was Douglas's turn to speak, there was a "long pause [for] 15 minutes." Harry A. Blackmun, Conference Notes at 1, *SCRAP II*, 422 U.S. 289 (Nos. 73-1966 & 73-1971) (Mar. 28, 1975) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20). Not long after, the Justices themselves decided to take action to persuade Justice Douglas to resign, which he finally did the following fall. MURPHY, *supra* note 14, at 492–94.

162. 426 U.S. 776 (1976).

163. *Id.* at 783–84. The Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701–1721 (2006), requires these disclosure statements before developers may sell lots in interstate commerce. 15 U.S.C. § 1703 (2006); *Flint Ridge*, 426 U.S. at 778–79.

164. *Flint Ridge*, 426 U.S. at 787.

narrowly.¹⁶⁵ Second, Marshall declined to accept the Solicitor General's contention that this case was merely an instance of "minor" federal action because the federal government's role in approving private development was so limited.¹⁶⁶

Third, and more remarkably, Marshall declined to adopt the even broader reasoning (also advanced by the Solicitor General) that the other Justices thought, in light of their discussions at conference, would serve as the basis of the Court's opinion—the absence of statutory authority under its own statute for the agency to take environmental considerations into account.¹⁶⁷ Such reasoning would have been flatly inconsistent with Judge Wright's opinion in *Calvert Cliffs*, which stated that NEPA meant federal agencies, like the Atomic Energy Commission, could no longer use the absence of such statutory authority as a defense to NEPA compliance.¹⁶⁸ To the surprise of the other Justices, Marshall's opinion ignored that argument altogether and instead relied on the entirely statute-specific notion that NEPA EIS compliance was not required because of the exceedingly short time frame applicable to the decision-making process of the particular agency at issue in the case.¹⁶⁹ Whereas *Flint Ridge* as ultimately drafted had virtually no precedential effect, a Supreme Court holding on any of these three broader grounds would have sharply limited NEPA's reach.

Finally, Marshall filled his opinion with as much NEPA dicta favorable to environmentalists as he could muster, while keeping his majority. He made clear that NEPA's command that its requirements applied "to the fullest extent

165. See Harry A. Blackmun, Pre-Argument Notes at 4, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (Apr. 26, 1976) (on file with the Library of Congress, in *The Blackmun Papers*, *supra* note 20) ("The SG argues that the decisions below rest on a fundamental misinterpretation of the ILSDA and of NEPA and would render impossible the proper administration of the Disclosure Act. There are currently on file 7,000 effective filings from developers. On the [Tenth Circuit] Court of Appeals's reasoning, HUD has to prepare an EIS with respect to each. This is a crushing administrative burden and exceeds the total prepared by all federal agencies during the first four and a half years of NEPA. A statement might also be required whenever there is an amendment of a prior filing. These amount to 3,000 annually.").

166. Transcript of Oral Argument at 11, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545):

Mr. Shapiro: . . . really what we are saying is that you cannot turn major private action into major federal action even by virtue of—

Question: By virtue of minor participation by the Federal Government.

Mr. Shapiro: That is exactly the point, your Honor

167. Cert Pool Memorandum at 6, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (Dec. 1, 1975) (with *The Blackmun Papers*, *supra* note 20) (summarizing the Solicitor General's argument that "[t]he purpose of NEPA, to make agencies consider environmental factors in their decision-making, does not apply in the case of the Disclosure Act, since HUD has no substantive authority over the developer and does not even pass on the 'merits' of his project").

168. See *supra* notes 55–57 and accompanying text.

169. Clerk Memorandum to Justice Harry A. Blackmun at 1, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (June 3, 1976) (on file with the Library of Congress, in *The Blackmun Papers*, *supra* note 20) ("This one has a surprise in it. I had thought that CA10's holding that an impact statement was required in connection with a real estate development's 'statement of record' was going to be reversed on the broad ground that no EIS is required because the HUD Secretary has absolutely no discretion bearing on environmental issues. Instead, Justice Marshall has chosen the narrow ground").

possible” were words of expansion rather than words of limitation.¹⁷⁰ The opinion quoted at length from a statement of the House and Senate conferees stating that “no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.”¹⁷¹ And Marshall took care to emphasize that nothing in the Court’s ruling meant that “environmental concerns are irrelevant to the [federal statute at issue] or that the Secretary has no duties under NEPA,” describing circumstances when the Secretary could promulgate regulations that would promote NEPA’s environmental-impact-disclosure objectives.¹⁷²

4. *Kleppe v. Sierra Club* (1976).¹⁷³

In *Kleppe*, the federal government challenged a ruling by the D.C. Circuit requiring the government to prepare a regional EIS if it chose to develop the Powder River Coal Basin. The lower court had also enjoined the approval of four mining plans for which an EIS had already been prepared, but the Supreme Court stayed that injunction.¹⁷⁴ The Court reversed the D.C. Circuit on the merits in an opinion by Justice Powell, which was joined in full by Chief Justice Burger and Justices Stewart, White, Blackmun, Rehnquist, and Stevens. The Court concluded that, notwithstanding three separate government studies into regional development, there was no “report or recommendation on a proposal for major federal action with respect to the Northern Great Plains region” that would require an EIS.¹⁷⁵ It emphasized that NEPA’s EIS requirement is triggered only by a “recommendation or report on a proposal for federal action,” and certainly not by mere contemplation of regional development.¹⁷⁶ Finally, the Court found that decisions like the “determination of the region, if any, with respect to which a comprehensive statement is necessary” should properly be left to the expert discretion of the responsible agency.¹⁷⁷

The most significant aspect of the government’s victory in *Kleppe* is that it was achieved only after the government effectively conceded much of what it had been litigating in the lower court. As noted by several Justices when considering the case, the government conceded that it would have to prepare an EIS for its national coal-leasing program and did not dispute that it would have to prepare impact statements for local decisions like approving a mine plan or

170. *Flint Ridge*, 426 U.S. at 787.

171. *Id.* at 787–88 (quoting 115 CONG. REC. 39703 (1969)).

172. *Id.* at 792. As described below, Marshall tried to include even more favorable dictum than that which appears in the final opinion of the Court, but was effectively prevented from doing so by Justice Rehnquist. See *infra* notes 408–426 and accompanying text.

173. 427 U.S. 390 (1976).

174. *Id.* at 396.

175. *Id.* at 399–400.

176. *Id.* at 405–06 (quoting *SCRAP II*, 422 U.S. 289, 320 (1975)).

177. *Id.* at 412.

issuing a right-of-way permit.¹⁷⁸ The Court, accordingly, rejected the government's original position that "a statement is required only when the Government itself has designated the activities at issue a 'program.'"¹⁷⁹ The Court concluded that a comprehensive impact statement would sometimes be required when "several proposed actions are pending at the same time."¹⁸⁰ When several distinct proposals "will have cumulative or synergistic environmental impact upon a region [and] are pending concurrently before an agency, their environmental consequences must be considered together."¹⁸¹ The Justices were also aware that the Department of the Interior, by the time the case was before the Court, was already preparing the kinds of regional EISs that the agency had originally resisted, rendering the entire case "largely academic."¹⁸² Finally, the *Kleppe* case is noteworthy because Justice Powell's opinion expressly supported the notion that NEPA required federal agencies to take a "hard look" at the environmental consequences of their actions.¹⁸³

5. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (1978).¹⁸⁴

In *Vermont Yankee*, the Court reversed two D.C. Circuit rulings, one of which had been authored by Judge Skelly Wright, that had remanded cases to the Atomic Energy Commission based on NEPA violations. The Court disagreed with the lower court that the Nuclear Regulatory Commission had violated NEPA either by failing, in one case, to explore more fully the environmental effects of the uranium fuel cycle in its rule making, or by failing, in the second

178. *Id.* at 399–400. Justice Blackmun summarized the Solicitor General's concession on the national plan at oral argument: Harry A. Blackmun, Oral Argument Notes, *Kleppe*, 427 U.S. 390 (No. 75-561) (Apr. 28, 1976) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("Gt hs prepared a *natl* EIS. We concede we must."); Lewis F. Powell, Oral Argument Notes at 2, *Kleppe*, 427 U.S. 390 (No. 75-561) (Apr. 28, 1976) (on file with Washington and Lee University, in The Powell Papers, *supra* note 18) ("Gov't has completed an I/S nation-wide. There *is* a national program + thus I/S was required. Also I/Ss have been filed for each individual mining operation."); Cert Pool Memorandum at 5, *Kleppe*, 427 U.S. 390 (No. 75-561) (Dec. 10, 1975) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("The SG seems to accept the proposition that the granting of a particular lease may have ramifications in a broader area which must be considered in *some* environmental impact statement prior to the decision to grant that lease."). The government also abandoned in the Supreme Court the arguments that it had strongly pressed in the lower courts on justiciability and standing. *See* *Sierra Club v. Morton*, 514 F.2d 856, 868–69 n.20 (D.C. Cir. 1975).

179. *Sierra Club*, 514 F.2d at 873; *see* Clerk Bench Memorandum to Justice Harry A. Blackmun at 4, *Kleppe*, 427 U.S. 390 (No. 75-561) (Apr. 23, 1976) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("The SG's basic argument is that . . . there is only 'federal action' when the Government choses [sic] to call a set of actions one 'action' or 'proposal.'").

180. *Kleppe*, 427 U.S. at 409.

181. *Id.*

182. Clerk Bench Memorandum to Justice Harry A. Blackmun at 1, *Kleppe*, 427 U.S. 390 (No. 75-561) (Apr. 23, 1976) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("[T]he Dept. of Interior is voluntarily undertaking regional statements," making the case "largely academic, if not moot.").

183. *Kleppe*, 427 U.S. at 410 n.21.

184. 435 U.S. 519 (1978).

case, to include in an EIS a discussion of energy conservation as an alternative to nuclear power.¹⁸⁵ The Court also rejected the D.C. Circuit's suggestion that "the context of NEPA somehow permits a court to require procedures beyond those specified in § 4 of the [Administrative Procedure Act] when investigating factual issues through rulemaking."¹⁸⁶ The opinion of the Court was written by Justice Rehnquist and joined by all of the other Justices except Powell and Blackmun, who did not participate in the decision.

Here again, the Solicitor General achieved victory in part by conceding what had been a major bone of contention in the lower courts. Vermont Yankee had argued that the NRC "may grant a license to operate a nuclear reactor without any consideration of waste disposal and fuel reprocessing."¹⁸⁷ By the time the Court reached its decision, however, it recognized that the Commission had dropped that argument and found that the "issue [was] no longer presented by the record in this case."¹⁸⁸ One of the most controversial issues had therefore dropped out of *Vermont Yankee* by the time the Court decided the case. And for good reason: had the federal government not conceded this extreme point, it would likely have lost on the merits of the claim that NEPA did not require consideration of the impact of the spent-fuel processes. And, at the very least, it is a virtual certainty that had the government somehow prevailed on that ground before the High Court, the Court's ruling on that point would not have been unanimous. The government would have been hard-pressed to maintain that nuclear-waste disposal and spent-fuel reprocessing did not present significant environmental impacts within NEPA's purview, which is no doubt precisely why it jettisoned the argument before the Court.

But that is also why the fact that the environmentalists unanimously lost *Vermont Yankee* does not tell the full story of the case. They lost because they had already in effect won on a significant legal issue because of the government's concession. And that same concession was also the only reason the ruling was unanimous.¹⁸⁹

6. *Andrus v. Sierra Club* (1979).¹⁹⁰

In *Andrus*, the federal government challenged a D.C. Circuit ruling (with Judge Skelly Wright again writing for the panel) that the federal government must prepare an EIS for each annual budget appropriation request that either accompanies a proposed major federal action or "ushers in a considered program-

185. *Id.* at 549–55.

186. *Id.* at 548.

187. *Id.* at 538.

188. *Id.*

189. As described below, the most significant aspect of *Vermont Yankee* is the fact that Justice Rehnquist, who wrote the opinion for the Court, succeeded both in defeating Justice Brennan's effort to have the writ dismissed as improvidently granted and in including dictum at the close of the opinion that led to the end of NEPA's having any substantive effect. See *infra* notes 427–48 and accompanying text.

190. 442 U.S. 347 (1979).

matic course following a programmatic review” with significant environmental impacts.¹⁹¹ The Court reversed in a unanimous opinion by Justice Brennan. The Court held that NEPA does not require a federal agency to prepare an EIS to accompany its appropriation requests.¹⁹² And because it found that NEPA does not impose its requirements on appropriation requests, the Court also reversed the D.C. Circuit’s decision requiring OMB to adopt procedures to comply with NEPA during the budgeting process.¹⁹³

Andrus, like *Flint Ridge*, shows how a Justice may, in the context of reversing a lower court environmentalist victory, nonetheless include language extremely helpful to environmentalists in future litigation. Brennan’s opinion could have immediately focused on the narrow issue before the Court: whether NEPA “requires federal agencies to prepare environmental impact statements . . . to accompany appropriation requests.”¹⁹⁴ His opinion, however, took care first to lay out NEPA’s requirements in sympathetically worded “bold strokes.” He took the time to outline NEPA’s goals, to highlight the law’s intent to enact “action-forcing procedures” by mining favorable language in a Senate Report, and to describe its purpose to ensure that “environmental concerns be integrated into the very process of agency decision making.”¹⁹⁵ Brennan also gratuitously added that “[i]f environmental concerns are not interwoven into the fabric of agency planning, the ‘action-forcing’ characteristics of § 102(2)(C) would be lost.”¹⁹⁶ None of this favorable discussion was necessary for the Court to address the issue before it.

Brennan’s opinion for the Court further made clear that if an agency “were to decline to ask for funding so as to terminate a program” that “would significantly affect the quality of the human environment . . . the agency would have been required to include EIS’s in the recommendations or reports on the proposed underlying programmatic decisions.”¹⁹⁷ In other words, the agency would have to prepare the EIS at the decision stage, which might come before the appropriation stage. This seemed to satisfy a clerk for Justice Blackmun who pointed out this aspect of Brennan’s opinion to Blackmun and notified the Justice that “WJB has carefully accommodated the views you expressed, both at oral argument and in conference, about the need to ensure that EISs are prepared at *some* point when *negative* agency action is contemplated.”¹⁹⁸

But the aspect of the Court’s opinion in *Andrus* that was the most advantageous to environmentalists was the Court’s reliance on the new CEQ regula-

191. *Id.* at 354–55 (quoting *Sierra Club v. Andrus*, 581 F.2d 895, 903 (D.C. Cir. 1978)).

192. *Id.* at 348–49.

193. *Id.* at 365 n.24.

194. *Id.* at 349.

195. *See id.* at 350 (quoting S. REP. NO. 91-296, at 19 (1969)).

196. *Id.* at 350–51.

197. *Id.* at 363 n.22.

198. Clerk Memorandum to Justice Harry A. Blackmun, *Andrus*, 442 U.S. 347 (No. 78-625) (May 30, 1979) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (citing Justice Brennan’s Draft Opinion at 15 & n.22).

tions. The Solicitor General's first and primary argument for reversal focused on the meaning of the word "proposal." The federal government sought to persuade the Court to embrace a potentially sweeping argument that certain kinds of "predecisional recommendations" do not trigger NEPA.¹⁹⁹ The Solicitor General also contended that the environmentalists lacked Article III standing to maintain the lawsuit.²⁰⁰ The Solicitor General's reliance on CEQ regulations for the narrower contention that appropriation requests are not "proposals for legislation" within the meaning of NEPA was a tertiary point in the government's brief.²⁰¹

A ruling in favor of the government based on a crabbed interpretation of the word "proposal" would have had repercussions adverse to environmentalists in a wide variety of contexts. The Court's reliance on the CEQ regulations, which did not even become effective until two weeks after the Court's opinion,²⁰² had the precise opposite effect. To be sure, the CEQ regulations reversed the position previously taken by CEQ guidelines and therefore undermined the Sierra Club's legal position in the case at hand.²⁰³ But those regulations, prepared by CEQ during the Carter Administration, reflected NEPA's high water mark. They in effect codified and extended some of the most expansive judicial precedent environmentalists had championed during the 1970s.²⁰⁴ The Supreme Court's imprimatur of approval and admonition that those regulations were entitled to "substantial deference" as the product of a "detailed and comprehensive process[] ordered by the President" was therefore a significant boon for environmental plaintiffs.²⁰⁵ Notably, Justice Brennan's opinion for the Court even gave homage to Justice Douglas, by citing favorably to an "in chambers" opinion Douglas had written in the early 1970s regarding NEPA.²⁰⁶

7. *Strycker's Bay Neighborhood Council, Inc. v. Karlen* (1980).²⁰⁷

In *Strycker's Bay*, the Supreme Court summarily reversed the Second Circuit. The lower court had ruled that HUD had violated NEPA by failing to explore adequately alternatives in its decision to approve a plan to allow construction of a high-rise building with exclusively low-income housing.²⁰⁸ The appellate court also had ruled that HUD had not satisfied its NEPA obligations because "environmental factors, such as crowding low-income housing into a concen-

199. Brief for the Petitioners at 28–34, *Andrus*, 442 U.S. 347 (No. 78-625).

200. *Id.* at 21–22.

201. *See id.* at 39.

202. *See Andrus*, 442 U.S. at 357 n.16.

203. *See id.* at 356–61.

204. Houck, *supra* note 39, at 184; *see supra* notes 62–63 and accompanying text.

205. *Andrus*, 442 U.S. at 358.

206. *Id.* (citing *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1309–10 (1974) (Douglas, J., in chambers)).

207. 444 U.S. 223 (1980).

208. *Id.* at 224–25.

trated area, should be given determinative weight.”²⁰⁹ The Supreme Court reversed in a per curiam opinion, with Justice Marshall dissenting. The Court reasoned that “once an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences NEPA requires no more.”²¹⁰

The papers of the Justices reveal an interesting back story. At the Court’s initial conference on November 5, 1989, considering whether to grant review in *Strycker’s Bay*, five Justices voted in favor of granting certiorari (Justices Brennan, Stewart, White, Rehnquist, and Stevens; Justice Blackmun voted in favor of granting review if at least three other Justices favored certiorari, and Chief Justice Burger and Justice Powell were opposed to review).²¹¹ Justice Marshall was absent from the conference.²¹² The Justices, however, took the further action of relisting the case for the purpose of allowing Justice Rehnquist to draft a summary reversal in the case, without need for further briefing and oral argument.²¹³

Justice Rehnquist, consistent with his well-deserved reputation for speediness,²¹⁴ circulated to the other chambers a draft per curiam summary-reversal opinion eight days later and a revision with a few “stylistic” changes two days after that.²¹⁵ A majority quickly joined the draft opinion even before the second version came out (Chief Justice Burger and Justices Powell, Blackmun, White, and Stewart)²¹⁶ and Justices Brennan and Stevens joined the next day.²¹⁷

209. *Id.* at 227 (internal quotation marks omitted).

210. *Id.* at 227–28. It is only because the Court decided *Strycker’s Bay* on a per curiam basis, in the absence of full briefing and argument, that Justice Marshall’s lone dissent does not contradict the assertion that all environmental NEPA plaintiffs’ losses after plenary Court review were unanimous after the Court’s 1976 ruling in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) and until the Court’s more recent ruling in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). *See supra* notes 11–13 and accompanying text.

211. Docket Sheet, *Strycker’s Bay*, 444 U.S. 223 (No. 79-168) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

212. *Id.*

213. *Id.* (“G—relist WHR to write SR”).

214. *See infra* notes 413–19 and accompanying text.

215. *See* Draft Per Curiam Opinion, *Strycker’s Bay*, 444 U.S. 223 (No. 79-168) (Nov. 13, 1979) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17); Draft Per Curiam Opinion, *Strycker’s Bay*, 444 U.S. 223 (No. 79-168) (Nov. 15, 1979) (noting “stylistic changes pages 3, 5”) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17).

216. *See* Letter from Chief Justice Burger to Justice Rehnquist, *Strycker’s Bay*, 444 U.S. 223 (No. 19-168) (Nov. 14, 1979) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17); Letter from Justice Powell to Justice Rehnquist, *Strycker’s Bay*, 444 U.S. 223 (No. 19-168) (Nov. 14, 1979) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17); Letter from Justice Blackmun to Justice Rehnquist, *Strycker’s Bay*, 444 U.S. 223 (No. 19-168) (Nov. 14, 1979) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17); Letter from Justice White to Justice Rehnquist, *Strycker’s Bay*, 444 U.S. 223 (No. 19-168) (Nov. 14, 1979) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17); Letter from Justice Stewart to Justice Rehnquist, *Strycker’s Bay*, 444 U.S. 223 (No. 19-168) (Nov. 14, 1979) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17).

217. *See* Letter from Justice Brennan to Justice Rehnquist, *Strycker’s Bay*, 444 U.S. 223 (No. 19-168) (Nov. 15, 1979) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17);

At the Court's conference on November 26, however, the Court agreed to relist the case at the request of Justice Marshall,²¹⁸ apparently to allow Marshall the time necessary to draft a dissenting opinion, which Marshall published along with the Court's per curiam opinion six weeks later on January 7, 1980.²¹⁹ Justice Marshall's dissent is significant in two respects. First, the dissent underscores the Solicitor General's concession in the case that the "Secretary [of Housing and Urban Development] concedes that if an agency gave little or no weight to environmental values its decision might be arbitrary or capricious."²²⁰ Second, Justice Marshall's dissent prompted Justice Rehnquist to modify his per curiam opinion for the Court in a manner that potentially limited its reach. In particular, the published per curiam opinion, unlike the November 13th and November 15th drafts that eight Justices had already joined, included a new footnote,²²¹ which described its ruling in limiting terms. With the footnote language added in the final opinion,²²² it became clearer that the Court held only that NEPA does not require "reordering priorities"²²³ and not that NEPA and the APA allow an agency to give no weight or inadequate weight to environmental concerns. This caveat allows NEPA to matter not just procedurally, but substantively, even if not to the full extent of NEPA's actual potential.

8. *Weinberger v. Catholic Action of Hawaii/Peace Education Project* (1981).²²⁴

In *Catholic Action*, the federal government challenged a Ninth Circuit ruling requiring the Navy to prepare a hypothetical EIS assessing the impact of the storage of nuclear weapons when it constructed a facility capable of storing those weapons but could not disclose whether nuclear weapons would be stored there.²²⁵ The district court had concluded that the facility was a major federal action under NEPA but held that the preparation of an EIS would conflict with security requirements.²²⁶ The Ninth Circuit reversed, and the Supreme Court reversed again in an opinion by Justice Rehnquist, who was joined by Chief

Letter from Justice Stevens to Justice Rehnquist, *Strycker's Bay*, 444 U.S. 223 (No. 19-168) (Nov. 14, 1979) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17).

218. See Docket Sheet, *Strycker's Bay*, 444 U.S. 223 (No. 79-168) ("26 - relist TM") (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

219. *Strycker's Bay*, 444 U.S. 223.

220. *Id.* at 231 n.* (Marshall, J., dissenting) (citing Petition for Writ of Certiorari at 15 n.16, *Strycker's Bay*, 444 U.S. 223 (No. 79-184)).

221. Compare Draft Per Curiam Opinion, *Strycker's Bay*, 442 U.S. 223 (No. 79-168) (Nov. 13, 1979) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17) (lacking this footnote), and Draft Per Curiam Opinion, *Strycker's Bay*, 442 U.S. 223 (No. 79-168) (Nov. 15, 1979) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17) (same), with Draft Per Curiam Opinion, *Strycker's Bay*, 442 U.S. 223 (No. 79-168) (Dec. 18, 1979) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17) (including this footnote), and *Strycker's Bay*, 444 U.S. at 228 n.2 (Marshall, J., dissenting) (same).

222. *Strycker's Bay*, 444 U.S. at 228 n.2 (Marshall, J., dissenting).

223. See *id.*

224. 454 U.S. 139 (1981).

225. *Id.* at 140-42.

226. *Catholic Action of Haw./Peace Educ. Project v. Brown*, 468 F. Supp. 190, 193 (D. Haw. 1979).

Justice Burger and Justices White, Marshall, Powell, Stevens, and O'Connor. The Court held that the Navy would not have to release to the public any EIS on nuclear storage because public disclosure under NEPA is governed by FOIA, which exempts classified information.²²⁷ Additionally, the Court found that only a proposal to store nuclear weapons, and not merely the construction of a facility that could house them, would trigger the EIS requirement.²²⁸ Justice Blackmun filed an opinion concurring in the judgment that was joined by Justice Brennan.²²⁹

This case is yet another instance where significant government concessions provided for a unanimous High Court victory because the government gave up on litigation positions on which it might have lost or, at the very least, which would have prompted significant dissent. The papers of the Justices, moreover, make clear the significance of both the Solicitor General's concessions and the efforts by individual Justices to ensure that the opinion of the Court was narrowed accordingly.

The federal government made the threshold concession that NEPA applies to all of the Navy's activities, regardless of whether they are classified.²³⁰ The government also made the more precise acknowledgment in its reply brief "that, if nuclear weapons are stored at West Loch, 'an appropriate environmental impact document has been prepared, as required by NEPA and Department of Defense regulations.'"²³¹ These concessions made the case much easier to decide. As described by Justice Blackmun's bench memo:

There is considerably less to this case than meets the eye. The SG and resps agree on virtually every legal point involved. Indeed, were it not for the unfortunately overbroad language used by the CA9 there would be no need for the Court to consider this case at all.

. . . The SG, having apparently abandoned the Navy's 1978 position that storing nuclear weapons is not a major federal action under NEPA, concedes that the statute applies to the West Loch project. He also acknowledges that Navy decision makers must apprise themselves of relevant environmental

227. *Catholic Action*, 454 U.S. at 145–46.

228. *Id.*

229. *Id.* at 147–50 (Blackmun, J., concurring in judgment).

230. Clerk Bench Memorandum to Justice Harry A. Blackmun at 7, *Catholic Action*, 454 U.S. 139 (No. 80-1377) (Aug. 10, 1981) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("The SG readily acknowledges that NEPA applies to all of the Navy's activities, classified as well as unclassified."); *id.* at 13 ("The SG again acknowledged [sic] that the decision maker must be apprised of the relevant environmental considerations, and indicated that he quarreled with the CA9's decision 'only insofar as it compels public disclosure.'").

231. Clerk Supplemental Memorandum to Justice Harry A. Blackmun at 1, *Catholic Action*, 454 U.S. 139 (No. 80-1377) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("The SG has filed a reply brief, which makes the hypothetical concession that, if nuclear weapons are stored at West Loch, 'an appropriate environmental impact document has been prepared, as required by NEPA and Department of Defense regulations.'").

factors, which seemingly means that the Navy must prepare an EIS, at least for internal use. Indeed, so far as can be determined from the SG's brief the Navy may have already confidentially studied the environmental impact of storing nuclear weapons at West Loch.²³²

At oral argument, after being pressed by several Justices, the Solicitor General further agreed that it was no longer contesting the district court's judgment that there was a major federal action.²³³

Justice Rehnquist's opinion for the Court also reflected the attention that the Justices, especially Blackmun and O'Connor, paid to these concessions. The final opinion acknowledged that:

If the Navy proposes to store nuclear weapons at West Loch, the Department of Defense's regulations can fairly be read to require that an EIS be prepared solely for internal purposes, even though such a document cannot be disclosed to the public. The Navy must consider environmental consequences in its decisionmaking process, even if it is unable to meet NEPA's public disclosure goals by virtue of FOIA Exemption 1.²³⁴

Justice O'Connor apparently was able to persuade Justice Rehnquist to drop language in a prior draft opinion that seemed to ignore the Solicitor General's concession and that said more directly that no EIS would be required.²³⁵ Justice Blackmun was less successful in persuading Justice Rehnquist to acknowledge expressly the Solicitor General's concession that the Navy's actions constituted a "major federal action," and Blackmun ultimately decided it was best simply not to draw further attention to the ambiguity in the final opinion, although Justice Blackmun (and Justice Brennan) concurred separately.²³⁶

232. Clerk Bench Memorandum to Justice Harry A. Blackmun at 16, *Catholic Action*, 454 U.S. 139 (No. 80-1377) (Aug. 10, 1981) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

233. Transcript of Oral Argument at 15–19, *Catholic Action*, 454 U.S. 139 (No. 80-1377).

234. *Catholic Action*, 454 U.S. at 146.

235. In a letter to Justice Rehnquist, Justice O'Connor wrote, "I cannot agree, however, with the last two paragraphs of your opinion, in which you go on to conclude that NEPA does not require the Navy to prepare a classified EIS. . . . I thus conclude that the Navy is required to prepare—but not to publish—an EIS. I do not understand the Government to have argued to the contrary." Letter from Justice Sandra Day O'Connor to Justice William H. Rehnquist at 1, *Catholic Action*, 454 U.S. 139 (No. 80-1377) (Nov. 3, 1981) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20). She cautioned, "I would not reach out to address anything more." *Id.* at 2. She had been convinced by much of Justice Blackmun's criticism of Justice Rehnquist's original draft. *Cf.* Secretary Memorandum to Justice Harry A. Blackmun, *Catholic Action*, 454 U.S. 139 (No. 80-1377) (Nov. 10, 1981) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (On a typed memo asking him to return a call from Justice O'Connor, Justice Blackmun hand wrote, "Called—She highly approves what I said today to WHR in *Weinberger v. Catholic Action*.").

236. *See* Letter from Justice Harry A. Blackmun to Justice William H. Rehnquist at 1, *Catholic Action*, 454 U.S. 139 (No. 80-1377) (Nov. 10, 1981) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("In light of the SG's position at oral argument, could not the Court well observe that the Navy is bound by the lower court findings to the effect that the storage of nuclear

9. *Metropolitan Edison Co. v. People Against Nuclear Energy* (1983).²³⁷

In *Metropolitan Edison*, the federal government challenged a ruling by the D.C. Circuit, authored by Judge Skelly Wright, concluding that the Nuclear Regulatory Commission (NRC) “improperly failed to consider whether the risk of an accident at [Three Mile Island] might cause harm to the psychological health and community well-being of residents of the surrounding area.”²³⁸ The Court reversed in a unanimous opinion by Justice Rehnquist. The Court held that NEPA did not require consideration of the possible psychological effects associated with the risk of a nuclear accident.²³⁹ “In a causal chain from renewed operation of TMI-1 [Three-Mile Island Unit 1] to psychological health damage, the element of risk and its perception by PANE’s [the Respondent People Against Nuclear Energy’s] members are necessary middle links. We believe that the element of risk lengthens the causal chain beyond the reach of NEPA.”²⁴⁰

Here, too, the secret of the government’s success before the High Court was its willingness to give up on what had been its principal argument in the lower court in favor of a narrower, more nuanced position. Before the D.C. Circuit, both industry and the NRC had insisted that NEPA did not require the NRC to consider the claim that restarting a nuclear power plant would cause psychological distress to community residents on the ground that such mental injuries were not human health effects cognizable under NEPA because they were not readily quantifiable.²⁴¹ The industry maintained that argument before the Supreme Court, but the Solicitor General, representing the NRC,²⁴² abandoned the argument. The Solicitor General freely agreed that mental health effects are generally cognizable under NEPA and instead advanced a narrower reason that the particular mental health effects at issue were nonetheless out of bounds—the health effects were not proximately caused by an impact on the natural environment.²⁴³ NEPA, in other words, is not concerned with all federal agency actions

weapons is a major federal action?”); Letter from Justice William H. Rehnquist to Justice Harry A. Blackmun at 1, *Catholic Action*, 454 U.S. 139 (No. 80-1377) (Nov. 11, 1981) (on file with the Library of Congress, in The Brennan Papers, *supra* note 19) (“I do not think that the issue . . . needs to be expressly decided, and would prefer not to.”); Clerk Memorandum to Justice Harry A. Blackmun, *Catholic Action*, 454 U.S. 139 (No. 80-1377) (Nov. 12, 1981) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (“WHR’s opinion can be read as suggesting that it is a major action, and I’m not sure that there is much to be gained in drawing attention to the question.”).

237. 460 U.S. 766 (1983).

238. *Id.* at 768.

239. *Id.* at 775.

240. *Id.*

241. *People Against Nuclear Energy v. U.S. Nuclear Regulatory Comm’n*, 678 F.2d 222, 228 (D.C. Cir. 1982) (“[T]he Commission’s brief contends that psychological distress is beyond the scope of NEPA because it is not readily quantifiable.”).

242. The NRC has independent litigating authority in the lower federal courts, but not in the Supreme Court, where it is represented by the Solicitor General.

243. Brief for the United States and the United States Nuclear Regulatory Commission at 27, *Metropolitan Edison*, 460 U.S. 766 (Nos. 81-2399 & 82-358) (“Thus health effects, like any other class

that cause adverse human health effects, but only with federal agency actions that cause such health effects as the result of impacts on the natural environment.²⁴⁴ Indeed, its primary focus on the natural environment is what distinguishes NEPA from other federal laws.²⁴⁵ The federal government also no longer contested, as it had in the lower courts, that restarting the Three Mile Island unit was a “major federal action.”²⁴⁶

In ruling for the government, the Supreme Court mostly embraced the Solicitor General’s new reasoning. The Court noted the Solicitor General’s agreement “that effects on human health can be cognizable under NEPA, and that human health may include psychological health.”²⁴⁷ According to the Court, whether a particular human health effect is cognizable under NEPA requires an examination of the “relationship between that effect and the change in the physical environment caused by the major federal action at issue.”²⁴⁸ Moreover, even if a particular effect is “‘caused by’ a change in the physical environment in the sense of ‘but for’ causation,” it may nonetheless “not fall within § 102 because the causal chain is too attenuated.”²⁴⁹ On that basis, the Court concluded that the particular psychological effects alleged in the case before it fell outside NEPA because the “harm [was] simply too remote from the physical environment.”²⁵⁰

The papers of the Justices make clear the impact the Solicitor General’s concession and narrowing of legal arguments had on their voting and the Court’s opinion. Internal memoranda from more than one chamber highlighted the Solicitor General’s agreement that psychological effects could, under other circumstances, be cognizable under NEPA and emphasized that the federal government’s position was different from and more reasonable than industry’s.²⁵¹ The narrowness of the Court’s holding was also essential for unanimity.

of effects of a federal action that may be cognizable under NEPA, are so only to the extent that they are proximately traceable to the impact of the federal action upon the natural or physical environment . . .”).

244. *Id.* at 20 (“But we do not argue that NEPA excludes the effects of federal action on human beings from the mandated analysis; rather, our submission is simply that the consideration mandated by NEPA extends only to those influences on mankind’s interests that are environmentally propagated.”).

245. *Id.* at 28 (“Bringing all of these within NEPA would radically change that law from one directing special attention to environmental concerns to one dealing generally with human health and welfare.”).

246. *Metropolitan Edison*, 460 U.S. at 771 n.5.

247. *Id.* at 771.

248. *Id.* at 773.

249. *Id.* at 774.

250. *Id.*

251. See Clerk Bench Memorandum to Justice Harry A. Blackmun at 28–32, *Metropolitan Edison*, 460 U.S. 766 (Nos. 81-2399 & 82-358) (Feb. 27, 1983) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (contrasting Solicitor General and Metropolitan Edison’s arguments); Clerk Bench Memorandum to Justice Thurgood Marshall at 6, *Metropolitan Edison*, 460 U.S. 766 (Nos. 81-2399 & 82-358) (Feb. 21, 1983) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17) (“In my view Metro. Edison’s view is clearly incorrect. NEPA is concededly concerned with human health, and there is no support for artificially distinguishing between physical and mental

Justice Marshall made clear that he would join the Court's opinion only if it was "very narrow."²⁵² And Justice Brennan requested that Justice Rehnquist modify his draft to make clear that the test of proximate cause for NEPA would not be as demanding as the test under traditional tort law, which Rehnquist did.²⁵³

10. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.* (1983).²⁵⁴

In *Baltimore Gas & Electric*, the Supreme Court reversed a D.C. Circuit decision (also written by Judge Skelly Wright) that had vacated on NEPA grounds a rule promulgated by the NRC that required individual licensing boards to assume that "the permanent storage of certain nuclear wastes would have no significant environmental impact and thus should not affect the decision whether to license a particular nuclear power plant."²⁵⁵ Justice O'Connor authored the Court's opinion, which was joined by all other Justices except for Justice Powell, who did not participate in the case. The Court held that NEPA permitted the Commission to evaluate environmental impacts generically rather than leave that task to individual licensing boards because "NEPA does not require agencies to adopt any particular internal decisionmaking structure."²⁵⁶ The Court also rejected the argument that the zero-release assumption²⁵⁷ prevented individual licensing boards from considering evidence on the health, socioeconomic, and cumulative effects associated with the environmental impact of effluent releases and thus violated NEPA.²⁵⁸

But yet again, the federal government won partly by conceding away some issues, including that individual NRC licensing boards could consider nuclear-waste-disposal risks in individual reactor proceedings.²⁵⁹ But what is most revealing about this case is that, like in other NEPA cases, unanimity was not

health. . . . The SG's position is more reasonable, since it acknowledges that human health includes both mental and physical components.").

252. Justice William J. Brennan, Jr., Conference Notes, *Metropolitan Edison*, 460 U.S. 766 (Nos. 81-2399 & 82-358) (Mar. 4, 1983) (on file with the Library of Congress, in The Brennan Papers, *supra* note 19) (noting that Justice Marshall commented that he would "join only a very narrow opinion").

253. Justice Brennan persuaded Justice Rehnquist to add some better language to the opinion in footnote 7, which reads, "we do not mean to suggest that any cause-effect relation too attenuated to merit damages in a tort suit would also be too attenuated to merit notice in an EIS" *Metropolitan Edison*, 460 U.S. at 774 n.7. Justice Brennan said he had in mind "purely physical causal chains (smokestack emissions in Ohio to acid rain in Maine to dead fish in Maine lakes to starvation of fish-eating birds, etc.), which might be too 'attenuated' to merit damages, but which would nevertheless come within the core concerns of NEPA." Letter from Justice William J. Brennan, Jr. to Justice William H. Rehnquist at 2, *Metropolitan Edison*, 460 U.S. 766 (Nos. 81-2399 & 82-358) (Mar. 24, 1983) (on file with the Library of Congress, in The Brennan Papers, *supra* note 19).

254. 462 U.S. 87 (1983).

255. *Id.* at 90.

256. *Id.* at 100-01.

257. This is the assumption that new technologies would be developed to "isolate" the wastes so as to produce no environmental effects. *See id.* at 92.

258. *Id.* at 106-07.

259. *Id.*

the result of judicial apathy regarding NEPA. Quite the opposite. Unanimity occurred largely because several chambers worked to ensure that the opinion did not undermine NEPA's important purposes.

Justice O'Connor's opinion for the Court reflects the concerns of the Justices that the opinion remain narrow and avoid "paint[ing] with too broad a brush."²⁶⁰ In particular, the Court reversed not on the broad ground that Judge Wright's D.C. Circuit opinion had erred in the legal standard it had announced, but instead only on the far narrower, fact-bound basis that the lower court had misapplied that standard to the peculiar facts of the case.²⁶¹ Many chambers thought that Judge Wright's only error was his failure to appreciate the extent to which the NRC had taken account of uncertainties underlying the disposal of nuclear waste.²⁶²

The Court expressly "agree[d] with the Court of Appeals that NEPA requires an EIS to disclose the significant health, socioeconomic and cumulative consequences of the environmental impact of a proposed action."²⁶³ Finally, several Justices sought to ensure that the Court's ruling did not mean that the public would not be able to learn the uncertainties associated with the NRC's zero-release assumption. The opinion was accordingly modified to make that clear.²⁶⁴

260. Clerk Bench Memorandum to Justice Harry A. Blackmun at 28, *Baltimore Gas*, 462 U.S. 87 (Nos. 82-524, 82-545 & 82-551) (Apr. 18, 1983) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("The more difficult question is the lawfulness of the zero release assumption. I think the CA's decision must be reversed on this issue also, but on fairly narrow grounds. . . . Whoever writes this opinion will have much work to do and must take care not to paint with too broad a brush.").

261. *See id.* at 25–26 ("Other uncertainties, such as the risk of an accident at the reactor, can be effectively considered by licensing boards because they concern the area that might be affected.").

262. Clerk Memorandum to Justice William J. Brennan, Jr. at 2, *Baltimore Gas*, 462 U.S. 87 (Nos. 82-524, 82-545 & 82-551) (on file with the Library of Congress, in The Brennan Papers, *supra* note 19) (Justice Brennan himself (rather than a clerk) appears to have penciled in, "I think they did exactly what he said they should do."); *id.* at 1 (Justice Brennan's Clerk: "I agree with most of what Judge Bazelon's opinion says. Nevertheless, I would reverse on very narrow grounds because I think the DC Circuit was too harsh in construing the NRC's action."); Clerk Bench Memorandum to Justice Harry A. Blackmun, *supra* note 260, at ii ("The NRC did consider the uncertainties during its rulemaking, and it disclosed those uncertainties in the rule. It decided, however, that they were insufficient to make a difference in any individual proceeding I don't like the NRC's decision, but I think the NRC has reasonably exercised its rulemaking authority under the APA and NEPA."); Clerk Bench Memorandum to Justice Thurgood Marshall at 1, *Baltimore Gas*, 462 U.S. 87 (Nos. 82-524, 82-545 & 82-551) (Apr. 18, 1983) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17) ("Tentatively, I agree with Judge Bazelon's analysis but disagree with his conclusion, and therefore recommend reversing on narrow grounds. . . . I tentatively learn [sic] toward the view that the NRC has itself adequately assessed the risks at the generic level.").

263. *Baltimore Gas*, 462 U.S. at 106–07 ("The Commission later amended the interim rule to clarify that health effects were not covered by Table S-3 and could be litigated in individual licensing proceedings. In the final rule, the Commission expressly required licensing boards to consider the socioeconomic and cumulative effects in addition to the health effects of the releases projected in the Table.").

264. According to Justice Brennan's notes on the conference of the Justices on *Baltimore Gas*, Justice Stevens, for example, was worried that "where have to cross reference so much material ought say forthrightly there are risks." Justice William J. Brennan, Jr., Conference Notes at 3, *Baltimore Gas*, 462 U.S. 87 (Nos. 82-524, 82-545 & 82-551) (on file with the Library of Congress, in The Brennan

11. *Robertson v. Methow Valley Citizens Council* (1989)²⁶⁵ & *Marsh v. Oregon Natural Resources Council* (1989).²⁶⁶

In *Methow Valley*, the Supreme Court unanimously reversed a Ninth Circuit decision requiring the Forest Service to prepare a more detailed EIS before issuing a special use permit to develop a resort within a national forest.²⁶⁷ The appellate court had embraced the notions that NEPA imposed a substantive duty “to ‘develop the necessary mitigation measures *before* the permit is granted’”²⁶⁸ and that the EIS must include “a detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts of a proposed action,” not just a list of possible mitigation measures.²⁶⁹ Finally, the Ninth Circuit had declared that if the Service found it difficult to obtain adequate information to make a reasonable assessment of the environmental impact, NEPA required it to conduct a “worst case analysis.”²⁷⁰ Justice Stevens’ opinion for the Court rejected each of these grounds. Emphasizing that NEPA’s requirements are entirely procedural, the Court concluded that “NEPA merely prohibits uninformed—rather than unwise—agency action”²⁷¹ and therefore could not require the actual development of mitigation measures or a discussion of them.²⁷² The Court also determined that the agency was not required to perform a worst-case analysis because the CEQ had effectively repealed the regulation requiring one.²⁷³

Marsh was a companion case to *Methow Valley*, and based on the Court’s opinion in the latter, the Court reversed and remanded the former on the question whether an EIS “must contain a complete mitigation plan and a ‘worst

Papers, *supra* note 19). One of Justice Blackmun’s clerks saw a potential solution: “When the NRC adopted the final rule, it directed its staff to prepare, for public comment, an explanatory narrative addressing the uncertainties for possible inclusion in the rule. . . . This narrative certainly would satisfy my concern about the public information aspect of NEPA.” Clerk Bench Memorandum to Justice Harry A. Blackmun at 33–34, *Baltimore Gas*, 462 U.S. 87 (Nos. 82-524, 82-545 & 82-551) (Apr. 18, 1983) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20). The Court’s final opinion noted “that the Commission has proposed an explanatory narrative to accompany Table S-3, which would be included in an individual EIS. . . .” *Baltimore Gas*, 462 U.S. at 99 n.12. In response to a request from Justice Brennan, Justice O’Connor added the clarifying clause, “which would be included in an individual EIS.” See Letter from Justice William J. Brennan, Jr. to Justice Sandra Day O’Connor, *Baltimore Gas*, 462 U.S. 87 (Nos. 82-524, 82-545 & 82-551) (May 31, 1983) (on file with the Library of Congress, in The Brennan Papers, *supra* note 19); Letter from Justice Sandra Day O’Connor to Justice William J. Brennan, Jr., *Baltimore Gas*, 462 U.S. 87 (Nos. 82-524, 82-545 & 82-551) (June 1, 1983) (on file with the Library of Congress, in The Brennan Papers, *supra* note 19).

265. 490 U.S. 332 (1989).

266. 490 U.S. 360 (1989).

267. *Methow Valley*, 490 U.S. at 335–36, 346–47.

268. *Id.* at 347 (quoting *Methow Valley Citizens Council v. Reg’l Forester*, 833 F.2d 810, 817 (9th Cir. 1987)).

269. *Id.* at 353 (quoting 833 F.2d at 819) (internal quotation marks omitted).

270. *Id.* at 347 (internal quotation marks omitted).

271. *Id.* at 350–51.

272. *Id.* at 353.

273. *Id.* at 354–56 (deferring to the “CEQ’s abandonment of the ‘worst case analysis’” requirement in an earlier regulation, 40 C.F.R. § 1502.22 (1985)).

case analysis.”²⁷⁴ *Marsh*, however, raised the additional issue whether NEPA required the U.S. Army Corps of Engineers to prepare a supplemental EIS evaluating new information that had come to light after the Corps had prepared an initial EIS on the proposed development of a dam.²⁷⁵ In an opinion by Justice Stevens, the Court unanimously reversed the Ninth Circuit’s ruling that such a supplemental EIS was required.²⁷⁶ Applying an arbitrary and capricious standard of review, the Court concluded that “the Corps conducted a reasoned evaluation of the relevant information and reached a decision that, although perhaps disputable, was not ‘arbitrary or capricious.’”²⁷⁷

By the time the Court decided *Methow Valley* and *Marsh* in 1989, they appeared to be just the latest in an ever-lengthening line of sweeping unanimous NEPA losses for environmentalists in the Supreme Court.²⁷⁸ And while they were certainly losses—especially on the potential for NEPA to have direct substantive effect—and were also unanimous, a closer examination reveals that unanimity was achieved only because of government concessions and as a result of the careful work of Justice Stevens, the author of both opinions, in narrowing the holding and safeguarding some of NEPA’s procedural force.

Significantly, in contrast to the final vote when the opinion was announced several months later, the votes at the conferences of the Justices during deliberations were not unanimous. Four Justices voted to affirm in favor of the environmentalists on at least one issue in *Robertson*, and two Justices voted to affirm at least in part in *Marsh*.²⁷⁹ One of the Justices voting to affirm in part in *Robertson*, moreover, was Justice Stevens, who ended up writing the opinion for the Court. The Court achieved unanimity because Justice Stevens crafted an opinion in *Methow Valley* that avoided some issues, exploited government concessions on others, and appealed to those on the Court who were worried about a ruling that would undermine NEPA’s procedural rigor.

First, the *Methow Valley* Court emphasized that an EIS must include “a detailed discussion of possible mitigation measures” and wrote about NEPA’s related procedural requirements in sympathetic and forceful terms.²⁸⁰ Justice Stevens’ opinion stressed that “omission of a reasonably complete discussion of

274. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 363, 385 (1989).

275. *Id.* at 363, 369–70.

276. *Id.* at 385.

277. *Id.* at 375–76, 385.

278. See FRANK F. SKILLERN, ENVIRONMENTAL PROTECTION DESKBOOK § 2.53, at 94 (2d ed. 1995) (“The death knell sounded for substantive review under NEPA of agencies’ actions when the Supreme Court decided *Robertson* . . . in 1989.”); Harvey Bartlett, *Is NEPA Substantive Review Extinct, or Merely Hibernating? Resurrecting NEPA Section 102(1)*, 13 TUL. ENVTL. L.J. 411, 427 (2000) (“In the course of four decisions over a thirteen-year period beginning in 1976, the Supreme Court eroded this jurisprudence through a campaign of dicta. By the end of the thirteen years, NEPA substantive review was widely acknowledged as having become extinct.”).

279. Justice Harry A. Blackmun, Conference Notes at 1–3, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (No. 87-1703) & *Marsh*, 490 U.S. 360 (No. 87-1704) (Jan. 11, 1989) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

280. *Methow Valley*, 490 U.S. at 351.

possible mitigation measures would undermine the ‘action-forcing’ function of NEPA.”²⁸¹ The opinion also added that discussion of mitigation was necessary so “interested groups and individuals can properly evaluate the severity of the adverse effects” and to “guarantee[] that the agency has taken a ‘hard look’ at the environmental consequences of proposed federal action.”²⁸² Justice Brennan highlighted this in his single-sentence concurring opinion: “I write separately to highlight the Court’s observation that ‘one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences.’”²⁸³ The government had conceded this point in its brief.²⁸⁴

Justice Stevens also wrote his *Robertson* opinion narrowly—avoiding the issue of how much discussion of mitigation measures was minimally necessary—in order to obtain unanimity. He deliberately limited the opinion to what all Justices had agreed upon concerning the role of mitigation.²⁸⁵ And he avoided discussion of legal issues that he thought, based on disagreements expressed at their conference, would prompt a dissent, which Justice Brennan apparently almost filed anyway.²⁸⁶

Stevens’ opinion for the Court in *Marsh* was to similar effect. The govern-

281. *Id.* at 352.

282. *Id.*

283. *Id.* at 359 (Brennan, J., concurring) (quoting *Methow Valley*, 490 U.S. at 351).

284. Brief for the Petitioners, *Methow Valley*, 490 U.S. 332 (No. 87-1703) (“No one disputes that a federal agency can and should consider mitigation opportunities when assessing the environmental consequences of a proposed action. Indeed, the CEQ’s implementing regulations direct that mitigation opportunities be considered and discussed during the preparation of an environmental impact statement.”).

285. Clerk Memorandum to Justice Harry A. Blackmun at 1, *Methow Valley*, 490 U.S. 332 (No. 87-1703) (Mar. 21, 1989) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (commenting on Stevens’ draft opinion that “I should note, however, that on the mitigation issue JPS refrains from deciding the adequacy of the Environmental Impact Statement (EIS). Rather, he simply states that CA9 applied an incorrect legal standard (by asserting that the agency must engage in mitigation and by stating in detail what mitigation measures will be undertaken) and remands for further proceedings free from this legal error. JPS never indicates what [is] the correct legal standard for judicial review of a mitigation discussion in an EIS and, as already mentioned, never applies a standard to the EIS in this case”); *id.* at 1–2 (“There was, however, a difference of opinion at Conference on the sufficiency of the mitigation discussion in this case. JPS thus limited his opinion to what all the Justices agreed upon: that CA9 erred in its description of the legal standard governing mitigation.”); Clerk Memorandum to Justice Harry A. Blackmun, *Methow Valley*, 490 U.S. 332 (No. 87-1703) (Apr. 24, 1989) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (“While I regret to some extent the fact that the Court did not take the opportunity to explain what constitutes an adequate mitigation discussion in an EIS (but rather ducked the issue entirely), I see no point in writing separately if no one else wants to get involved in the issue. JPS hoped for unanimity if he addressed only the question whether a ‘complete’ mitigation plan is required and knew there would be dissent if he said anything more. Thus far he has been successful in his quest for unanimity. And since he is correct on what he does say (even if he avoids the tough issues), I don’t think you should disrupt the unanimity he has achieved thus far.”).

286. Clerk Memorandum to Justice Harry A. Blackmun Re: The Two NEPA Cases at 1, *Methow Valley*, 490 U.S. 332 (No. 87-1703) (Apr. 18, 1989) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (“WJB is thinking of writing separately in these two NEPA cases. WJB is concerned that . . . the Court has not yet decided whether the mitigation discussion is adequate.”).

ment did not even contest the lower court's ruling that the federal agency "had not adequately evaluated the cumulative environmental impact of the entire project."²⁸⁷ Nor did the government contest that NEPA would sometimes require a supplemental EIS even after approval of an initial EIS and after construction had commenced.²⁸⁸ The government and environmentalists even apparently agreed on the governing legal standard for when a supplemental EIS is necessary and the need for a "hard look" "even after a proposal has received initial approval."²⁸⁹ As a result of all these threshold concessions, the Court's final ruling that the lower court had erred because the federal agency had not been required to supplement the EIS was exceedingly narrow and fact bound. No significant adverse precedent was created, which is no doubt why here too there was unanimity, although Justice Brennan apparently seriously contemplated filing a dissent because he thought "that supplementation was required in *Marsh*."²⁹⁰

12. *Robertson v. Seattle Audubon Society* (1992).²⁹¹

Seattle Audubon Society was a significant NEPA case in the lower courts but not as ultimately disposed of by the Supreme Court, where the NEPA dimension became irrelevant. After lower federal courts enjoined logging in old-growth forests based on violations of NEPA, among other grounds, Congress enacted the "Northwest Timber Compromise," which both required the Forest Service and Bureau of Land Management (BLM) to log certain volumes of timber from those forests and declared that the statutory provisions at issue in the specific statutorily identified cases should be deemed satisfied by the provisions of that new legislation.²⁹² NEPA's provisions were among those requirements. In *Seattle Audubon Society*, the Supreme Court reversed the Ninth Circuit's ruling that the Timber Compromise legislation violated separation of powers by purporting, in effect, to overturn a judicial decision. Justice Clarence Thomas wrote the opinion for a unanimous Court. The Court held that the disputed provision of the new statute merely "replaced the legal standards underlying the two original challenges . . . without directing particular applications under either

287. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 369 (1989).

288. *Id.* at 373–74.

289. *Id.* ("On the other hand, and as petitioners concede, NEPA does require that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval."); Reply Brief for the Petitioners at 14, *Marsh*, 490 U.S. 360 (No. 87-1704) ("The parties agree . . . that the agency must prepare a supplemental environmental impact statement if the agency determines that the new information has 'significant' relevance or bearing on the proposed action or its effects.").

290. Clerk Memorandum to Justice Harry A. Blackmun, *supra* note 286 ("WJB is thinking of writing separately in these two NEPA cases. . . . WJB also apparently thinks that supplementation was required in *Marsh*.").

291. 503 U.S. 429 (1992).

292. *Id.* at 433–35 (citing Northwest Timber Compromise, Pub. L. No. 101-121, § 318(b)(6)(A), 103 Stat. 747 (1989)).

the old or the new standards.”²⁹³

By the time the Court reached and decided the *Seattle Audubon Society* case, its NEPA dimension had become incidental at best. And however one assesses the persuasiveness of the Court’s reasoning as a matter of separation of powers principles, the opinion did not have the effect of weakening NEPA’s protections. By concluding that Congress had amended NEPA in application to one particular set of factual circumstances, the Court both elided the separation of powers issue and ensured that it would be announcing NEPA law of no precedential consequence. Had the Court instead acquiesced in the notion that Congress could change NEPA law (and had in fact done so) through an appropriations provision like the one at issue in *Seattle Audubon Society*, such a judicial acquiescence would have had far greater precedential effect on NEPA law.

13. *Department of Transportation v. Public Citizen* (2004).²⁹⁴

In *Public Citizen*, the Court reversed a Ninth Circuit ruling that the Federal Motor Carrier Safety Administration (FMCSA) had violated NEPA by failing to evaluate “the environmental effects of cross-border operations of Mexican-domiciled motor carriers, where FMCSA’s promulgation of certain regulations would allow such cross-border operations to occur.”²⁹⁵ Justice Thomas wrote the opinion for the unanimous Court, concluding that “the causal connection between FMCSA’s issuance of the proposed regulations and the entry of the Mexican trucks is insufficient to make FMCSA responsible under NEPA to consider the environmental effects of the entry.”²⁹⁶ The Court reasoned that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”²⁹⁷ Under NEPA, therefore, “the agency need not consider these effects in its [environmental assessment] when determining whether its action is a ‘major Federal action.’”²⁹⁸

There is no question that *Public Citizen* was a significant loss for NEPA plaintiffs. As described above and elaborated upon in more detail below, the Court achieved in *Public Citizen* the limiting construction of NEPA that a majority of Justices had indicated they favored almost thirty years earlier in the *Flint Ridge* case but that the Court in *Flint Ridge* nonetheless declined to announce due to the efforts of Justice Marshall.²⁹⁹ The Court’s easy assumption that NEPA cannot itself serve as the basis of an agency’s authority to consider environmental consequences flies squarely in the face of the statutory language

293. *Id.* at 437.

294. 541 U.S. 752 (2004).

295. *Id.* at 756.

296. *Id.* at 768.

297. *Id.* at 770.

298. *Id.*

299. See *supra* section II.B.3; *infra* notes 390–404 and accompanying text.

and NEPA's central purpose,³⁰⁰ as described in *Calvert Cliffs*: to ensure that in the future no agency could claim "that it had no statutory authority to concern itself with the adverse environmental effects of its actions."³⁰¹ Yet, even within the context of such a loss, the Court's unanimity appears to have resulted from several limiting aspects.

First, the Solicitor General abandoned before the Supreme Court any claim that the NEPA plaintiffs lacked standing. The nature of the federal government's argument on the merits in this case—the lack of a direct relationship between the federal agency's approval of the motor vehicle regulations and increased air pollution—would seem to have lent itself to an analogous claim that the NEPA plaintiffs lacked Article III standing based on lack of a causal nexus or redressability. Indeed, that is what the federal government argued, and lost, in the lower courts.³⁰² But the Solicitor General declined to raise that threshold issue before the Supreme Court. The Solicitor General's tactical judgment undoubtedly helped the agency win all the issues before the Court—it is far less certain they would have garnered a majority for no Article III standing and virtually certain that they would not have won unanimously, given the number of Justices at that time who (unlike Justices Thomas and Scalia) had recently voted in favor of a more relaxed view of environmental-plaintiff standing.³⁰³

The Court's opinion in *Public Citizen* is also noteworthy for the concerted effort it makes to announce its own limitations. Somewhat curiously, the analysis portion of the opinion begins "by explaining what this case does *not* involve."³⁰⁴ The implications of such a beginning are obvious: to make clear from the outset what legal issues are being left unaddressed and what factual assumptions form the basis of the Court's legal conclusions. Most significantly, the Court stated that there was no challenge in the case to the agency's environmental assessment "due to its failure properly to consider possible alternatives to the proposed action (*i.e.*, the issuance of the challenged rules) that would mitigate the environmental impact of the authorization of the cross-border operations by Mexican motor carriers."³⁰⁵ Whether this is a fair assessment of the record, the implications of this caveat for the precedential effect of the Court's opinion are clear. Had such an objection been made and the accompanying record developed, the environmental plaintiffs might well have prevailed in this case.

300. See Mandelker, *supra* note 2, at 10640 ("One of the guiding concerns that led to the adoption of NEPA was the need to correct the sometimes myopic vision of federal mission agencies.").

301. *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

302. *Public Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1015–19 (9th Cir. 2003).

303. *Compare, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–88 (2000) (ruling that the environmental plaintiffs had standing under the Clean Water Act), *with id.* at 198–215 (Scalia and Thomas, JJ., dissenting) (disagreeing with the majority's finding of standing).

304. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004).

305. *Id.*

14. *Norton v. Southern Utah Wilderness Alliance* (2004).³⁰⁶

In *Southern Utah Wilderness Alliance*, the federal government challenged a Tenth Circuit ruling that the BLM had violated NEPA by failing to prepare a supplemental EIS that considered the significant increase in off-road vehicle use in a wilderness-study area managed by the BLM.³⁰⁷ The Court reversed unanimously in an opinion written by Justice Scalia. On the NEPA issue, the Court held that there was “no ongoing ‘major Federal action’ that could require supplementation,” because BLM’s land use plan had already been approved.³⁰⁸

Because the opinion was written by Justice Scalia, who once mocked Judge Skelly Wright’s suggestion in *Calvert Cliffs* that the judicial role was to ensure that NEPA’s important policies not be “lost or misdirected in the vast hallways of the federal bureaucracy,”³⁰⁹ it is perhaps not surprising that, unlike in some of the earlier NEPA cases, there is no favorable dictum within the opinion that NEPA plaintiffs can effectively mine in future cases. Perhaps one saving grace is that Scalia’s opinion for the Court is mercifully short in its dismissal of the merits of the NEPA claim and therefore does not say much at all.³¹⁰ The opinion makes a complicated question of NEPA law look easy. The Court matter-of-factly explains that no NEPA supplementation was necessary because there was no ongoing federal action when the land use plan that had triggered NEPA had previously been approved and therefore complete.³¹¹ The straightforwardness of the Court’s analysis sharply contrasted with the contrary view of NEPA’s applicability advocated in an amicus brief filed on behalf of every living former Chair and General Counsel of CEQ.³¹²

The Court’s unanimity, however, can likely be explained by the concessions the Solicitor General made in its briefing and argument before the Court, which also made the Court’s opinion less far-reaching than it might otherwise have been. In particular, the Solicitor General sharply limited the scope of debate by acknowledging NEPA’s applicability in wide-ranging circumstances, including commitments to engage in supplemental NEPA assessments in specific circumstances.³¹³ The Solicitor General also advised the Court that “BLM ha[d] issued notices of intent to prepare or revise land use plans for four of the five areas in

306. 542 U.S. 55 (2004).

307. *Id.* at 60–61.

308. *Id.* at 73.

309. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983) (quoting *Calvert Cliffs’ Coordinating Comm., Inc. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971)).

310. *See* 542 U.S. at 72–73.

311. *Id.* at 73.

312. *See* Brief for Former Chairs & General Counsels of the Council on Environmental Quality as Amici Curiae Supporting Respondents, *S. Utah Wilderness Alliance*, 542 U.S. 55 (No. 03-101).

313. *See* Brief for the Petitioners at 37, *S. Utah Wilderness Alliance*, 542 U.S. 55 (No. 03-101) (acknowledging that there are circumstances when “an agency must take a ‘hard look’ at intervening developments relevant to environmental concerns to determine whether supplementation is required before it takes or completes the action”).

which SUWA sought to compel a ‘hard look’ at whether to supplement an earlier NEPA analysis” and that “BLM anticipate[d] issuing a notice of intent to revise the land use plan for the fifth area in April 2004.”³¹⁴ The court of appeals below had been troubled by “serious questions about the likelihood of a future hard look actually occurring” in part because BLM had previously given only vague assurances that additional environmental analysis would take place “over the next ‘several’ or ‘few’ years.”³¹⁵ The Court’s opinion made note of this caveat by stating that no NEPA supplementation was then required because there was “no ongoing ‘major Federal action’ that could require supplementation (though BLM *is* required to perform additional NEPA analyses if a plan is amended or revised . . .).”³¹⁶ An exceedingly thin sliver of silver lining, to be sure, but it is at least something.

15. *Winter v. Natural Resources Defense Council, Inc.* (2008).³¹⁷

In *Winter*, the Supreme Court reversed a Ninth Circuit decision that had preliminarily enjoined the Navy from conducting sonar training off the coast of southern California unless the Navy implemented two controversial mitigating measures.³¹⁸ The Ninth Circuit had found that the plaintiffs were likely to prevail on their claim that NEPA obligated the Navy to complete an EIS and required that the mitigating measures be implemented during any sonar training until issuance of an acceptable EIS or a decision against the plaintiffs on the merits.³¹⁹ Chief Justice Roberts wrote the opinion for the Supreme Court, which was joined in full by Justices Scalia, Kennedy, Thomas, and Alito. The Court held, notwithstanding “the seriousness” of the interests in avoiding possible injuries to marine mammals, that “the balance of equities and consideration of the overall public interest . . . tip[ped] strongly in favor of the Navy.”³²⁰ The Court relied on NEPA’s procedural-only character to justify its ruling: “Given that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security.”³²¹ The Court never needed to reach the issue whether the Navy had in fact violated NEPA.

In contrast with *Norton*, *Winter* is yet another instance in which there is in fact much less to the government’s victory than it might initially seem. The

314. Reply Brief for the Petitioners at 18 n.6, *S. Utah Wilderness Alliance*, 542 U.S. 55 (No. 03-101).

315. *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1239–40 (10th Cir. 2002).

316. *S. Utah Wilderness Alliance*, 542 U.S. at 73.

317. 555 U.S. 7 (2008).

318. *Id.* at 12. The two measures were (1) a limitation on sonar use when a marine mammal was spotted near a vessel and (2) a requirement to power down sonar under specified conditions. *Id.* at 18–20.

319. *Id.* at 19–20.

320. *Id.* at 26.

321. *Id.* at 32–33.

NEPA plaintiffs in fact lost very little and could fairly be characterized as having won more than they lost in the litigation, which is not bounded by what took place before the Supreme Court. Here again, the secret to the government's success was that it gave up much of its case between the beginning of this litigation and the time the case reached the Supreme Court. In the lower court the government's central claim was that the Navy had reasonably concluded that no EIS was required.³²² Before the Supreme Court, the government not only no longer contested that the Navy had initially violated NEPA by failing to prepare an EIS, it also stressed that an EIS was now being prepared and would be prepared in the future.³²³

The Solicitor General addressed only two questions before the Court. The first was whether CEQ had validly invoked its regulation authorizing deviation from NEPA requirements in the event of "emergency circumstances" to excuse the Navy from any prior noncompliance with NEPA.³²⁴ That issue did not, accordingly, reach the distinct question, addressed by the lower courts, whether the Navy had initially violated NEPA by failing to prepare an EIS. The second issue addressed by the Solicitor General was whether, even assuming that the environmental plaintiffs had established a likelihood of success on the merits, the district court had failed properly to defer to the Navy's assessment of the likelihood of harm to marine mammals and the Navy's expertise in determining whether to issue preliminary injunctive relief.³²⁵

Moreover, the Navy sharply limited the scope of its challenge to the preliminary injunction. The Navy had initially challenged most of the district court's preliminary injunction conditions.³²⁶ Before the Supreme Court, however, the Solicitor General stressed that it was challenging only two of the many conditions imposed by the district court.³²⁷ That significant limitation made the Solicitor General's argument more reasonable and therefore more persuasive. But it also meant that the Solicitor General was winning less rather than more.

The Chief Justice's majority opinion relied on these concessions in ruling for the government.³²⁸ The Court never contested the lower court's conclusion that the Navy had initially violated NEPA and declined altogether to address the

322. See *Natural Res. Def. Council, Inc. v. Winter*, 530 F. Supp. 2d 1110, 1114 (C.D. Cal. 2008) (summarizing the Navy's initial argument in which it "insisted that [it was] not required to prepare an EIS").

323. See Transcript of Oral Argument, *Winter*, 555 U.S. 7 (No. 07-1239), 2008 U.S. Trans. LEXIS 66, at *8. ("[W]e're not here arguing that, at this point, that we had no duty to prepare an environmental impact statement" in light of CEQ's emergency circumstances.).

324. Brief for Appellant-Petitioner at 21-33, *Winter*, 555 U.S. 7 (No. 07-1239).

325. *Id.* at 34-54.

326. *NRDC v. Winter*, Order Issuing Preliminary Injunction (C.D. Cal., Jan. 3, 2008); *NRDC v. Winter*, Order Issuing Modified Preliminary Injunction (C.D. Cal., Jan. 10, 2008); *NRDC v. Winter*, Order Denying Defendants' Ex Parte Application To Vacate Preliminary Injunction or To Partially Stay Pending Appeal and Order Vacating Temporary Stay (C.D. Cal., Feb. 4, 2008).

327. *Winter*, 555 U.S. at 18 ("The Navy filed a notice of appeal, challenging only the last two restrictions.").

328. *Id.* at 31-33.

Solicitor General’s argument that CEQ had effectively cured any such violation by invoking an “emergency circumstances” exception.³²⁹ Indeed, especially given the tenor of some of the skeptical questions raised at oral argument concerning the statutory basis of CEQ’s assertion of emergency power, the failure of the Court to address CEQ’s authority—which had been the Solicitor General’s primary argument—left the impression that the Justices may harbor some significant doubts about its legitimacy.³³⁰ The exclusive basis for the Court’s ruling in favor of the Navy was the lower court’s failure in balancing the equities and assessing the public interest to give adequate deference to the Navy regarding the adverse impact on its training of the two preliminary injunction conditions that the Navy was still contesting.³³¹ As a practical matter, regardless of the Court’s disposition of the case in the Supreme Court, the NEPA plaintiffs in *Winter* achieved virtually all of their litigation goals: an EIS would be prepared and almost all of the district court preliminary injunctions would be imposed on Navy training, which would establish a useful precedent for future training exercises.

16. *Monsanto Co. v. Geertson Seed Farms* (2010).³³²

In *Monsanto*, the Supreme Court reversed a Ninth Circuit decision that had held that the Animal and Plant Health Inspection Service (APHIS) had violated NEPA by failing to complete an EIS before deciding to deregulate a variety of genetically altered alfalfa seeds.³³³ The Ninth Circuit had affirmed the district court’s entry of a permanent injunction prohibiting APHIS from deregulating, even in part, and prohibiting almost all future planting of the crop pending the completion of the required EIS.³³⁴ The Supreme Court reversed. Writing for the majority, Justice Alito, who was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Ginsburg, and Sotomayor, held that the district court had erred in enjoining *partial* deregulation.³³⁵ “If the agency found, on the basis of a new [environmental assessment], that a limited and temporary deregulation satisfied applicable statutory and regulatory requirements, it could proceed with such a deregulation even if it had not yet finished the onerous EIS required for complete deregulation.”³³⁶ Justice Alito emphasized that “[u]ntil such time as the agency decides whether and how to exercise its regulatory authority, . . .

329. Brief for Appellant-Petitioner, *supra* note 324.

330. Transcript of Oral Argument, *supra* note 323, at *10–12 (Justice Souter asking four times for the Solicitor General to identify the source of CEQ’s “statutory authority” to excuse EIS preparation under “emergency circumstances”); *id.* at *13 (statement of the Chief Justice) (“[B]ut why CEQ? I mean, NEPA doesn’t really give anybody any regulatory authority—EPA, CEQ. And it seems to me that CEQ is an odd entity to be doing this.”).

331. *Winter*, 555 U.S. at 28–33.

332. 130 S. Ct. 2743 (2010).

333. *Id.* at 2749.

334. *Id.* at 2750–52.

335. *Id.* at 2757–61.

336. *Id.* at 2758.

the courts have no cause to intervene.”³³⁷ Justice Stevens dissented alone (Justice Breyer did not participate). He suggested that the district court should not be read to have enjoined all partial deregulation, merely one particular partial deregulation proposal; and even if it had enjoined partial deregulation, doing so was within its discretion.³³⁸

In *Monsanto*, the NEPA plaintiffs at worst lost little and in many respects won far more than they lost. And, at the very least, the Court rejected all of the sweeping arguments proffered by industry and the government that would, unlike the Court’s actual ruling, sharply cut back on NEPA’s significance.

First, the reason the Court gave for overturning the lower court’s injunction was that injunctive relief was, as a practical matter, unnecessary, because the district court had vacated the agency action on NEPA grounds and there had been no appeal by the government or by industry of that ruling. The only appeal taken was of the injunction and not of the vacatur of the agency’s decision. As the Court explained, the vacatur of the APHIS’s deregulation decision “means that virtually no [genetically altered alfalfa seed] can be grown or sold until such time as a new deregulation decision is in place”³³⁹ The Court further recognized that, if the federal agency elects in the future to make a new deregulation decision, it will be subject to litigation by any aggrieved party, including on the ground that an EIS was required.³⁴⁰ In short, the reason that the Court overturned the injunction was that the NEPA plaintiffs had won almost all the relief they sought without an injunction, rendering the injunction unnecessary.

The Court also rejected industry and government arguments that would have sharply circumscribed NEPA’s effectiveness. Both contended that the NEPA plaintiffs lacked standing. The Court unanimously disagreed.³⁴¹ The Court ruled that a “reasonable probability” of injury was enough for Article III.³⁴² As the Court explained, the substantial risk of contamination was enough, by itself, to cause the NEPA plaintiffs to suffer harm, even if no contamination in fact occurred, and such harms are “sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis.”³⁴³

Finally, the Court likewise declined to embrace the government’s contention that environmental plaintiffs were not entitled to injunctive relief unless they could demonstrate that the claimed irreparable injury was “likely” to occur,

337. *Id.* at 2760.

338. *Id.* at 2765–72 (Stevens, J., dissenting).

339. *Id.* at 2761.

340. *Id.* at 2760.

341. *Id.* at 2754–56. Justice Stevens dissented from the Court’s judgment but did not dispute its ruling that environmental respondents possessed Article III standing. *Id.* at 2762–72 (Stevens, J., dissenting).

342. *Id.* at 2754–56.

343. *Id.* at 2755.

strongly suggesting a “more likely than not” standard.³⁴⁴ If adopted, such a standard could well have been the death knell to environmental plaintiffs—and not just in NEPA cases. Given the scientific uncertainty that frequently pervades cause and effect in the ecosystem, there is almost always some speculation underlying claims of environmental injury. A strict “likely” or “more probable than not” standard would consequently frequently prove insurmountable, which is why both the environmental respondents and their amici strongly resisted the government’s contention.³⁴⁵ For this same reason, the absence in the Court’s opinion of any embrace of this aspect of the government’s argument was a significant “win” for environmentalists.

In sum, a new, closer, and fuller look at the Supreme Court’s NEPA precedent does not suggest that environmentalists in fact won all those cases, but it does tell a story different from what has been long-settled wisdom regarding the Court’s NEPA record. The environmentalists won some real victories in much of that litigation, including at the Court itself: through significant government concessions, narrow rulings, and favorable dicta sometimes more significant than the adverse ruling itself. And the seeming unanimity of those rulings was occasionally the product of concern about safeguarding NEPA’s promise rather than its uncaring dismissal.

III. NEPA, ADVOCACY, AND THE NATURE OF SUPREME COURT DECISION MAKING

NEPA’s experience before the Supreme Court also offers broader insights into the role of advocacy before the Court and the dynamics of the decision-making process within the Court. What forty years of NEPA litigation shows is that advocacy before and within the Court not only matters, but matters a lot.³⁴⁶ Although environmental NEPA plaintiffs have not fared nearly as poorly as routinely supposed, it cannot be doubted that they have still lost more than they have won before the Court, in terms of NEPA’s potential. What a closer focus on the cases reveals is that a significant explanation for this result is effective advocacy by those before the Court defending against NEPA claims and those within the Court more skeptical of NEPA’s efficacy.

To a large extent, the federal government’s extraordinary winning streak at the High Court in NEPA cases is a product of its own effective advocacy. The

344. See Reply Brief for the Federal Respondents at 7, *Monsanto*, 130 S. Ct. 2743 (No. 09-475); Reply Brief for Petitioners at 13 n.4, *Monsanto*, 130 S. Ct. 2743 (No. 09-475) (“Respondents claim that ‘likely’ cannot mean ‘more likely than not.’ *Webster’s* begs to differ.” (citation omitted)).

345. Transcript of Oral Argument at 33, *Monsanto*, 130 S. Ct. 2743 (No. 09-475) (Counsel for Respondents Lawrence Robbins refuting the “more likely than not” suggestion of petitioners); Brief for Dinah Bear et al. as Amici Curiae Supporting Respondents at 6–23, *Monsanto*, 130 S. Ct. 2743 (No. 09-475); Brief for Natural Resources Defense Council et al. as Amici Curiae Supporting Respondents at 5–28, *Monsanto*, 130 S. Ct. 2743 (No. 09-475).

346. Outside of the context of NEPA, I have previously addressed the general issue of the impact of expert Supreme Court advocacy on the Court’s docket and rulings. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487, 1522–49 (2008).

Solicitor General generally outlitigated NEPA plaintiffs in the Supreme Court. By choosing carefully which cases and legal arguments to press before the Court and which to jettison, the Solicitor General avoided cases and arguments it most likely would have lost. And, by knowing the Justices well enough to understand how best to pitch a case to them, including the need to present new arguments not considered and raised in the lower courts, the Solicitor General transformed losing cases into winners. But it is also fair to say, based on a review of the cases, that as a result of the Solicitor General's tactics, NEPA plaintiffs lost less than it might seem and won some victories that have helped NEPA remain an effective piece of federal environmental legislation for four decades.

The NEPA litigation before the Court also underscores the immensely important role that advocacy *within* the Court plays in producing the Court's final opinion and judgment. Advocacy in a Supreme Court case does not end when the Chief Justice declares at the close of oral argument that "[t]he case will be submitted." The locus of advocacy merely shifts then from one side of the lectern, where the advocates stand, to the other side of the lectern, where the Justices sit. The Chief Justice and the Associate Justices deliberate, to be sure, but their deliberative process includes advocacy as some members of the Court try to persuade other members of the Court of the strength of their competing views of the questions presented in a case.

Such advocacy occurs during both the jurisdictional and merits stages, but no doubt mostly in the latter, which is when the Justices themselves are more fully engaged. At the merits stage, the role of advocacy reaches an initial high mark during the conference of the Justices, which takes place within at most a few days of the oral argument. That is when the Justices meet in complete privacy—no law clerks or any other Court personnel are present in the room—and they first vote on how to rule in each of the cases just argued.

But the advocacy within the Court continues during the opinion-writing process that occurs over the ensuing several weeks or months. The ability of an individual Justice to craft an opinion that obtains the minimum five votes necessary to become an "Opinion of the Court" is an important measure of a Justice's success. So too is the ability of those not formally assigned the task of producing a Court opinion to influence its writing by persuading the opinion author to add or delete certain language in the final opinion. Not all Justices are equally skilled in writing draft opinions or offering comments and suggested revisions of those drafts. But those are the skills that are ultimately the most important for influencing the only truly important work produced by the Court: its final written opinions. The NEPA cases demonstrate just that, with remarkable clarity.

A. ADVOCACY BEFORE THE COURT: THE EFFECTIVENESS OF THE SOLICITOR GENERAL

Without question, one reason for the lopsided nature of the Supreme Court's NEPA decisions is the extraordinary skill of the Office of the Solicitor General

before the Court. The Solicitor General wins more often because the attorneys in that office are especially able Supreme Court advocates who also enjoy heightened respect for the credibility of their arguments based on their representation of the United States.³⁴⁷

But as the discussion of the Court's NEPA cases above revealed, the Solicitor General's skill is expressed in ways more nuanced than just "winning." There is a cost to having a seemingly perfect record before the High Court. It requires abandoning lower court losses and not pressing those cases before the Court.³⁴⁸ A federal agency may wish to see Supreme Court review or a regulated industry may support such review, but the Solicitor General may nonetheless decide against filing a petition for a writ of certiorari precisely because of the risk of a loss.³⁴⁹ When, moreover, a regulated industry nonetheless seeks Supreme Court review in the absence of Solicitor General support, the Court has denied review on almost every occasion, with the absence of such support as essentially preclusive.³⁵⁰ Indeed, the Solicitor General likely avoided losing on the merits in its very first NEPA case, *Upper Pecos Ass'n v. Peterson*,³⁵¹ by essentially confessing error after the Court granted review in light of an intervening action by CEQ.³⁵² Commentators have frequently mentioned that the first Supreme Court NEPA ruling did not occur until the lower courts had decided hundreds of NEPA cases.³⁵³ Absent the Solicitor General's tactical move in *Upper Pecos*, the Court would not only have decided a NEPA case very early on but would have issued a ruling favorable to environmental plaintiffs that might well have promoted even more favorable lower court precedent, which is no doubt precisely why the Solicitor General took the extreme action he did to eliminate the case from the Court's docket.

When not abandoning a case altogether, the Solicitor General was able to achieve the Office's unblemished record by giving up on legal arguments that

347. This advantage persists over time even though, of course, individual attorneys and the Solicitors General themselves necessarily change. There is no member of the Solicitor General's Office today who was there in January 1, 1970, when NEPA first became law. The absence of complete identity over time does not, however, defeat that distinct expertise in Supreme Court litigation advantage. Apart from the Solicitor General (and since the early 1980s one of the four Deputy Solicitor Generals), all the other attorneys in the Office of the Solicitor General (roughly fifteen Assistants to the Solicitor General) are career, nonpolitical appointees, many of whom stay for years and sometimes even decades. There is accordingly an institutional expertise within that office that remains fairly constant, even while it may shift at the margins over time and between presidential administrations. The Solicitor General leads the Office and makes final decisions on filings and content but the vast proportion of career attorneys necessarily has a stabilizing effect that it would not have were the Office dominated by short-term political appointees. These are observations based on my own tenure in the Solicitor General's Office during the 1980s and my frequent and close work with the Office on cases in subsequent decades.

348. For examples of this strategy, see the cases discussed in sections II.B.1–16.

349. See *supra* section II.A.

350. See *id.*

351. 409 U.S. 1021 (1972).

352. See *supra* notes 126–31 and accompanying text.

353. See Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1678 n.46 (1993); Rodgers, *supra* note 93, at 493 & nn.28–29.

the government pressed in the lower courts. As described above, the Solicitor General in NEPA cases frequently won by conceding away arguments and legal issues that the federal government had pressed below, precisely because it was not so confident the government could prevail on those arguments and issues before the Supreme Court. The Solicitor General, for example, conceded much of the government's lower court arguments in *Kleppe v. Sierra Club*,³⁵⁴ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,³⁵⁵ *Weinberger v. Catholic Action of Hawaii/Peace Education Project*,³⁵⁶ *Metropolitan Edison Co. v. People Against Nuclear Energy*,³⁵⁷ *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*,³⁵⁸ *Robertson v. Methow Valley Citizens Council*,³⁵⁹ *Marsh v. Oregon Natural Resources Council*,³⁶⁰ *Department of Transportation v. Public Citizen*,³⁶¹ *Norton v. Southern Utah Wilderness Alliance*,³⁶² *Winter v. Natural Resources Defense Council, Inc.*,³⁶³ and *Montano Co. v. Geertson Seed Farms*.³⁶⁴ The Solicitor General declined to press standing arguments, agreed that certain kinds of impacts were legally cognizable under NEPA, acknowledged that EISs were required under a host of circumstances, and prepared additional NEPA documentation in many instances. On closer inspection, therefore, the government's "perfect record" in NEPA cases masks High Court precedent that is far more mixed than commentators have supposed.

These are, of course, nothing more than repeated instances of effective advocacy by the law office—the Office of the Solicitor General—widely known for its effective advocacy before the Supreme Court. In this regard, there is nothing unique or otherwise special about NEPA cases before the Court. The record reflects the dominant role that the Solicitor General and attorneys within that Office naturally play in NEPA cases, because federal agencies are the principal defendants, and their longstanding expertise in maximizing wins and minimizing losses in Supreme Court advocacy.³⁶⁵

B. THE DIFFERENCE A JUSTICE CAN MAKE: THE OPINION-WRITING PROCESS
WITHIN THE COURT

Because only the nine Justices vote on the disposition of each case, the influence of each on the rulings of law announced is of course considerable,

354. 427 U.S. 390 (1976); *see supra* section II.B.4.

355. 435 U.S. 519 (1978); *see supra* section II.B.5.

356. 454 U.S. 139 (1981); *see supra* section II.B.8.

357. 460 U.S. 766 (1983); *see supra* section II.B.9.

358. 462 U.S. 87 (1983); *see supra* section II.B.10.

359. 490 U.S. 332 (1989); *see supra* section II.B.11.

360. 490 U.S. 360 (1989); *see supra* section II.B.11.

361. 541 U.S. 752 (2004); *see supra* section II.B.13.

362. 542 U.S. 55 (2004); *see supra* section II.B.14.

363. 555 U.S. 7 (2008); *see supra* section II.B.15.

364. 130 S. Ct. 2743 (2010); *see supra* section II.B.16.

365. *See Lazarus, supra* note 346, at 1492–97.

especially in cases where the Justices are closely divided. The Court's final product, however, is an opinion with potentially sweeping precedential effect, and not just a single word "reversed" or "affirmed" disposing merely of the particular case at hand. The fuller measure of the influence of a Justice, therefore, is not how often he or she is in the majority or even the decisive "fifth" vote, but the extent to which he or she influences the final written product that is released as the "Opinion of the Court" on the decision day.

No less than the drafting of an advocate's brief before the Court, the crafting of a Supreme Court opinion requires enormous skill, including the skills of persuasion. Not only should the final published opinion be capable of persuading the public at large of its correctness, but it only becomes that final Court opinion if at least five Justices formally join it. The initial votes of the Justices at conference are only that—initial, nonbinding votes. Based on the initial vote, the senior Justice in the majority assigns the opinion to one of the Justices in the majority to draft. It is, however, then the challenge faced by the Justice assigned the opinion to craft one that a majority of the Court will in fact formally join. If the draft opinion subsequently circulated to the other chambers fails to meet that challenge and a majority of Justices decides instead to join a different opinion, including one that was originally denominated a draft "dissent," then what had been preliminarily treated as the "majority" view becomes the "dissent," and what had been tentatively denominated the "dissent" becomes instead the "majority" opinion. Such reversals do not happen with great frequency, but they are not extremely rare. The skill a Justice possesses in drafting an opinion that is sufficiently persuasive is therefore extremely important.

But even if outright reversals in outcome do not happen frequently, dramatic shifts in the reasoning of an opinion can frequently depart from what the Justices briefly outlined during the conference when they cast their initial votes on the merits of a case. At conference each Justice discusses his or her current thinking in addition to his or her initial vote to affirm or reverse, but those discussions fall far short of the degree of detailed reasoning required for the crafting of a formal opinion of the Court. The Justice charged with its drafting, accordingly, possesses significant discretion in deciding whether to write narrowly or broadly, address some issues but not others, or otherwise use words or phrases that are more or less likely to influence other future cases. The influence that a Justice charged with the initial drafting of the opinion attains is accordingly potentially huge.

However, it is not just the Justice formally charged with drafting the majority opinion that can influence its wording. The other Justices whose votes are necessary to establish a majority can use their leverage to persuade the author to make changes to the draft opinion. This, too, requires great skill. The Justice has to decide which battles are worth fighting and which are not, when merely to suggest politely a change in the draft, when to make the suggestion more strongly still, and when to declare with more or less certainty his or her intent to withhold a favorable vote unless the requested change in wording is made. The

related process of negotiation among the opinion's author and the four Justices whose votes the author needs at a minimum can be a delicate one, requiring considerable judgment, tact, and sensitivity. This is especially so when the Justices involved are likely simultaneously to be deciding many cases and therefore circulating many opinions in multiple cases, whose majorities depend on very different and always potentially shifting coalitions.

The NEPA Supreme Court cases decided on the merits display the importance of opinion writing and the effectiveness and ineffectiveness of various Justices in influencing the content of the Court's opinions. Justice Douglas appears to have been mostly ineffectual for the limited time that he remained on the Court when NEPA cases were first being decided. Justice Marshall, however, was quite adept and strove to use his opinion-writing assignments to do more (or less) than just reflect the consensus of the Justices during deliberations. But the clear champion, no doubt to the chagrin of environmental plaintiffs, was Justice and later Chief Justice Rehnquist. The NEPA cases reveal a Justice who by dint of his clear vision, sheer quickness, and personal charm enormously influenced the Court's NEPA precedent, both when he wrote the opinions for the Court and when he commented on the opinions drafted by other Justices. Whatever one thinks of the resulting precedent, it is hard not to admire such a skilled and effective jurist.

1. Justice William Douglas

Although Justice Douglas was only on the Court for a few years after NEPA was enacted, leaving the Court in November 1975, one might fairly have anticipated that he would have played a significant role in the Court's early NEPA precedent. Judge Skelly Wright succeeded in doing so within two years of the law's enactment.³⁶⁶ But Justice Douglas enjoyed no similar success, although he was on the Court when it considered and denied approximately thirty-three petitions for certiorari raising NEPA issues,³⁶⁷ granted one petition

366. See *supra* notes 40–57 and accompanying text.

367. See *Interstate 95 Comm. v. Coleman*, 423 U.S. 912 (1975); *Citizens for Balanced Env't & Transp. v. Coleman*, 423 U.S. 870 (1975); *Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.*, 423 U.S. 836 (1975); *Edwards Underground Water Dist. v. Hills*, 422 U.S. 1049 (1975); *Clinton Cmty. Hosp. Corp. v. S. Md. Med. Ctr.*, 422 U.S. 1048 (1975); *Sierra Club v. Hillis*, 421 U.S. 994 (1975); *Saipan v. U.S. Dep't of Interior*, 420 U.S. 1003 (1975); *Tewa Tesuque v. Morton*, 420 U.S. 962 (1975); *Cal. Highway Comm'n, Dept. of Pub. Works v. Keith*, 420 U.S. 908 (1975); *Md.-Nat'l Capital Park & Planning Comm'n v. Simon*, 419 U.S. 1069 (1974); *Zlotnick v. D.C. Redevelopment Land Agency*, 419 U.S. 963 (1974); *San Diego Gas & Elec. Co. v. Fed. Power Comm'n*, 419 U.S. 882 (1974); *Morningside Renewal Council, Inc., v. U.S. Atomic Energy Comm'n*, 417 U.S. 951 (1974); *Portland Cement Corp. v. Adm'r E.P.A.*, 417 U.S. 921 (1974); *Nat'l Helium Corp. v. Morton*, 416 U.S. 993 (1974); *Envtl. Def. Fund, Inc. v. Stamm*, 416 U.S. 974 (1974); *Appalachian Power Co. v. EPA*, 416 U.S. 969 (1974); *Life of the Land v. Brinegar*, 416 U.S. 961 (1974); *Citizens Env'tl. Council v. Brinegar*, 416 U.S. 936 (1974); *Hanly v. Saxbe*, 416 U.S. 936 (1974); *Save Our Cumberland Mountains Inc. v. Tenn. Valley Auth.*, 414 U.S. 1108 (1973); *Sullivan v. Brinegar*, 414 U.S. 855 (1973); *Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 412 U.S. 931 (1973); *Hanly v. Att'y Gen. of U.S.*, 412 U.S. 908 (1973); *Morton v. Wilderness Soc'y*, 411 U.S. 917 (1973); *Getty Oil Co. (E. Operations) v. Ruck-*

for the purpose of plenary review only subsequently to dismiss the petition on mootness grounds,³⁶⁸ granted another petition for the limited purpose of vacating and remanding for reconsideration in light of an intervening Supreme Court ruling,³⁶⁹ and decided only two NEPA cases on the merits.³⁷⁰ As made evident by his dissenting votes from denial of certiorari in early cases, Douglas was plainly interested in securing Supreme Court NEPA precedent akin to what Judge Wright had established in *Calvert Cliffs*. Nor should this be a surprise because environmentalism was likely Douglas's single greatest passion. Even while on the Court, he authored several books on the importance of environmental protection, proposed environmental legislation, and engaged in political activism in support of the protection of specific resources. Justice Douglas was not shy about his environmentalism.³⁷¹

Yet, in sharp contrast to his unwavering support for environmentalism and environmentalists' frequent trumpeting of Douglas,³⁷² he was strikingly ineffectual on the Court in furthering environmental causes. No doubt, his poor health in his final year on the Court provides some reason for this shortfall,³⁷³ but poor health does not fully explain his lack of accomplishment. Justice Douglas's failing was more longstanding and simply worsened over time.³⁷⁴ He was not particularly adept at writing important opinions capable of garnering the five votes necessary for a majority. His opinions were not carefully crafted, but more

elshaus, 409 U.S. 1125 (1973); *Hackensack Meadowlands Dev. Comm'n v. Transcon. Gas Pipe Line Corp.*, 409 U.S. 1118 (1973); *Bradford Twp. v. Ill. State Toll Highway Auth.*, 409 U.S. 1047 (1972); *Fugate v. Arlington Coal. on Transp.*, 409 U.S. 1000 (1972); *Hanly v. Kleindienst*, 409 U.S. 990 (1972); *Fed. Power Comm'n v. Greene Cnty. Planning Bd.*, 409 U.S. 849 (1972); *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 407 U.S. 926 (1972); *2,606.84 Acres of Land in Tarrant Cnty., Texas v. U.S.*, 402 U.S. 916 (1971).

368. *See* *Upper Pecos Ass'n v. Peterson*, 406 U.S. 944 (1972) (granting certiorari); *Upper Pecos Ass'n v. Peterson*, 409 U.S. 1021 (1972) (dismissing the petition on mootness grounds).

369. *See* *Coleman v. Conservation Soc'y of S. Vt., Inc.*, 423 U.S. 809 (1975).

370. *See* *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289 (1975); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

371. *See, e.g.*, WILLIAM O. DOUGLAS, *A WILDERNESS BILL OF RIGHTS* (1965); WILLIAM O. DOUGLAS, *OF MEN AND MOUNTAINS* (1950); William O. Douglas, *America's Vanishing Wilderness*, *LADIES HOME J.*, July 1964, at 37; *see generally*, *NATURE'S JUSTICE—WRITINGS OF WILLIAM O. DOUGLAS* (James O'Fallon ed., 2001) (collecting Justice Douglas's environmental writings).

372. *See, e.g.*, "HE SHALL NOT PASS THIS WAY AGAIN"—THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS (Stephen L. Wasby ed., 1990) (containing chapters by environmentalists and environmental scholars on Justice Douglas's contributions to modern environmental law).

373. Justice Douglas suffered a devastating stroke in December 1974 and, although he did not resign from the Court until the following November, he was, as a practical matter, physically and mentally incapable of full engagement as a Justice after that stroke. *See* MURPHY, *supra* note 14, at 481–94.

374. Christopher D. Stone, *Commentary: William O. Douglas and the Environment*, in "HE SHALL NOT PASS THIS WAY AGAIN"—THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS, *supra* note 372, at 227 ("Douglas will be more remembered overall for the positions he took . . . rather than for the persuasiveness of what he said, or for any particular institutional sensitivities. . . . [He was] withdrawn from his colleagues, irascible with his subordinates, and impatient with conventional notions of role constraints.").

rushed and conclusory in their legal analysis.³⁷⁵ Reportedly, Justice Brennan described Justice Douglas's last ten years on the Court as being "marked by the slovenliness of his writing and the mistakes that he constantly made."³⁷⁶

Douglas was a loner on the Court rather than a team player.³⁷⁷ He was more likely to push Justices away by insisting on the correctness of his views and the errors in theirs than to build the kinds of personal and professional relationships that might make other members of the Court more likely to listen, respect, and be influenced by Douglas in their voting on cases and their drafting of Court opinions.³⁷⁸ As a result, even when there was a liberal majority on the Court in the 1960s, he could not establish himself as a leader.

Justice Douglas's unflinching support for environmentalism, extending to all things NEPA, may well even have discredited rather than bolstered the new law in the eyes of his colleagues. There was little in his work that suggested reflective, thoughtful assessment of the legal issues presented in a case. Instead, his single-minded desire to further a particular public policy was wholly transparent and likely undermined any possible credibility he might otherwise have had on such matters based on his clear expertise.³⁷⁹ He would announce to the other Justices that he was likely going to recuse himself from a case because of the Sierra Club's involvement as a named party and his longstanding relationship to that organization.³⁸⁰ But then he would participate nonetheless

375. THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS, at x (Melvin I. Urofsky ed., 1987) ("[Douglas] became intellectually lazy in his Court work. He wrote his opinions quickly—some would say in a slapdash manner—and they lacked the rigorous analysis and logical coherence which could have formed the basis for a lasting jurisprudence."); James F. Simon, *William O. Douglas*, in THE WARREN COURT: A RETROSPECTIVE 211, 213–14 (Bernard Schwartz ed., 1996) (noting that Douglas "appeared to have little interest in the craft of judging").

376. MURPHY, *supra* note 14, at 386 (quoting Justice Brennan) (internal quotation mark omitted).

377. Simon, *supra* note 375, at 211, 213–14 (describing Douglas as a loner, happiest when working for and by himself); *id.* at 213 (quoting Justice Potter Stewart as stating that "Bill Douglas seems positively embarrassed if anyone agrees with him").

378. *Cf.* MURPHY, *supra* note 14, at 391 ("[T]he liberal votes were present for Douglas to lead the Court if he wished. But his reckless personal life, not to mention his desire to go his own way on the Court, prevented him from doing so.").

379. A law clerk examining a case for its certworthiness would, accordingly, readily dismiss the fact that Douglas supported an environmentalist petition with "Justice Douglas, of course, agrees . . ." Clerk Memorandum to Justice Harry A. Blackmun Re: Circulated Memo of Mr. Justice Douglas at 1, Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 407 U.S. 926 (1972) (No. 71-1219) (June 9, 1972) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20). Justice Douglas's own notes on the Court's conference in *Committee for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917 (1971) show that Justice Potter Stewart, the newest Justice and the swing Justice in the case, was "not persuaded by WOD's memo." See William O. Douglas, Conference Notes at 1, *Comm. for Nuclear Responsibility*, 404 U.S. 917 (No. A-483) (Nov. 6, 1971) (on file with the Library of Congress, in The Douglas Papers, *supra* note 16).

380. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), Justice Douglas's files indicated that he declined to vote on whether to grant review because of his long history with the Sierra Club. See Memo on WOD and the Sierra Club, *Sierra Club v. Morton*, 405 U.S. 727 (No. 70-34) (on file with the Library of Congress, in The Douglas Papers, *supra* note 16) (describing Douglas's relationship with the Sierra Club from 1959 until 1970); Clerk Memorandum on Certiorari to Justice William O. Douglas at 2, *Sierra Club v. Hickel* (No. 70-34) (Jan. 21, 1971) (on file with the Library of Congress, in The Douglas

and do so most aggressively.³⁸¹ As described by a clerk to Justice Marshall in a memorandum to the Justice about why Marshall might want to prepare his own dissent in *United States v. SCRAP*, “there is some indication that [Douglas’s dissent] will be pretty much a polemic on the problems of the environment without much hard analysis of the jurisdictional issue which is at the center of the case.”³⁸² Douglas’s increasing isolation from the other Justices and increasingly erratic conduct during his final years reportedly exacerbated his ineffectiveness.³⁸³ And then his poor health ended even a pretense of impact.³⁸⁴

2. Justice Thurgood Marshall

Justice Marshall, in contrast to Justice Douglas, is not typically described as a Justice particularly interested in environmental issues. However, Marshall in fact authored opinions for the Court in a significant number of environmental cases,³⁸⁵ especially those involving the administration of the nation’s public lands, and, unlike others, made the effort to dissent in environmental cases as well.³⁸⁶ Quite possibly, Marshall’s prominence as an author of the “Opinion of the Court” in many of those cases may reflect less Marshall’s keen interest in environmental protection than the low esteem Chief Justice Burger harbored for the topic and his desire, when serving as the senior Justice in the majority, to

Papers, *supra* note 16). He was a member of the Sierra Club at the time that the Sierra Club filed its petition (November 5, 1970), but resigned from the club approximately four weeks later. Compare Memo on WOD and the Sierra Club, *Sierra Club v. Morton*, 405 U.S. 727 (No. 70-34) (on file with the Library of Congress, in The Douglas Papers, *supra* note 16) (listing December 2, 1970 as the date of Justice Douglas’s resignation from the Sierra Club), with Docket Sheet, *Sierra Club v. Morton* (No. 70-34) (on file with the Library of Congress, in The Douglas Papers, *supra* note 16) (listing dates of filings). After oral argument in the case, Douglas did not vote, but instead passed, advising his colleagues on the Court that he might “end up *not* participating” because he had been previously on the Board of Directors of the organization and more recently a honorary member, from which he had also recently resigned. See Harry A. Blackmun, Conference Notes at 1, *Sierra Club v. Morton*, 405 U.S. 727 (No. 70-34) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

381. Of course, Douglas not only ended up participating in *Sierra Club v. Morton*, but doing so quite vigorously and crafting what may well be his most famous environmental dissent, notably invoking the idea that “[c]ontemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.” 405 U.S. at 741–42.

382. Clerk Memorandum to Justice Thurgood Marshall, *SCRAP*, 412 U.S. 669 (1973) (Nos. 72-535 & 72-562) (on file with the Library of Congress, in The Marshall Papers, *supra* note 17).

383. See MURPHY, *supra* note 14, at 427 (describing Douglas’s womanizing and the perception in his later years on the Court that “his behavior was now totally out of control”).

384. Reportedly, during the conference of the Justices for the last NEPA case in which Douglas participated, *SCRAP II*, 422 U.S. 289 (1975), Douglas was in such poor condition that there was a fifteen-minute pause before he spoke at that conference. See *supra* note 161.

385. Marshall’s opinions for the Court include: *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Hodel v. Indiana*, 452 U.S. 314 (1981); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981); *Union Elec. Co. v. EPA*, 427 U.S. 256 (1976); *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1 (1976); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

386. See *infra* notes 388–89 and accompanying text.

assign Marshall the Court opinion in those cases for that same reason.³⁸⁷ Or, perhaps Marshall had an affinity for the topic, as Judge Skelly Wright did, derived from a core belief forged in the civil rights context in the need for a strong federal judiciary overseeing government bureaucracies. Marshall and Wright certainly were close personally and professionally, and the former subsequently hired many of Wright's law clerks as his own. Be that as it may, Marshall ended up playing a significant role in the Court's NEPA cases, authoring one opinion, *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*,³⁸⁸ and making the effort to file formal dissents in three others. Indeed, with three dissents, Justice Marshall has dissented in favor of environmental plaintiffs in NEPA cases more than any other Justice.³⁸⁹

Justice Marshall's opinion for the Court in *Flint Ridge* illustrates both the process by which opinions are assigned and the way in which an individual Justice can use the power of the opinion writer to shape the ruling, including in ways not necessarily contemplated by the other Justices during the conference deliberations on the case. At issue in *Flint Ridge* was whether NEPA required HUD to prepare EISs as part of its review of disclosure statements filed by developers.³⁹⁰ At conference, the Justices voted unanimously, with Justice Powell not participating, to reverse the Tenth Circuit ruling that NEPA required the preparation of EISs when the development under submission might have significant environmental effects. Chief Justice Burger, as the senior Justice in the majority, assigned Justice Marshall the opinion, perhaps because *Flint Ridge* was one of only two cases argued that week in which Marshall was in the majority and therefore could be assigned to write an opinion. The other case was an important civil rights case, *Runyon v. McCrary*,³⁹¹ which Marshall likely would have far preferred to have written, but the Chief assigned Marshall to write the *Flint Ridge* case instead.

Whatever the reason for the assignment, Justice Marshall plainly sought to take its full advantage. The papers of the Justices suggest that the Court had granted review because the case provided an opportunity to consider broad issues regarding NEPA's applicability to agencies like HUD and the Securities and Exchange Commission (SEC) when they were exercising responsibilities under statutory provisions that did not provide the agency with an authority to take environmental considerations into account. The Tenth Circuit in *Flint*

387. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 65 (1979) (describing how Chief Justice Burger sought to keep important cases away from liberal Justices like Marshall).

388. 426 U.S. 776 (1976).

389. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228 (1980) (Marshall, J., dissenting); *Kleppe v. Sierra Club*, 427 U.S. 390, 415 (1975) (Marshall, J., concurring in part and dissenting in part); *SCRAP*, 412 U.S. 669, 724 (1972) (Marshall, J., concurring in part and dissenting in part).

390. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 778 (1976).

391. 427 U.S. 160 (1976). In *Runyon*, the Court ruled, with Justices White and Rehnquist dissenting, that the federal antidiscrimination law barred private schools from discriminating on the basis of race. *Id.* at 178-79.

Ridge had imposed NEPA's procedural requirements on HUD, notwithstanding the absence of such authority,³⁹² and a recent federal district court ruling had done the same in application to the SEC.³⁹³ The Justices' Cert Pool Memoranda about the case specifically commented on the SEC ruling in particular and on the opportunity *Flint Ridge* provided for the Court to curb NEPA.³⁹⁴

However, when Justice Marshall subsequently circulated his draft opinion for the Court, its reasoning was not what others on the Court appear to have anticipated. As articulated by one chamber in response to the draft:

This one has a surprise in it. I had thought the CA10's holding that an impact statement was required in connection with a real estate development's "statement of record" was going to be reversed on the broad ground that no EIS is required because the HUD Secretary has absolutely no discretion bearing on environmental issues. Instead, Justice Marshall has chosen the narrow ground³⁹⁵

Marshall's opinion eschewed a broad ruling based on the absence of the agency's statutory authority to consider environmental factors,³⁹⁶ which would have been a ruling wholly at odds with what Judge Wright had written in *Calvert Cliffs*. Marshall's opinion for the Court expressly declined to reach that issue and reversed instead on the extremely narrow ground that preparation of an impact statement is inconsistent with the Secretary's mandatory duties to make disclosure statements effective within thirty days of filing.³⁹⁷

As previously described, moreover, the opinion also failed to embrace other, more sweeping arguments advanced by the Solicitor General for ruling that NEPA did not apply, such as the suggestion that the associated administrative burden excused compliance.³⁹⁸ Marshall's opinion for the Court was also full of language that served to bolster rather than diminish NEPA's significance. The opinion's strong declaration that "NEPA's instruction that all federal agencies comply with the impact statement requirement . . . 'to the fullest extent possible[]' . . . is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureau-

392. *Flint Ridge*, 426 U.S. at 783–85.

393. See *Natural Res. Def. Council, Inc. v. SEC*, 389 F. Supp. 689, 702 (D.D.C. 1974).

394. Cert Pool Memorandum at 6, 9, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (Dec. 1, 1975) (on file with the Library of Congress, in *The Marshall Papers*, *supra* note 17) (discussing the implications of the lower court's reasoning for the work of other federal agencies, including the SEC); Cert Pool Memorandum at 1, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (Dec. 1, 1975) (on file with Washington and Lee University, in *The Powell Papers*, *supra* note 18) (Powell clerk, in handwritten notes, commenting "[t]his case seems a good opportunity to explore the farthest reaches of NEPA").

395. Clerk Memorandum to Justice Harry A. Blackmun, Proposed Opinion for the Court by Justice Marshall at 1, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (June 3, 1976) (on file with the Library of Congress, in *The Blackmun Papers*, *supra* note 20).

396. 426 U.S. at 787–88.

397. *Id.* at 788–91.

398. Brief for the Petitioners at 10–12, *Flint Ridge*, 426 U.S. 776 (No. 75-545).

cratic shuffle”³⁹⁹ is traceable to the views expressed by Judge Wright in *Calvert Cliffs* regarding the need not to let NEPA get “lost or misdirected in the vast hallways of the federal bureaucracy.”⁴⁰⁰ And Marshall’s language, like *Calvert Cliffs*, was repeatedly relied upon by lower courts in subsequent cases.⁴⁰¹

Finally, the papers also underscore the role that Marshall played as the opinion author in including a significant discussion at the end of the opinion that the Court’s decision did not imply “that environmental concerns are irrelevant to the Disclosure Act or that the Secretary has no duties under NEPA.”⁴⁰² Here again, although the papers of other Justices make clear their shared assumption that NEPA should play no role here and HUD has no authority to consider environmental factors,⁴⁰³ Marshall’s opinion suggests otherwise, saying environmentalists could, based on NEPA, require the HUD Secretary to consider a rule making that required “developers to incorporate a wide range of environmental information into property reports to be furnished prospective purchasers.”⁴⁰⁴

Marshall left the Court in October 1991. Ironically, the Justice who replaced him, Clarence Thomas, was the Justice who wrote the opinion for the Court in 2004 in *Department of Transportation v. Public Citizen*,⁴⁰⁵ which finally embraced the reasoning that Marshall had carefully avoided in *Flint Ridge*. The Court in *Public Citizen* held that the Federal Motor Carrier Safety Administration had not violated NEPA by failing to prepare an EIS, because “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect,” and “the agency need not consider these effects” in complying with NEPA.⁴⁰⁶ Marshall’s legacy in this aspect of NEPA lasted, therefore, almost thirty years.

399. 426 U.S. at 787 (quoting 42 U.S.C. § 4332).

400. *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

401. *See, e.g., California v. Block*, 690 F.2d 753, 775 (9th Cir. 1982); *Pub. Serv. Co. v. U.S. Nuclear Regulatory Comm’n*, 582 F.2d 77, 81 (1st Cir. 1978).

402. *Flint Ridge*, 426 U.S. at 792.

403. *See* Clerk Bench Memorandum to Justice Harry A. Blackmun at 16, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (Apr. 23, 1975) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) (“The statute on its face gives not the slightest hint that environmental considerations bear on the Secretary’s decision. . . . The purpose of the statement of record is disclosure, and the completeness and accuracy of disclosure is the Secretary’s only concern. Inaccuracy or incompleteness are the only grounds on which the statement may be rejected. As far as we can tell from the statute, the environmentally most disastrous real estate development in the world would have to be approved, so long as the statement of record fully and accurately disclosed the environmental disaster.”); *id.* at 17–17a (“To support application of NEPA, a court must find some pre-existing discretion in the hands of the federal officer that Congress might plausibly have intended, when it enacted NEPA, to expand to the consideration of environmental factors. . . . [T]his is an easy case the other way . . .”).

404. 426 U.S. at 792.

405. 541 U.S. 752 (2004).

406. *Id.* at 770.

3. Justice and Chief Justice William Rehnquist

William Rehnquist served first as an Associate Justice until 1986 when he became Chief Justice, an office he held until his death in September 2005. Most frequently described as ideologically conservative, he was also widely hailed from all quarters as an outstanding Chief Justice in his administration of the Court and in his leadership in the operation of the entire federal judiciary. Whatever ideological divisions may have persisted within the Court in the votes of the Justices on controversial cases, there appears to have been consensus within the Court that the Chief Justice was a skilled and fair-minded administrator. Some prominent academics, including those who share little of his judicial ideology, describe him as one of the nation's most influential Chief Justices and a great administrator.⁴⁰⁷

What is less appreciated but clear from close examination of the Court's NEPA cases is how extraordinarily skilled Rehnquist was in influencing the content of the Court's opinions. Whether one applauds the resulting precedent, his skills as a Justice cannot be gainsaid. Both as an opinion author and as a commentator, Rehnquist influenced the Court's NEPA precedent far more than any other Justice. He did so because he had a clear, consistent vision of what he thought should be NEPA's bounds, and he skillfully and persistently promoted that vision in authoring opinions and in commenting on the opinions authored by others on the Court.

Marshall's *Flint Ridge* opinion is illustrative. As much as Marshall managed, in effect, to smuggle into his opinion for the Court language that was positive about NEPA, Rehnquist managed to persuade Marshall to eliminate from earlier drafts proposed language that would have been far more positive than what survived into the final draft. Marshall's initial *Flint Ridge* draft was full of language that environmentalists would have applauded even while otherwise losing the case. Indeed, had Marshall's draft been the final opinion, their gains would have far outstripped their narrow loss on the merits. For example, Marshall's draft cited to and quoted favorably from Judge Wright's *Calvert Cliffs* opinion, thereby giving that ruling some imprimatur of Supreme Court endorsement.⁴⁰⁸ Even more particularly, the draft cited *Calvert Cliffs* for the proposition, in direct contravention of the Solicitor General's argument in *Flint Ridge*, that "[c]onsiderations of administrative difficulty, delay or economic

407. See Walter Dellinger, *In Memoriam: William H. Rehnquist, The Man Who Devised the Natural Law of Federalism*, SLATE (Sep. 4, 2005, 12:08 PM), <http://www.slate.com/id/2125685>; *Uncommon Knowledge: Holding Court: The Legacy of the Rehnquist Court* (Hoover Institution broadcast May 26, 2005), available at <http://www.hoover.org/multimedia/uk/2939316.html> (interviewing Kathleen Sullivan, who stated that "[Rehnquist] may be the greatest Chief Justice since Chief Justice Marshall").

408. See Draft Opinion Circulated by Justice Thurgood Marshall at 10, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (June 1, 1976) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

costs will not suffice to strip the section of its fundamental importance.”⁴⁰⁹ Marshall’s draft opinion also expressly concluded that the Secretary of HUD “has authority to adopt rules requiring developers to incorporate a wide range of environmental information into property reports” and cited, with obvious approval, the then-recent federal district court ruling that had concluded that the SEC had similar responsibilities under NEPA.⁴¹⁰ This was of course the same district court ruling that had prompted more than one Justice to believe that the case warranted the Court’s attention for the purpose of its cutting back rather than its endorsement.⁴¹¹ And, in a clever back-handed way of saying that the Court was “express[ing] no view” on whether NEPA “gives mandatory content” to the Secretary’s authority, Justice Marshall’s opinion was seeking to bolster the possible environmentalist argument that NEPA did just that.⁴¹²

But Justice Rehnquist immediately stepped in to try to minimize the sweep of Justice Marshall’s draft. Marshall circulated his draft opinion on June 1st.⁴¹³ Rehnquist circulated detailed comments on Marshall’s draft the very next day, June 2nd.⁴¹⁴ The advantages of such a remarkably quick response were considerable. It minimized the possibility that four other Chambers would quickly agree to “join” the opinion in a low-profile case about which there had been unanimity, which also made it a draft opinion that other Chambers might not take the time to read closely. Although he prefaced his letter respectfully—“While I agree with your result and with much of your opinion, several relatively minor points in it give me trouble”—Rehnquist bore down with precision on the draft language he sought to have modified.⁴¹⁵ He described as “unnecessary and undesirable” the draft’s quotation of *Calvert Cliffs* “to give added weight to [Justice Marshall’s] point.”⁴¹⁶ He also zeroed in on Marshall’s possible suggestion that NEPA authorized, or even required, the HUD Secretary to initiate a rule making that would require developers to disclose more information about the adverse environmental impacts of their development.⁴¹⁷ Finally, he took

409. *Id.* (quoting *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971)).

410. *Id.* at 12 (“The Secretary therefore has authority to adopt rules requiring developers to incorporate a wide range of environmental information into property reports . . . and respondents may request the Secretary to institute a rulemaking proceeding to consider the desirability of ordering such disclosure.” (citing *Natural Resources Defense Council, Inc. v. SEC*, 389 F. Supp. 689 (D.D.C. 1974))).

411. There were references to the SEC district court ruling in the cert-pool memo recommending certiorari, and the case had also apparently been mentioned during conference deliberations. See Justice Lewis F. Powell, Docket Sheet, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (Dec. 5, 1975) (on file with Washington and Lee University, in *The Powell Papers*, *supra* note 18); Cert Pool Memorandum, *supra* note 394, at 6, 9.

412. Draft Opinion Circulated by Justice Thurgood Marshall, *supra* note 408, at 13.

413. *Id.* at 1 (listing the date of circulation of the draft opinion as June 1st, 1976).

414. Letter from Justice William H. Rehnquist to Justice Thurgood Marshall, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (June 2, 1976) (on file with the Library of Congress, in *The Blackmun Papers*, *supra* note 20).

415. *Id.* at 1.

416. *Id.* at 2.

417. *Id.* at 3–4.

issue with Marshall's citation of the district court's ruling in *Natural Resources Defense Council, Inc. v. SEC*,⁴¹⁸ stating that "I am simply unwilling to look as favorably as you do upon Judge Richey's opinion" in that case.⁴¹⁹

Justice Potter Stewart immediately embraced Justice Rehnquist's suggestions and made clear that Stewart's vote hinged on Justice Marshall's accepting of Rehnquist's recommendations. Stewart wrote to Marshall the same day Rehnquist circulated his comments to say "I think all of Bill Rehnquist's suggestions are good ones. If you see fit to accept them, I shall be glad to join your opinion for the Court."⁴²⁰ Justice Blackmun's clerk expressed surprise to his Justice that Marshall wrote so narrowly, recommended "holding off" to see how Marshall would respond to the Rehnquist letter, and suggested that Blackmun "consider concurring briefly on the broader ground," speculating, "I'll bet we could get a few votes."⁴²¹

Although Marshall's letter responding to Rehnquist, dated June 3rd, resisted the latter's suggestions in several respects,⁴²² Rehnquist prevailed on each of his most significant points after further exchanges, including a letter from the Chief Justice echoing that "I can join your circulation of June 1 if you find Bill Rehnquist's suggestion acceptable."⁴²³ In his follow-up letter replying to Marshall's response on the day after Marshall circulated his response, Rehnquist also respectfully made clear that his joining of Marshall's opinion in full hinged on Marshall's agreement with Rehnquist's requests.⁴²⁴ Marshall ultimately eliminated the citations to both *Calvert Cliffs* and *Natural Resources Defense Council, Inc. v. SEC*, the discussions of how administrative burden did not warrant NEPA noncompliance, and the language suggesting that NEPA either authorized or required the HUD Secretary to promulgate rules calling for additional environmental-impact disclosure.⁴²⁵ In short, Marshall had succeeded in ensuring that the Court did not issue a ruling that significantly cut back on NEPA, but Rehnquist had succeeded in preventing Marshall from using *Flint*

418. 389 F. Supp. 689 (D.D.C. 1974).

419. Letter from Justice William H. Rehnquist to Justice Thurgood Marshall, *supra* note 414, at 4.

420. Letter from Justice Potter Stewart to Justice Thurgood Marshall, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (June 2, 1976) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

421. Clerk Memorandum to Justice Harry A. Blackmun, Proposed Opinion for the Court by Justice Marshall, *supra* note 395, at 1–2.

422. Letter from Justice Thurgood Marshall to Justice William H. Rehnquist, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (June 3, 1976) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

423. Letter from Chief Justice Warren E. Burger to Justice Thurgood Marshall, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (June 10, 1976) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

424. Letter from Justice William H. Rehnquist to Justice Thurgood Marshall at 2, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (June 4, 1976) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("I do not doubt that eminently reasonable minds may differ on this point, as our exchange of correspondence testifies. But if you cannot see your way clear to deleting these two portions of your opinion, please show me as concurring in the result.")

425. *Flint Ridge*, 426 U.S. 776 (1976).

Ridge to include the kind of sweeping language favored by Judge Wright. Marshall made the changes and Rehnquist, and other Justices, all joined.⁴²⁶

Justice Rehnquist, however, was even more skillful when he authored the opinion for the Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*⁴²⁷ Best known as an important administrative law case,⁴²⁸ *Vermont Yankee* is also the case that marked the true beginning of the demise of NEPA in the Supreme Court. The earlier cases were not significant NEPA losses. *Vermont Yankee* was and, absent Rehnquist's acumen as a Justice, would not have been. In *Vermont Yankee*, Rehnquist not only succeeded in limiting NEPA in two significant respects, but he did so while commanding a unanimous Court. Marshall had achieved unanimity by saying relatively little, but Rehnquist did so while writing more broadly than required by the case. And he overcame efforts made by others to prevent that from happening.

First, Rehnquist's opinion cut back on the scope of alternatives that had to be discussed in a NEPA analysis. CEQ has long described the "alternatives" discussion in an EIS as the "heart" of the statement because it creates a record capable of showing whether the adverse environmental impacts of a particular proposed action are in fact necessary.⁴²⁹ It is hard to make that judgment absent a decision-making record that provides a basis for such comparison. Also, once agencies stopped trying to avoid NEPA by declining altogether to prepare EISs, an agency's failure to consider a full range of alternatives under NEPA had become a favored basis for environmentalists to challenge the adequacy of an impact statement.⁴³⁰ In *Vermont Yankee*, Rehnquist's opinion for the Court cabined NEPA alternative analysis in two ways: (a) by making clear that "the concept of alternatives must be bounded by some notion of feasibility"; and (b) by imposing on environmentalists who believe an alternative should be discussed some responsibility to bring that alternative to the attention of the agency.⁴³¹

426. Letter from Justice William H. Rehnquist to Justice Thurgood Marshall, *supra* note 414; Letter from Justice William H. Rehnquist to Justice Thurgood Marshall, *supra* note 424; Letter from Justice William H. Rehnquist to Justice Thurgood Marshall, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (June 18, 1976) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20); see Clerk Memorandum to Justice Harry A. Blackmun, *Flint Ridge*, 426 U.S. 776 (Nos. 75-510 & 75-545) (June 18, 1976) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("The differences [between Justices Marshall and Rehnquist] have been resolved by Justice Marshall's removing the controversial material, principally a cite to a Skelly Wright CADC opinion on the subject of what NEPA requires. I see no reason not to join Justice Marshall's opinion, as Justices Rehnquist and Stewart have done.").

427. 435 U.S. 519 (1978).

428. See Gillian E. Metzger, *The Story of Vermont Yankee: A Cautionary Tale of Judicial Review and Nuclear Waste*, in ADMINISTRATIVE LAW STORIES 124 (Peter L. Strauss ed., 2006).

429. 40 C.F.R. § 1502.14 (2011).

430. See, e.g., *Alaska v. Andrus*, 580 F.2d, 465, 472-76 (D.C. Cir. 1978) (challenging as inadequate an alternative analysis); *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 92-96 (2d Cir. 1975) (same); *Davis v. Coleman*, 521 F.2d 661, 681-82 (9th Cir. 1975) (same); *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 834-38 (D.C. Cir. 1972) (declining to summarily reverse district court ruling that agency NEPA alternative analysis was inadequate).

431. 435 U.S. at 551-55.

Second, and far more important, Rehnquist continued his effort, first forecast by his comments on Marshall's *Flint Ridge* draft opinion,⁴³² to deny any substantive dimension to NEPA. Judge Wright's *Calvert Cliffs* opinion had left open the possibility of NEPA having a substantive effect, in the sense of authorizing or requiring federal agencies to give some substantive weight to environmental concerns in their decision making.⁴³³ Marshall's *Flint Ridge* draft had promoted that possibility.⁴³⁴ In his *Vermont Yankee* opinion, Rehnquist began to shut that door. While acknowledging that "NEPA does set forth significant substantive goals for the Nation," the Court's opinion went on to provide that "its mandate to the agencies is essentially procedural."⁴³⁵

The paragraph that included this broadside against NEPA's possible substantive dimension was classic dictum. But it was also well placed by Rehnquist. It was included in the final paragraph of the ruling, after the opinion had completed its analysis of the legal issues presented. The paragraph begins by freely acknowledging its own surplusage: "All this leads us to make one further observation of some relevance to this case."⁴³⁶ The "essentially procedural" point also appears to have been one of Rehnquist's own making.⁴³⁷ It has no clear derivation in any of the written briefs submitted or oral arguments presented by the parties.

Justice Rehnquist achieved this result, moreover, only by defeating an effort made by other Justices, notably Justice Brennan, to avoid issuing a Court opinion in this case. Following oral argument in the case, Justice Brennan twice circulated, once in January and a second time in February,⁴³⁸ a draft per curiam opinion that would have dismissed the writ as improvidently granted and in accompanying memoranda declared that he "still fe[lt] strongly that we should dismiss th[is] case[] as improvidently granted."⁴³⁹ Rehnquist effectively refuted this by making clear in a letter sent a few days after Brennan had sent his first memorandum and draft per curiam that Rehnquist would dissent from any such opinion.⁴⁴⁰ And, in response to Brennan's second memorandum and draft

432. See *supra* notes 414–19 and accompanying text.

433. See *supra* notes 41–57 and accompanying text.

434. See *supra* notes 408–09 and accompanying text.

435. 435 U.S. at 558.

436. *Id.* at 557.

437. *Id.* at 558.

438. See Justice William J. Brennan, Jr., Memorandum to the Conference, *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528) (Jan. 12, 1978) (on file with the Library of Congress, in The Brennan Papers, *supra* note 19) (attaching draft per curiam opinion); Justice William J. Brennan, Jr., Memorandum to the Conference, *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528) (Feb. 10, 1978) (on file with the Library of Congress, in The Brennan Papers, *supra* note 19) (attaching revised draft per curiam opinion).

439. Justice William J. Brennan, Jr., Memorandum to the Conference, *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528) (Feb. 10, 1978) (on file with the Library of Congress, in The Brennan Papers, *supra* note 19).

440. See Letter from Justice William H. Rehnquist to Justice William J. Brennan, Jr., *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528) (Jan. 17, 1978) (on file with the Library of Congress, in The Brennan Papers, *supra* note 19).

opinion, Rehnquist again responded by noting both that Brennan had missed a meeting during which the Justices already discussed and rejected that disposition, and that, based on that meeting, Rehnquist had been assigned the opinion, which he would soon circulate in a memorandum form.⁴⁴¹ This response plainly put the institutional equities on Rehnquist's side. Rehnquist then proceeded within two weeks to produce an exhaustive detailed "memorandum" in name, but a Court opinion in its form, substance, and length (thirty-five pages long) that reflected a huge investment of time by his chambers.⁴⁴² Brennan, accordingly, immediately backed down from his earlier recommendation, formally withdrawing his suggestion of dismissal "now that all this effort has been spent."⁴⁴³ Justice Stewart wrote Rehnquist that his preference had been "to dismiss the writ" but "that is now a lost cause" and he would join Rehnquist's memorandum "if it is converted into an opinion for the Court."⁴⁴⁴

Further evidence still of Rehnquist's abilities as an opinion writer was the careful way that he then parried comments of other Justices seeking revisions in his draft opinion. He was courteous, modest, and charming, willing to make some limited changes but quite resolute in not making others.⁴⁴⁵ Even Justice Brennan, who had lost the battle to Rehnquist in the case, could not help but express his admiration to his colleague. In one letter to Rehnquist, Brennan, referring to a recent conversation with Justice Byron White, told Rehnquist he was "a damned good fisherman" and "[i]ndeed, so good that I now give up the sporting fight and, again like Byron, 'acquiesce' in your catch in these cases."⁴⁴⁶ Brennan, however, parenthetically added: "You know I couldn't possibly *join*."⁴⁴⁷ But then, in a subsequent letter to Justice Rehnquist dated one week later,

441. Letter from Justice William H. Rehnquist to Justice William J. Brennan, Jr., *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528) (Feb. 10, 1978) (on file with the Library of Congress, in The Brennan Papers, *supra* note 19).

442. Memorandum of Mr. Justice Rehnquist, *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528) (Feb. 24, 1978) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

443. Letter from Justice William J. Brennan, Jr. to Justice William H. Rehnquist at 1, *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528) (Feb. 27, 1978) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

444. Letter from Justice Potter Stewart to Justice William H. Rehnquist, *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528) (Mar. 16, 1978) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

445. Letter from Justice William H. Rehnquist to Justice William J. Brennan, Jr. at 1, *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528) (Feb. 27, 1978) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("I think I can make some of the accommodations which you specify in your letter, but am more doubtful about some of the others."); *id.* ("I would prefer not to pass on it here, but if a majority of the Court wishes to do so, I will write it that way."); Letter from Justice William H. Rehnquist to Justice Thurgood Marshall, *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528) (Mar. 6, 1978) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20) ("I do not think we are far apart in substance Since I am dictating this in the office on Saturday, and I really do not know how our filing system works, I cannot locate the earlier draft.").

446. Letter from Justice William J. Brennan, Jr. to Justice William H. Rehnquist, *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528) (Mar. 20, 1978) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

447. *Id.* (emphasis in original).

Brennan did just that: “Just to complete the meal of crow, I also acquiesce in your opinion for the Court.”⁴⁴⁸ Brennan joined the opinion, as did all of the other participating Justices, for a unanimous Court.

Rehnquist, however, did not end with *Vermont Yankee* in seeking to bury the notion that NEPA included substantive requirements. In *Vermont Yankee*, he described NEPA as “essentially procedural,”⁴⁴⁹ but it was less than two years later in *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*⁴⁵⁰ that Rehnquist succeeded in converting that initial dictum into a formal ruling on the merits. And, as previously described,⁴⁵¹ he did so in a per curiam ruling by the Court, without the benefit of full briefing and oral argument.

Here again, Rehnquist’s speed at producing a draft opinion appears to have created significant momentum. Justice Marshall missed the conference at which the case was discussed and before Marshall had the opportunity to discuss the case, Rehnquist had not only persuaded the rest of the Court that summary reversal was appropriate, but within seven business days Rehnquist had circulated a draft per curiam opinion to that effect.⁴⁵² By the next day, he had obtained the votes of a majority of Justices for that draft opinion.⁴⁵³

The facts of the case also underscore Rehnquist’s effective exploitation of the case as a vehicle for announcing a legal position he seemed to have long maintained. The factual context of the case was exceedingly unusual for a NEPA case, involving the siting of a housing development with the alleged “environmental factors” being “crowding low-income housing into a concentrated area.”⁴⁵⁴ And, as the memorandum on certiorari by a clerk of Justice Blackmun stressed, “[w]hether NEPA places substantive constraints on agency decisions has been the subject of much debate.”⁴⁵⁵ Nonetheless, Rehnquist succeeded in persuading all the Justices except the absent Marshall to rule on this issue in a summary fashion with the only applicable precedent being the *Vermont Yankee* dictum that Rehnquist had himself skillfully inserted two Terms before.

448. Letter from Justice William J. Brennan, Jr. to Justice William H. Rehnquist, *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528) (Mar. 27, 1978) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

449. 435 U.S. at 538. The “essentially procedural” dictum in *Vermont Yankee* was sufficiently unpopular with CEQ that as a summer intern at CEQ the summer immediately after the Court decided *Vermont Yankee*, one of my jobs was to review draft NEPA appellate briefs written by the U.S. Department of Justice and to suggest the deletion in those briefs of any reliance on the “essentially procedural” language.

450. 444 U.S. 223, 227–28 (1980).

451. *See supra* section II.B.7.

452. The Court’s conference was held on Friday, November 5th, and Justice Rehnquist circulated his draft opinion on November 13th. *See supra* notes 211–17 and accompanying text. In 1979, November 5th was a Monday, November 10th and 11th a Saturday and Sunday, and Monday, November 12th was Veteran’s Day, a federal holiday on which the Court is closed.

453. Five Justices joined Rehnquist’s draft opinion on November 14th, and two additional Justices joined on November 15th. *See supra* notes 211–17 and accompanying text.

454. 444 U.S. at 227.

455. Cert Pool Memorandum at 5, *Strycker’s Bay*, 444 U.S. 223 (Nos. 79-168 & 79-181) (Oct. 19, 1979) (on file with the Library of Congress, in The Blackmun Papers, *supra* note 20).

Justice Marshall did, as described above, subsequently succeed in delaying the Court's issuance of Rehnquist's draft per curiam opinion long enough to prompt changes in its content.⁴⁵⁶ And those changes, reflecting Marshall's own skill, have significantly aided NEPA plaintiffs. But, even with those changes, *Strycker's Bay* effectively ended the debate over whether NEPA itself had any substantive effect. And what began in *Vermont Yankee* as "essentially procedural" ultimately became "only procedural" by 2004, the year before the departure of then-Chief Justice Rehnquist upon his death.⁴⁵⁷ Nothing in the language of NEPA compelled that result, and the language was susceptible to a very different reading, a reading for which some courts had earlier indicated their support.⁴⁵⁸ But Rehnquist's effective advocacy within the Court, both in influencing the opinions of others, and in drafting opinions for the Court himself, steered the Court in a different direction and had a profound impact on limiting NEPA's direct legal force.⁴⁵⁹

Nor is *Vermont Yankee* the only NEPA case underscoring Rehnquist's skill in crafting legal analysis that would prove to have a lasting influence on future precedent. In *Metropolitan Edison*, Rehnquist's opinion for the Court invoked notions of "proximate cause" in support of the ruling that NEPA does not require further analysis of the adverse psychological effects of restarting a unit of the Three Mile Island nuclear facility.⁴⁶⁰ Twenty-one years later in *Department of Transportation v. Public Citizen*, Justice Thomas authored an opinion for the Court that, relying heavily on Rehnquist's proximate-cause analysis first announced in *Metropolitan Edison*, limited NEPA's scope even more.⁴⁶¹ Further highlighting the long-lasting nature of Rehnquist's analytical abilities, the Court has continued to rely on his proximate-cause analysis both in cases after his death and in environmental statutory contexts other than NEPA. For example, in *National Ass'n of Home Builders v. Defenders of Wildlife*, in a 2007 opinion written by Justice Samuel Alito, the Court agreed with the EPA that the procedural requirements of the Endangered Species Act do not apply to the EPA's decision to transfer Clean Water Act permitting authority to a state because, by analogy to its ruling in *Public Citizen* (which relied on Rehnquist's opinion for the Court in *Metropolitan Edison*) simple "but for" causation is not

456. See *supra* notes 218–23 and accompanying text.

457. See *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008) ("Instead, NEPA imposes only procedural requirements . . ."); *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756 (2004) ("Rather, NEPA imposes only procedural requirements on federal agencies . . .").

458. NICHOLAS C. YOST, NEPA DESKBOOK 24 (2d ed. 1995) ("Early in NEPA's development there were considerable indications that the judiciary would go beyond procedure and show a greater willingness to conduct substantive review of final agency decisions.").

459. MATHEW J. LINDSTROM & ZACHARY A. SMITH, THE NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL MISCONSTRUCTION, LEGISLATIVE INDIFFERENCE, & EXECUTIVE NEGLIGENCE 119 (2001) ("In *Strycker's Bay* . . . the Supreme Court effectively killed any possibility of judicial enforcement of NEPA's substantive goals.").

460. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

461. 541 U.S. at 766–70.

sufficient to make the agency the “legal cause” for purposes of triggering the Endangered Species Act.⁴⁶²

As I have previously described elsewhere at great length, advocacy matters both before and within the Supreme Court.⁴⁶³ And what the above discussion adds is that NEPA is no exception. The quality of advocacy affects the cases the Court hears and it affects the Court’s ultimate disposition, including the all-important wording of the opinions. The related lesson is that it should also affect how one reads, evaluates, and ultimately understands those same Court opinions. As products of advocacy, it is a mistake to read the opinions as simple “wins” or “losses.” Their immediate practical impact and their longer term precedential import are revealed only upon a more searching review, including broader consideration of the role that advocacy played in the opinion’s production.

CONCLUSION

NEPA has certainly had a tough time in the Supreme Court. Environmentalists have never won a case on the merits by obtaining an affirmance of a favorable judgment or a reversal of an unfavorable one. And the Court subsequently dismissed prior to oral argument the only environmentalist petition that the Court ever granted. The federal government, by contrast, has persuaded the Supreme Court to overturn lower court judgments favorable to environmentalists in every NEPA case that the Court has heard and decided on the merits. The government’s winning streak began with the Court’s first NEPA case, *United States v. Students Challenging Regulatory Agency Procedures*, decided in 1973, and extends to its most recent ruling, *Monsanto Co. v. Geertson Seed Farms*, decided thirty-seven years later in 2010.

However, a close examination of the Supreme Court’s NEPA precedent, including the archival papers of many of the Justices who decided those cases, tells a more interesting and less lopsided story. There were many important environmental victories within those losses, which have since played a role in NEPA continuing to serve as one of the nation’s most important environmental statutes. Those victories resulted from efforts made by individual Justices within the Court, especially during the opinion-drafting process, and from major concessions and shifts in legal position effected by the Solicitor General during litigation before the Court. It is a mistake, therefore, to characterize in a binary fashion all of the Court’s NEPA cases as mere environmental losses without a fuller accounting of what happened in those cases.

There are also important related lessons to be learned from such a close look at NEPA’s history before the Supreme Court. The first is the importance of advocacy before the Court. The high quality of the Solicitor General’s advocacy is one major reason why the federal government has fared so well in NEPA

462. 551 U.S. 644, 666–68 (2007).

463. See Lazarus, *supra* note 346.

cases and environmentalists, by comparison, less well. More than most may appreciate, an effective Supreme Court advocate's decisions about which issues to raise (and which not to) and which arguments to advance (and which not to) can influence the Court's opinion and ruling. And it is typically the details set forth in the Court's written opinion, and not just its formal judgment, that are most important.

The second lesson is the important role that individual Justices play within the Court as advocates for their respective positions. Advocacy is not limited to one side of the lectern. It continues after a case is formally submitted to the Court and the Justices begin to deliberate and circulate draft opinions. The skills of a Justice, both personal and professional, are accordingly highly influential. An effective Justice does far more than just vote. The full measure of a Justice's effectiveness extends to his or her participation in the internal Court deliberations and in the opinion-writing process.

By playing this broader role in the Court's decision-making process, Justice Marshall was highly effective in shaping early NEPA precedent to be favorable to environmentalists, even in drafting a ruling against their bottom-line position. While serving on the Court in NEPA's early years, Justice Douglas was, by contrast, mostly ineffectual. Douglas had a clear passion for NEPA but lacked the positive personal relationships with other Justices and the desire to craft "opinions of the Court." Douglas's passion, standing alone, may even have undermined rather than bolstered his influence with his colleagues on the bench.

Unfortunately for environmental NEPA plaintiffs, no Justice on the Court matched the effectiveness of Chief Justice Rehnquist. His extraordinary personal and professional skills allowed him to shape the Court's NEPA precedent more than any other member of the Court. NEPA is, as a result, a less significant statute than it might otherwise have been. Justice, then Chief Justice, Rehnquist served on the Court from 1972 through 2005, a period that saw all but two of the Court's NEPA cases so far.

Because of the Court's rulings, NEPA has never realized its potential to serve as a substantive limit on agency action or as a source of affirmative statutory authority for agencies to take environmental factors into account. Somewhat paradoxically, however, the statute also remains significant because of that same Supreme Court precedent. Even in ruling against environmental plaintiffs, the Supreme Court has promoted a view of NEPA that, in important respects, is likely far greater than its drafters envisioned at the time. The Act has already had a profound and important impact on federal agency decision making. Whether environmental plaintiffs will be able to maintain that level of success or improve upon it in the future will depend, as it has in the past, on the quality of their advocacy before the Supreme Court and whether they can obtain, finally, an effective champion for their views within the Court.