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Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions

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I. INTRODUCTION

The proper role of the courts in our system of government has long been the source of considerable controversy.[1] Proponents of "judicial activism" argue that because only the courts are insulated from political pressures, courts should exercise the judicial power broadly in the constitutional context to ensure that legislation is consistent with constitutional norms.[2] Likewise, the argument continues, judicial activism

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1. *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); L. BOUDIN, GOVERNMENT BY JUDICIARY (1932); A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976); J. DALY, A. CHAYES, I. GLASSER, A. SCALIA & L. SILBERMAN, AN IMPERIAL JUDICIARY: FACT OR MYTH (1979); T. HIGGINS, JUDICIAL REVIEW UNMASKED (1981). *See generally* SUPREME COURT ACTIVISM AND RESTRAINT (S. Halpern & C. Lamb eds. 1982). Recently, tbe controversy surrounding tbe nomination of Judge Robert Bork to the Supreme Court reflected this debate. *See* Greenhouse, *Bork's Testimony Ends with Panel Still Deeply Split*, N.Y. Times, Sept. 20, 1987, § 1, at 1, col. 6; Boyd, *Bork Picked for High Court; Reagan Cites His 'Restraint'; Confirmation Fight Looms*, N.Y. Times, July 2, 1987, § 1, at 1, col. 6. *See generally* Wright, *The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges*, 14 HASTINGS CONST. L.Q. 487, 488-89 (1987) (describing emphasis on judicial restraint by the Reagan Administration). Although the controversy usually focuses on judicial review of the constitutionality of state or federal legislation, similar issues are presented when courts review administrative action. *See, e.g.*, McKay, *Judicial Review in a Liberal Democracy*, in LIBERAL DEMOCRACY 121, 124-25 (J. Pennock & J. Chapman eds. 1983); Spaeth & Teger, *Activism and Restraint: A Cloak for the Justices' Policy Preferences*, in SUPREME COURT ACTIVISM AND RESTRAINT 227, 278 (S. Halpern & C. Lamb eds. 1982). For a discussion of the debate over activism and restraint in the regulatory context, see *infra* notes 44-59 and accompanying text.

2. *See, e.g.*, Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); *see also* Wright, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R.-C.L. L. REV. 1 (1980) (arguing that the role of judicial review is to protect individual rights, particularly those of unempowered minorities).

is necessary in the regulatory context to ensure that administrative agencies implement statutory objectives.[3] In contrast, proponents of "judicial restraint" argue that the legislative and executive branches alone should make public policy because only these branches are responsive to the electorate. Because the courts are not politically accountable, advocates of judicial restraint contend that broad use of judicial power is contrary to democratic principles.[4] Under this view, the exercise of judicial restraint will prevent courts from infringing on the policymaking functions of the political branches of government.

The environmental law decisions of the United States Supreme Court illustrate the opportunities for, and implications of, the exercise of judicial activism and restraint in the regulatory context.[5] Beginning in the late 1960s, Congress enacted a series of statutes intended, sometimes at the expense of economic efficiency, to prevent environmental degradation and to force improvements in pollution control technology.[6] Perceiving administrative reluctance to implement these laws, the Supreme Court in the 1960s and early 1970s exercised its power broadly to ensure the realization of a pro-environment policy.[7] This judicial activ-

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3. *See infra* notes 44-50 and accompanying text.

4. *See infra* notes 54-55 and accompanying text. This position coincides with the arguments for judicial restraint in the constitutional context. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962); T. HIGGINS, *supra* note 1; Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695; Glazer, *Towards an Imperial Judiciary?*, 40 PUB. INTEREST 104 (1975).

5. For purposes of this Article, "environmental law" decisions include cases interpreting or implementing the following: statutes designed to control pollution, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370 (1982), and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982); and the provisions of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678 (1982), that regulate toxic chemicals in the workplace. Other commentators have defined environmental law differently. For example, some definitions of environmental law include laws concerning the allocation of public lands and natural resources. *See, e.g.*, R. FINDLEY & D. FARBER, ENVIRONMENTAL LAW xviii (2d ed. 1985). Cases decided under these laws have been excluded from this Article in order to maintain a manageable group of decisions to analyze. Ultimately, definitional differences are unimportant for the purposes of this Article because it explores the Supreme Court's performance in a limited and discrete area of regulatory law.

6. *See* Clean Air Amendments of 1970 (Clean Air Act), Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)); Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)); *see also* statutes cited in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 404 n.1 (1971). *See generally* EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 79-83 (1980) (construing Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982)); Union Elec. Co. v. EPA, 427 U.S. 246, 256-57 (1976) (construing Clean Air Act, 42 U.S.C. § 1857 (1982)). For a discussion of recent congressional efforts to strengthen environmental laws, see Shapiro & Glicksman, *The Supreme Court, Congress, and the Quiet Revolution in Administrative Law* 1988 DUKE L.J. 819, 824-40.

7. Between 1960 and 1975, the Supreme Court reached pro-enviroument results in 14 out of 18 cases, or about 78% of the time. *See* Table 1, *infra* text accompanying note 65. The numbers in Tables 1 through 5, *infra* text accompanying notes 65, 79, 84, 203, 323, are derived from the results of Supreme Court environmental law decisions compiled in Tables 6 and 7 in the appendix to this

ism was supported by commentators who argued that environmental interests were underrepresented in the regulatory process and that judicial intervention was necessary to counterbalance the powerful interests favoring industrial development at the expense of environmental protection.[8]

More recently, the Supreme Court appears to have retreated from this activism by emphasizing judicial restraint in its environmental decisions.[9] Proponents of judicial restraint assume this shift has limited the Court's power to implement its own policy preferences. Under this presumed limitation the Court's decisions simply reflect the environmental policies of other governmental institutions. These recent Supreme Court decisions, however, reflect a trend seemingly at odds with congressional policy, reaching pro-development results far more often than pro-environment results.[10] While this shift may reflect the exercise of judicial restraint toward governmental institutions other than Congress that have pursued a development-oriented policy, the shift also may be the result of the Court's own pro-development policy. This latter possibility draws into question the traditional assumption that judicial restraint prevents the Court from implementing its own policy choices.

This Article concludes that, despite its ostensible adherence to principles of judicial restraint, the Supreme Court has pursued a policy far less protective of the environment than the policy intended by Congress. A detailed analysis of the Court's environmental decisions since 1976 supports this conclusion. To frame this analysis, Part II of the Article examines the concepts of judicial activism and judicial restraint. After first distinguishing between "institutional" and "policy" based activism and restraint, Part II then describes the institutional and policy implications of judicial oversight and implementation of regulatory programs in general, and of environmental regulation in particular. Part III discusses the Court's standards for substantive review of environmental

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Article. These results have been characterized as either "pro-environment" or "pro-development," depending on whether a given decision tends to promote environmental interests at the expense of industrial development or to promote industrial development at the expense of environmental interests. Likewise, the cases have been characterized as reflecting either institutional activism or restraint depending upon whether they tended to expand the Court's institutional power at the expense of other governmental institutions.

8. *See* Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970). *See generally* Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 714-22, 733-40 (1977) (advocating intrusive judicial action to protect certain environmental concerns).

9. *See infra* notes 89-91, 204-08, 330-33 and accompanying text.

10. Since 1976, the Supreme Court has reached pro-development results in 32 out of 43 cases, or about 74% of the time. *See* Table 2, *infra* text accompanying note 79.

policy decisions made by federal agencies. Part IV evaluates the Court's receptiveness to judicial remedies that supplement administrative enforcement of environmental statutes. Part V considers the Court's treatment of procedural opportunities for private parties to pursue environmental protection goals at the agency level and before the courts.

This Article suggests two reasons why the alleged exercise of judicial restraint has not prevented the Court from pursuing a pro-development policy. First, the Court has invoked principles of judicial restraint toward administrative agencies to justify decisions with pro-development consequences that are inconsistent with congressional intent. Second, the Court at times has engaged in judicial activism that produced pro-development results. In short, despite its emphasis on judicial restraint, the Supreme Court has been making environmental policy—a pro-development policy contrary to the pro-environment policy chosen by Congress.

II. Concepts of Activism and Restraint

The debate over judicial activism and restraint is as old as our republic.[11] Although the general meaning of the terms "judicial activism" and "judicial restraint" is thus commonly understood, application of the terms often is unclear, particularly in the complex regulatory context in which environmental policy is made. At least two sources of confusion can be identified. First, activism and restraint are not unitary concepts, but rather are composed of distinct, yet interrelated ideas.

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11. As early as Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), Supreme Court Justices expressed opposing viewpoints on the subject. In that case, Justice Chase took the position that the Court, as the ultimate enforcer of the social contract, could properly strike down legislative action on the basis of general principles even though the action was not expressly prohibited by stato or federal constitutions. Justice Chase stated:

> I cannot subscribe to the *omnipotence* of a *State Legislature*, or that it is *absolute and without controul*; although its authority should not be *expressly* restrained by the *Constitution*, or *fundamental law* of the State. . . . There are certain *vital* principles in our *free Republican governments*, which will determine and over-rule an apparent and flagrant abuse of legislative power . . . . An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.

Id. at 387-88 (emphasis in original). Justice Iredell, in contrast, believed that the Court should exercise its power of judicial review sparingly—only on the basis of a clear conflict with a specific constitutional provision. Justice Iredell stated:

> If any act of Congress, or of the Legislature of a state, violates . . . constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it void, merely because it is, in their judgment, contrary to the principles of natural justice.

Id. at 399.

Second, although the debate over activism and restraint developed in the field of constitutional law, a context in which the application of the concepts of activism and restraint is relatively straightforward, the debate in recent years has moved into the regulatory arena, a context in which the implications of a decision in terms of activism and restraint are more complex.

To clarify the analysis of judicial activism and restraint, this Article distinguishes between "institutional" and "policy" activism and restraint. This distinction is illustrated initially in terms of familiar constitutional law decisions whose institutional and policy implications are easily identified. Proponents of judicial restraint have failed to recognize this distinction, perhaps because in the field of constitutional law institutional and policy activism often converge. The distinction becomes important in the regulatory context, however, because in that context the institutional and policy implications of a judicial decision often differ. In particular, the distinction provides a useful tool for analyzing the Supreme Court's recent emphasis on judicial restraint in its environmental law decisions.

A. Institutional and Policy Activism and Restraint

Supreme Court decisions not only affect public policy, but also influence the role of the Court (or courts generally) as an institution of government.[12] Thus, the Court may engage in activism or restraint along both institutional and policy lines.[13] A decision reflects institutional activism when it tends to expand judicial power either absolutely or relative to other institutions of government, and, conversely, reflects institutional restraint when it tends to limit judicial power.[14] Policy activism occurs when the Court pursues its own version of sound public policy, whereas policy restraint requires broad deference to the policy decisions made by other governmental institutions. The two forms of activism are obviously related, because a court often will engage in in-

12. Obviously, the primary consequences of a judicial decision are the consequences of the decision for the parties themselves, but these consequences are not directly relevant to questions of judicial activism and restraint.

13. The Authors first developed this distinction in connection with Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209 (1987). *See id.* at 211 n.3. A similar distinction is made by Judge Wright. *See* Wright, *supra* note 1, at 490-91 (noting that restraint can mean deference to politically accountable branches of government, respect for precedent, or apolitical judicial decisionmaking); *see also* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 207-15 (1985) (distinguishing between five different forms of judicial restraint).

14. *See* R. POSNER, *supra* note 13, at 208 (describing " 'separation-of[-]powers judicial self-restraint,' or less clumsily 'structural restraint' " as "the judge's trying to limit his court's power over other government institutions"); Wright, *supra* note 1, at 490 (describing one form of restraint as deference to politically accountable branches of government).

stitutional activism as a means of pursuing its activist policy agenda. This relationship, together with the commentators' frequent treatment of the two forms of activism as coextensive, has led proponents of judicial restraint to assume that a similar relationship exists betweeen institutional and policy restraint: that a court practicing institutional restraint cannot engage in policy activism. This assumption, which is crucial to the argument for judicial restraint, remains untested.

1. Institutional and Policy Activism Distinguished

An institutionally active court expands its power in various ways. The most conspicuous form of institutional activism occurs when courts declare federal statutes unconstitutional. Such rulings create a direct conflict with, and invoke a power superior to, the combined authority of Congress and the President. Courts also plainly engage in institutional activism when they extensively use their power to declare common law or creatively exercise the power of statutory interpretation to fashion substantive legal rules.[15] In addition, courts are institutionally active when they expand their opportunities to exercise judicial power by methods such as reading their jurisdiction expansively or imposing remedies that require ongoing judicial oversight of other governmental institutions.[16] Finally, courts may be institutionally active in their treatment of various internal doctrines through which the courts define their own institutional power.[17] For example, the Supreme Court engages in institutional activism when it takes a relaxed view of stare

15. *See* R. ALDISERT, THE JUDICIAL PROCESS 88-235 (1976) (compiling discussions concerning judges acting as lawmakers through statutory interpretation); Luneburg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction*, 58 IND. L.J. 211, 269 (1982) (discussing Justice Rehnquist's reliance on institutional considerations to justify a narrow reading of federal common law); *cf.* Pierce, Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 305-06 (1988) (arguing tbat courts make policy when tbey interpret statutes).

16. *See* Cannon v. University of Chicago, 441 U.S. 677, 746 (1978) (Powell, J., dissenting) (stating that when a court of limited jurisdiction creates a privato right of action, it necessarily extends its authority to embrace a dispute tbat Congress has not assigned it to resolve); Halpern, *On the Imperial Judiciary and Comparative Institutional Development and Power in America*, in SUPREME COURT ACTIVISM AND RESTRAINT, *supra* note 1, at 224-27 (describing and responding to criticism of "Affirmative Activism" involving judicial imposition and supervision of elaborate remedies); Luneburg, *supra* note 15, at 229-33 (arguing that courts expand tbeir lawmaking power by reading jurisdictional grants broadly); Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 881 (1983) (criticizing the relaxation of standing requirements as "an overjudicialization of the processes of self-governance").

17. *E.g.*, Canon, *A Framework for Analysis of Judicial Activism*, in SUPREME COURT ACTIVISM AND RESTRAINT, *supra* note 1, at 392-95 (discussing respect for precedent); Lamb, *Judicial Restraint on the Supreme Court*, in SUPREME COURT ACTIVISM AND RESTRAINT, *supra*, noto 1, at 19-20 (discussing respect for precedent and tbe avoidance of constitutional questions when possible); Wright, *supra* note 1, at 490.

decisis.[18]

A policy active court uses the judicial power to pursue its own choice of policy. Policy activism, like institutional activism, is most apparent when a court invalidates a legislative act on constitutional grounds. This broad assertion of judicial power reflects policy activism in addition to institutional activism when the court is substituting its policies for those of the legislature. A court also may pursue its policy objectives through other aspects of the judicial power, including statutory interpretation, creation of common-law rules, and expansive definitions of jurisdiction. Accordingly, when a court engages in policy activism, it frequently engages in institutional activism as the means of implementing its policy preferences.

Institutional and policy activism are not coextensive, however, as two contrasting examples illustrate. *Marbury v. Madison*[19] is the first example. In *Marbury*, of course, the Supreme Court first asserted the power to declare legislation unconstitutional. Although Chief Justice Marshall's opinion in *Marbury* has been subjected to countless analyses from various perspectives,[20] this treatment of *Marbury* focuses on the two ways in which the decision was institutionally active.[21] First, and most obviously, by asserting the power of judicial review, *Marbury* expanded the power of the federal courts in general and the Supreme Court in particular at the expense of the President, Congress, and the states. Second, the Court seemed to reach out to hold the relevant statute unconstitutional despite various doctrines through which the Court might have avoided the question.[22] Because the Court resolved the un-

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18. Respect for precedent is often viewed as an exercise of institutional restraint because it perpetuates the myth that judges merely "find" or "declare," rather than make, law. *See* Canon, *supra* note 17, at 393. But respect for precedent also operates as a concrete restriction on judicial power by limiting a court's discretion to choose between competing rules.

Judge Posner has rejected the argument of "liberal" commentators that respect for precedent is an essential component of judicial restraint. This view, he argues, creates a "ratchet" effect, because liberal, activist judges will not respect conservative precedents, but conservative, restrained judges will respect all precedents, including liberal ones. *See* R. POSNER, *supra* note 13, at 217. Regardless of the merits of Judge Posner's rachet effect observation, it fails to prove that respect for precedent is not a form of institutional restraint. Instead, it constitutes an argument for the exercise of institutional activism by conservative judges.

19. 5 U.S. (1 Cranch) 137 (1803).

20. For a useful collection of materials, see W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW 8-15 (6th ed. 1986) [hereinafter W. LOCKHART].

21. For an early example of institutional restraint, see the Letter of the Justices to President Washington (August 8, 1793), *quoted in* G. GUNTHER, CONSTITUTIONAL LAW 1535-36 (11th ed. 1985). The Justices declined to render advisory opinions on the legality of transactions with England and France in light of U.S. neutrality in their ongoing war, stating that the " 'three departments of the government [being] in certain respects checks upon each other, and our being judges in a court of last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to." *Id.* at 1535.

22. *See* Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 32-33.

derlying political dispute between the Federalists (including Marshall) and the Antifederalists in favor of the Antifederalists,[23] however, the result in *Marbury* did not further Marshall's policy objectives.[24] The case thus illustrates that institutional activism need not reflect policy activism.[25]

By contrast, a good example of policy activism is the so-called *Lochner* era, named for *Lochner v. New York*,[26] in which the Supreme Court struck down a New York statute regulating the hours of bakery workers as violating the right of contract protected by the fourteenth amendment. During this period, from the late 1890s to the 1930s,[27] the Court pursued a doctrine of "economic substantive due process" that constitutionalized *laissez faire* economic policy and blocked efforts by the states and the federal government to regulate the economy for the protection of workers and consumers.[28] The activism of the *Lochner* era differed from the institutional activism of the *Marbury* Court because

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23. For a brief discussion of the events giving rise to *Marbury*, see 1 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 1.2 (1986) [hereinafter SUBSTANCE AND PROCEDURE]. The case arose as the result of President Jefferson's refusal to deliver the commission of William Marbury as Justice of the Peace. Marbury was one of the "midnight judges"—he had been appointed and confirmed, and his commission signed, in the final days of John Adams's tenure as President. Adams and Marshall were Federalists. Jefferson was an Antifederalist. As a result of the holding in *Marbury*, the Supreme Court (and Marshall) were denied jurisdiction to rule on the validity of Jefferson's refusal to deliver Marbury's commission, and the refusal was thus sustained.

24. That this decision constituted policy restraint is supported by the conclusion of Professor Morris Cohen that "it is obvious that John Marshall was motivated by fear of impeachment." M. COHEN, THE FAITH OF A LIBERAL 17 (1946).

25. Arguably, Marshall sacrificed an apparent short-term policy goal to further his long-term policy goals by asserting the institutional authority to review legislative and executive acts to ensure their compliance with constitutional norms. Indeed, it has been suggested that Marshall had seized upon the case as "the perfect vehicle for laying claim to the power of judicial review while avoiding a direct confrontation with the other branches of government." 1 SUBSTANCE AND PROCEDURE, *supra* note 23, § 1.4; *accord* R. MCCLOSKEY, THE AMERICAN SUPREME COURT 40 (1960) (stating that "[t]he decision is a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another"). Insofar as this view of Marshall's motivation is correct, *Marbury* might be characterized as involving both policy and institutional activism. This possibility, however, does not affect *Marbury*'s usefulness in illustrating the difference between institutional and policy activism.

26. 198 U.S. 45 (1905).

27. While the era is sometimes dated from *Lochner*, *see, e.g.*, Wright, *supra* note 1, at 488 n.4, the first case in which the Court invoked the due process clause to strike down economic legislation was Allgeyer v. Louisiana, 165 U.S. 578 (1897), and earlier cases had hinted in dicta at such a result. *See* W. LOCKHART, *supra* note 20, at 389. The Court's decision upholding regulation of minimum milk prices in Nebbia v. New York, 291 U.S. 502 (1934), is often regarded as the end of the *Lochner* era.

28. *See* W. LOCKHART, *supra* note 20, at 393-95. *See generally* Currie, *The Constitution and the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324 (1985); McCloskey, *Economic Substantive Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

during the *Lochner* era the Court repeatedly used judicial review to implement its view of sound economic policy. Because the *Lochner* era decisions so clearly involved the substitution of judicial policy choices for those of the people's elected representatives, the judicial activism of the *Lochner* era provoked strong dissents from some members of the Court and considerable criticism from contemporary commentators.[29]

While the *Lochner* era typifies policy activism, it also reflects institutional activism. The Supreme Court expanded its power at the expense of Congress, the President, and the states by employing judicial review broadly in order to achieve its desired policy objectives. Perhaps the presence of both policy and institutional activism in the *Lochner* era cases explains why many post-*Lochner* analyses have regarded the policy and institutional aspects of judicial activism and restraint as inextricably intertwined. This assumption, however, is not necessarily valid.

2. Institutional and Policy Restraint Conflated

Ultimately, the Court retreated from the path of economic substantive due process and accepted the economic and social programs of the New Deal.[30] The decisions of the Court during the post-*Lochner* period emphasized judicial restraint toward federal and state economic regulation.[31] This period also witnessed the publication of significant works

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29. The most famous dissent from the principles of economic substantive due process was Justice Holmes's dissent in *Lochner* itself. His comment that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*" is well known. *Lochner*, 198 U.S. at 75, Justices Harlan, White, and Day also dissented in *Lochner*, *id.* at 65, and in later cases Holmes was joined in dissent by Justice Brandeis, Justice Stone, and Chief Justice Hughes. *See* W. LOCKHART, *supra* note 20, at 394. For criticism by contemporary commentators, see, e.g., Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); and Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926). This criticism not only extended to economic substantive due process, but also went so far as to challenge the legitimacy of constitutional review. *See, e.g.*, L. BOUDIN, *supra* note 1. Contemporary defenses of judicial review include: E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW (1914); R. VON MOSCHZIESKER, JUDICIAL REVIEW OF LEGISLATION (1923); and McDonough, *The Alleged Usurpation of Power by Federal Courts*, 46 AM. L. REV. 45 (1912).

30. *See, e.g.*, 1 SUBSTANCE AND PROCEDURE, *supra* note 23, § 15.4.

31. In Williamson v. Lee Optical Co., 348 U.S. 483 (1955), for example, the Court stated that an Oklahoma statute requiring license for fitting or replacing lenses "may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." *Id.* at 487. Likewise, in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), the Court noted "if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." *Id.* at 399. Finally, in *Nebbia*, 291 U.S. 502, the Court commented:

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the

by prominent advocates of judicial restraint.[32] Thus, the decades following the *Lochner* era were marked by the ascendancy of a judicial restraint philosophy rooted in the contemporary criticism of *Lochner* and its progeny. The underlying principle of this philosophy is that because our political system is fundamentally democratic in nature, only the representative branches of government have the responsibility to make decisions of public policy.[33] Proponents of judicial restraint believe that because the courts are nondemocratic institutions, they should not make policy decisions, but rather should function as neutral conduits for policy decisions made elsewhere. Only when decisions of the other branches of government are irreconcilable with clear constitutional mandates is judicial intervention justified under the judicial restraint model.[34]

This approach to judicial restraint tends to equate institutional activism with policy activism because it assumes that the power to make *policy* choices is beyond the proper *institutional* responsibilities of the courts.[35] As a result, proponents of judicial restraint generally regard institutional activism as the product of the Court's desire to pursue its own policy agenda.[36] Conversely, they assnme that adherence to doctrines of institutional restraint will necessarily prevent policy activ-

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legislature, to override it.

Id. at 537.

32. *E.g.*, H. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS (1943); Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See generally* A. BICKEL, *supra* note 4, (recognizing that judicial intervention is countermajoritarian, but defending judicial review).

33. *See, e.g.*, A. BICKEL, *supra* note 4, at 16. Bickel stated:

> The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.

34. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) (stating that "a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society"); Johnson, *The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 455, 473 (1977); Scalia, *supra* note 16, at 896-97.

35. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978) (stating that "[t]he fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action" (emphasis in original)); Wright, *supra* note 1, at 494 (commenting that "[t]he majoritarians insist that courts should play the most limited role possible in evaluating majoritarian political choices, and should never appropriate the power to make controversial value choices"). Even judges who endorse some forms of activism recognize that courts "should not be in the business of determining overall policy direction for government agencies." Mikva, *The Changing Role of Judicial Review*, 38 ADMIN. L. REV. 115, 134 (1986).

36. *See* Pierce, *supra* note 15, at 310 & n.45.

ism.[37] These assumptions appear logical when the debate focuses on the Court's power to strike down legislation as unconstitutional. In exercising that power, the Court not only rejects policy decisions made by the President and Congress or by the states in favor of a contrary and presumably constitutional policy, but also asserts an institutional authority superior to that of Congress and the President or that of the states.

It is by no means clear, however, that the assumed connection between institutional and policy activism and restraint is always present. As *Marbury* illustrates, the Court may engage in institutional activism without seeking to further any particular policy.[38] Furthermore, in the context of judicial oversight and implementation of regulatory programs, the institutional and policy consequences of the Court's decisions are more complex. The complex institutional concerns that arise in the regulatory context may present opportunities for courts to implement their policy preferences without systematically engaging in institutional activism.

B. Activism and Restraint in the Regulatory Context

Until recently, the tensions between judicial activism and restraint have most frequently arisen when the Supreme Court has reviewed the constitutionality of legislation. The emergence of the modern regulatory state, however, has forced the Court to define the role of the judiciary in relation to the regulatory process. Following an initial period of great deference to administrative decisions,[39] the Court began to endorse institutional activism in furtherance of perceived congressional regulatory objectives.[40] More recently, the Court's emphasis on restraint appears to signal a retreat from this posture.[41] The complex issues presented by

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37. In the environmental law context, for example, the Supreme Court has repeatedly underscored its emphasis on institutional restraint with the admonition that environmental policy is to be made by Congress and the administrative agencies, not the courts. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 864-65 (1983); Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983); City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (*Milwaukee II*); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 557-58 (1978). The necessary premise of such statements is that the principles of institutional restraint, whether in the form of deferential substantive review (*Chevron* and *Baltimore Gas*), refusal to recognize supplemental remedies (*Milwaukee II*), or refusal to impose procedural requirements on agencies (*Vermont Yankee*), ensure that courts do not make policy. The analysis in this Article demonstrates that this premise is invalid.

38. *See supra* notes 22-25 and accompanying text.

39. *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 32-34 (2d ed. 1985) (declaring that judicial deference to administrative process led to enactment of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706 (1982), and in the wake of the APA, "cooperative accommodation between court and agency had evolved").

40. *See infra* notes 44-50 and accompanying text.

41. *See infra* notes 58-59 and accompanying text.

the rise and fall of regulatory activism have become obscured, however, particularly in the environmental law field, because as an historical and theoretical matter the rise and fall of activism in the regulatory context were closely associated with the rise and fall of a new wave of activism in the context of constitutional review. As a result of this association, important institutional and policy differences between regulatory activism and the more traditional forms of constitutional activism have received little attention.

1. The Rise and Fall of Regulatory Activism

Even as proponents of judicial restraint were consolidating their victory over economic substantive due process, the seeds of a new version of judicial activism were being sown.[42] Beginning in the 1950s, courts at all levels, including the Supreme Court, began to expand the protection provided by due process, equal protection, and other provisions of the Bill of Rights to certain groups of people or types of interests that previously had been unprotected.[43] In addition to its constitutional dimension, the judicial activism of this period extended to the regulatory context; the Court intervened broadly in this context to further certain regulatory policies by engaging in more aggressive substantive review of administrative decisions,[44] by recognizing judicial remedies to supplement administrative enforcement,[45] and by expanding procedural opportunities for the beneficiaries of regulatory programs.[46]

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42. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also* Skinner v. Oklahoma, 316 U.S. 535 (1942).

43. Many mark the beginning of this sort of judicial activism with the Court's landmark decision in Brown v. Board of Educ., 347 U.S. 483 (1954), though earlier examples can be found, particularly in the context of the "incorporation-nonincorporation" debate over the applicability of provisions of the Bill of Rights to the states through the fourteenth amendment. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Powell v. Alabama, 287 U.S. 45 (1932). Several well-known "activist" decisions were handed down in the 1960s, including Miranda v. Arizona, 384 U.S. 436 (1966), and Griswold v. Connecticut, 381 U.S. 479 (1965). A controversial example from the early 1970s is Roe v. Wade, 410 U.S. 113 (1973).

44. The "hard look" doctrine, which was first developed by the federal courts of appeals, generally demanded that the agency employ procedures adequate to ventilate all important issues before it and accompany its decisions with a clear explanation of the factors considered, the weights assigned to them, and the reasons for the decisions ultimately adopted. *See generally* R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 7.5.2 (1985); Shapiro & Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 419-20; Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61 (1985).

45. For example, the Court was willing to fashion implied rights of action to further statutory objectives. *See, e.g.* J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

46. *See, e.g.*, Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154-56 (1970) (relaxing standing requirements for beneficiaries of statutory programs).

The activism of the 1960s and early 1970s reflected the widespread belief of courts and commentators that because special interests dominated the political process, the process could not adequately protect politically, economically, or socially disadvantaged groups or interests.[47] Thus, it was thought necessary and appropriate for the courts to counteract this problem by extending constitutional principles and expanding the judicial role in the regulatory process.[48] This justification was particularly powerful in the regulatory context, in which proponents of activism believed that the powerful special interests opposing public interest regulation had captured administrative agencies.[49] These proponents viewed judicial activism as a necessary counterweight to the problem of agency capture.[50]

Disciples of judicial restraint both on[51] and off[52] the bench have sharply criticized this judicial activism. These critics have compared the expansive use of constitutional review in furtherance of a broadly "liberal" policy agenda to the discredited substantive due process of the *Lochner* era.[53] Likewise, activism in the regulatory context has been criticized on both institutional and policy grounds. On the institutional level, critics charged that the courts were intruding into a sphere that Congress had assigned to agencies and were interfering with administrative efficiency and expertise.[54] At the policy level, the critics argued

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47. *See, e.g.*, T. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 85-97 (1969); M. OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 125-31 (2d ed. 1971).

48. *See, e.g.*, Sunstein, *supra* note 44, at 85.

49. *See, e.g.*, S. BREYER & R. STEWART, *supra* note 39, at 35-36.

50. *See, e.g., id.*; Marcel, *The Role of Courts in a Legislative and Administrative Legal System—The Use of Hard Look Review in Federal Environmental Litigation*, 62 OR. L. REV. 403, 409-10 (1983).

51. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 677 (1969) (Harlan, J., dissenting) (criticizing the Court's decision striking down one-year residency requirements in state welfare laws); *see also* Cannon v. University of Chicago, 441 U.S. 677, 731, 742-47 (1979) (Powell, J., dissenting) (criticizing majority's creation of a private right of action under § 901(a) of Title IX of the Education Amendments of 1972, which prohibits sexual discrimination by educational programs receiving federal assistance); Scalia, *supra* note 16 (criticizing relaxation of standing requirements).

52. *See, e.g.*, Pierce, *supra* note 15, at 311 (observing that in the *Benzene* and *Cotton Dust* decisions "political liberals on the Court tortured the statutory language and legislative history to support an interpretation consistent with their political philosophy, while the political conservatives on the Court engaged in a similar effort to support their preferred resolution of the policy issue"); Levin, Morrison, Starr, Sunstein & Willard, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 373 (1987) (panel discussion) [hereinafter *Judicial Review*] (remarks of Assistant Attorney General Willard) (stating that the "D.C. Circuit's jurisprudence for the past 20 or 30 years" has been characterized by "open-ended judicial arrogance").

53. *See* Bork, *supra* note 34; *cf.* Shapiro, *APA: Past, Present, and Future*, 72 VA. L. REV. 447, 472 (1986) (arguing that activist review of agencies "is nothing less than a hymn to substantive economic due process").

54. Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985); Shapiro, *supra* note 53.

that the courts were substituting their policy choices for those of Congress and the administrative agencies.[55]

Judicial restraint became a rallying cry for conservative politicians, who sought to change the composition of both the Supreme Court and lower federal courts to reflect a restraint-oriented philosophy.[56] Such changes began under the Nixon Administration and continued under Presidents Ford and Reagan.[57] By the late 1970s and early 1980s the Court's changing composition had slowed its activism. Although the Court has not expressly disavowed many of its more controversial constitutional decisions, the Court has slowed the expansion of constitutional protections and has substantially eroded some doctrines.[58] In the regulatory arena, however, the Court has ushered in what may be called a new era in the relationships between the courts, Congress, the President, and the administrative agencies by embracing judicial restraint more explicitly and more consistently than in other contexts.[59]

Lost in the controversy surrounding the rise and fall of regulatory activism was an important difference between regulatory activism and the more traditional forms of constitutional activism. As noted previously, when the Court exercises the power of constitutional review it stands in direct institutional and policy conflict with the combined power of the Congress and the President or with the states.[60] On the other hand, in the regulatory context the Court is not always in conflict with the political branches. Instead, the Court often is called upon to resolve institutional and policy conflicts between Congress and the President or administrative agencies, or between federal and state au-

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55. *See, e.g.*, Pierce, *supra* note 15, at 310-14.

56. *See* N.Y. Times, Nov. 15, 1975, at A18, col. 2 (describing comments by President Ford); N.Y. Times, Oct. 4, 1968, at A50, col. 2 (describing televised comments of Richard Nixon); N.Y. Times, Sept. 20, 1965, at A25, col. 3 (discussing speech by Governor Reagan); *see also* Wright, *supra* note 1 (discussing Reagan Administration emphasis on judicial restraint).

57. President Nixon appointed Chief Justice Burger, Justice Blackmun, Justice Powell, and (then) Justice Rehnquist; President Ford appointed Justice Stevens; and President Reagan appointed Justice O'Connor, Justice Scalia, and Justice Kennedy, and elevated Justice Rehnquist to Chief Justice. While not all of these appointees have consistently embraced judicial restraint (indeed, Justice Blackmun and at times Justice Stevens have joined the "liberal," "activist" wing of the Court), the overall composition of the Court has changed dramatically from the activist era of the Warren Court. *See* Wright, *supra* note 1, at 488. For a discussion of the changing composition of the lower federal courts, see Aldisert, *Philosophy, Jurisprudence, and Jurisprudential Temperament of Federal Judges*, 20 IND. L. REV. 453 (1987), and Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987).

58. *See* Scalia, *supra* note 16, at 897-99 (discussing restriction of standing); Wright, *supra* note 1, at 496-501 (discussing various trends). *But see generally* THE BURGER COURT, THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983).

59. *See* Shapiro & Glicksman, *supra* note 6, at 846-63. The authors concluded that "[t]he Supreme Court has almost completely reversed its prior policies of judicial activism. Area by area, it has withdrawn judicial control of administrative discretion." *Id.* at 863.

60. *See supra* notes 15-19 and accompanying text.

thorities.[61] Thus, at the institutional level, when the Court engages in activism by striking down the decision of one governmental institution, it may simultaneously exercise restraint toward the institution whose decision is upheld.[62] Similarly, at the policy level, the Court's decision may further its policies by preferring one of the political branches over a different branch that promotes countervailing policies.[63]

2. Environmental Activism and Restraint

The Court's environmental law decisions exemplify the shift from activism to restraint in the regulatory context. During the early years of modern environmental litigation, from 1960 to 1975,[64] the Supreme Court consistently reached pro-environment results, as the following table indicates.

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61. Such conflicts arise, for example, when an administrative agency composed of presidential appointees acts in a manner inconsistent with statutory provisions or policies, or when state regulation is inconsistent with federal regulatory policy.

62. *See Judicial Review, supra* note 52, at 366-71 (remarks of Professor Sunstein); *id.* at 373-76 (remarks of Alan Morrison).

63. *See, e.g., id.*

64. This Article divides the Supreme Court's environmental law decisions into two periods. The first period commenced in 1960, when the Court was presented with the first of several requests to interpret expansively the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1982), to cover activities causing water pollution, *see* United States v. Republic Steel Corp., 362 U.S. 482 (1960). The first period ended with Aberdeen & Rockfish Railroad v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289 (1975), the final environmental law decision issued by the Court in 1975. The second period began with the Court's first environmental law decision in 1976, Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976), and continues through the Court's most recent environmental law decisions. The dividing line between the two periods is based upon an important change in the composition of the Court: 1975 was the final year in the tenure of Justice Douglas, who was probably the Court's leading practitioner of pro-environment policy activism. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 741-42 (1972) (Douglas, J., dissenting) (stating 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"); United States v. Standard Oil Co., 384 U.S. 224, 225 (1966) (Douglas, J.) (commenting that "[t]his case comes to us at a time in the Nation's history when there is greater concern than ever over pollution"). Some evidence of a change in the Court's direction on environmental issues, however, was evident before Justice Douglas's departure. *See infra* appendix, Table 6.

TABLE 1: EARLY ENVIRONMENTAL DECISIONS[65]

	Institutional Activism	Institutional Restraint	Total
Pro-Environment	7	7	14
Pro-Development	2	2	4
Total	9	9	18

As the table suggests, pro-environment results in a number of cases were consistent with the exercise of institutional restraint.[66] Some of the Court's most significant pro-environment decisions, however, involved various forms of institutional activism.[67] During its activist period the Court engaged in aggressive substantive review of agency decisions to overturn several decisions that favored industrial development over environmental concerns.[68] In addition, the Court expansively employed the judicial power to fashion supplemental remedies for environmental harm[69] by creating implied statutory rights of action[70] and

65. The numbers in Table 1 reflect the results indicated in Table 6. *See infra* appendix, Tables 1, 6. Two cases in which the Court exercised institutional restraint to render environmentally neutral results have been omitted. *See id.*

66. *See, e.g., Republic Steel*, 362 U.S. at 490 (relying on "consistent administrative construction" of Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1982), to hold that the Act applied to the deposit of industrial organic wastes); *Standard Oil*, 384 U.S. at 226, 229-30 (deferring to views of Army Corps of Engineers and Justice Department that probibition on the deposit of "refuse matter" into navigable waters, 33 U.S.C. § 407 (1982), covered commercially valuable gasoline, even absent proof of an adverse effect on navigation).

67. The origins and manifestations of institutional judicial activism in early environmental litigation are explored in Glicksman, *supra* note 13, at 213-24.

68. *See, e.g.*, Train v. City of New York, 420 U.S. 35, 43, 46-47 (1975); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). For further discussion of this form of activism, see *infra* notes 85-88 and accompanying text.

69. In other decisions, the Supreme Court refused to hold that state law supplemental remedies were preempted by federal law. *See* Askew v. American Waterways Operators, Inc., 411 U.S. 325, 330 (1973) (holding that despite "pervasive system of federal control over discharges of oil," Federal Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-1175 (1970), did not preempt Florida oil spill legislation); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 444 (1960) (finding that federal laws establishing "an extensive and comprehensive set of controls over ships and shipping" did not preempt Detroit's smoke abatement code). These decisions made supplemental remedies available, but reflected the exercise of institutional restraint because the Court refused to exercise the judicial power to invalidate the decisions of another governmental institution—the states. For further discussion of preemption of state remedies, see *infra* notes 276-320 and accompanying text.

70. Although between 1960 and 1975 the Supreme Court did not address the availability of private rights of action, it did hold that the government had an implied right under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1982), to reimbursement of expenses incurred in removing a

federal common-law remedies.[71] The Court also engaged in institutional activism by expanding the procedural opportunities for pro-environment interests both at the agency level[72] and before the courts.[73] These procedural opportunities furthered the courts' pro-environment policy by allowing environmental groups to present evidence and arguments at the agency level[74] and by affording the courts more opportunities to review agency decisions and fashion supplemental remedies.

Many supporters of the institutional activism that seemed to pervade the federal courts' resolution of environmental cases justified their aggressive institutional posture in terms of constitutional checks and balances. They claimed that a strong judicial presence would prevent Congress's environmental protection mandate from being subverted by agencies that were either captured by the industries they were charged with regulating or otherwise disinclined to consider the potential environmental consequences of their actions.[75] According to this justification, aggressive judicial enforcement of statutorily defined policies was consistent with the courts' traditionally accepted institutional role.[76]

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negligently sunk vessel. Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967). The Court reached this conclusion even though the statutory grant of other express remedies might be read to exclude such a right; the Court instead relied on a broad reading of legislative intent, *id.* at 204, and the unexplained assertion that the inadequacy of criminal penalties provided in the Act was "beyond dispute," *id.* at 202.

71. *See* Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91 (1972). *But see* Ohio v. Wyandotte Chem. Corp., 401 U.S. 493, 498 & n.3 (1971) (indicating that nuisance action by State of Ohio against several Michigan corporations seeking to enjoin discharge of mercury into Lake Erie "raises no serious issues of federal law" and would have to be adjudicated under state law). In *Milwaukee I*, the Court cursorily dismissed its "contrary indication" in *Wyandotte Chemical* as "based on the preoccupation of that litigation with public nuisance under Ohio Law, not the federal common law which we now hold is ample basis for federal jurisdiction under 28 U.S.C. § 1331(a)." *Milwaukee I*, 406 U.S. at 102 n.3. For further discussion of *Milwaukee I*, see *infra* notes 230-47, 252-55 and accompanying text; and Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 155-58 (1985).

72. *See Overton Park*, 401 U.S. at 402. Although the Supreme Court's decision in *Overton Park* did not expressly provide for greater procedural opportunities in agency proceedings, the lower courts read it as an endorsement of this practice. *See infra* notes 341-42 and accompanying text.

73. Relaxing restrictions on standing and reviewability created these opportunities. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (noting that environmental injury is sufficient to confer standing); *Overton Park*, 401 U.S. at 410 (relaxing reviewability restrictions). For further discussion of standing and reviewability, see *infra* notes 323-40, 354-71 and accompanying text.

74. The Court also provided procedural opportunities before agencies in the belief that greater public participation would improve the agency decisionmaking process by forcing the agency to take a "hard look" at the problem before it. *See generally* Marcel, *supra* note 50, at 411-14.

75. *See* Glicksman, *supra* note 13, at 214-16.

76. In each of the Rivers and Harbors Act cases, for example, the Supreme Court interpreted ambiguous statutory language "charitably in light of the purposes to be served" by the Act. *Republic Steel*, 362 U.S. at 494; *see id.* at 491; *see also* United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 669-70 (1973); *Standard Oil*, 384 U.S. at 226, 230. In doing so, the Court

Critics of institutional activism were skeptical of this proffered justification. These critics suspected that institutional activism in environmental litigation was better explained as an attempt by judges to promote their own pro-environment policy agenda.[77] When their agenda was congruent with legislative or administrative determinations, the activists were content to exercise judicial restraint. But when the other two branches acted in a manner that the activists deemed insufficiently protective of the environment, these activist judges did not hesitate to substitute their own views for those of the policy-making branches.[78] According to the critics, such judicial policy-making exceeded the bounds of the courts' constitutional authority and improperly infringed on legislative and executive prerogatives. To avoid overstepping their proper role, judges should maintain policy neutrality. In the critics' view, such neutrality required the abandonment of the techniques of institutional activism that suffused environmental litigation.

By the mid-1970s a majority of the Supreme Court apparently had abandoned the institutionally active posture of the earlier environmental law decisions. At precisely the same time, the Court's environmental decisions began to change substantive direction. These results are reflected in the following table.

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refused to permit narrow, technical arguments of statutory construction to prevail over "common sense," legislative history, and fundamental statutory purposes. *E.g.*, *Standard Oil*, 384 U.S. at 225-26; *see also infra* notes 85-88 and accompanying text (discussing substantive review cases); *infra* notes 226-29 and accompanying text (discussing federal common law).

77. *See, e.g.*, Cramton & Boyer, *Citizen Suits in the Environmental Field: Peril or Promise?*, 2 ECOLOGY L.Q. 407 (1972). Indeed, early decisions deferring to the broad construction given the Rivers and Harbors Act by the Army Corps of Engineers provoked vigorous dissents from Justice Harlan, who argued that the Court's holdings were irreconcilable with the plain meaning of the statute. *See Standard Oil*, 384 U.S. at 234 (Harlan, J., dissenting); *Republic Steel*, 362 U.S. at 493-94 (Harlan, J., dissenting). Thus, according to Justice Harlan, although the Court purported to exercise institutional restraint in deferring to administrative interpretations of the Act, the Court was "reading into the statute things that actually [were] not there" to reach a result that the Court, not Congress, deemed appropriate. *Id.* at 510.

78. *See, e.g.*, *Standard Oil*, 384 U.S. at 230-31 (Harlan, J., dissenting); *Republic Steel*, 362 U.S. at 510 (Harlan, J., dissenting).

TABLE 2: LATER ENVIRONMENTAL DECISIONS[79]

	Institutional Activism	Institutional Restraint	Total
Pro-Environment	3	8	11
Pro-Development	10	22	32
Total	13	30	43

Because institutional and policy activism and restraint are not necessarily coextensive, the causes of these predominantly pro-development results are difficult to identify. On the one hand, these results are perhaps attributable to the elimination of the Justices' pro-environment policy bias and the Court's exercise of institutional restraint toward agencies and other governmental institutions with an increasingly pro-development policy orientation. This result is supported by the relatively large number of cases (twenty-two of forty-three) that exhibit both institutional restraint and a pro-development outcome. On the other hand, of the eighteen cases in which institutional restraint would have produced pro-environment results (the ten pro-development institutional activism cases and the eight pro-environment institutional restraint cases), the Court abandoned institutional restraint and reached pro-development policy results in ten of the cases. These figures suggest that the Court's commitment to a pro-development policy is at least as great as its commitment to institutional restraint.

Thus, a more careful analysis of the Court's decisions is in order, particularly in light of the complexities in evaluating institutional activism and restraint in the regulatory context. In many environmental law cases, the Court has been presented with arguments that administrative agencies had pursued a pro-development policy in conflict with the congressional policy expressed in environmental statutes;[80] that Congress intended the courts to fashion judicial remedies to supplement administrative implementation of environmental policy;[81] or that procedural opportunities for pro-environment interests were necessary and appro-

79. The numbers in Table 2 reflect the results indicated in Table 7. *See infra* appendix, Table 7. This table omits two cases, one institutionally active and the other restrained, in which the Court reached environmentally neutral results. *See id.* These cases are also omitted from Tables 3 and 4, *see infra* notes 84, 202.

80. *See, e.g.*, Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 134-35 (1985) (Marshall, J., dissenting).

81. *See, e.g.*, Glicksman, *supra* note 71, at 161-63.

priate to ensure fulfillment of Congress's environmental policy.[82] In such cases, institutional restraint toward Congress may dictate that the Court engage in institutional activism toward administrative agencies to ensure the implementation of congressional policy. Conversely, if the Court exercises institutional restraint toward administrative agencies, that restraint may implement an administrative and judicial policy at the expense of a policy chosen by Congress.

The remainder of this Article analyzes the Court's application of institutional restraint principles in its later environmental law decisions. In particular, this analysis focuses on the degree to which the Court has considered the full range of institutional consequences accompanying its decisionmaking and the consistency with which it has applied the principles of institutional restraint. This analysis demonstrates that the Court's strongly pro-development record since 1976 cannot be fully explained as the policy-neutral exercise of judicial restraint. This conclusion suggests two further possible conclusions. Either the exercise of institutional restraint has left ample opportunity for policy preferences to infuse the results of judicial decisions, or the Court has selectively applied the principles of judicial restraint and has refused to defer to other governmental institutions when those institutions have pursued a policy at odds with the Court's own policy preferences.

III. Substantive Review of Administrative Decisions Affecting the Environment

The Court's later environmental law decisions reviewing agency action emphasize institutional restraint in the form of deference to agency interpretation and implementation of relevant statutes,[83] and generally have reached pro-development results. The following table summarizes the cases.

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82. *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

83. This Article distinguishes between statutory "interpretation" and "implementation". Interpretation is the determination of the meaning of statutory language, while implementation entails the application of statutory language whose meaning is clear to a particular factual situation. It is not always possible to tell whether a particular decision involves interpretation or implementation; indeed both are often present in the application of ambiguous statutory provisions.

TABLE 3: SUBSTANTIVE REVIEW DECISIONS[84]

	Institutional Activism	Institutional Restraint	Total
Pro-Environment	1	7	8
Pro-Development	4	7	11
Total	5	14	19

At first glance, the table suggests a strong tendency toward institutional restraint (fourteen to five) and a slight pro-development orientation (eleven to eight). The following analysis, however, demonstrates that the pro-development orientation of the cases is even more pronounced and the exercise of institutional restraint is less evenhanded than these numbers appear to indicate.

A. The Institutional Implications of Deferential Substantive Review

During the Supreme Court's period of regulatory activism it did not hesitate to overturn administrative decisions with pro-development consequences.[85] This activism was justified as a product of the Court's duty to exercise judicial review to ensure that development-oriented

84. The numbers in Table 3 reflect the results indicated in Table 7. *See infra* appendix, Tables 7. In one additional case, not reflected in Table 3, the Supreme Court exercised institutional restraint to produce environmentally neutral results. In EPA v. Brown, 431 U.S. 99 (1977), the Court declined to pass on the validity of EPA regulations that the EPA had conceded were in need of modification.

85. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), for example, the Court narrowly defined the discretion that the Secretary of Transportation could use in selecting highway routes through urban parks and then concluded that the administrative record was insufficient to establish that the Secretary had properly exercised that discretion. *Id.* at 415-19. In Train v. City of New York, 420 U.S. 35 (1975), the Court held that the Clean Water Act, 33 U.S.C. §§ 1285, 1287 (Supp. III 1970), did not give the EPA discretion to impound funds authorized by Congress for the construction of municipal sewage treatment plants. The Court concluded that the EPA's arguments in favor of discretion were "unpersuasive" and impossible to square with congressional intent. 420 U.S. at 43-47; *see also* Train v. Campaign Clean Water, Inc., 420 U.S. 136 (1975) (holding that the EPA had no discretion to impound funds under the Clean Water Act). The Court's refusal to defer to the EPA on a question of statutory interpretation produced a pro-environment result in another case, in which the Court issued no opinion. In Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C.), *aff'd*, 2 Envtl. L. Rep. (Envtl. L. Inst.) 20,656 (D.C. Cir. 1972), a federal district court enjoined the EPA under the Clean Air Act from approving state plans that permit significant deterioration of air quality in clean air areas of the country, despite the EPA's contention that it had no obligation to administer the program. The Court affirmed without opinion on a four to four vote. Fri v. Sierra Club, 412 U.S. 541 (1973).

agencies carried out Congress's environmental protection policies.[86] The Court resolved doubts in statutory interpretation or implementation in a manner that furthered Congress's policy mandate.[87] Lower courts followed the Court's lead, developing the "hard look" doctrine under which the courts subjected agency decisions to significant substantive scrutiny.[88]

More recently, the Court has stressed deference to agency decisions and, consequently, has affirmed administrative interpretation or implementation of environmental statutes.[89] Two interrelated justifications have figured prominently in the recent cases addressing the scope of review of agency decisions. First, deference is proper because the courts are incompetent to interpret and implement complex statutes in areas requiring the technical expertise possessed by administrative agencies.[90] Second, deference is required because Congress has delegated the decisionmaking authority to the agencies. Thus, judicial interference improperly encroaches upon the institutional responsibilities delegated by Congress.[91]

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86. *See, e.g., Overton Park*, 401 U.S. at 415 (stating that Administrative Procedure Act (APA) review provisions "require the reviewing court to engage in a substantial inquiry"; while the administrative decision is "entitled to a presumption of regularity . . . that presumption is not to shield his action from a thorough, probing, in-depth review").

87. In *Overton Park*, the Supreme Court stressed the "paramount importance" of parkland protection policy to Congress. *Id.* at 412-13. Similarly, in *Train v. City of New York* the Court rejected the EPA's contention that it had the discretion to determine the timing of funding allotment because such "seemingly limitless power to withhold funds from allotment and obligation" might "scuttle[] the entire effort" to address the urgent problem of municipal pollution. *Train v. City of New York*, 420 U.S. at 45-46.

88. *See generally* Shapiro & Levy, *supra* note 44, at 419. This hard look review had both substantive and procedural elements. *Id.* The procedural aspects of hard look review are discussed *infra* notes 341-42 and accompanying text.

89. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (statutory interpretation); Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983) (statutory implementation). For further discussion of *Chevron*, see *infra* notes 129-38 and accompanying text. For further discussion of *Baltimore Gas*, see *infra* notes 122-25 and accompanying text.

90. *See Chevron*, 467 U.S. at 844 (stating that "a full understanding of the force of the statutory policy . . . has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations" (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)); *Baltimore Gas*, 462 U.S. at 103. In *Baltimore Gas* the Court stated that "a reviewing court must remember that the [Nuclear Regulatory] Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential." *Id.*

91. See *Chevron*, 467 U.S. at 843-44. In *Chevron*, the Supreme Court explained:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. (footnote omitted). Similarly, in *Baltimore Gas* the Court stressed the limited institutional role

Both of these justifications rest on the assumption that administrative agencies will faithfully implement statutory policies. Whether or not this assumption is valid in general, administrative agencies in some cases do pursue policies inconsistent with statutory objectives.[92] This incongruence may be the result of various personal, economic, political, or institutional factors that motivate administrators,[93] or it may be the product of a policy dispute between Congress and the President, who has responsibility for the appointment of administrative officers.[94] When a conflict between administrative and congressional policy occurs, institutional restraint toward the agencies may constitute policy activism toward Congress,[95] because institutional restraint effectively elevates administrative policy choices over congressional ones.

Proponents of deference to administrative agencies respond to these concerns by insisting that more democratic means of controlling agencies are available. They argue that Congress can control agencies through devices such as oversight hearings, the appropriations process, and more specific legislative prescriptions,[96] or that if the electorate is dissatisfied with the President's policies as implemented by administrative agencies, the electorate can then vote the President out of office.[97] Although these necessary and desirable methods of control are important checks on administrative error and abuse, they cannot replace judicial review as a method for ensuring compliance with statutory

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to be played by the courts, stating that "[r]esolution of . . . fundamental policy questions lies . . . with Congress and the agencies to which Congress has delegated authority," and that "Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes." *Baltimore Gas*, 462 U.S. at 97.

92. *See generally* S. BREYER & R. STEWART, *supra* note 39, at 130-61 (collecting materials critical of agencies).

93. *See* J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT 283-95 (1962); A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 88-95 (1957); P. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 143-74 (1981); Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 211-13 (1976); Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 341-42 (1974); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 10-13 (1971).

94. *See* U.S. CONST. art. II, § 2, cl. 2 (mandating that the President appoint officers of the United States with advice and consent of the Senate; appointment of inferior officers may be vested by Congress in the President, the heads of departments, or the courts).

95. *Cf.* United States v. Standard Oil Co., 384 U.S. 224, 230 (1966) (Harlan, J., dissenting) (accusing the majority of engaging in judicial activism by deferring to expansive administrative construction of the Rivers and Harbors Act); United States v. Republic Steel Corp., 362 U.S. 482, 510 (1960) (Harlan, J., dissenting).

96. *See, e.g.*, Mikva, *supra* note 35, at 119-21 (discussing control avenues that might substitute for the legislative veto); *see also* R. CASS & C. DIVER, ADMINISTRATIVE LAW 58-60 (1987); R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 44, § 3.1 (describing mechanisms of congressional control).

97. *See, e.g.*, Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985).

mandates.[98] As a large deliberative body with a broad range of responsibilities, Congress cannot oversee the day-to-day operations of agencies; therefore, congressional correction of administrative policies will necessarily be sporadic.[99] Likewise, the electorate, which must evaluate a broad range of issues in choosing a President, is unlikely to vote on the basis of a particular regulatory policy in any but the most extreme cases.[100]

Thus, judicial review is necessary to supplement the other methods of controlling administrative discretion. Less deferential review is not, however, without risks. It invites judges, who lack technical expertise and are not politically accountable, to substitute their judgment for that of the agency in resolving complex environmental issues.[101] Moreover, aggressive judicial review may undermine administrative efficiency.[102] When an agency acts contrary to statutory directives or policy, however, these objections have little force because administrative expertise, political accountability, and efficiency are not concerns that justify disregarding statutory provisions. The ultimate goal, therefore, is to balance the need for judicial oversight against its potential disadvantages, and the fundamental question is whether the Court has struck an appropriate balance.

The Court's adoption and application of standards for reviewing agency interpretation and implementation of statutes in the later environmental law cases is subject to two criticisms. First, in deferring broadly to administrative decisions with pro-development results, the Court has allowed agencies to undermine congressional policies. This problem is illustrated by the Court's approach to the substantive review of agency implementation of the National Environmental Policy Act (NEPA)[103] and by its failure to consider underlying statutory objectives

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98. *See* Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 394-95 (1986); Shapiro & Glicksman, *supra* note 6, at 863-72.

99. *See, e.g.*, Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 272-73 (arguing that congressional oversight is unsystematic and superficial); Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1200-03 (1981) (asserting the unevenness of congressional oversight of agencies).

100. *See, e.g.*, Pierce & Shapiro, *supra* note 99, at 1211 (arguing that presidential accountability is more symbolic than real because re-election can represent only an undifferentiated judgment upon overall performance). Public opinion polls conducted prior to the 1984 election support this conclusion. According to these polls, a majority of the population often disagreed with President Reagan on specific issues, yet intended to vote for him anyway. *See* Rosenbaum, *Poll Shows Many Choose Reagan Even if They Disagree with Him*, N.Y. Times, Sept. 19, 1984, at A1, col. 3.

101. *See, e.g.*, Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 817 (1977); Verkuil, *Judicial Review of Informal Rulemaking: Waiting for* Vermont Yankee II, 55 TUL. L. REV. 418, 427 (1981).

102. *See* Breyer, *supra* note 98, at 393; Shapiro & Levy, *supra* note 44, at 409.

103. 42 U.S.C. §§ 4321-4370 (1982).

when reviewing agency statutory interpretations. Second, the Court has not applied the principles of deference with equal vigor when faced with administrative decisions that yield pro-environment results. In these cases the Court not only has engaged in institutional activism to overturn several agency decisions, but also has qualified the pro-environment aspects of several agency decisions that it has upheld. Considered together, the cases suggest that the Court's purported commitment to deferential standards of review has not prevented the Court's exercise of pro-development judicial policy activism.

B. The Court's Treatment of Pro-Development Administrative Decisions

Although it has not always relied on principles of deference, the Court has ruled in accord with the agency decision in question in all but one of the eight pro-development administrative decisions that it has reviewed. The lone exception was *TVA v. Hill*,[104] in which the Court held that the Endangered Species Act[105] left it no choice but to halt the construction of the Tellico Dam. The Court refused to defer to TVA's argument that the Court should construe the statute to avoid the absurd result of sacrificing the nearly completed dam at great cost to preserve the snail darter, a species of fish that the Department of Interior had found to be endangered.[106] This refusal to defer to TVA's interpre-

104. 437 U.S. 153 (1978). Because *Hill* was a case that resulted in the reversal of the TVA's decisiou to go forward with the Tellico Dam project, this Article categorizes the decision as an exercise of judicial activism toward the TVA. On the other hand, the TVA's decision appears to have been in conflict with regulations issued by the Secretary of the Interior, who had found that the snail darter was an endangered species and that the waters affected by the dam were a critical habitat for the snail darter. The Secretary had declared, " '[A]ll Federal agencies must take such action as is necessary to insure that actions authorized, funded, or carried out by them do not result in the destruction or modification of this critical habitat area.' " *Hill*, 437 U.S. at 162 (quoting 41 Fed. Reg. 13,928 (1976)). The Court noted that this declaration "was pointedly directed at TVA and clearly aimed at halting completion or operation of the dam." *Id.* Insofar as the Court agreed with the decision of the Secretary of the Interior, *Hill* may be regarded as an example of institutional restraint toward an administrative decision with pro-environment results rather than pro-environment institutional activism. The latter characterization was chosen because the TVA's decision, not the decision of the Secretary of the Interior, was under review. In addition, characterizing this decision as institutionally active gives the case a stronger pro-environment component, which may serve to offset any pro-development bias in the characterization of other cases.

105. 16 U.S.C. §§ 1531-1543 (1982).

106. *Hill*, 437 U.S. at 184. The Court based its refusal to defer on the clear statutory language and legislative history that the Court believed compelled the result. *See id.* at 172-95. Justice Powell, joined in dissent by Justice Blackmun, disagreed, arguing that the history of appropriations for the Tellico Dam project revealed that Congress intended the dam to go forward despite the provisions of the Endangered Species Act. *Id.* at 196-202 (Powell, J., dissenting). The dissenting Justices further argued that neither the language nor the legislative history of the Endangered Species Act clearly required the result reached by the majority. *Id.* at 202-10 (Powell, J., dissenting). Justice Rehnquist also dissented on the narrower ground that the uncertainty regard-

tation of the statute constituted institutional activism toward the agency, but the Court emphasized that it was exercising institutional restraint toward Congress: "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end."[107]

Hill recognized that when congressional and administrative policies conflict, institutional restraint requires courts to give effect to the congressional policy. In the remaining cases in which administrative agencies reached pro-development results, however, the Court seemed to ignore the potential for such a conflict. This potential is particularly acute in the environmental law field for two reasons. First, statutes such as NEPA, which was enacted specifically to require development-oriented agencies to take account of environmental concerns,[108] are unlikely to receive a warm embrace from the agencies whose activities they govern. Second, since at least 1981 presidential and administrative policies have generally favored industrial development at the expense of environmental concerns,[109] despite significant legislative efforts to protect the environment.[110] Under these circumstances, the Court's strong tendency to agree with pro-development administrative decisions may undermine congressional efforts to protect the environment.

1. Substantive Review Under NEPA

This threat to congressional efforts is well illustrated by the judicial treatment of NEPA,[111] which requires all federal agencies to con-

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ing the proper construction of the statute justified the district court's exercise of equitable discretion to refuse the injunctive relief requested by the environmentalists who had sued to halt further construction of the dam. *Id.* at 211-13 (Rehnquist, J., dissenting).

107. *Id.* at 194.

108. *See, e.g.*, Yost, *Administrative Implementation of and Judicial Review Under the National Environmental Policy Act*, in 1 LAW OF ENVIRONMENTAL PROTECTION § 9.01, at 9-4 (S. Novick, D. Stever & M. Mellon eds. 1987).

109. Wassermann, *United States: Environmental De-regulation*, 17 J. WORLD TRADE L. 365 (1983). For example, the Reagan Administration has used its oversight power to discourage EPA efforts to regulate the environment. *See* Note, *Presidential Policy Management of Agency Rules Under Reagan Order 12,498*, 38 ADMIN. L. REV. 63, 97-101 (1986).

110. Throughout the decade, Congress strengthened pollution control statutes in the process of reauthorizing those laws. *See* Glicksman, *supra* note 13, at 241. The statutory amendments were characterized by consistent efforts to reduce EPA discretion as a means of preventing the agency from subverting congressional policy. *See* Shapiro & Glicksman, *supra* note 6, at 825-28.

111. The Supreme Court's hostility to NEPA is well documented. *See* 1 J. BATTLE, ENVIRONMENTAL LAW: ENVIRONMENTAL DECISIONMAKING AND NEPA 114 (1986); Murchison, *Does NEPA Matter?—An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act*, 18 U. RICH. L. REV. 557, 592-601 (1984). During the period in question the Court rejected all seven challenges to pro-development agency action based on

sider the environmental consequences of their decisions[112] and to prepare an Environmental Impact Statement (EIS) for legislative proposals and for other major actions affecting the environment.[113] NEPA is silent on the availability of and criteria for judicial review of agency decisions subject to its provisions. As a result, it is unclear whether Congress intended to allow courts to overturn agency decisions inconsistent with NEPA's substantive obligations, or to limit reversals to

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NEPA. *See* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983) (upholding the NRC's rule that permanent storage of nuclear wastes has no environmental impact for purposes of licensing individual nuclear power plants); Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983) (holding that NEPA did not require the NRC to consider psychological harm from fear of future accidents when authorizing restart of Three Mile Island nuclear power plant); Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981) (holding that the Navy is not required by NEPA to prepare a hypothetical Environmental Impact Statement (EIS) regarding nuclear weapons storage); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) (per curiam) (upholding a Department of Housing and Urban Development (HUD) decision on low income housing site despite a HUD report disclosing potential adverse environmental consequences); Andrus v. Sierra Club, 442 U.S. 347 (1979) (holding that EIS is not required for the Department of Interior's decision to seek reduced appropriations for the National Wildlife Refuge System); Kleppe v. Sierra Club, 427 U.S. 390 (1976) (holding that the Department of the Interior is not required to prepare regionwide EIS before approving specific plans for coal development within region); Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976) (stating that the HUD decision to allow disclosure statement under Interstate Land Sales Full Disclosure Act to become effective did not require EIS). In an additional case, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), which is known principally for its rejection of judicially imposed procedures under the Administrative Procedure Act, *see infra* notes 343-46 and accompanying text, the Court also rejected arguments based on NEPA. *See Vermont Yankee*, 435 U.S. at 538, 549-55.

Only two of the NEPA decisions, *Baltimore Gas* and *Strycker's Bay*, which dealt with substantive review of agency decisions to go forward with proposed action, are considered in this discussion. The remaining five decisions are considered in connection with the Court's treatment of procedural requirements at the agency level. *See infra* note 348 and accompanying text.

112. *See* 42 U.S.C. § 4331(b) (1982). The provision states:

> In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—
>
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
>
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
>
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Id.

113. *Id.* at § 4332(2)(C).

procedural violations.[114] Based on its conclusion that NEPA's requirements are "essentially procedural,"[115] the Court has resolved this question in favor of an extremely deferential standard of review.

The Supreme Court addressed NEPA's substantive content in *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,[116] in which it upheld the Department of Housing and Urban Development's (HUD's) decision to proceed with a low income housing project in the face of recognized "potential social environmental impacts," even though HUD's only explanation for its refusal to consider alternative sites was the desire to avoid delay.[117] In a short, per curiam opinion the Court stated bluntly that under NEPA "the only role for a court is to insure that the agency has considered the environmental consequences."[118] This language prompted some observers to conclude that the Court had rejected substantive review under NEPA altogether.[119] But even if *Strycker's Bay* theoretically permits minimal substantive review,[120] if the desire to avoid delay is a sufficient explanation for disregarding adverse environmental consequences disclosed in an EIS, then the Court has given agencies a built-in excuse for ignoring such consequences.[121]

The Supreme Court again addressed the scope of substantive review under NEPA in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*[122] Although the Court in *Baltimore Gas* made clear that agency decisions under NEPA were subject to review under the "arbitrary and capricious" standard of section 706 of the Ad-

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114. *See, e.g.*, F. GRAD, ENVIRONMENTAL LAW 1168-69 (3d ed. 1985). This uncertainty has provoked considerable commentary, most of it favoring substantive review. *See id.* at 1169 (citing articles); W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 738 n.1 (1977) (citing articles). The general trend in the lower courts was to engage in substantive review, although agency action was seldom overturned for violation of NEPA's substantive requirements. *See* 1 J. BATTLE, *supra* note 111, at 133-34; F. GRAD, *supra*, at 1168-69.

115. *Vermont Yankee*, 435 U.S. at 558; *accord Baltimore Gas* 462 U.S. at 96-97; *Strycker's Bay* 444 U.S. at 227.

116. 444 U.S. 223 (1980) (per curiam).

117. *Id.* at 225-27. This conclusion prompted a dissent by Justice Marshall which contained a veiled accusation that the majority's decision was the product of racism. *See id.* at 231 (Marshall, J., dissenting) (stating that "I cannot believe that the Court would adhere to that position in a different factual setting"). For criticism of *Strycker's Bay* see Goldsmith & Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1, 9-13 (1983).

118. *Strycker's Bay*, 444 U.S. at 227. The Court additionally stated: "In the present litigation there is no doubt that HUD considered the environmental consequences of its decision . . . . NEPA requires no more." *Id.* at 228.

119. *See, e.g.*, F. GRAD, *supra* note 114, at 1169.

120. *See* Yost, *supra* note 108, § 9.01[4][e][iii].

121. Because accommodation of environmental interests will almost always delay the completion of proposed agency action, an agency will nearly always be able to claim that its refusal to proceed in a manner more protective of the environment is justified by its desire to avoid delay.

122. 462 U.S. 87 (1983).

ministrative Procedure Act (APA),[123] it relied on notions of institutional restraint to emphasize that reviewing courts must be extremely deferential in applying the standard.[124] Deferential review in *Baltimore Gas* ultimately enabled the Court to uphold the Nuclear Regulatory Commission's highly questionable nuclear power plant licensing policy of treating as nonexistent the risk of radioactive discharge from long-term storage of nuclear waste.[125]

Thus, in *Strycker's Bay* and *Baltimore Gas* the Court both exercised institutional restraint to restrict severely the scope of substantive review under NEPA and exhibited great deference to agency decisions that disregarded or minimized apparently adverse environmental impacts. This approach enables development-oriented agencies to circumvent NEPA's obligation to consider environmental consequences. As a solely procedural statute NEPA may serve some functions,[126] but the absence of any meaningful substantive review by the courts allows affected agencies to "jump through the hoops" of NEPA's procedural requirements without giving any real weight to environmental consequences.[127] This problem is particularly acute in light of many agencies' probable hostility to NEPA's goals.[128]

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123. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982).

124. *See supra* notes 89-91.

125. Although the decision in *Baltimore Gas* was unanimous, it has provoked significant criticism. *See, e.g.*, Yellin, *Science, Technology, and Administrative Government: Institutional Designs for Environmental Decisionmaking*, 92 YALE L.J. 1300, 1320-24 (1983); Note, *The* Vermont Yankee *Line: A Hard Look Becomes A Passing Glance*, 19 NEW ENG. L. REV. 837, 860-66 (1984); Note, *Return to* Vermont Yankee *and the Foreclosure of Judicial Review of the NRC's Generic Rulemaking:* Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 1 PACE ENVTL. L. REV. 200, 211-13 (1983).

126. NEPA arguably forces agencies to consider the environmental consequences of their activities and serves as an environmental "full disclosure" law that reveals to Congress and the public those situations in which the agency has proceeded with a project despite adverse environmental consequences. *See, e.g., Baltimore Gas*, 462 U.S. at 97; California v. Block, 690 F.2d 753, 761 (9th Cir. 1982).

127. *See* Hill & Ortolano, *NEPA's Effect on the Consideration of Alternatives: A Crucial Test*, 18 NAT. RESOURCES J. 285, 310-11 (1978) (concluding that NEPA's requirements had brought about mostly cosmetic changes in the U.S. Army Corps of Engineers' planning of projects). Recognition of this prohlem has prompted the Supreme Court in recent years to endorse far more aggressive application of the arbitrary and capricious standard of review in other regulatory contexts. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983); *see also* Bowen v. American Hosp. Ass'n, 106 S. Ct. 2101, 2113 (1986) (plurality opinion). *See generally* Levin, *Federal Scope-of-Review Standards: A Preliminary Restatement*, 37 ADMIN. L. REV. 95 (1985); Shapiro & Levy, *supra* note 44, at 435-36.

128. NEPA was specifically intended to force development-oriented agencies to take environmental considerations into account. *See, e.g.*, Sive, *supra* note 8, at 650.

2. The *Chevron* Test

The Supreme Court has also adopted a deferential standard of review for agency statutory interpretation. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[129] the Court articulated a two-part test. The first prong of the *Chevron* test requires a court to determine whether the language or legislative history of a statute reveals that Congress has "directly spoken to the precise question at issue."[130] If so, the Court is to give effect to that intent.[131] If a court finds no clear congressional intent, then the second prong of the *Chevron* test requires deference to the administrative construction unless that construction is unreasonable.[132]

The *Chevron* test does not sufficiently control agency discretion because it allows an agency to pursue policies at odds with underlying statutory objectives.[133] The first prong of the test is easily manipulated. Given the nature of language, it is almost always possible to identify some statutory ambiguity.[134] Nor is a search of the legislative history likely to prevent manipulation. Congress cannot anticipate every issue that may arise under a statute; therefore, legislative history often fails to indicate that Congress has "directly spoken to the precise question at

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129. 467 U.S. 837 (1984). On the merits, the Court upheld the EPA's interpretation of the Clean Air Act to allow the use of a "bubble" concept in "nonattainment" areas. Nonattainment areas are those areas that have not met standards for reducing air pollution and thus are subject to provisions requiring states to adopt permit programs substantially limiting construction of new or modified sources of pollution. *See* 42 U.S.C. §§ 7410(a)(2)(I), 7503 (1982). Under the bubble concept, a polluter may increase pollution at one point in a plant without triggering expensive pollution control requirements if emission reductions elsewhere at the plant offset the increase. *See Chevron*, 467 U.S. at 840, 855-57. For a highly critical student evaluation of the Court's treatment of the merits in *Chevron*, see Note, *Judicial Deference to Administrative Over-Extension and the End of Environmental Control:* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 29 J. URB. & CONTEMP. L. 297 (1985).

130. *Chevron*, 467 U.S. at 841.

131. *Id.* at 842-43.

132. *Id.* at 843.

133. *See, e.g.*, Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372-82 (1986) (observing that *Chevron* gives too much discretion to agencies); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 467 (1987).

134. *See* Shapiro & Glicksman, *supra* note 6, at 859 n.185 (stating that "[i]n cases where the Court has cited *Chevron*, it has found about twice as many statutes to be ambiguous as unambiguous"); *Judicial Review*, *supra* note 52, at 371 (remarks of Professor Sunstein) (commenting that *Chevron* places "a thumb on the scales in favor of the agency"); Note, *The* Chevron *Legacy:* Young v. Community Nutrition Institute *Compounds the Confusion*, 73 CORNELL L. REV. 113, 132 (1987). The difficulty in finding statutory clarity is illustrated by the disagreement expressed by the dissenters in *Hill*. *See supra* note 104 and accompanying text. Similar disputes arose in a number of cases in which the Court was called upon to interpret environmental statutes in contexts other than review of administrative interpretations. *See infra* notes 377-81 and accompanying text (discussing *Ruckelshaus v. Sierra Club*); *infra* note 355 (discussing *Harrison v. PPG Indus.*); *infra* notes 243-47 and accompanying text (discussing *Milwaukee II*).

issue."[135] Congressional intent is particularly difficult to find under the *Chevron* standard because the Court's language seems to suggest that Congress must specifically consider and then address a question in order for its intent to be relevant.[136] The second prong of the *Chevron* test rests on the theory that if congressional intent is not apparent under the first prong, then Congress must have delegated policy-making discretion to the agency.[137] When Congress has delegated in this manner, the second prong of the test in effect dictates that courts not disturb agency interpretations. Indeed, one judge has noted that the Court "has . . . [never] cast a vote against an agency under *Chevron* [s]tep [t]wo."[138] This overly deferential approach to agency interpretation of ambiguous statutes ignores the general policy goals embodied in legislation and reflected in legislative history. Thus, the *Chevron* test leaves little capacity for ensuring agency fidelity to such general policy goals because these goals may lie between the prongs of "specific" congressional intent on the "precise question at issue" and delegation of unchecked policy-making discretion to administrative agencies.

Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.[139] illustrates that application of the *Chevron* test may permit administrative agencies to undermine legislative intent. In *Chemical Manufacturers Association* the Court held that the EPA had authority to grant variances from industrywide regulations applicable to indirect dischargers of toxic pollutants,[140] despite a provision of the Clean Water Act prohibiting the EPA from "modifying" the requirements of the Act as they applied to toxic pollutants.[141] Because the statute does not define a "modification," the Court concluded that the plain meaning of the statute did not indicate whether variances consti-

135. *Judicial Review*, *supra* note 52, at 368-69 (remarks of Professor Sunstein).

136. *Id.*

137. *See Chevron*, 467 U.S. at 843-44.

138. *Judicial Review*, *supra* note 52, at 366 (remarks of Judge Starr); *see also*, 1 W. RODGERS, ENVIRONMENTAL LAW 228 (1986) (noting that *Chevron* allows agencies "considerable freedom"). There is some evidence, however, that the Court is retreating from the most deferential aspects of the *Chevron* test, at least in other regulatory contexts. *See* NLRB v. United Food & Commercial Workers, Local 23, 108 S. Ct. 413 (1987); INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987); Hochberg, *"Two Step" Method of Analysis: Still in Transition After* Chevron, Nat'l L.J., May 16, 1988, at 22-23, 26-27; *see also* Shapiro & Glicksman, *supra* note 6, at 860-62.

139. 470 U.S. 116 (1985). Justice Marshall authored a scathing dissent, joined by Justices Blackmun and Stevens, and in part by Justice O'Connor. *See id.* at 134-65.

140. An indirect discharger dumps its waste into a publicly-owned treatment works rather than directly into a body of navigable water. *See Chemical Mfrs.*, 470 U.S. at 118-19. The variances at issue were termed "fundamentally different factor (FDF)" variances because they were granted on the basis of factors that affect individual dischargers—factors that were fundamentally different from the factors considered by the EPA in adopting an industrywide standard. *See id.* at 120 n.7.

141. Section 301(*l*) of the Clean Water Act, 33 U.S.C. § 1311(*l*) (1982).

tuted modifications.[142] Thus, deference to the EPA's view that the variances did not constitute modifications was appropriate "unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress."[143] The Court concluded that the legislative history did not demonstrate Congress's unambiguous intention to forbid the specific modifications in question,[144] and refused to overturn the EPA's interpretation of the statute.

This analysis reveals the limits of the *Chevron* test. To some observers, the Clean Water Act's prohibition of modifications does appear on its face to prohibit variances for toxic pollutants.[145] At the very least, the Authors regard the interpretation rejected by the Court to be a more plausible reading of the statutory language than the EPA's position.[146] Nonetheless, because the Court could identify some ambiguity in the statute that was not resolved by legislative history specifically addressing the availability of the variances at issue, the Court deferred under the second prong of *Chevron*. By doing so, the Court ignored the broader legislative intent and fundamental statutory purpose to strengthen toxic pollutant regulation[147] and rejected, out of deference to

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142. *Chemical Mfrs.*, 470 U.S. at 125-26. The Court acknowledged that "[i]f the word 'modify' . . . is read in its broadest sense" the statute would prohibit variances, but concluded that this interpretation would lead to the absurd result that the EPA was forbidden from amending its own standards to correct errors or make the standards stricter. *Id.* at 125. Moreover, the Court concluded that this reading would be inconsistent with other statutory provisions directing the EPA to revise its standards to account for changes in circumstances. *Id.* at 126.

143. *Id.* at 126. The Court dismissed without much explanation the NRDC's argument that congressional committees and individual legislators had at various times during the course of statutory enactment indicated the equivalence of the terms "variance" and "modification" by using the terms interchangeably. *Id.* In fact, the EPA itself had repeatedly referred to fundamentally different factor variances as "modifications" prior to the adoption of § 301(*l*). *See id.* at 163 n.22 (Marshall, J., dissenting). The Court did not explain why this contemporaneous construction should be afforded less deference than the EPA's later view that variances were available even when modifications were not.

144. *Id.* at 129. The Court relied on the delegation rationale advanced in *Chevron*. *See supra* note 137 and accompanying text.

145. *See Chemical Mfrs.*, 470 U.S. at 139 (Marshall, J., dissenting). For an extensive criticism of the Court's decision in *Chemical Manufacturers*, see Funk, *The Exception That Approves the Rule: FDF Variances Under the Clean Water Act*, 13 B.C. ENVTL. AFF. L. REV. 1 (1985).

146. While the Court stated that it did "not sit to judge the relative wisdom of competing statutory interpretations," *Chemical Manufacturers*, 470 U.S. at 134, in other contexts the Court has recognized that "to acknowledge ambiguity is not to conclude that all interpretations are equally plausible." Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 108 S. Ct. 376, 381 (1987); *see infra* note 267 and accompanying text.

147. As noted by Justice Marshall, § 301(*l*) was adopted as part of the 1977 amendments to the Clean Water Act, Pub. L. No. 95-217, § 301(*l*), 91 Stat. 1567 (1977), whose primary purpose was to strengthen the regulation of toxic pollutants. *Chemical Mfrs.*, 470 U.S. at 141 (Marshall, J., dissenting). Thus, to the extent § 301(*l*) was unclear on its face, the Court should have resolved the ambiguity in a manner consistent with the underlying statutory objective, the reduction of toxic pollutant discharges. In this case, an expansive interpretation of § 301(*l*)'s prohibition to include variances would have promoted that fundamental statutory purpose.

an *administrative* policy, a statutory construction more consistent with this *congressional* policy.[148]

Thus, a rule requiring judicial deference to agency statutory implementation and interpretation may operate to undermine congressional policy.[149] Courts function as a necessary check on administrative agen-

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In earlier cases, the Court often relied on Congress's main goal of preventing environmental harm to support broad statutory interpretations and to narrow an agency's discretion when that agency's implementation of the Act appeared to risk defeating that congressional goal. *See supra* notes 86-87 and accompanying text. While the Court occasionally still reverts to that analysis, *see, e.g.*, United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455, 462 (1985), its treatment of the underlying policy of the Clean Water Act in *Chemical Manufacturers* is consistent with other recent environmental law decisions which emphasize that environmental statutes are compromise measures designed to achieve a variety of goals and that elevating environmental protection concerns above these other goals is too simplistic. *See, e.g.*, International Paper Co. v. Ouellette, 107 S. Ct. 805, 813 (1987) (stating that "[i]n determining whether Vermont nuisance law 'stands as an obstacle' to the full implementation of the [Clean Water Act], it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution"); *Chevron*, 467 U.S. at 851 (stating that in the nonattainment area permit program, "Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality").

This emphasis, coupled with principles of deference, suggests policy activism by the Court. It is somewhat remarkable, for example, that a court can defer to an agency's determination that Congress intended to give priority, or even equal weight, to promoting economic expansion when Congress enacted a series of amendments intended to accelerate achievement of air pollution reductions. *See Chevron*, 467 U.S. 837.

148. The EPA in *Chemical Manufacturers* did argue, in effect, that the FDF variances furthered the purposes of the Act by providing flexibility in the application of nationwide standards that necessarily had been promulgated without consideration of "unique factors applicable to atypical plants." *See Chemical Mfrs.*, 470 U.S. at 133. The Court, however, ignored an expression of legislative intent to "force technology," which was evidenced by Congress's requiring categories of polluters to comply with " 'the average of the best existing performance by plants of various sizes, ages, and unit processes' " or " 'the best performer in an industrial category.' " *Id.* at 155 (Marshall, J., dissenting) (quoting Senator Muskie, a drafter and Senate floor manager of the bill). Allowing variances for individual plants obviously undermines that goal.

149. The possibilities for manipulating principles of institutional restraint in cases of institutional conflict are further illustrated by two other decisions that entailed substantive review of agency action and presented an institutional conflict between the states and the federal government. In EPA v. California *ex rel.* State Water Resources Control Board, 426 U.S. 200 (1976) and Hancock v. Train, 426 U.S. 167 (1976), the Court agreed with, but did not express deference to, the EPA's conclusion that federal installations were not obligated to comply with state permit programs established under the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982) and the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982). In both cases the Court relied on the presumption that state regulation of federal activity is impermissible absent a "clear and unambignous" congressional authorization. *California ex rel. State Water Resources Control Bd.*, 426 U.S. at 211; *Hancock*, 426 U.S. at 179. Despite provisions in both statutes that obligate federal installations to comply with state requirements "to the same extent as any nongovernmental entity," Clean Air Act, 42 U.S.C. § 7418(a)(2) (1982), and Clean Water Act, 33 U.S.C. § 1323 (1982), the Court concluded that congressional authorization for state permit requirements was not sufficiently clear and unambiguous. This conclusion seems inconsistent with the notion that institutional restraint demands judicial deference to decisions of state governments, *see supra* notes 61-63 and accompanying text, particularly in light of the apparent congressional conclusion that state regulation would not interfere with the institutional prerogatives of the federal government. These cases further demonstrate that when the Court is confronted with competing institutional considerations, institutional re-

cies whose policy objectives may be inconsistent with the goals of the statutes they administer. Although the *Chevron* statutory interpretation test and the Court's deferential application of the arbitrary and capricious standard of review under NEPA constitute institutional restraint toward agencies, these exercises in judicial deference may constitute institutional activism toward Congress by understating the problem of administrative fidelity. Moreover, when administrative and judicial policies coincide, the Court may engage in policy activism while ostensibly exercising institutional restraint simply by deferring to administrative action at odds with congressional policy. Indeed, it is interesting to note that the Court, shortly after announcing the broad principles of deference to pro-development agency decisions implementing and interpreting environmental statutes, found it necessary to retreat from these pronouncements in its decisions reviewing agency action outside of the environmental context.[150]

C. *The Court's Treatment of Pro-Environment Administrative Decisions*

The preceding criticisms might be less persuasive if the Court applied the principle of deference with equal vigor to its review of agency decisions with pro-environment results. But the Court has not done so. Although the Court affirmed the agency in seven of the eleven pro-environment decisions that it reviewed,[151] the exercise of restraint was more illusory than real. In fact, two of the four decisions reversing agency action are striking examples of institutional activism exercised in pursuit of a pro-development policy.[152] Moreover, the pro-environment re-

straint leaves ample room for the implementation of judicial policy preferences through the choice of the institution to be accorded deference. For more detailed consideration of the Court's treatment of the institutional concerns raised by state regulation designed to protect the environment, see *infra* notes 276-317 (discussing federal preemption of state remedies).

150. Outside of the environmental context, the Supreme Court has, since *Baltimore Gas* and *Chevron*, decided cases reflecting less deferential review of agency statutory implementation and interpretation. *See supra* notes 127, 138. It remains to be seen whether this trend will also take hold in the Court's environmental law decisions.

151. *See* Table 3, *supra* text accompanying note 84.

152. *See* Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980); Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978). In the other two cases the Court restricted agency authority to conduct on-site inspections of regulated plants. *See* United States v. Stauffer Chem. Co., 464 U.S. 165 (1984) (holding EPA collaterally estopped on issue of authority to hire private contractors to conduct inspections under § 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2) (1982)); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (finding § 8(a) of the Occupational Safety and Health Act of 1970 permits warrantless workplace searches held unconstitutional). Although the Court in *Stauffer Chemical* rested its conclusion on a narrow ground that left open the question of statutory authority, the case reflects institutional activism because the Court rejected the agency's position. Both cases involve the overlap of environmental and criminal procedure issues, discussed further *infra* notes 197-201 and accompanying text.

sults in at least five of the seven cases affirming agency action were qualified by the pro-development aspects of the Court's opinion in those cases or in prior decisions.[153]

1. Activism in Statutory Interpretation

The two cases in which the Supreme Court reversed agency action on statutory grounds stand in stark contrast to decisions such as *Chevron* and *Chemical Manufacturers* that stress deference to agency statutory interpretation. The first, *Adamo Wrecking Co. v. United States*,[154] evaluated an EPA regulation that specified procedures for the demolition of buildings containing asbestos. The EPA had purported to act under its authority in the Clean Air Act to issue "emission standards" for hazardous air pollutants.[155] The government subsequently indicted Adamo Wrecking for violating the regulation, and the company defended on the ground that the regulation was invalid because it did not constitute an "emission standard."[156] Relying on statutory language and the legislative history of subsequent amendments, the Court rejected the EPA's interpretation of the statute and concluded that the asbestos regulation was not an "emission standard."[157]

The Court exhibited no deference to the EPA's construction of the statute.[158] Instead, relying on a 1944 decision, it stated that the degree of deference that a court must give to an agency varies with " 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' "[159] In

153. *See infra* notes 178-201 and accompanying text.

154. 434 U.S. 275 (1978).

155. 42 U.S.C. § 7412 (1982).

156. *See Adamo Wrecking*, 434 U.S. at 278-79. A key issue in the case was whether Adamo Wrecking was precluded from raising this defense because it could have sought direct review of the regulation under 42 U.S.C. § 7607(b)(1) (1982). The majority concluded that Adamo Wrecking was not precluded. For a discussion of this holding, see *infra* notes 357-63 and accompanying text.

157. *See Adamo Wrecking*, 434 U.S. at 285-89.

158. This aspect of the majority opinion was criticized by Justice Stevens. *See id.* at 300 (Stevens, J., dissenting) (the issue was not whether, as an initial matter, the Court would regard the asbestos regulation as an "emission standard," but "whether [EPA's] answer to the question of statutory construction is 'sufficiently reasonable that it should have been accepted by the reviewing courts' " (quoting Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 75 (1975))); *id.* at 306 (Stevens, J., dissenting) (arguing that the Court here substituted "its reading of a complex statute for that of the Administrator charged with the responsibility of enforcing it").

159. *Id.* at 287 n.5 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). Exactly why the Court applied *Skidmore* is not clear. The Court noted only that the 1977 Amendments to the Clean Air Act, Pub. L. No. 95-95, 91 Stat. 685 (1977), in which Congress expressly authorized the EPA to issue design and work practice standards for hazardous air pollutants, *see Adamo Wrecking*, 434 U.S. at 286, tended to indicate that the EPA lacked that authority before 1977, when it issued the asbestos regulations. While Skidmore did discuss the standard of review for interpretive

Adamo Wrecking, because the EPA's regulations did not specify its reasons for concluding that the work practice controls in its asbestos regulations were authorized "emission standards," the Court refused to speculate on those reasons.[160] This approach to the review of the EPA's statutory construction is inconsistent with and far less restrained than the test the Court later applied in *Chevron*.

In the second case, *Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene)*,[161] a fractured Court invalidated Occupational Safety and Health Administration (OSHA) regulations for controlling workplace exposure to the carcinogen benzene.[162] The plurality opinion construed section 3(8) of the Occupational Safety and Health Act[163] to require OSHA to find, as a prerequisite to regulation, that a significant risk of material health impairment existed.[164] Because OSHA had not made this threshold finding, the Supreme Court held that the benzene regulations exceeded OSHA's authority.[165]

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regulations issued without express statutory authority, reliance on Skidmore here seems to suggest that institutional restraint requires deference only when Congress expressly delegated authority to an administrative agency—a suggestion plainly inconsistent with the *Chevron* premise that statutory ambiguity constitutes an implicit delegation of authority to the agency. *See supra* notes 137-38 and accompanying text.

160. *See Adamo Wrecking*, 434 U.S. at 287-88 n.5. When the agency's explanation for its conclusion is inadequate, the normal course is to remand to the agency for reconsideration. *See* SEC v. Chenery Corp., 318 U.S. 80, 94-95 (1943). Institutional restraint would have required such a remand in *Adamo Wrecking*. Even if the Court was correct in concluding that the agency had not given sufficient consideration to the issue or provided an adequate explanation for its conclusion that the regulation constituted an emission standard, a remand would have enabled the agency to apply its expertise to the question and would have left the initial resolution of a statutory ambiguity to the agency.

161. 448 U.S. 607 (1980).

162. *See id.* at 614-15. A plurality of the Court, in an opinion authored by Justice Stevens and joined by Justice Stewart, Justice Powell, and Chief Justice Burger, concluded that OSHA had exceeded its statutory authority. Both Chief Justice Burger, *id.* at 662 (Burger, C.J., concurring), and Justice Powell, *id.* at 664 (Powell, J., concurring), also wrote separate concurrences. Justice Rehnquist concurred in the judgment on the ground that the statute was an unconstitutional violation of the nondelegation doctrine. *Id.* at 671. Justice Marshall, joined by Justices Brennan, White, and Blackmun, dissented. *Id.* at 688 (Marshall, J., dissenting).

163. 29 U.S.C. § 652(8) (1982).

164. *See Benzene*, 448 U.S. at 639-40. The question before the Court was whether the Act imposed a "feasibility" or "cost/benefit" standard for the OSHA regulation. OSHA argued that it was required to set an exposure limit that was either safe or at the lowest level technologically and economically feasible. *See id.* at 613. The lower court had held that OSHA was required to weigh the costs of any standard against the proposed benefits. *See id.* at 614. The Court did not resolve this issue in *Benzene*, but rather sidestepped the question by striking down the regulations for their failure to comply with the significant risk requirement. In a later case the Court held that once a finding of significant risk had been made, the statute imposed a feasibility standard. American Textile Mfrs. Inst. v. Donovan (*Cotton Dust*), 452 U.S. 490 (1981). For further discussion of *Cotton Dust*, see *infra* notes 182-86 and accompanying text.

165. *See Benzene*, 448 U.S. at 659. Applying the significant risk requirement, the Court concluded that OSHA, by relying on a special policy for carcinogens that imposed the burden on industry to prove the existence of a safe benzene exposure level, improperly avoided its own re-

This determination appears to be the product of policy activism by the plurality. Indeed, the plurality's efforts to explain the result in terms of statutory language and legislative history were largely unpersuasive.[166] Although the plurality asserted at one point that the significant risk requirement was based upon statutory langnage,[167] elsewhere in the opinion the plurality stated that the Supreme Court had to determine the scope of OSHA's authority "[i]n the absence of a clear mandate in the Act."[168] If the legislature's intent was indeed unclear, then one would have expected the Court to exhibit deference to OSHA's interpretation of the statute.[169] Without even considering OSHA's explanation, however, the plurality concluded that it was "unreasonable to assume" that Congress intended to delegate to OSHA the "unprecedented power" over industry that necessarily would have flowed from OSHA's interpretation of the statute.[170] That assumption was unreasonable, according to the plurality, because such a broad delegation of power might violate the nondelegation doctrine, and "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored."[171]

The plurality's reliance on the nondelegation doctrine to construe the statute narrowly is troubling for several reasons. First, the nondele-

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sponsibility to establish a need for the benzene standard. *Id.*

166. This point was made forcefully by Justice Marshall in dissent. *Id.* at 690 (Marshall, J., dissenting). The plurality's threshold requirement, he said, was "a fabrication bearing no connection with the acts or intentions of Congress." *Id.* at 708. Rather than deferring to Congress's clearly enunciated purpose, the plurality had "flagrantly disregard[ed constitutional] restrictions on judicial authority," and "distort[ed] a statute's meaning in order to make it conform with the Justices' own views of sound social policy." *Id.* at 688. The dissent is sprinkled with similar charges. *See id.* at 690, 691, 723.

167. The Court stated tbat the definition of an "occupational safety and health standard" in § 3(8) "implicitly required" OSHA to issue findings (A) that a significant risk exists, and (B) that additional regulation is "reasonably necessary or appropriate" to address that risk. *Id.* at 640-41 n.45.

168. *Benzene*, 448 U.S. at 645.

169. *See Chevron*, 467 U.S. at 843-45.

170. *Benzene*, 448 U.S. at 645. "[T]he Government's theory," the plurality remarked, "would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit." *Id.* That OSHA could impose such regulations would be irrelevant to the issue before the Court, however, if Congress had consciously chosen to elevate the protection of workplace health and safety above considerations of efficiency or cost-benefit analysis.

171. *Id.* at 646 (citing A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935)). In so holding, the plurality rejected the American Petroleum Institute's argument that the Act unconstitutionally delegated legislative power. Justice Rehnquist, however, agreed with that argument and concurred in the result on nondelegation grounds. *Benzene*, 448 U.S. at 671. He argued that neither the statute nor its legislative history resolved the question of whether the Act imposed a cost-benefit or feasibility standard. Thus, Congress was "simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge." *Id.* at 687.

gation doctrine was thought to be a discarded relic of the *Lochner* era[172] because the Supreme Court had not applied the doctrine to strike down legislation since the 1930s.[173] Second, the plurality's concern in *Benzene* that OSHA would have "unprecedented power" over industry[174] appears to reflect a misapplication of the nondelegation doctrine. The correct issue in nondelegation cases is whether Congress has provided an "intelligible principle" that limits agency discretion and provides a standard for courts to apply in reviewing administrative action.[175] The plurality seems to have assumed incorrectly that a broad power to ban chemicals at levels below which there is a proven health risk, even if exercised pursuant to a specific "feasibility" standard, would present a nondelegation problem.[176] Finally, the Court in *Chevron* expressed no concern over the delegation of decisionmaking power to an agency. Indeed, in *Chevron* a unanimous Court[177] stated that "it is entirely appropriate for [agencies] to make . . . policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency."[178]

Adamo Wrecking and *Benzene* demonstrate that adopting a generally deferential posture toward administrative construction of statutes does not prevent judicial policy activism. On the one hand, if an administrative construction of a statute is consistent with a reviewing court's policy preferences, then the court can almost always justify deference by identifying statutory ambiguity. On the other hand, a court reviewing administrative decisions with which it disagrees may reject the

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172. *See* Shapiro & Levy, *supra* note 44, at 400.

173. *See id.*

174. *Benzene*, 448 U.S. at 645.

175. *See* R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 44, § 3.4. Thus, contrary to what the plurality opinion implies, the statute would not fall prey to the doctrine simply because Congress decided to authorize regulation of the workplace in the absence of proof of a significant risk to health or safety. *See* Goldsmith & Banks, *supra* note 117, at 36-37. Such a decision might reflect a legislative policy choice to err on the side of overregulation to protect worker health and safety. The statute would conflict with the nondelegation doctrine only if Congress failed to provide a standard for determining when regulation would be appropriate.

176. It is true that in some nondelegation cases prior to *Benzene* the Supreme Court narrowly construed the scope of power delegated to an agency in order to uphold the statute at issue. *See* R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 44, § 3.4.3. But the mere a grant of broad regulatory authority would not violate the nondelegation doctrine as long as sufficient standards were contained in the statute. For example, in Yakus v. United States, 321 U.S. 414 (1944), the Court upheld the delegation of authority to set wages and prices—an authority surely as sweeping as the power to regulate toxic chemicals in the workplace. It distinguished *Schechter Poultry* on the grounds that Congress "has stated the legislative objective, has prescribed the method of achieving that objective . . . and has laid down standards to guide the administrative determination[s]." *Id.* at 423.

177. Justices Marshall, Rehnquist, and O'Connor did not participate in the decision in *Chevron*, 467 U.S. at 839.

178. *Id.* at 865-66.

agency's views, while justifying its resort to institutional activism by manufacturing statutory "clarity," selectively reading statutory language and legislative history, or applying obscure principles of statutory construction.

2. Restraint and Pro-Environment Agency Decisions

Although the Supreme Court abandoned restraint to promote pro-development policies in *Adamo Wrecking* and *Benzene*, it has not uniformly resorted to institutional activism whenever agencies have interpreted statutes in a pro-environment manner. In seven of the Court's later environmental law cases it has upheld administrative decisions with pro-environment consequences. Indeed, two of the cases, *United States v. Riverside Bayview Homes, Inc.*[179] and *Union Electric Co. v. EPA*,[180] appear to exemplify institutional restraint with pro-environment consequences. In *Riverside Bayview*, a unanimous Court deferred under the *Chevron* test to the Army Corps of Engineers' extension of the Clean Water Act's dredge and fill permit program to wetlands adjacent to navigable waters.[181] In *Union Electric*, the Court without dissent upheld the EPA's own determination that the agency was precluded from rejecting a state implementation plan under the Clean Air Act on the ground that the plan was economically and technologically infeasible.[182]

The remaining five cases with pro-environment results, however, reflect a less than wholehearted commitment to institutional restraint. For example, in *American Textile Manufacturer's Institute, Inc. v. Donovan (Cotton Dust)*,[183] the Court, addressing an issue left open in *Benzene*, upheld OSHA's standard limiting exposure to cotton dust in the workplace by rejecting industry's argument that OSHA was required to engage in a cost-benefit analysis.[184] In doing so, however, the Court engaged in an independent construction of the statute and did

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179. 474 U.S. 121 (1985).

180. 427 U.S. 246 (1976).

181. *Riverside Bayview*, 474 U.S. at 131-39. The Supreme Court also resoundingly rejected the landowner's argument that the Army Corps' power to require a permit before filling wetlands constituted an uncompensated "taking" in violation of the fifth amendment. Id. at 126-29.

182. *Union Electric*, 427 U.S. at 256-67. Concurring opinions expressed dissatisfaction with the result, but noted that the statutory language compelled the result. *Id.* at 269-72 (Powell, J., concurring). This case is treated as a pure example of institutional restraint with pro-environment results despite Professor Rodgers's observation that "the sting [of industry's] defeat is assuaged by dicta promising a variety of opportunities to be heard on feasibility objections." 1 W. RODGERS, *supra* note 138, at 230; *accord* Goldsmith & Banks, *supra* note 117, at 19-20; *see Union Electric*, 427 U.S. at 266-68.

183. 452 U.S. 490 (1981).

184. *Id.* at 506-22.

not defer to OSHA.[185] Moreover, a majority of the Court confirmed the *Benzene* plurality's construction of the statute to require OSHA to find a significant risk as a prerequisite to regulation.[186] The long-term impact of that narrow construction on OSHA's effectiveness has rendered Pyrrhic the agency's victory in *Cotton Dust*.[187]

Likewise, the Court's treatment of the EPA's authority under section 301 of the Clean Water Act[188] to issue industrywide regulations setting forth uniform effluent limitations cannot be regarded purely as an exercise of judicial restraint. Although the Court upheld the EPA's assertion of this authority in *E.I. du Pont de Nemours & Co. v. Train*,[189] it relied on the "clear language" of the statute and an independent examination of the legislative history,[190] noting only as an afterthought that deference was appropriate.[191] Moreover, the Court qualified its holding by stating that the regulations were permissible only "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause."[192] The Court did not explain the source of this condition, which cannot be traced to any statutory provision.[193] In fact, while section 301(c) expressly *per-*

185. *Id.* The Court, however, did defer under the substantial evidence standard of review to OSHA's finding that the cotton dust standard was economically feasible. *See id.* at 522-36.

186. *See id.* at 505 n.25, 506-07; *supra* notes 162-63 and accompanying text.

187. For a discussion of the adverse impact of the *Benzene* and *Cotton Dust* decisions on OSHA's ability to regulate, see: Schroeder & Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J. 1231, 1260-63 (1984); McGarity & Shapiro, *OSHA Rulemaking Procedures*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATION AND REPORT 79, 117 (Jan. 12, 1987) (stating that "[i]f OSHA must hold a separate hearing on significant risk for every chemical it regulates, the agency is unlikely to be able to act on very many of the hundreds of chemicals that may require regulation"); and Goldsmith & Banks, *supra* note 117, at 30 (commenting that "Benzene's 'threshold' requirement eviscerates section 6(b)(5) just as effectively as a cost-benefit requirement would").

188. 33 U.S.C. § 1311 (1982); *see supra* note 141.

189. 430 U.S. 112 (1977).

190. *du Pont*, 430 U.S. at 126-34. Throughout its discussion the Court referred to "our construction" or "our reading" of the statute—as opposed to the EPA's.

191. *See id.* at 134-36. Such a treatment of the agency's interpretation is appropriate even under *Chevron* if the statutory language is indeed clear. But if that were the case, the Court's examination of the legislative history is puzzling, as is its statement that the "Agency's interpretation is also supported by thorough, scholarly opinions written by some of our finest judges, and has received the overwhelming support of the Courts of Appeals." *Id.* at 135. This statement implies that neither the language and history of the statute nor the weight of the agency's interpretation was sufficient to sustain its conclusion.

192. *Id.* at 128.

193. This failure is particularly startling in view of the Court's criticism, later in the same case, of the lower court's conclusion that the EPA must include a variance mechanism in its regulations establishing effluent standards for new sources, which were classified as a separate category of polluters. The Court stated that the question "is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for *these* regulations." *Id.* at 138 (emphasis in original).

mits the EPA to create variances from one category of effluent limitations, there exists no such authorization, much less a *requirement*, that the EPA include variances from the category of limitations that were at issue in *du Pont*.[194] This aspect of the Court's opinion, then, seems to reflect institutional activism with pro-development consequences.[195] Although *du Pont* did not articulate the factors that the EPA should consider in granting these variances, the issue was resolved in *EPA v. National Crushed Stone Association*,[196] in which the Court deferred to the EPA's determination that variances could not be granted on the basis of economic factors.[197] While *Crushed Stone* reflects institutional restraint toward an agency's pro-environment decision, this restraint must be evaluated in light of the origins of the variance requirement at issue.

Two remaining cases with pro-environment results juxtaposed environmental policy issues against criminal procedure issues. In *United States v. Ward*[198] and in *Dow Chemical Co. v. United States*,[199] the Supreme Court rejected challenges to agency enforcement of environmental laws based on constitutional safeguards of criminal defendants' rights. Because the Court upheld the agency action in question, the cases may be characterized as institutional restraint decisions.[200] These cases did not focus, however, on questions of institutional restraint toward administrative agencies, but rather on the scope of constitutional

194. Section 301(b) creates a two step regulatory process. Under § 301(b)(1), by July 1, 1977, the EPA was to promulgate and industry was to achieve effluent limitations requiring the application of the "best practicable control technology currently available" (BPT limitations). 33 U.S.C. § 1311(b)(1)(A) (1982). Under § 301(b)(2), industry was to comply by July 1, 1984, with effluent limitations requiring the application of the "best available technology economically achievable" (BAT limitations). *Id.* § 1311(b)(2)(A). Section 301(c) expressly allows a variance mechanism for BAT limitations; it provides that the EPA "may modify the requirements of subsection (b)(2)(A) . . . with respect to any point source." *Id.* § 1311(c). But the statute is silent on the availability of variances from BPT regulations, which were at issue in *du Pont*. The logical inference from this silence, coupled with the express language in the same section of the statute permitting variances for BAT limitations, is that Congress did not intend variances from BPT limitations to be made available.

195. Unlike the institutional activism of *Benzene*, which has significantly impaired OSHA's ability to regulate, *see supra* note 186, the long-term impact of the *du Pont* variance requirement has been minimal. *See* Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 124 n.12 (1985) (noting that by 1984 a total of only four variances had been granted).

196. 449 U.S. 64 (1980).

197. *Id.* at 83.

198. 448 U.S. 242 (1980) (holding that penalties for discharge of oil into navigable waters were civil and did not trigger constitutional criminal procedure safeguards).

199. 476 U.S. 227 (1986) (upholding EPA's statutory authority to use aerial photography to conduct a site inspection and concluding that such photography does not constitute a fourth amendment search).

200. In two other cases the Supreme Court engaged in institutional activism to limit administrative authority to search regulated plants. *See supra* note 152.

protection afforded criminal defendants.[201] These cases may be better explained as an outgrowth of the broad trend in the Court's decisions toward restricting the rights of criminal defendants,[202] rather than as the product of a firm commitment to institutional and policy restraint toward environmental issues.

IV. Supplemental Remedies for Environmental Harm

The Supreme Court also made substantive determinations of environmental policy in the cases in which it addressed the availability of supplemental remedies under federal or state law for environmental damage. In these cases, which differ from those previously discussed in that they did not involve review of agency decisions, the Court exhibited a significant hostility to such supplemental remedies, regardless of the institutional implications of its decisions.

Table 4: Supplemental Remedy Decisions[203]

	Institutional Activism	Institutional Restraint	Total
Pro-Environment	1	1	2
Pro-Development	4	4	8
Total	5	5	10

Generally, the Court explained its rejection of supplemental remedies as an exercise of institutional restraint by reasoning that federal administrative processes were intended to create the exclusive regulatory structure for addressing environmental problems.[204] These decisions

201. The Court in *Dow* cursorily disposed of the defendant's statutory authority argument. *Dow*, 476 U.S. at 233-34. In *Ward*, the Court discussed only whether the proper characterization of the action was civil or criminal. *Ward*, 448 U.S. at 248-54.

202. This trend has heen amply documented elsewhere. *See, e.g.*, Wright, *supra* note 1, at 496-98. The desire to limit procedural safeguards for criminal defendants has given way at times to pro-development policy concerns. *See supra* note 152.

203. The numbers in Table 4 reflect the results indicated in Table 7. *See infra* appendix, Tahle 7. In one case not reflected in the table, the Court struck down, under the commerce clause, a New Jersey statute that prohibited the importation of any waste that originated outside of the state. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). Although the case is an example of institutional activism (albeit easily supportable on doctrinal grounds), it was excluded from Table 4 because its environmental implications are impossible to evaluate. The state statute in question benefited the environment of New Jersey at the expense of the environment in other states; striking down the statute henefited other states at the expense of New Jersey.

204. *See infra* notes 204-08 and accompanying text.

had a pro-development policy impact because they blocked attempts by those dissatisfied with administrative enforcement either to impose more stringent environmental standards or to engage in more vigorous enforcement of environmental laws. Moreover, while the Court explained its decisions as exercises of institutional restraint, its rejection of supplemental remedies may constitute either institutional activism or restraint, depending on whether a state or federal remedy is at issue and whether Congress intended that remedy to be preserved.

A. Federal Supplemental Remedies

Since 1976 the Supreme Court has restricted the availability of federal supplemental remedies by stressing the need for institutional restraint toward Congress and the agencies.[205] The Court emphasized that Congress, which has adopted a comprehensive environmental program, is the proper governmental institution for the formulation of environmental policy.[206] Judicial recognition of supplemental remedies, argued the Court, would encroach upon the authority delegated by Congress to administrative agencies[207] and would interfere with implementation of environmental policy by agencies with greater technical expertise than courts.[208] Thus, institutional restraint toward federal supplemental remedies is grounded in concerns similar to those used to justify deference to substantive agency decisions.[209]

While the Court's position may be defended as the exercise of institutional restraint, congressional intent may be an important counter-

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205. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 312-13 (1981) (*Milwaukee II*) (stating that "[t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not hy the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress"); California v. Sierra Club, 451 U.S. 287, 297 (1981) (commenting that "[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide").

206. *See supra* note 205.

207. *See Milwaukee II*, 451 U.S. at 317 (noting that "Congress has not left the formulation of appropriate federal standards to the courts through application of . . . nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency"); *see also* Middlesex City Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13-14 (1981) (relying on elaborate administrative enforcement mechanisms, supplemented by express citizen suit provisions, to conclude that Congress did not intend additional private rights of action under the Clean Water Act or Federal Marine Protection, Research, and Sanctuaries Act); California v. Sierra Club, 451 U.S. at 298 (noting that the Rivers and Harbors Act "was intended to benefit the public at large through a general regulatory scheme to be administered by the then Secretary of War").

208. *See Milwaukee II*, 451 U.S. at 325 (stating that "Congress vested authority to administer the [Clean Water] Act in administrative agencies possessing the necessary expertise because the general area involved difficult technical problems" and was "particularly unsuited" to a federal common-law approach).

209. *See supra* notes 89-91 and accompanying text.

vailing consideration. Congress may choose to delegate to the courts a role in the implementation of environmental policy, whether in the form of substantive review of administrative decisions or by the grant of jurisdiction to provide remedies for environmental damage.[210] Judicial refusal to enforce the supplemental remedies intended by the legislature may appear to be institutional restraint because it is a refusal to exercise judicial power, but this type of refusal is clearly a form of policy activism.[211] Although the conclusion that the Court is engaged in policy activism may not be apparent if the delegation of authority to courts is implicit, when the Court refuses to implement explicit statutory provisions the conclusion is inescapable.[212]

1. Implied Rights of Action

For much of the twentieth century the Supreme Court has recognized "implied rights of action"—the inference of a federal right to relief from statutory provisions that do not expressly create such a remedy.[213] The Court has explained the creation of these rights as part of a judicial "duty . . . to be alert to provide such remedies as are necessary to make effective the congressional purpose."[214] In recent years, however, the Court has disavowed this broad willingness to assist in statutory implementation through the implication of rights of action.[215]

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210. Thus, for example, Congress has delegated to the courts a role in enforcing the Clean Water Act through the inclusion of express citizen suit provisions. *See* 33 U.S.C. § 1365(a) (1982). The Supreme Court, however, has not displayed particular enthusiasm for this role. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (holding that federal courts have discretion to deny injunctive relief under citizen suit provisions); *infra* notes 377-412 and accompanying text (discussing the Court's narrow reading of attorney's fees provisions designed to facilitate maintenance of citizen suits); *cf.* Gwaltney of Smithfield v. Chesapeake Bay Found., 108 S. Ct. 376 (1987) (holding that citizen suits may not be maintained for wholly past violations, but rejecting narrow reading of statute that would require evidence of ongoing violations to maintain suit).

211. *See Milwaukee II*, 451 U.S. at 339 n.8 (Blackmun, J., dissenting) (commenting that "[t]his Court is no more free to disregard expressions of legislative desire to preserve federal common law than it is to overlook congressional intent to curtail it").

212. *See infra* notes 244-62 and accompanying text.

213. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916). *See generally* Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333, 1339-58 (1980) (presenting an overview of the history of implied rights of action under securities and civil rights laws).

214. *J.I. Case Co.*, 377 U.S. at 433. The Court did not embrace such actions in all areas, however; in some statutes it discerned a congressional intent not to provide a private remedy. *See* Hazen, *supra* note 212, at 1355-58.

215. In Cort v. Ash, 422 U.S. 66 (1975), the Court enunciated a four-part test for implied rights of action:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create

Instead, the Court has emphasized that the availability of such remedies ultimately depends on congressional intent and has presumed that Congress's provision of express statutory remedies indicates its intent to preclude all other remedies.[216] Under this view, judicial implication of remedies constitutes institutional activism, because the courts are recognizing substantive rights that Congress consciously declined to create.

This institutional restraint rationale has pervaded the Court's two post-1976 implied right of action cases in the environmental law field. In *California v. Sierra Club*[217] the Court refused to infer a private right to enjoin violations of section 10 of the River and Harbor Act of 1899,[218] and in *Middlesex County Sewerage Authority v. National Sea Clammers Association*[219] it rejected private rights of action for damages arising from violations of two more recent water pollution statutes.[220] The Court perceived the "ultimate issue" to be whether Congress intended to create a private right of action.[221] In both cases, the Court concluded that the inclusion of certain express remedial mechanisms in the statute made it unlikely that Congress had intended courts to infer the existence of additional private enforcement rights.[222] If the Court's reluctance to recognize implied rights of action is indeed based upon

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such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted) (emphasis in original). In cases applying the *Cort v. Ash* test, the Court has generally refused te recognize implied rights of action. *See, e.g.*, Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). *But see* Cannon v. University of Chicago, 441 U.S. 677 (1979). This trend has been described as a shift toward a strong presumption against implied rights of action. See Community & Econ. Dev. Ass'n v. Suhurban Cook County Area Agency on Aging, 770 F.2d 662, 664 (7th Cir. 1985).

216. *See* California v. Sierra Club, 451 U.S. at 293. Indeed, Justice Stevens, concurring on the issue of implied rights of action in *Sea Clammers*, claimed that the Court's insistence on evidence of congressional intent to create implied rights of action made the presumption virtually irrebuttable, because legislative histery is unlikely to reveal evidence of intent to authorize a remedy that, by definition, is not expressly included in the statute. *See Sea Clammers*, 453 U.S. at 24 (Stevens, J., concurring in part and dissenting in part).

217. 451 U.S. 287 (1981).

218. 33 U.S.C. § 403 (1982) (prohibiting the creation of obstructions not affirmatively authorized by Congress to the navigable waters of the United States).

219. 453 U.S. 1 (1981).

220. The Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982), and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1445 (1982).

221. California v. Sierra Club, 451 U.S. at 293; *see also Sea Clammers*, 453 U.S. at 13.

222. *See Sea Clammers*, 453 U.S. at 14-15 (relying on the "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it" (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979))); *see also* California v. Sierra Club, 451 U.S. at 295 n.6.

deference to legislative intent, then this trend would appear to be the product of both institutional and policy restraint.[223]

2. Federal Common Law

The Supreme Court also has shifted its approach to the availability of federal common-law remedies to redress environmental injuries arising from interstate pollution disputes. This shift is embodied in two related cases, the first decided in 1972[224] and the second in 1981,[225] in which the Court first recognized, but later rejected, federal common-law rights to abate interstate water pollution. The Court explained the reversal by reference to intervening legislation that indicated a congressional intent to foreclose federal common-law remedies.[226] Thus, the rejection of these remedies, like the refusal to imply private rights of action, was justified as the exercise of institutional restraint toward Congress. The Court's complete disregard of strong evidence of a legislative intent to preserve federal common-law remedies, however, casts doubt upon the Court's proffered explanation.

In the 1972 case, *Illinois v. City of Milwaukee (Milwaukee I)*,[227] the Court held that Illinois' allegation that Milwaukee's operation of its sewage treatment plants was creating a federal common-law nuisance was sufficient to vest federal courts with subject matter jurisdiction.[228] Generally, the Court stated, federal courts could create federal common law "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism."[229] The Court explained that a federal common law of pub-

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223. The reluctance to recognize implied rights of action appears to have broad support among the members of the Supreme Court. The judgment in *California v. Sierra Club* was unanimous, although Justices Stevens and Rehnquist wrote separately. The Court was also unanimous on the implied right of action issue in *Sea Clammers*.

Sea Clammers, however, contains some indications that more than deference to legislative intent may have motivated the Court. Justice Stevens, in a separate opinion concurring in part and dissenting in part (joined by Justice Blackmun), suggested that the Court may have been motivated by concerns "about the burdens imposed upon the Federal Judiciary" by the creation of a plethora of new federal statutory rights. *Sea Clammers*, 453 U.S. at 24 (Stevens, J., concurring in part, dissenting in part). If the Court's hostility to implied private rights of action is indeed based on the Court's desire to reduce federal caseloads rather than on a legitimate attempt to discern congressional intent, then the implied rights of action cases may reflect policy activism. Justice Stevens leveled a more direct accusation of policy activism at the Court's resolution of an express private right of action issue in *Sea Clammers*. *See infra* note 320.

224. Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (*Milwaukee I*).

225. City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (*Milwaukee II*).

226. *See infra* notes 230-35 and accompanying text.

227. 406 U.S. 91 (1972).

228. *See id.* at 100 (stating that 28 U.S.C. § 1331 (1982) "jurisdiction will support claims founded upon federal common law as well as those of statutory origin").

229. *Milwaukee I*, 406 U.S. at 105 n.6.

lic nuisance to regulate interstate air or water pollution was not only appropriate, but also necessary to protect one state's environmental rights from invasion by pollution emanating from sources in other states.[230]

Nine years later, in *City of Milwaukee v. Illinois (Milwaukee II)*,[231] the Court held that the 1972 amendments to the Federal Water Pollution Control Act,[232] enacted just seven months after the decision in *Milwaukee I*, had displaced Illinois' federal common-law nuisance action against Milwaukee.[233] The Court stated that these amendments "were not merely another law 'touching interstate waters' of the sort surveyed in [*Milwaukee I*], and found inadequate to supplant federal common law."[234] Rather, the 1972 legislation had "establish[ed] an all-encompassing program of water pollution regulation"[235] that was intended to leave the federal courts no freedom to impose more stringent requirements through the application of federal common-law nuisance remedies.[236]

But more than the differing legislative histories of the pre-1972 and 1972 federal legislation is reflected in the opposing conclusions of *Milwaukee I* and *Milwaukee II*. The tenor of the two opinions differs dramatically. In *Milwaukee I* the Court denied that the existence of a package of express statutory remedies precluded the federal courts from

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230. *See id.* at 103, 107 n.9. The Court acknowledged that Congress already had fashioned remedies for interstate pollution and that these remedies did not expressly include federal common-law nuisance remedies. *Id.* at 102-03. Nevertheless, the Court held that "the remedies which Congress provides are not necessarily the only federal remedies available," *id.* at 103, and noted that "it is not uncommon for federal courts to create federal law where federal rights are concerned," *id.* (quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957)). Although future federal laws might preempt the field of the federal common law of nuisance, *id.* at 107, current federal statutory laws had not yet done so; therefore, the application of federal common law to resolve interstate pollution disputes was consistent with congressional intent, *id.* at 104. Indeed, the Court encouraged the lower federal courts to assist Congress in effectuating the policies reflected in federal pollution control laws by fashioning a federal common law of public nuisance. *Id.* at 103 n.5. For further discussion of *Milwaukee I*, see Glicksman, *supra* note 71, at 155-58.

231. 451 U.S. 304 (1981).

232. Act of Oct. 18, 1972, Pub. L. No. 92-500, 86 Stat. 816 (later amended by the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982)); *see supra* note 141.

233. *See Milwaukee II*, 451 U.S. at 317, 332. Although the Court had recognized a federal common-law action for nuisance in *Milwaukee I*, it declined to exercise its original jurisdiction over the claim. *See Milwaukee I*, 406 U.S. at 108; *see also id.* at 93-98 (holding that the original jurisdiction of the Court was not mandatory). Illinois refiled its complaint against Milwaukee in federal district court in Illinois. *See Milwaukee II*, 451 U.S. at 310. The Court held that this federal common-law action was preempted in *Milwaukee II*. The Court extended its *Milwaukee II* holding in *Sea Clammers*, in which the Court stated that "the federal common law of nuisance has been fully preempted in the area of ocean pollution." *Sea Clammers*, 453 U.S. at 11.

234. *Milwaukee II*, 451 U.S. at 317.

235. *Id.* at 318.

236. *See id.* at 320.

recognizing others.[237] In *Milwaukee II* the existence of "a self-consciously comprehensive [regulatory] program . . . strongly suggest[ed] that there is no room for courts to attempt to improve on that program with federal common law."[238] Moreover, the Court in *Milwaukee II* returned to a concern voiced prior to *Milwaukee I* but not raised in that case—the incompetence of the courts to deal adequately with the difficult technical problems involved in areas "as complex as water pollution control."[239]

Most important, the Court's perception of the role of the federal judiciary in relation to the powers of the other two branches seems to have changed in the nine-year interval between *Milwaukee I* and *Milwaukee II*. In *Milwaukee I* the Court viewed the federal judiciary as a force for affirmatively assisting Congress's environmental policy.[240] Nine years later the Court emphasized its fundamental "commitment to the separation of powers"[241] and raised the specter of an overreaching judiciary applying federal common-law standards that would inevitably interfere with legislative policies.[242] Under this view the courts' obligation to defer to the solutions to environmental problems created by the political branches of the federal government dictated institutional restraint.[243]

The Court's holding in *Milwaukee II*, however, need not be viewed as merely an exercise in institutional restraint.[244] Congressional intent to preserve supplemental federal common-law nuisance remedies seems clear from the citizen suit provisions of the Clean Water Act, which state that "[n]othing in this section shall restrict any right which any person . . . may have under . . . common law to seek" relief for injury

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237. *See supra* note 229.

238. *Milwaukee II*, 451 U.S. at 319.

239. *Id.* at 325. This concern had been expressed in Ohio v. Wyandotte Chemical Corp., 401 U.S. 493, 502, 504-05 (1971). *See supra* note 71.

240. *See supra* note 229.

241. *Milwaukee II*, 451 U.S. at 315 (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).

242. *See, e.g., id.* (stating that courts must not "judicially decree[] what accords with 'common sense and the public weal' when Congress has addressed the problem" (quoting *Hill*, 437 U.S. at 195)); *id.* at 317 (noting that " 'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law" (footnote omitted)); *id.* at 320 (commenting that "[f]ederal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme").

243. *See id.* at 323 (stating that "[a]lthough a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the [Clean Water] Act, such disagreement alone is no basis for the creation of federal common law").

244. Indeed, Justice Blackmun, joined in dissent by Justices Stevens and Marshall, argued that "the language and structure of the Clean Water Act leave no doubt that Congress intended to preserve the federal common law of nuisance." *Id.* at 339 (Blackmun, J., dissenting).

caused by water pollution.[245] The Court also ignored legislative history that showed the intent to preserve supplemental remedies.[246] Congress has the authority to delegate to the judiciary a role in the implementation of federal environmental policy, and if Congress does so, the courts have no authority to refuse to perform that function.[247] Thus, the Court's failure to defer to Congress's intent to preserve supplemental remedies reflects the exercise of policy activism.[248]

3. Express Statutory Remedies

The two Supreme Court cases addressing express statutory causes of action under the citizen suit provisions of the Clean Water Act[249] further illustrate that judicial refusal to carry out a congressionally assigned role in the implementation of environmental policy may constitute policy activism. In the first, *Weinberger v. Romero-Barcelo*,[250] the

245. 33 U.S.C. § 1365(e) (1982). Justice Rehnquist, writing for the majority in *Milwaukee II*, declared that although nothing in the citizen suit provision supplanted formerly available common-law remedies, the rest of the Clean Water Act did. *See Milwaukee II*, 451 U.S. at 328-29. Justice Blackmun characterized this interpretation as "extremely strained . . . and . . . at odds with the manifest intent of Congress to permit more stringent remedies under both federal and state law." *Id.* at 342 (Blackmun, J., dissenting).

246. *See* S. REP. No. 414, 92d Cong., 1st Sess. 81, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3746-47 (stating that "the [citizen suit] section would specifically preserve *any* rights or remedies under *any other law* . . . . [c]ompliance with requirements under this Act would not be a defense to a common law action" (emphasis added)). Elsewhere, the floor debates show that Congress specifically considered federal common-law suits and intended that they remain available. *See Milwaukee II*, 451 U.S. at 343-44 (Blackmun, J., dissenting).

247. *See Milwaukee II*, 451 U.S. at 339 n.8 (Blackmun, J., dissenting). Justice Blackmun stated:

> [T]he fact that Congress *can* properly check the courts' exercise of federal common law does not mean that it has done so in a specific case. This Court is no more free to disregard expressions of legislative desire to preserve federal common law than it is to overlook congressional intent to curtail it.

Id. (emphasis in original).

248. *See* Luneburg, *supra* note 15, at 284-85. For a more complete discussion of *Milwaukee II*, see Glicksman, *supra* note 70, at 159-71. The conclusion that *Milwaukee II* was an exercise of policy activism is reinforced by a recent decision in which principles of institutional restraint did not prevent the Court from creating federal common law. In Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988), the Court fashioned a federal common-law of liability for defense contractors that preempted state tort law and immunized defense contractors from liability when they had complied witb defense department specifications. The Court's willingness to "make law" in this area stands in stark contrast to its emphasis on institutional restraint in *Milwaukee II*, particularly because the Court in *Boyle* applied its new common-law rule to strike down traditional state law remedies. *See infra* notes 279-83 and accompanying text. In *Boyle* the Court's creation of federal common-law immunity came in the wake of consistent congressional rejection of legislation aimed at providing such a defense. *See Boyle*, 108 S. Ct. at 2519-20 & n.1 (Brennan, J., dissenting). Thus, while *Milwaukee II* and *Boyle* reach different conclusions as to the propriety of creating federal common law, the two decisions share both the disregard of apparent congressional intent and the rejection of remedies for injured plaintiffs.

249. 33 U.S.C. § 1365 (1982).

250. 456 U.S. 305 (1982).

Court held that courts retained their traditional equitable discretion to refuse to issue an immediate injunction against discharges that violated the Act's permit requirements.[251] *Romero-Barcelo* is remarkable not so much for this result,[252] but because the Court's description of the role of the courts under the Clean Water Act directly contradicts the description in *Milwaukee II*, decided just one year earlier. The two decisions share only a pro-development result limiting the availability of supplemental remedies for environmental damages.

Writing for the majority in *Romero-Barcelo*, Justice White characterized the Clean Water Act as a regulatory program that "as a whole contemplates the exercise of discretion and balancing of equities" and explained that Congress did not intend "to deny courts their traditional equitable discretion in enforcing the statute."[253] Writing about the same statute one year earlier, Justice Rehnquist asserted in the *Milwaukee II* majority opinion that "Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence."[254] In *Romero-Barcelo*, the Court concluded that the Clean Water Act "permits the district court to order that relief it considers necessary to secure prompt compliance with the Act."[255] In *Milwaukee II*, the majority bemoaned the inability of the federal judiciary to grasp and adequately dispose of the difficult technical problems involved in water pollution control; such inability, argued the majority, made invocation of federal common law "peculiarly inappropriate."[256]

The Court's conflicting treatment of legislative intent in *Romero-*

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251. *See id.* at 318, 320.

252. Because the district court had been requested to enjoin the federal government, an institutional consideration was present that is not at stake when a court is asked to enjoin a private polluter. This consideration may have been particularly significant in *Romero-Barcelo* because the military was involved, and national security interests cut against the requested injunction. *See id.* at 310 (district court finding that " 'injunctive relief sought would cause grievous, and perhaps irreparable harm . . . to the general welfare of this Nation' " (quoting Barcelo v. Brown, 478 F. Supp. 646, 707 (D.P.R. 1979))); *cf.* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981) (relying in part on national security concerns to explain the refusal to require the Navy to prepare an E.I.S. regarding nuclear weapons storage).

253. *Romero-Barcelo*, 456 U.S. at 316.

254. *Milwaukee II*, 451 U.S. at 317. Justice Rehnquist added that the establishment of the Clean Water Act's "self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Id.* at 319. Justice Stevens, dissenting in *Romero-Barcelo*, contrasted this statement with the Court's resolution of what he perceived to be the issue in *Romero-Barcelo*—"whether a federal judge may create a loophole in the scheme by refusing to enjoin a violation." *Romero-Barcelo*, 456 U.S. at 330-31 (Stevens, J., dissenting). A puzzled Justice Stevens then suggested that there was no explanation "[w]hy a different standard should be used to define the scope of judicial discretion in these two situations." *Id.* (Stevens, J., dissenting).

255. *Romero-Barcelo*, 456 U.S. at 320 (emphasis added).

256. *Milwaukee II*, 451 U.S. at 325.

Barcelo[257] and *Milwaukee II* suggests that at least one of the two cases was the product of policy activism. Indeed, Justice Stevens's dissent in *Romero-Barcelo* charged the Court with ignoring the proper bounds of its authority.[258] Justice Stevens believed that "Congress channeled the discretion of the federal judiciary much more narrowly than the Court's rather glib opinion suggest[ed],"[259] and that the Court paid "mere lip-service to the statutory mandate"[260] when it authorized federal courts to "second-guess" Congress's decision that compliance with the permit process was necessary to achieve the objectives of the Clean Water Act.[261] Justice Stevens concluded that unlike *TVA v. Hill*,[262] which the majority had distinguished, the Court in *Romero-Barcelo* showed little "respect for the law and the proper allocation of lawmaking responsibilities in our Government."[263]

The second case that addressed express statutory remedies, *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*,[264] further illustrates that institutional restraint need not prevent policy activism. The issue in *Gwaltney* was whether citizen suits under the Clean Water Act were available to redress wholly past violations, and if not, what proof of an ongoing or future violation was necessary to maintain the suit.[265] The Circuit Courts of Appeal had employed three alternative interpretations of the Act: (1) allowing suit based on wholly past violations; (2) requiring only good faith allegations of a continuing likelihood of violations; and (3) requiring an allegation of an ongoing violation.[266] Steering the middle course, the Supreme Court in *Gwaltney* held that, although suit could not be maintained on the basis of wholly past violations, "a good-faith allegation of continuous or intermittent violation" would suffice to establish jurisdiction.[267] The Court explained this result

257. *See, e.g., Romero-Barcelo*, 456 U.S. at 316.

258. Justice Stevens accused the majority of granting "an open-ended license to federal judges to carve gaping holes in a reticulated statutory scheme designed by Congress to protect a precious natural resource from the consequences of ad hoc judgments about specific discharges of pollutants." *Id.* at 323 (Stevens, J., dissenting).

259. *Id.* at 322 (Stevens, J., dissenting).

260. *Id.* at 328 (Stevens, J., dissenting). Justice Stevens quoted from Justice Frankfurter's concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952): "When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion." *Id.* at 609-10 (quoted in *Romero-Barcelo*, 456 U.S. at 329 n.10 (Stevens, J., dissenting)).

261. *Romero-Barcelo*, 456 U.S. at 333 (Stevens, J, dissenting).

262. 437 U.S. 153 (1978); *see supra* notes 104-07 and accompanying text.

263. *Romero-Barcelo*, 456 U.S. at 335 (Stevens, J., dissenting).

264. 108 S. Ct. 376 (1987).

265. *See id.* at 378, 384-85.

266. *See id.* at 380-81.

267. *Id.* at 385.

as the most plausible construction of the statutory language at issue, which provided for suit against any persons "alleged to be in violation" of the effluent limitations promulgated under the Act.[268]

The Court relied on principles of institutional restraint to justify its conclusion that wholly past violations would not sustain an action.[269] For example, the Court noted that "[p]ermitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit" by interfering with administrative discretion to enforce the Act;[270] allowing such citizens suits would change "the na-

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268. 33 U.S.C. § 1365(a) (1982). The Supreme Court acknowledged that the provision is not one "in which Congress's limpid prose puts an end to all dispute," but argued further that "to acknowledge ambiguity is not to conclude that all interpretations are equally plausible." *Gwaltney*, 108 S. Ct. at 381. The notion that there may be a most plausible interpretation of an ambiguous statutory provision is conspicuously absent from the Court's decisions deferring to administrative interpretations of statutes. *See supra* note 146.

The Court's resolution of the statutory issue in *Gwaltney* illustrates that even an institutionally restrained court has opportunities to make policy choices. The statutory interpretation issue in *Gwaltney* bad substantial implications for environmental policy, because of " 'the practical difficulties of detecting and proving chronic episodic violations of environmental standards.' " *Gwaltney*, 108 S. Ct. at 385 (quoting brief of the Unites States as *amicus curiae*). That the Court in this case chose a middle ground between the most pro-environment and the most pro-development results does not mean that the Court did not make a policy choice. In countless cases courts are confronted with indeterminate legal issues on which they will have some discretion to choose between competing policies. Institutional restraint does not eliminate these opportunities for exercising judicial policy discretion, nor does it guarantee that courts will be policy-neutral in resolving close questions.

269. For purposes of Table 4, *Gwaltney* was nonetheless treated as a case allowing federal supplemental remedies and therefore an exercise of pro-environmental institutional activism. This treatment was based on two considerations. First, three concurring Justices disagreed with that part of the Court's decision which held that good faith allegations of intermittent or continuing violations were sufficient to sustain a suit. *See Gwaltney*, 108 S. Ct. at 386 (Scalia, J., joined by Stevens and O'Connor, JJ., concurring in part, concurring in judgment). These Justices would have required a showing that the defendant "was in fact 'in violation' " on the date the suit was brought. *Id.* at 387. They indicated, however, that although the violation had temporarily ceased, if the defendant had not put in place "remedial measures that clearly eliminate the cause of the violation," *id.*, then the defendant continued to be in violation of the Act. Although the dissenters conceded that the practical difference between the two formulations of the requirement were minimal, *id.* at 388, their more restrictive reading of the Act's citizen suit provision prompted the Authors to regard the majority's decision as reflecting neither the most institutionally restrained nor the most pro-development result possible. Second, the categorization of this case as pro-environment is counterbalanced by International Paper Co. v. Ouellette, 479 U.S. 481 (1987), another case in which the Court chose a middle path, and which this Article characterizes as institutionally active and pro-development because the case struck down some state remedies for environmental harm. *See infra* note 311.

270. *Gwaltney*, 108 S. Ct. at 383. To illustrate this concern the Court offered as an example the situation in which the EPA might compromise by agreeing not to pursue past claims in exchange for the violator's agreement to take "some extreme corrective action"—a bargain that would achieve substantial environmental benefit while avoiding prolonged litigation. *Id.* This example, however, ignores that existing statutory mechanisms require 60 days notice to the EPA of all citizen suits and allow the EPA to preclude a citizen suit by taking enforcement action. *See* 33 U.S.C. § 1365(b)(1) (1982). Thus, had the Court allowed citizen suits for wholly past violations, the

ture of the citizens' role from interstitial to potentially intrusive."[271] This description of the limited role of citizen suits seems inconsistent with Congress's view that citizen suits "operate both to *spur* and supplement government enforcement actions."[272] Indeed, section 505(a)(2) of the Clean Water Act allows suit against the EPA for failure to perform "any act or duty under [the Clean Water Act] which is not discretionary."[273] While this provision preserves administrative discretion, it suggests that citizen suits were to perform the additional function of ensuring implementation of the Act when the EPA failed to do so.[274]

Taken together, *Romero-Barcelo* and *Gwaltney* seem to reflect a hostility to citizen suits that extends beyond the principles of institutional restraint. As in its decisions holding that federal common law is precluded by statute,[275] the Court has, despite express statutory provisions to the contrary, found a congressional intent to create an exclusive administrative framework for implementation of environmental policy. These results have implications similar to those of the Court's decisions on direct substantive review of administrative agencies;[276] institutional restraint toward the agency may constitute institutional activism toward Congress when the Court rejects a role that Congress intends for the judiciary to fulfill. When these decisions produce consistent pro-development policy results, they suggest that the Court is engaged in policy activism. This conclusion is reinforced by the Court's willingness to abandon its commitment to institutional restraint in order to strike down supplemental remedies created under state law.

B. State Supplemental Remedies

In early environmental law cases the Supreme Court accepted the availability of state law supplemental remedies as consistent with a general congressional policy of environmental protection.[277] But since 1976

EPA nonetheless could have compromised a claim like the one discussed in the Court's example by commencing an enforcement action and then entering into a settlement agreement. *See id.* § 1319(b).

271. *Gwaltney*, 108 S. Ct. at 383.

272. S. REP. No. 50, 99th Cong., 1st Sess. 28 (1985) (emphasis added). This report accompanied amendments to the enforcement provisions of the Clean Water Act, which left the relevant provisions intact.

273. 33 U.S.C. § 1365(a)(2) (1982).

274. Lower courts are currently split regarding whether agency enforcement of effluent limitations is a discretionary function. *See* Dubois v. Thomas, 820 F.2d 943, 946 (8th Cir. 1987) (discussing cases). The majority view is that enforcement is discretionary. *Id.*

275. *See supra* notes 230-47; *see infra* note 320 and accompanying text.

276. *See supra* notes 149-50 and accompanying text.

277. *See* Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) (holding that Florida oil spill legislation was not preempted by Federal Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-1175 (1972)); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)

the Court has generally held such remedies to be preempted.[278] As with supplemental federal remedies, the Court has explained its rejection of state law remedies in terms of institutional restraint. It has emphasized Congress's pervasive regulation of the environment through delegation to administrative agencies and has concluded that state supplemental remedies, whether created by statute, administrative agency, or common law, interfere with the federal administrative scheme.[279] The Court's analysis seems to ignore the different institutional concerns raised by the judicial invalidation of state as opposed to federal supplemental remedies.

If a court does hold that state remedies are preempted by federal legislation, then it has engaged in institutional activism by asserting a judicial power to invalidate the action of another governmental institution.[280] Indeed, the Supreme Court acknowledged this difference in *Mil-*

(upholding Detroit smoke abatement ordinance against commerce clause and federal preemption challenges); *see also* Lake Carriers Ass'n v. MacMullan, 406 U.S. 498 (1972) (abstaining from commerce clause and preemption challenges to Michigan water pollution legislation). In these cases, the Supreme Court established tests that presumed the validity of environmental regulation enacted under the states' police powers. Environmental regulation is valid under the commerce clause, U.S. CONST. art. I, § 8, cl. 3, if it "does not discriminate against interstate commerce or operate to disrupt its required uniformity," *Huron*, 362 U.S. at 448. Similarly, federal preemption "is not to be inferred from the mere fact that Congress has seen fit to . . . occupy a limited field. In other words, such intent is not to he implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." *Id.* at 443 (quoting Savage v. Jones, 225 U.S. 501, 533 (1912)). Although the Court in *Askew* relied on statutory "savings" clauses, *see Askew*, 411 U.S. at 329 (quoting 33 U.S.C. § 1161(o)(1)-(3)), it also indicated that concurrent state regulatory authority is appropriate "absent a clear conflict with federal law," *Askew*, 411 U.S. at 341.

278. *See* International Paper Co. v Ouellette, 479 U.S. 481 (1987) (holding that the Clean Water Act preempts state common-law nuisance actions based on law of affected state); Exxon Corp. v. Hunt, 475 U.S. 355 (1986) (concluding that the Comprehensive Environmental Response, Compensation, and Liability Act preempts state tax fund intended to pay for toxic waste clean up); Ohio v. Kovacs, 469 U.S. 274 (1985) (holding that state law obligations to clean up toxic waste sites dischargeable in bankruptcy); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (determining that Washington Tanker regulation was preempted by Ports and Waterways Safety Act of 1972). *But see* Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494 (1986) (holding that bankruptcy trustee was not empowered to abandon toxic waste sitcs in contravention of state law). In one additional case with environmentally neutral results, neither reflected in Table 4 nor included in this discussion, the Court engaged in institutional activism to strike down a state law on commerce clause grounds. *See supra* note 202.

279. *See infra* notes 285-91, 313-14 and accompanying text.

280. In contrast, when the Court restricts federal supplemental remedies it refuses to exercise judicial power (*i.e.*, it engages in institutional restraint). In cases striking down state law the Court engages in institutional activism toward the states, much as it did in *Lochner* and related cases that struck down state laws on constitutional grounds. *See supra* notes 26-29 and accompanying text. In both the preemption and substantive due process cases, the Court relies on a constitutional provision (in preemption cases, the supremacy clause, U.S. CONST. art. VI, cl. 2) to invalidate state law; and in both kinds of cases the Court gives effect to a federal policy at the expense of a contrary state policy. An important difference, however, is that preemption cases also involve the institutional concerns of Congress and (potentially) administrative agencies. *See infra* notes 281-82 and accompanying text.

waukee II when it indicated in dictum that state law preemption cases, unlike the cases precluding federal common law, "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[281] Institutional restraint toward Congress must be weighed against the concerns of states. If Congress, acting within the scope of its authority, intends to preempt state law, then under the supremacy clause the courts must give effect to that intention.[282] Thus, preemption cases require the Court to balance competing institutional considerations. Since 1976, however, the Court has been virtually oblivious to the institutional concerns of states; for example, the Court has ignored its repeated statements that preemption of state law should not be presumed.[283] Although the need for institutional restraint toward Congress might justify these results, the Court has also ignored strong indications that Congress did not intend to preempt state remedies.[284] This pattern suggests both institutional and policy activism.

1. The Disappearing Presumption Against Preemption

Since 1976 the Supreme Court gradually has retreated from the presumption against preemption of state law remedies.[285] For example, in 1978 the Court held in *Ray v. Atlantic Richfield Co.*[286] that the Ports and Waterways Safety Act of 1972[287] preempted a Washington statute that regulated the design, size, and movement of oil tankers in Puget Sound. Although the Court initially repeated the presumption against the preemption of state laws enacted under the police power,[288] the evidence that the Court found adequate to rebut the presumption was less than overwhelming. The Court concluded that the section of the state law that imposed "standard safety features" on oil tankers using Puget Sound was inconsistent with Congress's intent to create uniform national standards for design and construction of tankers.[289] Washington's

281. *Milwaukee II*, 451 U.S. at 316 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (noting that the Court's preemption analysis "has included 'due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy' " (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959))).

282. *See generally* Glicksman, *supra* note 71, at 183-85.

283. *See infra* notes 287-91, 297-99, 305-09 and accompanying text.

284. *See infra* notes 315-17 and accompanying text.

285. *See supra* notes 276, 280.

286. 435 U.S. 151 (1978).

287. 33 U.S.C. §§ 1221-1227 (1982).

288. *See Ray*, 435 U.S. at 157.

289. *See id.* at 161-63. In addition to the design requirements, the Atlantic Richfield Co. had challenged various other provisions of the Washington statute. These challenges met with some,

more stringent standards were invalid despite Congress's use in the federal Act of the term "minimum" to describe the Act's standards.[290] Although the term "minimum" might be read to allow states to impose higher standards, the Court dismissed this language as insufficient to overcome the congressional intent that there be uniform federal standards.[291] This supposed intent had not been stated expressly in the Act or in its legislative history, but rather was inferred by the Court from two sources: the "statutory pattern," and the application of the Act to foreign vessels, a subject particularly appropriate for uniform national standards.[292]

Nor do the Court's subsequent cases display any predisposition against the preemption of state environmental laws. In two cases decided under the federal bankruptcy laws, the Court held that state law obligations to clean up toxic waste sites were claims dischargeable in bankruptcy,[293] but that federal law did not authorize a trustee in bankruptcy to abandon a toxic waste site in violation of state law.[294] Although the state law was upheld in one of these cases, in neither case did the Court mention the presumption against preemption.[295]

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but not complete, success. *See id.* at 158-60, 169-80. The Authors consider it appropriate to treat the case as striking down the state statute at issue, because the portions of the statute upheld by the Court constituted a relatively minor aspect of the state regulatory scheme.

290. *See id.* at 161 (quoting 46 U.S.C. § 391a(1) (1982)).

291. *See id.* at 168 n.19. The Court also indicated in *Ray* that even the absence of federal regulation could preempt state law if the failure to regulate indicates a decision by the appropriate federal officials that "no such regulation is appropriate or approved pursuant to the policy of the statute." *Id.* at 178 (quoting Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 774 (1947) (citing Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926))).

292. *See Ray*, 435 U.S. at 163, 166-68. In striking down the state's prohibition of tankers over a certain size from the sound, *see id.* at 174-75, the Court did refer to specific legislative history indicating the desire for uniform vessel size requirements, but the Court mentioned no such evidence of a desire for uniform safety standards.

293. Ohio v. Kovacs, 469 U.S. 274 (1985).

294. Midlantic Nat'l Bank v. New Jersey Dept of Envtl. Protection, 474 U.S. 494 (1986).

295. Indeed the Court did not even mention the preemption doctrine in either case, although both cases required the Court to determine whether state law was in conflict with, and therefore supplanted by, federal bankruptcy law. In *Kovacs*, the Supreme Court treated the question solely as one of proper construction of the Bankruptcy Reform Act, 11 U.S.C. § 101(4)(B) (1982 & Supp. IV 1986). The Court did note, however, that means were available to the state to enforce its environmental policy. *Kovacs*, 469 U.S. at 284. In *Midlantic*, the Court relied on "[t]he normal rule of statutory construction . . . that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific," and concluded that Congress did not intend to do away with the traditional judge-made doctrine that limited the trustee's power of abandonment, *Midlantic Nat'l Bank*, 474 U.S. at 501, which applied equally to federal and state restrictions on the abandonment power. *Id.* at 505. One wonders why this principle of statutory construction did not preserve federal common law in *Milwaukee II*, when, far from explicitly indicating a desire to change a judicially created concept, Congress had expressed its intention to preserve it. *See supra* notes 244-45 and accompanying text. For a discussion of the conflict between federal bankruptcy law and state attempts to exercise the police power, see Sward, *Resolving Conflicts Between Bankruptcy Law and the State Police Power*, 1987 WIS. L. REV. 403.

Similarly inconsistent with the presumption against preemption is the Court's decision in *Exxon Corp. v. Hunt*[296] that section 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[297] preempted a New Jersey statute that taxed major petroleum and chemical facilities in the state to create a cleanup fund for leaking hazardous waste disposal sites. Although characterizing the case as one of "express preemption" in which the Court "need go no further than the statutory language to determine whether the state statute is preempted,"[298] the Court nevertheless found that the "inartfully" drafted provisions of CERCLA were unclear,[299] and therefore turned to the legislative history to divine Congress's intent.[300] New Jersey argued that its statute was not preempted because the statute furthered the congressional intent to eliminate threats to public health and safety created by improperly managed hazardous waste disposal facilities.[301] The Court responded by inferring an additional congressional intent to avoid damaging the American chemical industry through excessive taxation.[302] The Court, therefore, concluded that New Jersey's attempt to tax industry for expenditures that might be covered by CERCLA was preempted because such a tax would upset the balance struck by Congress; the Court, however, upheld the tax as it applied to purposes for which CERCLA monies would be unavailable.[303]

2. Reversing the Presumption

The Supreme Court's failure to apply the presumption against preemption might be justifiable as an exercise of institutional restraint if the Court were giving effect to congressional intent to preempt. Recently, however, the Court paid little heed to an apparent congressional

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296. 475 U.S. 355 (1986).

297. 42 U.S.C. § 9614(c) (1982). That section provided in part that "[e]xcept as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title." *Id.* This provision has since been repealed. *See* Pub. L. No. 99-499, § 114(a), 100 Stat. 1613, 1652 (1986).

298. *Exxon*, 475 U.S. at 362 (citing Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 12 (1983)).

299. *See id.* at 362-63.

300. *See id.* at 363-65.

301. *Id.* at 371.

302. *See id.*

303. *See id.* at 376. Justice Stevens dissented, indicating that the Court "should not presume preemption unless Congress clearly identifies its intent to curtail the lawmaking power of a sovereign State, either by careful draftmanship of its preemptive command or by necessary implication based on the scope of its entire regulatory program." *Id.* at 382 (Stevens, J., dissenting). Finding no such clear intent in either the "opaque" langnage of § 114(c) or in the CERCLA's legislative history, Justice Stevens would have upheld the validity of New Jersey's cleanup fund statute.

intent *not* to preempt state law remedies. In *International Paper Company v. Ouellette*[304] the Court held that in interstate water pollution disputes the Clean Water Act preempts common-law actions under the law of the affected state.[305] Reversing the previous presumption against preemption, the Court stated that preemption may be presumed when federal legislation is sufficiently comprehensive to indicate Congress's desire to preclude supplementary state legislation.[306] This curious statement, which directly contradicts Justice Rehnquist's opinion in *Milwaukee II*[307] and many earlier preemption cases,[308] led the Court to assert that in light of the Clean Water Act's "pervasive regulation" of water pollution, "it is clear that the only state [common-law] suits that remain available are those *specifically preserved* by the Act."[309] Thus, under the presumption applied in *International Paper* in favor of preemption, the Court allocated to the party arguing against preemption the burden of showing Congress's intent to preserve state remedies.[310]

Believing that the statute "[did] not speak directly to the issue,"[311] the Court turned to the goals and policies of the Clean Water Act to determine whether Congress intended to preempt state common-law

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304. 479 U.S. 481 (1987).

305. *Id.* at 494. The Court concluded, however, that an action under the law of the state in which the pollution originated remained available. *Id.* at 497.

306. *International Paper*, 479 U.S. at 491. In a footnote, the Court recited the presumption against preemption. *See id.* at 491 n.11. The remainder of the opinion, however, makes no mention of this presumption.

307. *See Milwaukee II*, 451 U.S. at 316 (stating that the Court starts with the assumption that state police powers are not preempted "unless that was the clear and manifest purpose of Congress"). Moreover, in *Milwaukee II* the Court asserted that "the comprehensive character of a federal statute" would not be relevant to a state preemption issue. *Id.* at 319 n.14.

308. *See supra* note 276.

309. *International Paper*, 479 U.S. at 492 (emphasis added).

310. In a revealing footnote, the Court provided additional evidence that the traditional presumption against preemption referred to in *Milwaukee II* had been neutralized if not reversed by the time that *International Paper* was decided. The federal government, as *amicus curiae* in *International Paper*, argued that the Clean Water Act preempted state common-law actions for injunctive relief, but not for compensatory damages. The Court rejected this argument, citing its decision in Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), to support the proposition that "unless there is evidence that Congress meant to 'split' a particular remedy for pre-emption purposes, it is assumed that the full cause of action under state law is available (or as in this case, preempted)." *International Paper*, 479 U.S. at 498 n.19. An important distinction between *Silkwood* and *International Paper*, however, is that in *Silkwood* the refusal to "split" a cause of action meant that federal law preempted neither a state common-law claim for compensatory damages nor one for punitive damages, *Silkwood*, 464 U.S. at 251, 255; in *International Paper* the Court's refusal to split a cause of action meant that both state common-law injunctive and compensatory remedies were preempted by the Clean Water Act. Because of the presumption against preemption, however, the "splitting the cause of action" question should have been a tougher one in *International Paper*, in which a refusal to split would have required preemption, than in *Silkwood*, in which a refusal resulted in preservation of state law.

311. *International Paper*, 479 U.S. at 493.

remedies in interstate pollution disputes. It concluded that preserving remedies created by the law of the state affected by the pollution would seriously interfere with congressional objectives.[312] As it had done in *Exxon Corporation*, the Court rejected the argument that it ought to resolve ambiguities in the manner most consistent with the statute's ultimate goal of eliminating water pollution. Instead, the Court concluded that Congress had recognized that competing considerations such as economic and technological feasibility must temper this goal.[313] According to the Court, Congress delegated the task of striking the appropriate balance among these competing considerations to the agencies responsible for issuing Clean Water Act permits (the EPA or the state where a point source is located).[314] Furthermore, the Court concluded that it was "unlikely . . . that Congress intended to establish . . . a chaotic regulatory structure" under which a discharger would have to comply not only with the express conditions of its Clean Water Act permit, but also with the common-law standards of all downstream states.[315]

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312. *See id.* The Supreme Court, however, upheld remedies based on the law of the state in which the pollution originated, and concluded that such suits could be maintained in the courts of an affected state. *See id.* at 498-500. Despite these aspects of the Court's decision, the decision is treated here as one striking down state law for two reasons. First, four dissenting Justices would have upheld the state law at issue, *see infra* notes 315-17 and accompanying text; this dissent suggests that the disagreement on the Court was over the availability of state law remedies based on the law of the affected state. Second, in this respect the case is counterbalanced by *Gwaltney*, which this Article treats as a case allowing federal remedies because the concurring Justices in that case would have read the federal remedy more narrowly than the majority. *See supra* note 268.

313. *See International Paper*, 479 U.S. at 494-95. Justice Powell asserted, without supporting references, that if a state elects to impose its own standards on a point source located within its borders, the state must consider the technological feasibility of controls more stringent than minimum federal standards. *See id.* This statement is simply wrong. The Act expressly reserves the right of states to impose more stringent controls, *see, e.g.*, 33 U.S.C. §§ 1311(b)(1)(C), 1370(1) (1982), and nowhere expressly qualifies that right with the obligation to consider the technological feasibility of more stringent state controls. *See also* S. REP. No. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3751 (stating that "[t]his section of the Act retains the right of *any* State or locality to adopt or enforce . . . *any* . . . requirement more stringent than those required or established under this Act" (emphasis added)); H.R. CONF. REP. No. 1236, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3776, 3825 (stating that "[s]tates . . . retain the right to set more restrictive standards and limitations").

314. *International Paper*, 479 U.S. at 494-95. Thus, the application of one state's common-law remedies to a point source that is located in another state and is in compliance with its Clean Water Act permit would "upset[] the balance of public and private interests so carefully addressed by the Act." *Id.* Moreover, the application of one state's common-law remedies to a point source in another state would undermine what the Supreme Court deemed "the important goals of efficiency and predictability in the permit system." *Id.*

315. *Id.* at 497. This conclusion was necessary because of what the Court characterized as Congress's clear decision that states affected by pollution "occupy a subordinate position to [states where pollution originates] in the federal regulatory program." *Id.* at 491. According to this rather remarkable characterization, when Congress enacted a statute the express policy of which is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," 33 U.S.C. § 1251(b) (1982), it concluded that whenever a dispute

The Court's conclusion is questionable for reasons beyond its apparent establishment of a presumption of preemption. The express language of the citizen suit provisions of the Clean Water Act[316] indicates Congress's intent to preserve state law remedies. This intent is reinforced by legislative history indicating that compliance with minimum federal standards was not to be a defense to actions based upon more stringent state standards.[317] This legislative history, however, was not cited by the majority. Against this background, there is a hollow ring to the Court's assertion that allowing affected states to impose more stringent standards would upset the balance between pollution control and economic efficiency struck by agencies to whom Congress had delegated the task of accommodating these competing goals. Indeed, this result can be explained only as an example of policy activism.[318]

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arises between an upstream polluting state and a downstream state seeking to apply standards more stringent than the minimum federal standards to polluters affecting its waters, the polluting state must always prevail. *International Paper*, 479 U.S. at 490-91.

316. Although the Court stated that the statute "does not speak directly to the [preemption] issue," *International Paper*, 479 U.S. at 493, the savings clause of the citizen suit provision, 33 U.S.C. § 1365(e) (1982), preserves "any right which any person . . . may have under . . . common law." *Id.* Thus, the dissenting opinion argued that "the Act's plain language clearly indicates that Congress wanted to leave intact the traditional right of the affected State to apply its own tort law when its residents are injured by an out-of-state polluter." *International Paper*, 479 U.S. at 504 (Brennan, J., dissenting). The majority relied on reasoning similar to that used in *Milwaukee II* to dismiss the relevance of this section, arguing that the savings clause only deals with the preemptive effect of the citizen suit provision itself, and "does not purport to preclude pre-emption of state law by other provisions of the Act." *Id.* at 493 & n.14. Justice Brennan retorted that the provision logically referred to the nonpreemptive effect of "this section" because the citizen suit provision, § 505, "is the only section of the Act that expressly implicates private suits." *Id.* at 503 n.2 (Brennan, J., dissenting). Justice Brennan also cited § 510(2) of the Act, 33 U.S.C. § 1370(2) (1982), which provides that *"[e]xcept as expressly provided in this [Act]*, nothing in this [Act] shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.* (emphasis added). Justice Brennan appears to have construed this provision as preserving a state's right to protect the quality of its waters, regardless of the geographical location of the initial invasion of those waters by pollution. *International Paper*, 479 U.S. at 503. He might have added that the introductory provision (italicized above) reflects a legislative directive to the courts not to imply any congressional intent to preempt state water pollution control laws. In light of that directive, the Court should have required explicit evidence of Congress's intent to preempt.

317. *See International Paper*, 479 U.S. at 493 n.13 (quoting S. REP. No. 414, 92d Cong., 2d Sess. 81, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3746-47) (stating that "if damages could be shown, other remedies [in addition to a citizen suit] would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages"). The Court also iguored § 510(1), which indicates that, absent express statutory evidence to the contrary (of which the Court cited none), the Clean Water Act does not "preclude or deny the right of any State to adopt or enforce" pollution control requirements more stringent than those in effect under the Act. 33 U.S.C. § 1370(1) (1982). In dictum in *Milwaukee II*, the Court construed this provision to preserve limitations established under state nuisance law. *See Milwaukee II*, 451 U.S. at 327-28.

318. *See International Paper*, 479 U.S. at 505 (Brennan, J., concurring in part, dissenting in part) (stating that the majority's "concern that tort liability might undercut permit requirements

International Paper is the latest example in the Supreme Court's pattern of rejecting supplemental remedies despite the provision of the Clean Water Act stating that "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief."[319] As it had done in *Milwaukee II*[320] and in *Sea Clammers*,[321] the Court disregarded the language of that provision, as well as substantial legislative history, in concluding that Congress intended to create an exclusive administrative framework for environmental protection under the Act. But because *International Paper* involved the preemption of state remedies, it differs in an important respect from the previous cases. While those cases might arguably be justified as an exercise of institutional restraint because the Court refused to exercise its power to supplement the administrative framework, in *International Paper* the Court used its power *broadly* to strike down state remedies. Thus, *International Paper* does not reflect institutional restraint, but rather reflects the exercise of institutional activism. When read in conjunction with the other cases that addressed supplemental remedies, *International Paper* heightens suspicion that pro-development policy activism was also afoot.

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was . . . not shared by Congress"). Justice Brennan also accused the majority of engaging in institutional activism by "improperly reach[ing] out to decide" the preemption issue, because nothing in the record indicated any difference between the nuisance law of New York, the source state, and Vermont, the affected state. *Id.* at 501. Absent such a difference, there would be no need to decide whether a New York polluter could be subjected to Vermont standards more stringent than applicable New York standards. *Id.* For the same reason, Justice Stevens "wonder[ed] what has happened to the once respected doctrine of judicial restraint." *Id.* at 509 (Stevens, J., concurring in part, dissenting in part). The Court's willingness to reach out to decide in a pro-development fashion issues not squarely presented to it, a willingness also demonstrated in *Sea Clammers*, 453 U.S. at 19, is another example of institutional activism in furtherance of a pro-development policy.

319. 33 U.S.C. § 1365(e) (1982). Supplemental remedies expressly created by the Act have suffered an analogous fate in the Court's hands. *See supra* notes 248-73 and accompanying text.

320. *See supra* note 244 and accompanying text.

321. In addition to extending its *Milwaukee II* holding that the Clean Water Act precludes actions based on federal common law, the Supreme Court in *Sea Clammers* concluded that private parties could not sue state officials under the civil rights statute, 42 U.S.C. § 1983 (1982), for violations of federal water pollution control legislation "under color of" state law. *See Sea Clammers*, 453 U.S. at 19-21. The Court dismissed the savings clause by concluding that it applied only when both the substantive right that was allegedly violated and the remedy sought are derived from statutes other than the federal water pollution control laws. In a § 1983 action against a state official for permitting point sources to violate the water pollution laws, the remedy would be derived from a statute other than the water pollution laws (*i.e.*, 42 U.S.C. § 1983), but the substantive right would be derived from the water pollution laws. *Sea Clammers*, 453 U.S. at 20 n.31. In Justice Stevens's view, however, the plain language of the statute provided ample evidence of Congress's intent to preserve such a remedy, and he accused the majority of substituting its own judgment of the proper federal remedial scheme for that of Congress. *See id.* at 28-29 (Stevens, J., concurring in part, dissenting in part). For a more extensive analysis of *Sea Clammers* and its implications, see Glicksman, *supra* note 71, at 146-51.

V. Procedural Opportunities in the Administrative Context

The analysis in Parts III and IV suggests a pattern of pro-development policy activism despite the ostensible exercise of institutional restraint in the Supreme Court's substantive review of administrative decisions and in its treatment of supplemental remedies. Similar questions regarding proper institutional relationships and similar opportunities for policy activism are presented when the Court resolves questions regarding the procedural opportunities for private parties to participate in agency decisions, to challenge agency action before the courts, or to pursue supplemental remedies. Since 1976 the Court has decided fourteen cases in which it determined the availability of such procedural opportunities.[322] The results are summarized in the table below.

Table 5: Procedural Opportunity Decisions[323]

	Institutional Activism	Institutional Restraint	Total
Pro-Environment	1	0	1
Pro-Development	2	11	13
Total	3	11	14

A. *Institutional and Policy Considerations*

The numbers reflected in table above show a pattern similar to the Court's performance in other contexts. Admittedly, a proper characterization of the Court's decisions regarding procedural opportunities is more difficult, because these decisions implicate more complex institutional and policy considerations. Once these considerations are identified, however, analysis of the cases along institutional and policy lines is possible. This analysis suggests that in the procedural context the Court has also engaged in policy activism while ostensibly exercising institutional restraint.

322. An additional case, Adamo Wrecking Co. v. United States, 434 U.S. 275 (1977), is discussed below, but not included in Table 5. In addition to questions regarding procedural opportunities for private parties, the case addressed issues of substantive review. It was therefore included in Table 3, which depicted the Court's treatment of substantive review issues, and was excluded from Table 5 in order to avoid double counting.

323. The numbers in Table 5 reflect the results indicated in Table 7. *See infra* appendix, Table 7.

1. Institutional Implications

The institutional implications of the decisions regarding procedural opportunities for parties in agency or in court proceedings may not be readily apparent because these decisions do not create direct conflicts between the courts and other governmental institutions. Nevertheless, the decisions have significant institutional implications, because under article III's case or controversy requirement[324] courts can act only when a dispute is brought before them for resolution. Thus, although courts cannot reach out on their own authority to resolve issues, they can expand their power indirectly by expanding the procedural opportunities for parties. During its period of pro-environmental activism, the Court expanded procedural opportunities by encouraging lower courts to impose procedural requirements at the agency level,[325] by refusing to restrict the reviewability of agency decisions,[326] and by relaxing standing requirements.[327]

This expansion was justified institutionally as an exercise of the courts' constitutional responsibility to prevent administrative subversion of legislative policy determinations. Under this view, increasing the procedural rights for private parties before the agencies both helped ensure "that the administrative process itself will confine and control the exercise of [agency] discretion"[328] and facilitated the review of administrative decisions by creating a record of the proceedings before the agency.[329] Similarly, an expansive reading both of the courts' ability to review administrative action and of the plaintiffs' standing to seek review or to pursue supplemental remedies was necessary to enable courts to fulfill their oversight function and their supplemental role in implementing environmental policy.[330]

Although the Court since 1976 has retreated somewhat from its activist posture, it has refused to restrict some procedural opportunities. The Court has emphasized considerations of administrative autonomy (*i.e.*, institutional restraint) in restricting procedural opportunities before agencies,[331] but it has refused to restrict judicial review of administrative action[332] and has continued to read standing requirements

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324. U.S. CONST. art. III, § 2, cl. 1.

325. *See infra* notes 341-42 and accompanying text.

326. *See infra* note 354 and accompanying text.

327. *See id.*

328. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

329. *See* S. BREYER & R. STEWART, *supra* note 39, at 598.

330. While the Court has not fully explained the reasons for these trends, lower courts have advanced these rationales. *See* Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966) (*Church of Christ I*).

331. *See infra* notes 343-48 and accompanying text.

332. *See infra* notes 357-62 and accompanying text.

broadly.[333] Finally, the Court has emphasized institutional restraint in restrictively reading attorney's fees statutes that were designed to facilitate private suits to enforce pollution laws or to challenge administrative action.[334] Thus, although institutional restraint has been an important factor in the Court's post-1976 procedural opportunity decisions, the Court's application of institutional restraint principles has been inconsistent. What has been consistent, however, is the pro-development policy slant of these decisions.

2. Policy Considerations

During the period of pro-environment policy activism its proponents assumed that expanded procedural opportunities generally would produce pro-environment policy results.[335] Traditional doctrines provided procedural opportunities for those subject to environmental regulation, but did not provide similar opportunities for parties affected by pollution because these parties' interests were regarded as too insubstantial or diffuse to provide a basis for legal protection.[336] In addition, many courts and commentators believed that agencies tended to favor developmental interests at the expense of the environment because these agencies had been "captured" by the industries they regulated.[337] Thus, many believed that expanded procedural opportunities for environmental interests would produce pro-environment policy results by countering these problems at all levels; environmental interests would be adequately represented before agencies, adverse agency action could

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333. *See infra* notes 364-71 and accompanying text. The numbers in Table 5, *supra* text 323, do not reflect the Court's inconsistency in applying institutional restraint principles because the Court's refusal to restrict reviewability and standing, while of great practical significance, figured in only one of the decisions reflected in that Table. *See supra* note 322.

334. The attorney's fees cases have been treated as cases addressing "procedural opportunities" because allowing recovery of attorney's fees in public interest litigation encourages private parties to take advantage of procedural opportunities and thus brings more cases before the courts for the exercise of judicial power.

335. *See, e.g.*, Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 616 (2d Cir. 1965) (explaining that an expansion of standing was necessary to "insure that the Federal Power Commission . . . adequately protect[s] the public interest in the aesthetic, conservational, and recreational aspects of power development"), *cert. denied sub nom.* Consolidated Edison Co. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).

336. *See generally* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975). Professor Stewart observes that the traditional model of administrative law protected those subject to agency controls (e.g., polluters) from the coercive power of government by providing procedural opportunities at the agency level and before the courts, but did not provide similar opportunities for the beneficiaries of regulation (e.g., environmental groups). The expansion of procedural opportunities to the beneficiaries of regulation, he argnes, has "transformed" the traditional model into an "interest representation" model of administrative law designed to assure the equitable exercise of discretionary power by agencies.

337. *See supra* notes 47-50, 75-76 and accompanying text.

be challenged before the courts, and if agencies failed to act private interests could pursue supplemental remedies against polluters.

Despite these assumptions, expanded procedural opportunities in a particular case do not necessarily produce a pro-environment result. First, procedural opportunities may also benefit pro-development interests, particularly when an agency does act to protect the environment in a manner that adversely affects industry.[338] Second, expansive procedural opportunities alone do not guarantee a pro-environment result; even in the Court's activist period the environmental interests that found themselves to be the beneficiaries of broad procedural opportunities at times lost on the merits.[339] Thus, a case that expands procedural opportunities need not necessarily reflect a pro-environment policy, nor must a case restricting procedural opportunities necessarily reflect a pro-development policy.

Given this uncertain connection between procedural opportunities and policy implications, the characterization of decisions in Table 5 as either pro-environment or pro-development was based on two criteria. First, if the Court reached the merits, then the decision was evaluated according to the policy implications of its substantive holding.[340] Second, if no decision on the merits was reached, then the characterization depended on the positions taken by the parties.[341] Based on these criteria, the pro-development policy orientation of the Court's post-1976 cases emerges.

B. Procedural Opportunities Before Agencies

In the 1960s and early 1970s the lower federal courts engaged in a dramatic transformation of the notice and comment rulemaking procedures of the APA. These courts created a "paper hearing" process by requiring agencies to fully disclose relevant information on proposed rules to affected parties and to thoroughly explain the reasons for a decision by responding to all siguificant adverse comments contained in

338. In International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973), for example, the court set aside the EPA's refusal to grant an extension of deadlines for achieving emission standards because of inadequacies in the EPA's response to manufacturers' criticisms of its methodologies.

339. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) (allowing environmental groups standing, but holding that the lower court lacked the power to enjoin the agency action in question).

340. *E.g.*, Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978); *see also* Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) (not included in Table 5).

341. Thus, for example, the Court's rejection of environmental groups' requests for additional procedures before agencies was characterized as pro-development. *See infra* notes 343-48 and accompanying text.

the record.[342] Moreover, in some cases—particularly environmental law cases—courts sometimes additionally required agencies to provide oral hearings that were not otherwise required by statute.[343]

More recently the Supreme Court has reversed this trend and has revealed considerable hostility toward the imposition of procedural requirements on agencies. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[344] the Court resoundingly rejected judicial creation of procedural requirements. In a strongly worded opinion the Court held that, absent "constitutional constraints or extremely compelling circumstances," courts could not require more complex or more elaborate procedures than the procedures set forth in the APA or the agency's enabling legislation.[345] Agencies could voluntarily exceed minimal APA or other statutory requirements, but courts could not force them to do so.[346] The Court advanced an institutional restraint rationale for this conclusion, reasoning that "this sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress."[347] The Court has displayed simi-

342. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). Although the Court in *Overton Park* did not expressly require additional procedures, it did state that reviewing courts should determine whether administrative agencies "followed the necessary procedural requirements." *Id.* at 417. Moreover the Court stated that review should be based on the " 'whole record' compiled by the agency" rather than "*post hoc* rationalizations" and indicated that the lower court had substantial discretion to determine the "most expeditious" method of obtaining the necessary information in the event that the administrative record proved inadequate. *Id.* at 419-21. Perhaps drawing a lesson from *Overton Park*, the courts of appeals soon began to impose new and more elaborate procedural requirements on agencies making decisions with environmental consequences. *See generally* Glicksman, *supra* note 13, at 410-11; Shapiro & Levy, *supra* note 44, at 406. At times, the lower courts admitted that these procedural requirements—which included an obligation to inquire into and consider all relevant facts, to expand opportunities for intervention and public comment, and to respond to significant objections raised by commentators—could not be traced to either the APA or the agencies' organic statutes. *See, e.g.*, Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850 (D.C. Cir. 1972) (remanding to the EPA for development of a more complete explanation of a Clean Air Act rule, even though the court admitted that the regulation's statement of basis and purpose satisfied the minimal requirements of the APA). Rather, these requirements were derived from amorphous notions of "fairness," *see id.* at 850 n.18, or were applied to ensure that the agencies adequately fulfilled their substantive statutory obligations, *cf. Scenic Hudson*, 354 F.2d at 620 (predating *Overton Park*).

343. *See* Shapiro & Levy, *supra* note 44, at 406 & n.83.

344. 435 U.S. 519 (1978). While *Vermont Yankee* expressly rejected only judicially imposed procedural requirements not dictated by the APA or due process, its criticism of the rationale for expanding procedural opportunities, *see id.* at 547-48, establishes a "mood" in which expansive reading of statutery requirements is unlikely. *See* Costle v. Pacific Legal Foundation, 445 U.S. 198 (1980) (reading statutory procedural requirements narrowly to deny a hearing); Shapiro & Levy, *supra* note 44, at 407.

345. *See Vermont Yankee*, 435 U.S. at 543.

346. *See id.* at 524, 543, 546.

347. *Id.* at 548. The Court added that courts are not authorized to "stray beyond the judicial province" by fashioning extraordinary procedural requirements simply because they feel that such

lar hostility toward expansive judicial interpretation of statutory procedural requirements imposed on agencies. Thus, in *Costle v. Pacific Legal Foundation*[348] the Court narrowly construed the Clean Water Act not to require that the EPA hold a hearing on alleged adverse environmental impacts.[349] Likewise, the Court has rejected environmentalists' efforts to apply NEPA's procedural requirements broadly.[350]

Despite the Court's consistent foreclosure of procedural opportunities for environmentalists, its analysis in *Vermont Yankee* contains a loophole through which pro-development interests may be able to obtain procedural safeguards at the agency level. The Court in *Vermont Yankee* recognized that "constitutional constraints" such as due process may require agencies to engage in additional procedures such as an oral hearing.[351] Due process is engaged, however, only when a protected liberty or property interest is involved.[352] Such interests are unlikely to be affected when an agency refuses to regulate in order to protect the

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procedures are likely "to further some vague, undefined public good." *Id.* at 549.

348. 445 U.S. 198 (1980).

349. The Court relied in part on *Vermont Yankee*, 445 U.S. at 214-15, to uphold the EPA's determination that § 402(a)(1) of the Act, 33 U.S.C. § 1342(a)(1) (1982), which allows for the issuance of a discharge permit after "opportunity for a public hearing," requires only an adjudicatory hearing if material facts are in dispute. *Pacific Legal Foundation* concerned an EPA decision to extend the City of Los Angeles's permit to discharge from a city-owned sewage treatment plant into the Pacific Ocean. On the merits, the Pacific Legal Foundation (PLF) argued that a proposed project to replace ocean discharge with disposal in landfill would cause greater adverse environmental impact than continued ocean discharge. *See Vermont Yankee*, 445 U.S. at 206 n.7, 220. The Court considered these arguments irrelevant to the permit extension in question. *Id.* at 220. Because the PLF took an ostensibly pro-environment position in the litigation, the Authors characterized the result of this case as pro-environment, despite the PLF's well-known pro-development orientation. *See, e.g.*, Slater, *Pacific Legal Foundation Learns from Its Adversaries: Conservative Law Firm Insists It Speaks for Free Enterprise, Not Business*, L.A. Daily J., July 4, 1984, at 22; *see also* Gerber, *The Pacific Legal Foundation: Its Goal Is Deregulation: A Champion of the Conservative Cause, the PLF Aims to Protect the Rights of the Individual*, 1 CAL. LAW. 26 (Nov. 1981). The Authors consider it inappropriate in characterizing this case to assume that the Court looked beyond the PLF's litigating position to its long-term objectives.

350. The Court has construed narrowly the range of proposals that trigger NEPA's requirement to prepare an EIS. First the Court has excluded certain administrative decisions or alleged environmental impacts from the requirement, Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983); Andrus v. Sierra Club, 442 U.S. 347 (1979); Kleppe v. Sierra Club, 427 U.S. 390 (1976). Second the Court has held that provisions of other statutes preclude the need to comply with NEPA. Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981); Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976). These decisions provoked little controversy; although the Court reversed decisions of the courts of appeals in each of the cases, only one case produced a dissent. *See Kleppe*, 427 U.S. at 415 (Marshall, J., joined by Brennan, J., concurring in part, dissenting in part). In two other cases Justices Brennan and Blackmun filed separate concurring opinions that did not express substantial disagreement with majority opinions. *See Metropolitan Edison*, 460 U.S. at 779 (Brennan, J., concurring); *Catholic Action*, 454 U.S. at 147 (Blackmun, J., joined by Brennan, J., concurring). Nonetheless, the overall pattern of the cases is significant. *See* Murcheson, *supra* note 111, at 600-01.

351. *Vermont Yankee*, 435 U.S. at 519.

352. *See generally* R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 44, at 224-48.

environment, but are often at issue when an agency requires compliance with pollution standards.[353] Indeed, the Court indicated as much in *E.I. du Pont de Nemours & Co. v. Train*,[354] in which it stated that variance mechanisms were required when the EPA set effluent limitations on an industrywide basis.[355] When a variance is sought, due process may require agencies to provide an oral hearing.[356]

C. *Procedural Opportunities Before Courts*

During its activist period the Supreme Court read standing and reviewability doctrines broadly to allow environmental interests to have their day in court.[357] Unlike the other areas discussed in this Article,

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353. The existence of a protected liberty or property interest is plain when the government brings an action for civil or criminal enforcement of environmental standards. Due process issues may also be raised by the adoption of emission standards, *cf.* Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973) (refusing to require a hearing because an emission standard was general in nature, but assuming that a protected interest was involved), and in decisions affecting licenses or permits, *cf.* Barry v. Barchi, 443 U.S. 55 (1979) (holding that suspension of a jockey's license engages due process protections but that the jockey's interests were adequately safeguarded).

354. 430 U.S. 112 (1977).

355. *See supra* notes 191-94 and accompanying text. The Court in *du Pont* did not explain why variance mechanisms were required, but the only possible explanation is due process. *Cf.* FPC v. Texaco, Inc., 377 U.S. 33, 40 (1964) (holding that statutory hearing requirements could be avoided through application of general regulations when waiver provisions are available); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). Moreover, in *Chemical Manufacturers* the majority bolstered its conclusion that the Clean Water Act did not prohibit "FDF variances," *see supra* notes 139-44 and accompanying text, by asserting that Congress was aware that in the *du Pont* decision the Court had required the EPA to make variances available to dischargers subject to industrywide effluent limitations and that Congress may have allowed variances to avoid due process problems. *See Chemical Mfrs.*, 105 S. Ct. at 1112 n.25.

356. In *FPC v. Texaco*, for example, although the Supreme Court held that no hearing was required in the case before it, the Court recognized that "[f]acts might . . . be alleged sufficient on their face to provide a basis for waiver of the . . . rules and for a hearing on the matter." *FPC v. Texaco*, 377 U.S. at 40-41; *see also* American Airlines, Inc. v. CAB, 359 F.2d 624, 631 (D.C. Cir.) (en banc) (stating that while application of rules to alter pre-existing licenses does not automatically require a hearing, in some cases hearings might be required), *cert. denied*, 385 U.S. 843 (1966).

357. The Court relaxed the requirement that a plaintiff allege "injury in fact" for standing by recognizing that environmental injury is sufficient. *SCRAP*, 412 U.S. at 669; Sierra Club v. Morton, 405 U.S. 727 (1972) (dictum). Although the Court in *Sierra Club v. Morton* denied the plaintiffs standing based on a purely ideological interest, the recognition that environmental injury could constitute injury in fact has made it very easy for environmental organizations in future cases to overcome the standing hurdle simply by arguing that one of its members had suffered the requisite injury in fact. The degree to which *Sierra Club v. Morton* relaxed the standing requirement is illustrated by the *SCRAP* case, in which the Court accepted a rather far-fetched allegation that the ICC's approval of a rate increase for railroad shipping would injure members of the plaintiff environmental groups by discouraging recycling, which in turn would increase the volume of litter disposed of in recreational facilities in the Washington, D.C. area. *See SCRAP*, 412 U.S. at 678, 689-90. Similarly, the Court, by refusing to preclude review on the merits, refused to eliminate opportunities for judicial activism. *See Overton Park*, 401 U.S. at 410 (noting that neither exception to reviewability contained in 5 U.S.C. § 701 (Supp. V 1964) precludes review of the Secretary of Transportation's decision to route highway through public park).

the Court's post-1976 retreat from institutional activism has been incomplete in this group of cases. The pattern of pro-development policy results, however, remains. In several cases the Court engaged in institutional activism toward procedural issues and reached pro-development policy results on the merits.[358] In another group of cases that raised questions of attorney's fees for pro-environment litigants, the Court exercised institutional restraint to again reach pro-development results.[359]

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358. In two cases included in Table 5, but not discussed below, the Court resolved reviewability issues in an institutionally restrained and pro-development manner; Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980) and Crown Simpson Pulp Co. v. Costle, 445 U.S. 193 (1980) (per curiam). In *Harrison*, the Court held that a stationary source could petition federal courts of appeals rather than district courts to seek review of an informal determination by a regional EPA official that the source was subject to national emission standards for new plants under a provision authorizing judicial review of both specified EPA actions and "any other final action" of the EPA under the Clean Air Act, 42 U.S.C. § 7607(b)(1) (1982). *Harrison*, 446 U.S. at 581-86. Because it discerned "no uncertainty in the meaning of [this] phrase," the Court held that review of the EPA's "action" in this case was appropriate. *Id.* at 588-89. Justice Rehnquist, dissenting, however, thought that "[t]he effort to determine congressional intent here might better be entrusted to a detective than to a judge." *Id.* at 595 (Rehnquist, J., dissenting); *see also id.* at 595-96 (stating that "what we know of the matter makes [the meaning of] Congress' [amendments to the judicial review provision] no less curious than was the incident in the Silver Blaze of the dog that did nothing in the nighttime"). In *Crown Simpson*, the Court held that the EPA's denial of a variance and veto of a permit granted by a state agency was subject to direct review in the courts of appeals under the Clean Water Act, 33 U.S.C. § 1369(b) (1982). *Crown Simpson*, 445 U.S. at 194-97.

Although the proper characterization of these cases presented some difficulty, the Authors characterized them as institutionally restrained and pro-development. The cases were considered to be institutionally restrained because, although they expanded the jurisdiction of the courts of appeal, they restricted the jurisdiction of the district courts. Because district courts are in a better position to supplement incomplete administrative records, *see Harrison*, 446 U.S. at 596-97 (Rehnquist, J., dissenting), and thus to engage in more thorough review, the results tended at least marginally to favor deference to administrative action. The cases were characterized as pro-development because in each case the Court agreed with the position taken by the pro-development party, which sought review in the courts of appeals. *See supra* notes 339-40 and accompanying text. Moreover, in *Crown Simpson* the Court hinted that direct review in the courts of appeal might not be available for environmental groups who challenged the EPA's refusal to veto state permits. *Crown Simpson*, 445 U.S. at 197 n.9 (stating that the "EPA's failure to object, as opposed to its affirmative veto of a state-issued permit, would not necessarily amount to 'Administrator's action' within the meaning" of the direct review provision); 2 W. RODGERS, *supra* note 138, at 90 (stating that "[t]he Court reads the Act generously to allow review in the courts of appeals by industries objecting to EPA veto of permit conditions but reads it strictly to forbid review in the courts of appeals by environmental groups challenging refusals to veto").

Admittedly, at least some doubt remains regarding whether these cases should be characterized as institutionally restrained, because the party seeking review would normally prefer the courts least likely to defer to agency decisions. Here, the desire to resolve the case as speedily as possible seemed to be an overriding factor for the development interests (and perhaps speedier review could be characterized as institutionally active). The Authors decided to err on the side of the characterization (restraint) least likely to reflect the Authors' own biases.

359. Attorney's fees is one area that the Court's pre-1976 pro-environmental institutional and policy activism did not reach. The Court did not decide an attorney's fees case until 1975, when in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), it refused to allow environmentalists to recover attorney's fees in the absence of statutory authorization. The Court relied heavily on an institutional restraint rationale and indicated that whether and when to allow

1. Pro-Development Procedural Activism

Perhaps the starkest example of pro-development activism in the procedural context is *Adamo Wrecking Co. v. United States*,[360] in which the Court held that a defendant charged with a criminal violation of a regulation promulgated by the EPA could challenge the validity of the regulation in the criminal proceeding. The Court reached this conclusion despite a statutory provision foreclosing review "in civil or criminal proceedings for enforcement" of EPA action that could have been reviewed under a provision for direct review of "emission standard[s]."[361] Because the challenge was based on the argument that the EPA had improperly designated the regulation as an "emission standard," the substantive question of the regulation's validity and the procedural question of reviewability merged.[362] As a result of this merger the Court asserted, notwithstanding the plain language of the statute, that whether Congress intended the EPA's designation of a regulation as an "emission standard" to be subject to judicial review in a criminal prosecution was "[a]t the very least, . . . subject to some doubt."[363] Having concluded that congressional intent was unclear, the Court, by applying "the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant,' " held that review was not precluded.[364] This treatment of the preclusion issue constituted institutional activism because it expanded the opportunity to

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recovery of attorney's fees "are matters for Congress to determine." *Id.* at 262; *see also id.* at 271 (stating that the Court would not "invade the legislature's province" by awarding fees absent statutory authorization). Justice Marshall dissented in *Alyeska*, arguing that the decision whether to award attorney's fees "has an independent basis in the equitable powers of the courts." *Id.* at 274 (Marshall, J., dissenting).

360. 434 U.S. 275 (1978). Although *Adamo Wrecking's* holding on the reviewability issue is discussed here, the case is not reflected in Table 5. *See supra* note 321.

361. 42 U.S.C. § 1857h-5(b) (1982). Three dissenting Justices charged the majority with "tampering with the plain statutory language." *See Adamo Wrecking*, 434 U.S. at 291 (Stewart, J., dissenting).

362. In adopting a regulation that specified procedures to be followed in the demolition of buildings containing ashestos, the EPA acted under a statutory provision authorizing the promulgation of "emission standards." 42 U.S.C. § 1857c-7 (1982). Adamo Wrecking argued that because such a regulation could not be characterized as an emission standard, the regulation was invalid. Similarly, if the regulation was not an emission standard, then it was not subject to the statutory provision precluding review.

363. *Adamo Wrecking*, 434 U.S. at 284-85.

364. *Id.* at 285 (quoting United States v. Bass, 404 U.S. 336, 348 (1971)). The Court had refused to apply that "rule" twelve years earlier in a criminal prosecution brought under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1982). *Compare* United States v. Standard Oil Co., 384 U.S. 224, 231 (1966) (Harlan, J., dissenting) (invoking "the traditional rule that penal statutes are to be strictly construed") *with id.* at 226 (refusing to adhere to " 'a narrow, cramped reading' of [the Act] in partial defeat of its purpose" (quoting United States v. Republic Steel Corp., 362 U.S. 482, 491 (1960))).

seek review of the regulation.[365] Moreover, the Court engaged in institutional and policy activism on the merits by rejecting the EPA's interpretation of a statute that the Agency administered.[366]

A second example of institutional activism with pro-development results in the procedural context is *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[367] in which an environmental group challenged the constitutionality of the Price-Anderson Act.[368] The Price-Anderson Act sets limits on nuclear power plant liability for damages caused by nuclear accidents. A preliminary issue in the case was whether the plaintiffs had standing based on an injury caused by pollution from nearby power plants that the plaintiffs alleged would not have been built but for the protection provided the nuclear power industry by the Act.[369] As previously discussed, the Court had liberalized standing requirements during its activist period by recognizing that environmental injury might constitute injury in fact;[370] in a later case outside of the environmental law context, however, the Court had limited standing by requiring a plaintiff to show that an alleged injury was fairly traceable to the activities of the defendant and that the exercise of the Court's remedial powers would redress the alleged injury.[371] Although the Court applied this more rigorous test in *Duke Power*,[372] it accepted as sufficient the plaintiffs' tenuous allegations of "injury in fact."[373] Thus, the Court engaged in institutional activism to reach the

365. *See* 1 W. RODGERS, *supra* note 138, at 230 (stating that this aspect of *Adamo Wrecking* "seriously undermines the preclusion provisions of Section 307(a)(2) [sic] that are an important part of the enforcement apparatus of the Act").

366. *See supra* notes 154-60 and accompanying text.

367. 438 U.S. 59 (1978).

368. 42 U.S.C. § 2210 (1982).

369. *See Duke Power Co.*, 438 U.S. at 74-75.

370. *See supra* note 326 and accompanying text.

371. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-43 (1976).

372. *Duke Power Co.*, 438 U.S. at 74. The Court refused, however, to extend to environmental litigants the requirement enunciated in taxpayer standing suits, *see* Flast v. Cohen, 392 U.S. 83, 102-03 (1968), that the plaintiff demonstrate a connection between the alleged injuries and the constitutional rights being asserted. *Duke Power Co.*, 438 U.S. at 78-80. The Court rejected the argument that the alleged pollution injury did not satisfy standing requirements because it was unrelated to the plaintiffs' constitutional claim that the liability limits in the Price-Anderson Act violated due process. Thus, the Court declined to expand the so-called "prudential limitation[s]" on standing that the courts and legislatures have developed in addition to the constitutional standing criteria out of a concern for " 'the proper—and properly limited—role of the courts in a democratic society.' " *Id.* at 80 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). For a discussion of these prudential limits, see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-76 (1982), and Warth v. Seldin, 422 U.S. 490, 499-500 (1975).

373. *Duke Power Co.*, 438 U.S. at 74. The Supreme Court accepted the lower court's finding, based on industry statements in the Price-Anderson Act's legislative history, that without the protections of the Act the particular power plants at issue would not have been built, and therefore would not have caused the pollution that was the basis of the plaintiffs' alleged injuries. *See id.* at

merits of the case, which the Court resolved against the plaintiffs' challenge to the Act.[374]

In a third case, *Tull v. United States*,[375] the Court again engaged in institutional activism with pro-development results. In *Tull* the Court held that a defendant in an action for civil penalties under the Clean Water Act was entitled to a jury trial under the seventh amendment on the issue of liability.[376] In reaching this conclusion, the Court focused entirely on whether the suit was "more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty."[377] While this is the traditional framework for analyzing seventh amendment questions,[378] and while there was no dissent from the Court's conclusion that a jury trial was required to determine liability,[379] it is nonetheless curious that the theme of institutional restraint, which had figured so prominently in so many of the Court's recent environmental decisions, never entered into the Court's opinion in *Tull*.[380]

74-75. Justice Stevens, concurring in the judgment, stated that "[i]t is remarkable that such a series of speculations is considered sufficient . . . to establish appellee's standing." *Id.* at 103 (Stevens, J., concurring in the judgment); *see id.* at 100-01 (Rehnquist, J., concurring in the judgment); *accord id.* at 94-95 (Stewart, J., concurring in the result). The Court's acceptance of the allegations as sufficient to sustain standing in *Duke Power* is particularly striking because in *Simon* it rejected similar allegations that an IRS ruling allowing hospitals to maintain their tax exempt status while providing fewer free medical services for indigents had caused the plaintiffs to be denied free services by the hospitals that had decreased their provision of free services as the result of the IRS ruling. *Simon*, 426 U.S. at 41.

374. *Duke Power Co.*, 438 U.S. at 84-94. The Supreme Court's decision on the merits exhibited institutional restraint, however, because it refused to hold the statute in question unconstitutional. The Court's inconsistency in applying standing requirements, of which the *Duke Power* decision is but one example, has led to substantial and highly critical commentary suggesting that the Court manipulates the doctrine according to its views on the merits. *See, e.g.*, Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 19 (1982); Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185, 186 (1980); Varat, *Variable Justiciability and the* Duke Power *Case*, 58 TEX. L. REV. 273 (1980).

Prior to his elevation to the Court Judge Scalia argued in various contexts for the restriction of standing. He charged that an expansive reading of standing "is not judicial vindication of private rights, but judicial infringement upon the people's prerogative to have their elected representatives determine how laws that do not bear upon private rights shall be applied." Center for Auto Safety v. National Highway Traffic Safety Admin., 793 F.2d 1322, 1342 (D.C. Cir. 1986) (Scalia, J., dissenting); *see also* Scalia, *supra* note 16. *See generally*, Note, *Deference to Discretion: Scalia's Impact on Judicial Review of Agency Action in an Era of Deregulation*, 38 HASTINGS L.J. 1223, 1235-47 (1987). It remains to be seen whether Justice Scalia's views on standing will be implemented by the Court as a whole.

375. 107 S. Ct. 1831 (1987).

376. *Id.* at 1835-39.

377. *Id.* at 1835.

378. *See id.*

379. Justices Scalia and Stevens, however, dissented from the Supreme Court's further holding that the seventh amendment did not require a jury determination of the amount of the penalty. *See id.* at 1840-41. That aspect of the Court's decision reflected institutional restraint.

380. Although *Tull* dealt with a civil penalty, it may represent the kind of policy conflict presented in the Court's decisions juxtaposing environmental policy and criminal procedure issues.

2. Institutional Restraint and Attorney's Fees

The Supreme Court has restricted the availability of attorney's fees under the Clean Air Act. In the first of three cases, *Ruckelshaus v. Sierra Club*,[381] the Court overturned a lower court's award of fees to environmental groups that had unsuccessfully challenged an EPA regulation. The lower court had concluded that an award was appropriate because the environmental groups had provided a necessary counterweight to the industrial interests that had challenged the regulation as overly restrictive.[382] Despite a statutory provision that a "court may award costs of litigation (including reasonable attorney and expert witness fees) *whenever it determines* that such award is appropriate,"[383] the Court held that it is *never* proper for a court to award attorney's fees to a party that does not achieve some success on the merits.[384] To reach this conclusion, the Court first characterized the statute as ambiguous[385] and then read the attorney's fee provision "in the light of the historic principles of fee-shifting in this and other countries."[386] The Court concluded that these principles reflected "one consistent, established rule: a successful party need not pay its unsuccessful adversary's fees."[387] The legislative history of the provision fared no better in the

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See supra notes 197-201 and accompanying text.

381. 463 U.S. 680 (1983).

382. *See id.* at 699 (Stevens, J., dissenting) (quoting Sierra Club v. Gorsuch, 672 F.2d 33, 41 (D.C. Cir. 1982)). The lower court added:

> It was absolutely essential in a case of this dimension that this court have expert and articulate spokesmen for environmental as well as industrial interests. The rulemaking process not only involved highly technical and complex data, but controversial considerations of public policy. Given the complexity of the subject matter, without competent representatives of environmental interests, the process of judicial review might have been fatally skewed.

Id. at 700 (quoting *Gorsuch*, 672 F.2d at 41).

383. 42 U.S.C. § 7607(f) (1982) (emphasis added).

384. *See Ruckelshaus*, 463 U.S. at 682.

385. *Id.* at 682-83. The Court reasoned that Congress's use of the word "appropriate" made the statute ambiguous because Congress did not indicate when the award should be appropriate. *Id.* at 683. The Court ignored the words "whenever it determines" in order to conclude that Congress meant to limit the court's discretion to award fees. Four dissenting Justices described the statutory language as "straightforward," *id.* at 700 (Stevens, J., dissenting), and concluded that the award of fees in this case "complied with the plain language of the statute," *id.* at 701 (Stevens, J., dissenting). Indeed, while the Authors characterized this case as institutionally restrained because it discouraged private parties from bringing actions to review administrative decisions, *see supra* note 333 and accompanying text, the dissenters accused the majority of engaging in activism by rewriting the statute to suit their own preferences, *see Ruckelshaus*, 463 U.S. at 712 & n.29 (Stevens, J., dissenting).

386. *Ruckelshaus*, 463 U.S. at 682. The Court's "basic point of reference" was the so-called "American Rule," "under which even 'the *prevailing* litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the *loser*.' " *Id.* at 683-84 (emphasis in original) (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975)).

387. *Ruckelshaus*, 463 U.S. at 685. Justice Rehnquist argued that if Congress had meant to codify the "radical" departure from traditional principles suggested by the environmental groups,

hands of the Court than did the statutory language. According to the Court, the statement in a committee report that Congress "did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the 'prevailing party' "[388] meant only that *"partially prevailing parties"* could also recover fees.[389]

The Court further restricted the availability of attorney's fees in two decisions regarding fee awards arising from lengthy litigation over the entry and enforcement of a consent decree that had compelled Pennsylvania to institute and implement a vehicle emission inspection and maintenance program as required by the Clean Air Act.[390] In both cases the Court refused to allow an upward adjustment of the "lodestar" amount in computing attorney's fees. Attorney's fee awards generally are computed in a two-step process.[391] In the first step, a "lodestar" amount is determined by multiplying the number of hours worked by a reasonable hourly rate.[392] In the second step, the lodestar amount is adjusted upward or downward to reflect a variety of factors.[393]

In the first decision, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley I)*,[394] the Court concluded that the lower court had properly awarded fees for work done in preparing comments on regulations proposed by a state agency in order to comply with the consent decree.[395] This pro-environment aspect of the decision reflected a relatively small portion of the overall fee award.[396] Far more significant in monetary terms was the Court's holding that the district court had erred in enhancing the fee award with respect to another phase of the litigation to reflect the superior quality of the work performed.[397] This aspect of *Delaware Valley I* accelerated the Court's

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it would have done so explicitly. *Id.* at 684-85.

388. H.R. REP. No. 294, 95th Cong., 1st Sess. 337 (1977).

389. *Ruckelshaus*, 463 U.S. at 688-90 (emphasis in original).

390. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987) (*Delaware Valley II*); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 106 S. Ct. 3088 (1986) (*Delaware Valley I*).

391. *See generally* Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

392. *Blum*, 465 U.S. at 888; *Hensley*, 461 U.S. at 433.

393. *Blum*, 465 U.S. at 898-900; *Hensley*, 461 U.S. at 434.

394. 106 S. Ct. 3088 (1986).

395. *See id.* at 3094-96. This work was conducted in Phases II and IX of the litigation. *Id.* at 3094.

396. The award for this portion of the litigation totaled $3175.50. *See id.* at 3093 (giving amounts in table of fee awards for Phases II and IX of the litigation). In order to avoid bias in characterizing this case, for purposes of Table 5 it was treated as institutionally active and pro-development, because the Supreme Court upheld at least some of tbe award and in this respect read the statute broadly.

397. The lower court had doubled the lodestar amount in Phase V of the litigation to reflect

trend, established in other contexts, of restricting the lower courts' discretion to adjust the lodestar amount upward.[398] Indeed, the Court has virtually foreclosed upward adjustment based on quality of work with its statement in *Delaware Valley I* that because "considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate, the overall quality of performance ordinarily should not be used to adjust the lodestar."[399]

In the second decision, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*,[400] the Court rejected the lower court's upward adjustment of the lodestar based on the contingent nature of the suit.[401] The plurality suggested that such an adjustment was never appropriate: "[W]e are unconvinced that Congress intended the risk of losing a lawsuit to be an independent basis for increasing the amount of any otherwise reasonable fee for the time and effort expended in prevailing."[402] The plurality, based on its perception that "enhancing fees for risk of loss forces losing defendants to compensate plaintiff's lawyers for not prevailing against defendants in other cases,"[403] concluded that such fee adjustments were inconsistent with Congress's intent that losing plaintiffs should not receive fee awards.[404] The plurality recognized that the statute was intended to enable those who cannot afford competent counsel to obtain a lawyer, but asserted that enhancing the lodestar award to compensate for the risk of non-

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superior quality of work. *See id.* at 3099. Because the lower court had also doubled the fee award for Phase V on the basis of risk, *see infra* note 396, that lodestar amount ($27,372.50) had been multiplied by a factor of four for a total of $108,490.00. *See Delaware Valley I*, 106 S. Ct. at 3093. (This amount apparently reflects an error in arithmetic: 4 X $27,372.50 = $109,490.00.) The effect of the *Delaware Valley I* holding, then, was to cut the total in half—to reduce the award by $54,745.00 (using the Court's figure).

398. As the Court in *Delaware Valley I* noted, while *Hensley* had taken "a more expansive view" of the factors that might justify an upward adjustment, *Blum* "limited the factors which a district court may consider in determining whether to make adjustments in the lodestar amount," and indicated that "such modifications are proper only in certain 'rare' and 'exceptional' cases." *Delaware Valley I*, 106 S. Ct. at 3098 (quoting *Blum*, 465 U.S. at 899). The *Hensley* and *Blum* decisions applied the Civil Rights Attorney's Fee Act. *See infra* note 409.

399. *Delaware Valley I*, 106 S. Ct. at 3099.

400. 107 S. Ct. 3078 (1987).

401. *See id.* at 3083-87. This issue had been set for reargument by the Court in *Delaware Valley I*, 106 S. Ct. at 3100, and was the most significant in monetary terms. Based on risk of loss, the district court had doubled the lodestar amount for Phases IV, V, and VII of the litigation, an enhancement that totaled $69,454.50. *See id.* at 3093.

402. *Delaware Valley II*, 107 S. Ct. at 3086. Elsewhere in the opinion, the plurality indicated that a risk enhancement might be appropriate in some cases, *see id.* at 3087-88, 3089, and Justice O'Connor wrote separately to state her conclusion that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee," although she believed that "the District Court erred in employing a risk multiplier in the circumstances of this case." *Id.* at 3089 (O'Connor, J., concurring in part, concurring in the judgment).

403. *Id.* at 3086.

404. *Id.*

payment was unnecessary to attract competent counsel.[405]

The restriction of fee awards in these three decisions might be defended as the exercise of institutional restraint. Because the availability of fee awards encourages parties to litigate, one could argue that the effect of the decisions is to discourage litigation and thus to reduce the opportunities for the exercise of judicial power.[406] Although this rationale did not figure prominently in the attorney's fee decisions,[407] it is consistent with the Court's emphasis on institutional restraint in other environmental law decisions. The Court's hostility to fee awards,[408] however, is not just the exercise of institutional restraint; it is inconsistent with the fundamental purpose of the fee award provisions and undermines congressional intent. It is the exercise of policy activism.

The history of attorney's fee provisions shows that Congress regarded attorney's fee awards as necessary to ensure the proper enforcement of federal law.[409] Thus, Congress intended that private litigants serve an important watchdog function under the environmental laws by bringing suits to review administrative action and private actions to enforce environmental laws.[410] While paying lip service to this intent,[411]

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405. *Id.* at 3086-87.

406. Indeed, Congress enacted the Clean Air Act attorney's fee provisions "to encourage litigation which will ensure the proper implementation and administration of the act or otherwise serve the public interest." H.R. REP. No. 294, 95th Cong., 1st Sess. 337 (1977).

407. In *Delaware Valley II*, for example, the plurality relied on its assessment that allowing upward adjustment of fee awards would produce conflicts of interest, create difficult problems of assessing the degree of risk, and unfairly penalize the defendant with the strongest defense. *See Delaware Valley II*, 107 S. Ct. at 3084-86. These considerations, however, mischaracterized the effect of such enhancements. *See infra* note 412.

408. At one point in *Delaware Valley II*, for example, the plurality expressed its distaste for attorney's fee litigation by stating that fee litigation "is often protracted, complicated and exhausting. There is little doubt that it should be simplified to the maximum extent possible." *Delaware Valley II*, 107 S. Ct. at 3085. Surely the nature of fee litigation is not a ground for refusing to award fees as Congress intended they be awarded.

409. This view of attorney's fee provisions is reflected in the legislative history of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1982). *See* H.R. REP. No. 1558, 94th Cong., 2d Sess. 1 (1976); S. REP. No. 1011, 94th Cong., 2d Sess. 2 (1976). As the Court noted in *Ruckelshaus*, this purpose extends to attorney's fees provisions in environmental statutes as well, *see Ruckelshaus*, 463 U.S. at 691-92; this relationship was also implicitly recognized in *Delaware Valley I* and *II* by the Court's reliance on cases decided under § 1988 (*Hensley* and *Blum*) to determine the propriety of enhancing the lodestar amount of an award. Congress had the additional purpose in the Clean Air Act provisions of discouraging frivolous litigation by allowing prevailing defendants to be awarded fees when it was in the public interest. *See id.* at 692-93. Throughout its analysis in the attorney's fees cases the Court appears to have elevated this desire into the primary policy of the provisions and used it to resolve ambiguities, whether real or imagined.

410. This role, and the Court's treatment of it, is also discussed in connection with the Court's decisions regarding supplemental remedies in the environmental law context. *See supra* notes 268-73 and accompanying text.

411. *E.g., Delaware Valley II*, 107 S. Ct. at 3086 (stating that "[w]e agree that a fundamental aim of such statutes is to make it possible for those who cannot pay a lawyer for his time and effort to obtain competent counsel").

the Supreme Court has failed to implement it. In *Ruckelshaus*, for example, the Court discounted the argument that environmental groups, even when they are unsuccessful in litigation, perform an important function because they represent interests that otherwise would be unrepresented and counterbalance the influence of industrial interests.[412] In light of this function, a congressional decision to allow courts to make fee awards to unsuccessful litigants is perfectly reasonable, despite the Court's strained efforts to read the statutory language and the legislative history to reach a contrary result.[413] Similarly, in refusing to allow upward fee adjustments in *Delaware Valley II*, the plurality asserted that in most cases environmental interests will be represented because the attorneys who represent these interests will receive reasonable compensation for their efforts if they are eventually victorious.[414] But the refusal to allow an enhancement for contingency means that this "reasonable" compensation is less than market rate and that the plurality has substituted its judgment of what is reasonable for Congress's intent that environmental attorneys be compensated at the market rate.[415] Based on its apparent desire to discourage environmental litigation, the plurality not only mangled legislative history which showed that Congress was aware of and approved of enhancement of fee awards,[416] but also mischaracterized the effect of such enhancements.[417]

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412. While the lower court had based its award on a determination that the environmental groups, even though they had not prevailed, had contributed substantially to the proper resolution of a difficult case, *see supra* note 378 and accompanying text, the Court did not mention this rationale at all.

413. Indeed, the House Report accompanying the attorney's fee provision in question expressly relied on Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331, 1338 (1st Cir. 1973), which advanced just such an argument. *See* H.R. REP. No. 294, 95th Cong., 1st Sess. 337 (1977) (citing to page 1388 of the opinion—an apparent typographical error). The majority dismissed the congressional reliance on this case because the environmentalists had prevailed in part in that case, but not in *Ruckelshaus*.

414. *See Delaware Valley II*, 107 S. Ct. at 3086-87.

415. As noted by the dissent in *Delaware Valley II*, by refusing to allow upward adjustment of the lodestar in cases in which payment of fees was contingent on success, the plurality effectively ensured that attorneys in such cases would be paid at less than the prevailing market rate, because the market pays a premium for contingency cases. *See id.* at 3091-92. Congress, however, expressly indicated its desire that attorneys be compensated at the market rate. *See* S. REP. No. 1011, 94th Cong., 2d Sess. 6 (1976); H.R. REP. No. 1558, 94th Cong., 2d Sess. 8-9 (1976); *see also Blum*, 465 U.S. at 895.

416. The plurality acknowledged that Congress had cited Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd per curiam*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978), as an example of the correct determination of an attorney's fee award, and that the court in that case had adjusted the lodestar amount upward based in part upon contingency considerations. *See Delaware Valley II*, 107 S. Ct. at 3085-86. But because Congress also cited two cases that did not adjust fees awards upward for risk of loss (one case adjusted upward on the basis of exceptional results and the other reduced the prevailing party's award), the plurality asserted that Congress's reliance on *Zurcher* was "inconclusive." *Id.* at 3086. This argument is ludicrous. Congress's citation to Zurcher shows that it clearly understood and approved the pre-

VI. CONCLUSION

The analysis in this Article demonstrates that a consistent pro-development pattern has prevailed in the Supreme Court's environmental law decisions since 1976. Although the Court exercised institutional restraint in the majority of its environmental law decisions, the pro-development results are not explainable solely as the product of a neutral exercise of institutional restraint; these decisions reflect policy activism by the Court. In a number of significant decisions the Court abandoned the principles of institutional restraint in order to reach a pro-development result. Moreover, in many cases the Court's exercise of institutional restraint seems inconsistent with statutory language or legislative history. While the reader may disagree with this Article's criticisms of individual cases, which admittedly may be colored by the Authors' views of proper environmental policy, the overall pattern of the cases is unmistakable.

In particular, the Supreme Court has elevated economic efficiency to a level of importance not shared by Congress and has virtually ignored the legislative desire to force improvements in pollution control technology.[418] This policy activism has pervaded the Court's substantive review of administrative decisions. In cases such as *Baltimore Gas*, *Chevron*, and *Chemical Manufacturers*, the Court has used its characterization of legislative intent to defer to administrative decisions that accommodated economic efficiency at the expense of environmental protection. In other decisions, such as *du Pont*, the Court has mitigated the impact of pro-environment agency decisions by creating exceptions that favor developmental interests. Moreover, when the Court believed that agencies had gone too far in protecting environmental interests, as in *Benzene*, it invoked constitutional principles reminiscent of substan-

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existing practice of adjusting fee awards upward based on risk of loss. That Congress also recognized divergent possibilities for adjusting fee awards in cases presenting differing circumstances by no means belies that approval.

417. The Court assumed that the greater the risk of loss, the greater the enhancement for risk. As a result, it concluded that risk adjustments were difficult to calculate, might lead to limitless upward adjustment of awards, would create conflicts of interests because attorneys would characterize their cases as weak in order to maximize fee awards, and would penalize the defendants with the strongest defenses. *See Delaware Valley II*, 107 S. Ct. at 3084-86. As correctly pointed out by the dissenting and concurring opinions, however, this parade of horribles rests on the faulty assumption that a contingency adjustment requires an assessment of the degree of risk involved in a case, rather than a simple determination of whether the attorneys took a case on a contingency fee basis. *See id.* at 3089 (O'Connor, J., concurring); *see also id.* at 3096-3101 (Blackmun, J. dissenting).

418. *See supra* note 6 and accompanying text. While the Court at times acknowledged this legislative policy, *see supra* note 6, in its most significant decisions the Court disregarded the implications of that policy for the resolution of the issues before it. Other observers have reached a similar conclusion. *See generally* Goldsmith & Banks, *supra* note 117.

tive economic due process to block the agency's action.[419] Similarly, the Court has employed its perception of the congressional desire to balance environmental protection and economic efficiency to reject supplemental remedies in the face of strong evidence of congressional intent to preserve and foster such remedies. Indeed, the Court has taken virtually every opportunity to discourage supplemental remedies, whether by exercising institutional restraint to reject federal remedies in cases such as *Milwaukee II*, or by exercising activism to strike down remedies created under state law as in *International Paper*. Similarly, the Court has run roughshod over Congress's desire to facilitate such remedies through the reimbursement of attorney's fees. Finally, in *Vermont Yankee* the Court issued a ringing endorsement of institutional restraint in rejecting the judicial imposition of procedural opportunities in agency proceedings to benefit environmental interests; yet in *Duke Power* and *Adamo Wrecking* it ignored the institutional restrictions on its own power in order to reach pro-development results on the merits. Thus, within each of the three categories of environmental law decisions analyzed in this Article, the Court has reached pro-development results on many of the most far-reaching issues to come before it.

Whether or not these pro-development policy results are the product of a disingenuous manipulation of principles of institutional restraint or an unconscious coloration of the Court's analysis by its policy preferences,[420] two things are clear. First, the Court has been pursuing

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419. The Court's application of the nondelegation doctrine in *Benzene* to restrict the agency's power to impose costs on industry, *see supra* notes 173-75 and accompanying text, is similar to the *Lochner* era rejection of regulatory programs that imposed excessive costs on industry. *See supra* notes 26-28 and accompanying text. The potential impact of the *Benzene* rationale is illustrated by Natural Resources Defense Council, Inc. v. EPA, 824 F.2d 1146 (D.C. Cir. 1987) (en banc). In an opinion authored by Judge Bork, the D.C. Circuit relied on *Benzene* to conclude that a statutory provision directing the EPA to set exposure levels for hazardous pollutants, "at the level which in [the EPA's] judgment provided an ample margin of safety," 42 U.S.C. § 7412(b)(1)(B) (1982), did not require the agency to set an exposure level that was absolutely safe. Natural Resources Defense Council, Inc. v. EPA, 824 F.2d at 1154. This application of the nondelegation rationale is particularly perverse, because it was used to *expand*, rather than contract, the scope of the agency's discretion. This result, though directly at odds with the nondelegation doctrine, is perfectly consistent with economic substantive due process. Another example of the Court's current sympathy for economic substantive due process is Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987), in which the Court struck down as a "taking" without just compensation a state administrative agency's decision requiring landowners to provide lateral public access to their beachfront property as a condition to rebuilding. *See also* Kaiser Aetna v. United States, 444 U.S. 164 (1979) (striking down Army Corps of Engineers' permit requirement as a taking of property without just compensation). For criticism of *Nollan*, see Farber, *"Taking" Liberties*, NEW REPUBLIC, June 27, 1988, at 19 (suggesting that *Nollan* may presage a new age of *Lochner*-type activism in pursuit of *laissez faire* economic policy).

420. Some have suggested that the Court manipulates principles of restraint in order to achieve desired policy outcomes. *See, e.g.*, Spaeth & Teger, *supra* note 1, at 277. Despite this Article's intemperate criticism of the Court's reasoning at times, however, the Authors consider it

an environmental policy that is not consistent with the predominant policy of Congress. In the face of such policy activism, Congress may need to legislate further to ensure the implementation of its environmental policy. Legislation will have to be more specific than previous statutes in order to prevent administrative agencies from undermining legislative intent and to prevent the Court from evading congressional policy.[421] Second, the principles of institutional restraint have failed to prevent policy activism. Institutional restraint does not prevent policy activism in the regulatory context because the Court generally is faced with competing institutional considerations. When the Court is called upon to resolve an apparent conflict between Congress and administrative agencies, or between federal and state governmental bodies, the question is not *whether* to exercise institutional restraint, but rather *which* governmental institution is to receive deference. To answer this question, the Court must determine whether a particular institution's decision is within the limits of that institution's decisionmaking capacity. This determination in turn often requires a subjective evaluation of materials, such as statutory language or legislative history, that are susceptible to conflicting interpretations. Ultimately, the Court's underlying view of each institution's policies is likely to influence the process of evaluation.

Thus, while other justifications for institutional restraint may exist,[422] this restraint cannot be defended on the bare assertion that courts should not make policy. Extensive reliance on indeterminate principles of institutional restraint tends merely to divert attention from underlying policy choices and to obscure the actual basis for a given decision. This Article does not intend to suggest that courts should disregard their institutional limitations in order to pursue a judicial policy agenda, but rather suggests that recognition of these limitations neither resolves difficult institutional questions nor ensures that resolution of these questions will remain free from the influence of policy considerations. Instead, this Article urges that courts be more aware of, and more candid in acknowledging, the policy considerations that

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equally likely that, in most cases at least, each individual Justice was attempting in good faith to reach a correct result in light of statutory language, legislative history, administrative explanations for particular decisions, and precedent. The Authors believe, however, that even a good faith reading of such ambiguous materials will nonetheless be influenced by a particular Justice's view of sound policy. It is not possible to determine what an individual Justice's motivation was in a particular case. Thus, each reader personally must decide which is the best explanation for the Court's behavior.

421. Recent enactments in the environmental law field suggest that this process is already underway. *See* Shapiro & Glicksman, *supra* note 6, at 824-40.

422. For example, one might attempt to justify institutional restraint in order to preserve scarce judicial resources in an era of crowded dockets. *See* R. POSNER, *supra* note 13, at 207.

underlie their decisions. Such candor will not prevent courts from pursuing their policy preferences at the expense of those chosen by other governmental institutions. But candor does make judicial policy choices available for public scrutiny. In a system in which judges enjoy substantial independence, public scrutiny—not institutional restraint—is the best protection against unwarranted policy activism.

APPENDIX

Tables 6 and 7 list the Supreme Court's environmental law decisions from 1960-1975 and 1976-1988, respectively. Each case is characterized according to institutional result (*i.e.*, institutional activism or restraint); policy result (*i.e.*, pro-environment or pro-development); and type of case (*i.e.*, substantive review, supplemental remedies, or procedural opportunities). Some cases were difficult to characterize because they involved more than one holding or because the institutional or policy implications of a holding were not clear. The characterizations of difficult cases in Table 7 were discussed in the Article, and references to these discussions are contained in the relevant footnotes along with the case citations. Generally, the Authors attempted to make the characterization of decisions in Table 6 consistent with the principles discussed in the Article regarding cases in Table 7. When necessary, references to these discussions or additional explanations are given in the relevant footnotes.

TABLE 6: CHARACTERIZATION OF EARLY DECISIONS

Case Name	Institutional Result	Policy Result	Type of Case
Huron Portland Cement Co. v. City of Detroit[423]	Restraint	Pro-Environment	Supplemental Remedies
United States v. Republic Steel[424]	Restraint	Pro-Environment	Substantive Review
United States v. Standard Oil Co.[425]	Restraint	Pro-Environment	Substantive Review
Wyandotte Transp. Co. v. United States[426]	Activism	Pro-Environment	Supplemental Remedies
Citizens to Preserve Overton Park, Inc. v. Volpe[427]	Activism	Pro-Environment	Substantive Review
Ohio v. Wyandotte Chemicals Corp.[428]	Restraint	Neutral	Supplemental Remedies
Sierra Club v. Morton[429]	Activism	Pro-Environment	Procedural Opportunities
Illinois v. City of Milwaukee[430]	Activism	Pro-Environment	Supplemental Remedies

423. 362 U.S. 440 (1960).
424. 362 U.S. 482 (1960).
425. 384 U.S. 224 (1966).
426. 389 U.S. 191 (1967).
427. 401 U.S. 402 (1971). This case was characterized as a substantive review case although it also involved procedural opportunity issues, because the Authors regarded the substantive review holding as the most significant. The Court engaged in institutional activism and reached pro-environmental policy results on all counts.
428. 401 U.S. 493 (1971). This case was characterized as institutionally restrained because the Supreme Court declined to exercise its original jurisdiction over the case. The case was considered to be policy-neutral because that decision left open a suit in lower courts and was not likely to have a substantial impact on the eventual outcome on the merits.
429. 405 U.S. 727 (1972). Although the actual holding in *Sierra Club v. Morton* denied the plaintiff environmental group standing, the case was characterized as institutionally active and pro-environment because the Court's broad dicta finding environmental injury as sufficient for standing opened the door for future environmental litigation. The case therefore generally has been regarded as pro-environment.
430. 406 U.S 91 (1972).

Case Name	Institutional Result	Policy Result	Type of Case
Washington v. General Motors Corp.[431]	Restraint	Neutral	Substantive Review
Lake Carriers' Ass'n v. MacMullan[432]	Restraint	Pro-Environment	Supplemental Remedies
United States v. Pennsylvania Indust. Chem. Corp.[433]	Restraint	Pro-Environment	Substantive Review
Askew v. American Waterways Operators, Inc.[434]	Restraint	Pro-Environment	Supplemental Remedies
Fri v. Sierra Club[435]	Activism	Pro-Environment	Substantive Review
United States v. SCRAP[436]	Activism	Pro-Development	Procedural Opportunities
Air Pollution Variance Bd. v. Western Alfalfa Corp.[437]	Restraint	Pro-Environment	Substantive Review
Train v. City of New York[438]	Activism	Pro-Environment	Substantive Review
Train v. Campaign Clean Water, Inc.[439]	Activism	Pro-Environment	Substantive Review

431. 406 U.S. 109 (1972); *see supra* note 423.

432. 406 U.S. 498 (1972). This case was characterized as institutionally restrained because although the Court held that the preemption issue in the case was justiciable, it then abstained in order to allow state courts to construe the state statute first.

433. 411 U.S. 655 (1973). This case was characterized as institutionally restrained and pro-environment because the Court upheld the agency's broad pro-environment interpretation of its statutory authority. In another respect the case involved pro-development institutional activism because the Court indicated that the agency's prior narrow interpretation might be used to establish a defense of lack of fair warning.

434. 411 U.S. 325 (1973).

435. 412 U.S. 541 (1973).

436. 412 U.S. 669 (1973). This case was characterized as pro-development because although the Court decided in favor of the plaintiff environmental group on the standing issue, it held that the lower court lacked authority to grant the requested injunctive relief on the merits. *See supra* note 339 and accompanying text.

437. 416 U.S. 861 (1974).

438. 420 U.S. 35 (1975).

439. 420 U.S. 136 (1975).

Case Name	Institutional Result	Policy Result	Type of Case
Train v. NRDC[440]	Restraint	Pro-Development	Substantive Review
Alyeska Pipeline Serv. Co. v. Wilderness Soc'y[441]	Restraint	Pro-Development	Procedural Opportunities
Aberdeen & Rockfish v. SCRAP[442]	Activism	Pro-Development	Procedural Opportunities

TABLE 7: CHARACTERIZATION OF LATER DECISIONS

Case Name	Institutional Result	Policy Result	Type of Case
Train v. Colorado Pub. Interest Research Group, Inc.[443]	Restraint	Pro-Development	Substantive Review
Hancock v. Train[444]	Restraint	Pro-Development	Substantive Review
EPA v. California *ex rel.* State Water Resources Control Bd.[445]	Restraint	Pro-Development	Substantive Review
Flint Ridge Dev. Co. v. Scenic Rivers Ass'n[446]	Restraint	Pro-Development	Procedural Opportunities
Union Elec. Co. v. EPA[447]	Restraint	Pro-Environment	Substantive Review

440. 420 U.S. 60 (1975).
441. 421 U.S. 240 (1975).
442. 422 U.S. 289 (1975). This case was characterized as pro-development because although the Supreme Court upheld assertion of lower court jurisdiction to review agency action, it rejected the plaintiff environmental group's claims on the merits. *See supr* note 339 and accompanying text.
443. 426 U.S. 1 (1976).
444. 426 U.S. 167 (1976); *see supra* note 149.
445. 426 U.S. 200 (1976); *see supra* note 149.
446. 426 U.S. 776 (1976); *see supra* note 111.
447. 427 U.S. 246 (1976); *see supra* note 181.

Case Name	Institutional Result	Policy Result	Type of Case
Kleppe v. Sierra Club[448]	Restraint	Pro-Development	Procedural Opportunities
E.I. du Pont de Nemours & Co. v. Train[449]	Restraint	Pro-Environment	Substantive Review
EPA v. Brown[450]	Restraint	Neutral	Substantive Review
Adamo Wrecking Co. v. United States[451]	Activism	Pro-Development	Substantive Review
Ray v. Atlantic Richfield Co.[452]	Activism	Pro-Development	Supplemental Remedies
Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.[453]	Restraint	Pro-Development	Procedural Opportunities
Marshall v. Barlow's, Inc.[454]	Activism	Pro-Development	Substantive Review
TVA v. Hill[455]	Activism	Pro-Environment	Substantive Review
City of Philadelphia v. New Jersey[456]	Activism	Neutral	Supplemental Remedies
Duke Power Co. v. Carolina Environmental Study Group, Inc.[457]	Activism	Pro-Development	Procedural Opportunities
Andrus v. Sierra Club[458]	Restraint	Pro-Development	Procedural Opportunities

448. 427 U.S. 390 (1976); *see supra* note 111.
449. 430 U.S. 112 (1977); *see supra* notes 187-94 and accompanying text.
450. 431 U.S. 99 (1977); *see supra* note 84.
451. 434 U.S. 275 (1978); *see supra* note 321.
452. 435 U.S. 151 (1978); *see supra* note 288.
453. 435 U.S. 519 (1978).
454. 436 U.S. 307 (1978).
455. 437 U.S. 153 (1978); *see supra* note 104.
456. 437 U.S. 617 (1978); *see supra* note 202.
457. 438 U.S. 59 (1978); *see supra* note 339 and accompanying text.
458. 442 U.S. 347 (1979); *see supra* note 111.

Case Name	Institutional Result	Policy Result	Type of Case
Strycker's Bay Neighborhood Council, Inc. v. Karlen[459]	Restraint	Pro-Development	Substantive Review
Crown Simpson Pulp Co. v. Costle[460]	Restraint	Pro-Development	Procedural Opportunities
Costle v. Pacific Legal Found.[461]	Restraint	Pro-Environment	Procedural Opportunities
Harrison v. PPG Ind., Inc.[462]	Restraint	Pro-Development	Procedural Opportunities
United States v. Ward[463]	Restraint	Pro-Development	Substantive Review
Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.[464]	Activism	Pro-Development	Substantive Review
EPA v. National Crushed Stone Ass'n[465]	Restraint	Pro-Environment	Substantive Review
California v. Sierra Club[466]	Restraint	Pro-Development	Supplemental Remedies
City of Milwaukee v. Illinois & Mich.[467]	Restraint	Pro-Development	Supplemental Remedies
American Textile Mfrs. Inst., Inc. v. Donovan[468]	Restraint	Pro-Environment	Substantive Review
Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n[469]	Restraint	Pro-Development	Supplemental Remedies

459. 444 U.S. 223 (1980) (per curiam); *see supra* note 111.
460. 445 U.S. 193 (1980); *see supra* note 355.
461. 445 U.S. 198 (1980); *see supra* note 347.
462. 446 U.S. 578 (1980); *see supra* note 355.
463. 448 U.S. 242 (1980); *see supra* notes 197-201 and accompanying text.
464. 448 U.S. 607 (1980).
465. 449 U.S. 64 (1980); *see supra* notes 195-96 and accompanying text.
466. 451 U.S. 287 (1981).
467. 451 U.S. 304 (1981).
468. 452 U.S. 490 (1981); *see supra* notes 182-86 and accompanying text.
469. 453 U.S. 1 (1981).

Case Name	Institutional Result	Policy Result	Type of Case
Weinberger v. Catholic Action of Haw./Peace Educ. Project[470]	Restraint	Pro-Development	Procedural Opportunities
Weinberger v. Romero-Barcelo[471]	Restraint	Pro-Development	Supplemental Remedies
Metropolitan Edison Co. v. People Against Nuclear Energy[472]	Restraint	Pro-Development	Procedural Opportunities
Baltimore Gas & Elec. Co. v. NRDC[473]	Restraint	Pro-Development	Substantive Review
Ruckleshaus v. Sierra Club[474]	Restraint	Pro-Development	Procedural Opportunities
United States v. Stauffer Chem. Co.[475]	Activism	Pro-Development	Substantive Review
Chevron, U.S.A., Inc. v. NRDC, Inc.[476]	Restraint	Pro-Development	Substantive Review
Ohio v. Kovacs[477]	Activism	Pro-Development	Supplemental Remedies
Chemical Mfrs. Ass'n v. NRDC, Inc.[478]	Restraint	Pro-Development	Substantive Review
United States v. Riverside Bayview Homes, Inc.[479]	Restraint	Pro-Environment	Substantive Review
Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection[480]	Restraint	Pro-Environment	Supplemental Remedies

470. 454 U.S. 139 (1981); *see supra* note 111.
471. 456 U.S. 305 (1982).
472. 460 U.S. 766 (1983); *see supra* note 111.
473. 462 U.S. 87 (1983); *see supra* note 111.
474. 463 U.S. 680 (1983); *see supra* note 333.
475. 464 U.S. 165 (1984).
476. 467 U.S. 837 (1984).
477. 469 U.S. 274 (1985).
478. 470 U.S. 116 (1985).
479. 474 U.S. 121 (1985).
480. 474 U.S. 494 (1986).

Case Name	Institutional Result	Policy Result	Type of Case
Exxon Corp. v. Hunt[481]	Activism	Pro-Development	Supplemental Remedies
Dow Chem. Co. v. United States[482]	Restraint	Pro-Environment	Substantive Review
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (I)[483]	Activism	Pro-Environment	Procedural Opportunities
International Paper Co. v. Ouellette[484]	Activism	Pro-Development	Supplemental Remedies
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (II)[485]	Restraint	Pro-Development	Procedural Opportunities
Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.[486]	Activism	Pro-Environment	Supplemental Remedies
Tull v. United States[487]	Activism	Pro-Development	Procedural Opportunities

481. 475 U.S. 355 (1986).
482. 476 U.S. 227 (1986); *see supra* notes 197-201 and accompanying text.
483. 106 S. Ct. 3088 (1986); *see supra* notes 333,392
484. 107 S. Ct. 3078 (1987); *see supra* note 333.
485. 107 S. Ct. 3078 (1987); *see supra* note 333.
486. 108 S. Ct. 376 (1987); *see supra* note 268.
487. 107 S. Ct. 1831 (1987).