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From Protecting Water Quality to Protecting States' Rights: Fifty Years of Supreme Court Clean Water Act Statutory Interpretation

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FROM PROTECTING WATER QUALITY TO PROTECTING STATES' RIGHTS: FIFTY YEARS OF SUPREME COURT CLEAN WATER ACT STATUTORY INTERPRETATION

*Stephen M. Johnson**

ABSTRACT

In 1972, a bipartisan Congress enacted the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Almost fifty years have passed since Congress enacted the law, and during that time, the Supreme Court has played a significant role in the administration and evolution of the law. Since the dawn of the environmental era in the 1970s, the Supreme Court has heard more cases involving the Clean Water Act than any other environmental law. However, the manner in which the Court has analyzed the law has changed substantially over the last half century. A review of the thirty cases that the Court has heard that involve statutory interpretation of the Clean Water Act show that during the early years of the Act, the Court focused heavily on legislative history and the purpose of the law in Section 101(a) and interpreted the law to carry out that purpose. Over time, though, the Court adopted a more textualist approach to interpreting the Clean Water Act, and beginning with the Rehnquist Court, the Court began to focus on protecting states’ rights. In contrast to the Court’s early opinions, opinions from the past few decades generally do not discuss the water quality protection purposes of § 101(a) of the Clean Water Act. Instead, to the limited extent that the Court focuses on the purposes of the law, it cites language in § 101(b) of the law that discusses a Congressional policy to preserve and protect states’ rights.

A review of the Court’s Clean Water Act cases also shows that as the Court has moved to a more textualist approach to statutory interpretation, it has become more ideologically divided, and the outcomes of the cases could be more frequently characterized as anti-environmental. In addition, while early Supreme Court Clean Water Act decisions often adopted a rhetorical tone sympathizing with the government’s efforts to advance public

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rights with limited resources, more recent decisions tend to adopt a tone of skepticism or even hostility toward government regulation.

The shift in the Supreme Court's interpretation of the Clean Water Act is troubling because it coincides with Congressional disengagement in oversight of the law. In the first few decades after the Clean Water Act was enacted, Congress was vigilant in responding to Supreme Court and lower court interpretations of the law, and frequently legislated to affirm or overturn those interpretations. That is no longer the case, for either the Clean Water Act or most other environmental laws. If the Supreme Court adopts an interpretation of the law that conflicts with the water quality protection goals and purposes of the law, Congress is no longer likely to step in to correct the Court's mistake.

The lack of concern demonstrated by the Supreme Court and Congress toward interpreting and applying the Clean Water Act to meet the § 101(a) goals to protect water quality could be counterbalanced to some degree by aggressive implementation of the law by EPA and the U.S. Army Corps of Engineers to carry out those goals. Chevron deference to the agencies' interpretations of the law could provide a minor bulwark against the erosion of the law. However, courts are increasingly finding ways to avoid applying Chevron to agency decisions. Even if courts continued to aggressively apply Chevron to agency actions, though, deferring to the actions that the EPA and the Corps have taken over the past few years would not advance the water quality protection goals of the Clean Water Act because the agencies have increasingly emphasized the protection of states' rights policy of the law in § 101(b) in their decision-making at the expense of the water quality protection goals of § 101(a). The agencies' recent navigable waters protection rule and EPA's policy reversal regarding discharges to groundwater in the County of Maui, Hawaii v. Hawaii Wildlife Fund case are just a few examples of the agencies' policy shift.

In anticipation of the upcoming fiftieth anniversary of the enactment of the modern Clean Water Act, this Article examines the evolution of the Court's statutory interpretation of the law over the half century since its enactment. The Article also explores the Congressional and agency responses to the Court's shifting interpretation. The Article suggests that all three branches of government have abdicated their responsibility to advance the ambitious water quality protection goals adopted by Congress in 1972, even though public opinion polls still show strong support for government regulation to protect clean water.

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I. INTRODUCTION

IN the middle of the twentieth century, it was said that anyone who fell into the Cuyahoga River would not drown, but would decay.¹ When, in 1969, the river caught fire for the thirteenth time in a century, it sparked a public outcry for more stringent protection of the nation’s waters.² In response to that call, a bipartisan Congress enacted the Federal Water Pollution Control Act Amendments of 1972, more commonly referred to today as the Clean Water Act.³ The goal of the law, set forth in § 101(a) of the statute, was “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁴ Almost fifty years have passed since Congress enacted the law, and during that time, the Supreme Court has played a significant role in the administration and evolution of the law.

1. *History of the Clean Water Act (CWA)*, U.S. ENV’T PROT. AGENCY, https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent_object_id=2571 [https://perma.cc/69LN-XSB2]; David A. Keiser & Joseph S. Shapiro, *Consequences of the Clean Water Act and the Demand for Water Quality* 1 (Nat’l Bureau of Econ. Rsch., Working Paper No. 23070, 2018), https://www.nber.org/system/files/working_papers/w23070/w23070.pdf [https://perma.cc/WP36-BZHK].

2. See U.S. ENV’T PROT. AGENCY, *supra* note 1; see also *The Cuyahoga’s Comeback*, AM. RIVERS, <https://www.americanrivers.org/cuyahoga50/index.html> [https://perma.cc/Q3FJ-HS24].

3. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C.).

4. Clean Water Act § 101(a), 33 U.S.C. § 1251(a).

Since the dawn of the environmental era in the 1970s, the Supreme Court has heard more cases involving the Clean Water Act than cases involving any other environmental law.⁵ However, the manner in which the Court has analyzed the law has changed substantially over the last half century. A review of the thirty cases that the Court has heard that involve statutory interpretation of the Clean Water Act shows that the Court, during the early years of the Act, focused heavily on legislative history and the purpose of the law as stated in § 101(a) and interpreted the law to carry out that purpose.⁶ Over time, though, the Court adopted a more textualist approach to interpreting the Clean Water Act,⁷ and beginning with the Rehnquist Court, the Court began to focus on protecting states' rights.⁸ In contrast to the Court's early opinions, opinions from the past few decades generally do not discuss the water quality protection purposes of § 101(a) of the Clean Water Act.⁹ Instead, to the limited extent that the Court focuses on the purposes of the law, it cites language in § 101(b)¹⁰ that discusses a congressional policy to preserve and protect states' rights.¹¹ The trend from a purposivist approach to statutory interpretation to a textualist approach in Clean Water Act cases is similar to a trend identified by Professor David Driesen and his associates in their review of fifty years of the Court's Clean Air Act jurisprudence.¹² A review of the Court's Clean Water Act cases also shows that as the Court has moved to a more textualist approach to statutory interpretation, it has become more ideologically divided,¹³ and the outcomes of the cases could more frequently be characterized as anti-environmental.¹⁴ In addition, while early Supreme Court Clean Water Act decisions often adopted a rhetorical tone sympathetic to the government's efforts to advance public rights with limited resources, more recent decisions tend to adopt a tone of antiregulatory skepticism toward government regulation.¹⁵

The shift in the Supreme Court's interpretation of the Clean Water Act is troubling because it coincides with congressional disengagement in

5. Between 1972 and 2012, the Supreme Court issued 34 opinions in cases involving the Clean Water Act, which equated to 34% of the 100 opinions that the Court issued during that time in cases involving environmental laws. Sandra Zellmer, *Treading Water While Congress Ignores the Nation's Environment*, 88 NOTRE DAME L. REV. 2323, 2324 (2013). The Clean Air Act was the second most frequent subject of Supreme Court opinions during that period, but the Court issued only twenty-two opinions addressing that law. *Id.*

6. *See infra* Sections V.A, V.B.

7. *See infra* Section V.A.

8. *See infra* Section V.D.

9. *See infra* Section V.B.

10. Clean Water Act § 101(b), 33 U.S.C. § 1251(b).

11. *See infra* Section V.B.

12. *See* David M. Driesen, Thomas M. Keck & Brandon T. Metroka, *Half a Century of Supreme Court Clean Air Act Interpretation: Purposivism, Textualism, Dynamism, and Activism*, 75 WASH. & LEE L. REV. 1781, 1825 (2018).

13. *See infra* Section V.C.

14. *See infra* Section V.E.

15. *See infra* Section V.E.

oversight of the law. In the first few decades after it enacted the Clean Water Act, Congress was vigilant in responding to Supreme Court and lower court interpretations of the law, and Congress frequently legislated to affirm or overturn those interpretations.¹⁶ That is no longer the case for the Clean Water Act and for most other environmental laws.¹⁷ If the Supreme Court adopts an interpretation of the law that conflicts with the water quality protection goals and the purposes of the law, Congress is no longer likely to step in to correct the Court's mistake.

The lack of concern demonstrated by the Supreme Court and Congress toward interpreting and applying the Clean Water Act to meet § 101(a)'s goals of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters"¹⁸ could be counterbalanced to some degree by aggressive implementation of the law by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to carry out those goals. *Chevron* deference to the agencies' interpretations of the law could provide a minor bulwark against the erosion of the law.¹⁹ However, courts are increasingly finding ways to avoid applying *Chevron* to agency decisions.²⁰ Even if courts continued to aggressively apply *Chevron* to agency actions, deferring to the EPA's and Corps's recent actions would not advance the water quality protection goals of the Clean Water Act because the agencies have increasingly emphasized the protection-of-states'-rights policy of the law in § 101(b) in their decision-making at the expense of the water quality protection goals of § 101(a).²¹ The agencies' recent navigable waters protection rule²² and the EPA's policy reversal regarding discharges to groundwater²³ in *County of Maui v. Hawaii Wildlife Fund*²⁴ are just a few examples of the agencies' policy shift.

The agencies' shifting interpretation of the Clean Water Act is also evident in an analysis of the actions being reviewed by the Supreme Court and the agencies' positions in those cases over time. While many of the early cases involved challenges to agency actions that imposed costly requirements on regulated entities, most of the challenges to agency action in the Roberts Court era involve allegations that the agencies were not regulating aggressively enough.²⁵ Notably, in most of the cases heard by the Roberts Court, the agencies supported the positions advanced by reg-

16. *See infra* Part VII.

17. *See infra* Part VII.

18. Clean Water Act § 101(a), 33 U.S.C. § 1251(a).

19. *See infra* Part VIII.

20. *See infra* Part VIII.

21. *See infra* Part VIII.

22. The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401).

23. Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810 (Apr. 23, 2019) (to be codified at 40 C.F.R. pt. 122).

24. *See* 140 S. Ct. 1462, 1474 (2020).

25. *See infra* Part VIII.

ulated entities.²⁶ At this point, therefore, it appears that all three branches of government have abdicated their responsibility to advance the ambitious water quality protection goals that Congress adopted in 1972. All of this is happening at a time when public opinion polls still show strong support for government regulation to protect clean water.²⁷

This Article focuses primarily on the evolution of the Supreme Court's statutory interpretation of the Clean Water Act over the half century since its enactment, although it also explores the congressional and agency response to the Court's shifting interpretation. The Article was inspired by the work done by Professor Driesen and his associates to explore the Court's treatment of the Clean Air Act²⁸ and by Professor Richard Lazarus's thorough reevaluation of the Court's decisions interpreting the National Environmental Policy Act (NEPA).²⁹ Part II of the Article provides background on the Clean Water Act and its structure, the regulatory regime that preceded the law, the successes of the law, and the obstacles to further progress under the law. Part III briefly shifts focus to outline the findings of Professor Driesen and Professor Lazarus in their studies of the Supreme Court's review of the Clean Air Act and NEPA, respectively. Part IV outlines the methodology used to identify and analyze the Supreme Court Clean Water Act decisions that are the subject of the Article. Part V discusses the similarities between the findings of this study and the findings of Professor Driesen and his associates. Specifically, it discusses the Court's shift to textualism and de-emphasis of the Act's purposes in § 101(a) and the shift from unanimous decisions to a fractured and ideologically ordered Court. It also discusses the rise of federalism and states' rights in the Court's opinions during the Rehnquist era. Part VI of the Article describes the similarities between the findings of this examination of the Clean Water Act decisions and the more general conclusions that other academics have reached regarding the Supreme Court's views toward environmental law. Part VII turns from an examination of the Court's decisions to an examination of the change in the congressional response to the Court's decisions. Part VIII then discusses the shift in federal administration of the Clean Water Act, the changing nature of the actions being challenged in the Supreme Court under the law, the change in the government's success rate over time, and the impact of *Chevron* on the Court's interpretation of the Act. Part IX provides some concluding thoughts on the changes in the Court, Congress, and agencies.

26. See *infra* Part VIII.

27. See *infra* notes 275–79.

28. See Driesen et al., *supra* note 12.

29. Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507 (2012).

II. THE CLEAN WATER ACT

Federal water pollution legislation did not begin with the Clean Water Act, but the nature of water pollution control was significantly different before the Act. The Federal Water Pollution Control Act of 1948³⁰ was the first major federal water pollution control law, but it treated water pollution as a problem to be solved by the states and provided money and research support to the states to address the problem.³¹ It did not establish or require any federal goals, limits, or guidelines, but it required states to create plans to address water pollution.³² Congress imposed additional responsibilities on states in the Water Quality Act of 1965, which required states to establish ambient water quality standards for all interstate waters.³³ Despite those early efforts, there was a widespread belief that the federal laissez-faire model was not working, as bacteria levels in the Hudson River were almost two hundred times higher than safe levels and the Cuyahoga River caught fire for the thirteenth time.³⁴ State and local governments were not adequately enforcing water pollution limits, and it was very difficult to identify polluters that were responsible for the pollution that led to violations of water quality standards.³⁵ In addition, state programs without federal regulation can never adequately protect water quality: water pollution crosses state lines, and states cannot regu-

30. Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251–1388).

31. See CLAUDIA COPELAND, CONG. RSCH. SERV., RL30030, CLEAN WATER ACT: A SUMMARY OF THE LAW 2 (2016). This was the typical federal response to environmental problems before the advent of the major environmental laws in the 1970s. See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 381 (2005); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1147–60 (1995).

32. See COPELAND, *supra* note 31, at 2–3; Percival, *supra* note 31, at 1155.

33. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903.

34. See Drew Caputo, *A Job Half Finished: The Clean Water Act After 25 Years*, 27 ENV'T L. REP. 10574, 10576–78 (1997) (describing the pollution in the Hudson and Cuyahoga Rivers and noting that the legislative history for the 1972 Clean Water Act characterized the existing water pollution control programs as inadequate in every vital aspect); Keiser & Shapiro, *supra* note 1, at 1; see also Jon Devine, *Clean Water Act at 45: Despite Success, It's Under Attack*, NAT. RES. DEF. COUNCIL (Oct. 18, 2017), <https://www.nrdc.org/experts/jon-devine/clean-water-act-45-despite-success-its-under-attack> [https://perma.cc/3MBC-AF6E] (describing 26 million fish killed by pollution in a Florida lake, pollution discharges in the Detroit River that increased mercury levels to six times the limit set by the Public Health Service, and projections that Lake Erie would become biologically dead due to municipal waste discharges and agricultural runoff); Adler, *supra* note 31, at 382. Some commentators argue, however, that some water pollution levels were declining faster before the Clean Water Act was adopted than the rate at which they declined after it was adopted. See, e.g., Keiser & Shapiro, *supra* note 1, at 21; Adler, *supra* note 31, at 465–66.

35. See COPELAND, *supra* note 31, at 2; Caputo, *supra* note 34, at 10578–79. Representative Harold Gross discussed concerns regarding the lax nature of state pollution control prior to the enactment of the Clean Water Act when, during the House debate on the bill that became the Clean Water Act, he noted that “[t]hrough the years the States and the local subdivisions of government, including the municipalities, failed to enforce laws and ordinances in the matter of pollution and especially the polluting of streams.” 118 CONG. REC. 10,203 (1972) (statement of Rep. Harold Gross), *reprinted in* COMM. ON PUB. WORKS, 93D CONG., 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 349 (1973) [hereinafter 1972 LEGISLATIVE HISTORY].

late outside of their jurisdiction to prevent pollution that originates upstream.³⁶ As a result, Congress adopted a new model in the Federal Water Pollution Control Act Amendments of 1972.³⁷ The Clean Water Act replaced the failed model of enforcement of ambient water quality standards through a patchwork of state laws with a comprehensive federal regulatory program.³⁸

The Clean Water Act was enacted with widespread public support³⁹ and overwhelming bipartisan congressional support.⁴⁰ The primary purpose of the law, outlined in § 101(a), is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁴¹ The law set an ambitious goal of eliminating all discharges of pollution into navigable waters by 1985⁴² and an interim goal of making all waters safe for fishing and swimming by 1983.⁴³ Congress adopted a “technology-forcing” approach⁴⁴ in the statute and required the EPA to establish technology-based standards to limit the amount of pollution that could be discharged into the nation’s waters.⁴⁵ The law requires all persons who discharge pollution into regulated waters to obtain a permit that limits the pollution levels to those established by the EPA’s technology-based standards.⁴⁶ The law also allows the permit issuer to establish more stringent limits on the discharger beyond the technology-based limits if it is necessary to ensure that the water into which the pollution is discharged does not violate state water quality standards.⁴⁷ While permits are issued to most industrial dischargers under § 402 of the law, permits for discharges of dredged or fill material are issued by the Corps under § 404 of the law.⁴⁸

Although the technology-based approach is more stringent than the approach taken by states prior to the enactment of the law, and the cost of compliance with the law was the predominant factor that led President Nixon to veto the law initially,⁴⁹ the Clean Water Act frequently autho-

36. The Supreme Court recognized the important role that the federal government plays in regulating water bodies that affect multiple States when it wrote, in *International Paper Co. v. Ouellette*, “While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States).” 479 U.S. 481, 490 (1987).

37. See COPELAND, *supra* note 31, at 2.

38. See *id.*; Adler, *supra* note 31, at 382–83.

39. See Caputo, *supra* note 34, at 10575.

40. See *id.* at 10574. The bill passed unanimously in the Senate and passed in the House with only eleven dissenters. *Id.* (citing 1972 LEGISLATIVE HISTORY, *supra* note 35, at 222–23). Although President Nixon vetoed the bill, the House and Senate quickly overturned the President’s veto by comfortable margins. See *id.* (citing 1972 LEGISLATIVE HISTORY, *supra* note 35, at 109–13, 135–36).

41. Clean Water Act § 101(a), 33 U.S.C. § 1251(a).

42. *Id.* § 1251(a)(1).

43. *Id.* § 1251(a)(2).

44. COPELAND, *supra* note 31, at 2; see Caputo, *supra* note 34, at 10578–79.

45. See 33 U.S.C. § 1311(b).

46. See *id.* § 1311(a).

47. See *id.* § 1311(b)(1)(C).

48. See *id.* § 1344(a), (d).

49. See Caputo, *supra* note 34, at 10575.

rizes the EPA to consider cost in setting the technology-based limits or issuing permits.⁵⁰ Many of the Supreme Court's Clean Water Act opinions have struggled with the role that cost plays in various provisions of the law.⁵¹

Like most federal environmental laws, the Clean Water Act adopts a cooperative federalism model.⁵² Section 101(b) of the law outlines congressional policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources."⁵³ If states adopt laws and regulations that meet federal standards, states can take over primary administration and enforcement of the Clean Water Act permitting programs, though the federal government retains authority to review the permits issued by states and bring enforcement actions in those states.⁵⁴ Even if states do not take over the federal permitting programs, § 401 of the law authorizes states to impose conditions on federal permits to ensure that discharges meet water quality standards and other state requirements.⁵⁵ In addition to playing a role in permitting, states also receive funding under the Clean Water Act to facilitate a wide variety of water pollution planning and control programs.⁵⁶ Finally, § 510 of the Clean Water Act provides that states can adopt their own water quality protection laws and rules that are as stringent or more stringent than the federal law.⁵⁷ This floor preemption model is typical of most federal environmental laws.⁵⁸

Congress made modifications to the Clean Water Act in 1977⁵⁹ and 1987⁶⁰ to address toxic water pollutants and non-point source pollution⁶¹

50. *See, e.g.*, 33 U.S.C. § 1311(c) (variances from best available technology requirements available based on economic hardship); *id.* § 1314(b)(1)(B) (authorizing EPA to consider cost in setting effluent limits based on best practicable technology); *id.* § 1314(b)(4)(B) (authorizing EPA to consider cost in setting effluent limits based on best conventional technology).

51. *See, e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009); *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 85 (1980) (EPA not required to provide variances from best practicable technology effluent limits based on economic inability to comply).

52. *See* COPELAND, *supra* note 31, at 4, 7; Adler, *supra* note 31, at 384–85.

53. Clean Water Act § 101(b), 33 U.S.C. § 1251(b).

54. *See id.* §§ 1342(b), 1344(g)(1); *see also* COPELAND, *supra* note 31, at 7. Forty-six states have been delegated authority to administer the Clean Water Act § 402 permit program. COPELAND, *supra* note 31, at 4. Only two states have assumed authority to issue § 404 dredge and fill permits. *Id.* at 6.

55. 33 U.S.C. § 1341(a)(2).

56. *See, e.g., id.* § 1255(a)(1) (grants to states, municipalities or interstate agencies for water pollution demonstration projects); *id.* § 1255(b) (grants to states or interstate agencies for water pollution demonstration projects in river basins); *id.* § 1258(a) (grants to states for water pollution programs in the Great Lakes).

57. *Id.* § 1370.

58. *See, e.g.*, Resource Conservation and Recovery Act, 42 U.S.C. § 6929; Clean Air Act, 42 U.S.C. § 7604.

59. *See* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.).

60. *See* Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (codified as amended in scattered sections of 33 U.S.C.).

61. *See, e.g.*, 33 U.S.C. §§ 1317, 1329.

but did not make any other significant changes to the law in the subsequent thirty-three years.⁶² Although the law has not yet achieved its ambitious goals in the near fifty years since its enactment, most commentators agree that it has prompted significant reductions in pollution from point sources and reduced the levels of many types of pollutants in the nation's waters.⁶³ The point source program has prevented more than 700 billion pounds of toxic pollutant discharges;⁶⁴ slowed the pace of wetland destruction in many areas;⁶⁵ greatly reduced the levels of biochemical oxygen demand (BOD),⁶⁶ fecal coliform,⁶⁷ total suspended solids,⁶⁸ and lead and mercury in the nation's waters;⁶⁹ and increased the percentage of waters that are fishable and swimmable by 12%.⁷⁰

Although the Act has prompted significant reduction in pollution from point sources, the law has done little to slow pollution from non-point sources or to improve compliance with water quality standards.⁷¹ Both of those areas have been left largely to state regulation under the Clean Water Act. Recent studies show more than half of all waters do not meet water quality standards, including more than two-thirds of the nation's lakes and reservoirs.⁷² More than 35% of the nation's lakes and streams have excess nutrient levels,⁷³ and 46% of the nation's rivers and streams were in poor condition.⁷⁴ Most state water quality standards fail to include provisions to protect the biological or physical integrity of the state's waters.⁷⁵ The country is still not close to meeting the 1983 interim

62. See COPELAND, *supra* note 31, at 1. Although authorizations for appropriations for the law ended in 1990, Congress has continued to appropriate funds to administer the law for the following three decades. *Id.*

63. See Caputo, *supra* note 34, at 10576.

64. See Devine, *supra* note 34.

65. See *id.*

66. See Keiser & Shapiro, *supra* note 1, at 21 (finding a decline of 1%–2% per year in BOD levels between 1972 and 2001); see also ANDREW STODDARD, JON B. HARCUM, JONATHAN T. SIMPSON, JAMES R. PAGENKOPF & ROBERT K. BASTIAN, MUNICIPAL WASTEWATER TREATMENT: EVALUATING IMPROVEMENTS IN NATIONAL WATER QUALITY 61 (2002) (noting that an EPA study found a 23% decline in the amount of BOD discharges from industrial point sources between 1968 and 1996).

67. See Keiser & Shapiro, *supra* note 1, at 21 (finding a decline of 2.5% per year in fecal coliform levels between 1972 and 2001).

68. See *id.*

69. See *id.* at 22.

70. See *id.* at 21. However, for most pollutants, Keiser & Shapiro did not find significant reductions after 1990. *Id.* at 20–21.

71. See Caputo, *supra* note 34, at 10575, 10577–78; see also THE JOHNSON FOUND. AT WINGSPREAD, CONFERENCE REPORT: CONSIDERING THE CLEAN WATER ACT 10 (2009), https://www.johnsonfdn.org/sites/default/files/Clean_Water_Act_3.02.10.web_.pdf [<https://perma.cc/7CX2-H7JF>]. Non-point source pollution is a primary reason why many waters do not meet state water-quality standards. See Caputo, *supra* note 34, at 10577–78.

72. See THE JOHNSON FOUND. AT WINGSPREAD, *supra* note 71, at 8 (noting that 66% of lakes and 64% of bays and estuaries do not meet water quality standards); Devine, *supra* note 34 (finding that 52.7% of rivers and streams and 70.5% of lakes, reservoirs, and ponds do not meet water quality standards).

73. See Devine, *supra* note 34 (excess nutrient levels in 40% of rivers and streams).

74. See *id.*

75. See THE JOHNSON FOUND. AT WINGSPREAD, *supra* note 71, at 12.

goal that all waters should be fishable and swimmable,⁷⁶ and the rate of wetland loss in the United States increased between 2004 and 2009.⁷⁷ In response to these failures, some critics argue that stronger federal authority is needed to address the remaining problems.⁷⁸ Supreme Court decisions narrowing federal jurisdiction over waters under the Clean Water Act have contributed to the nation's water quality problems as well.⁷⁹

III. THE CLEAN AIR ACT AND NEPA IN THE SUPREME COURT

While the Clean Water Act has been the most heavily litigated environmental statute before the Supreme Court, the Court has also heard dozens of cases involving the Clean Air Act and NEPA, and academic analyses of the Court's treatment of those statutes inspired the study that forms the basis for this Article.

A. FIFTY YEARS OF SUPREME COURT CLEAN AIR ACT JURISPRUDENCE

In a 2018 law review article, Professors David Driesen, Thomas Keck, and Brandon Metroka examined the twenty opinions that the Supreme Court had issued that involved the Clean Air Act over fifty years.⁸⁰ They were interested in exploring whether and how the Court's approach to statutory interpretation had changed over the years,⁸¹ whether the Court adapted its approach to interpret the Clean Air Act dynamically,⁸² and whether the various methods of statutory interpretation facilitated or impeded ideological decision-making by the Justices.⁸³ They were also interested in exploring whether and how the Court adapted its decision-making to changes in political views or elite opinion.⁸⁴

At the outset of the article, they noted that many scholars have argued that the predominant method of statutory interpretation on the Supreme Court has shifted from purposivism, which was popular through the late

76. *See id.* at 8.

77. *See* Devine, *supra* note 34 (citing T.E. DAHL, U.S. FISH & WILDLIFE SERV., STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES 2004 TO 2009 16 (2011)).

78. *See* Caputo, *supra* note 34, at 10581; THE JOHNSON FOUND. AT WINGSPREAD, *supra* note 71, at 14 (discussing the need for a strong federal role, as well as a better framework with defined roles for federal, state and local regulators and improved coordination among those entities); WILLIAM L. ANDREEN & SHANA CAMPBELL JONES, CTR. FOR PROGRESSIVE REFORM, THE CLEAN WATER ACT: A BLUEPRINT FOR REFORM 30 (2008), http://www.progressivereform.net/articles/CW_Blueprint_802.pdf [<https://perma.cc/HP2V-XB5V>].

79. *See* THE JOHNSON FOUND. AT WINGSPREAD, *supra* note 71, at 5, 12.

80. *See* Driesen et al., *supra* note 12, at 1785–86.

81. *Id.* at 1785.

82. *Id.* at 1784–87.

83. *Id.* at 1784–85.

84. *Id.* at 1786–88.

twentieth century, to textualism.⁸⁵ In traditional purposivism, judges will interpret a statute to achieve the purposes for which Congress enacted the statute, even though that interpretation might not coincide with the most natural reading of the plain meaning of the text used in the statute.⁸⁶ Although purposivism in its most extreme form would counsel interpretation of a statute against its plain meaning, most judges that adopted a purposivist approach to statutory interpretation relied on the purpose to interpret a statute only when the language used by Congress was ambiguous.⁸⁷ Textualism, on the other hand, is a method of statutory interpretation that focuses primarily on the plain meaning of the text in a statute.⁸⁸ In its most extreme form, textualism eschews examination of legislative history or any other extrinsic sources of interpretation.⁸⁹ In its more moderate form, textualist judges will examine the structure of the statute and similar statutes, the context of language, and similar extrinsic sources to determine the meaning of otherwise ambiguous language.⁹⁰ Some commentators have suggested that the Roberts Court may be slowly moving back toward purposivism.⁹¹ In light of the prevailing views regarding the shifting nature of statutory interpretation on the Supreme Court, Professor Driesen and his coauthors wanted to explore whether the Court had adopted a shift from purposivism to textualism in its Clean Air Act jurisprudence as well.⁹²

85. *Id.* at 1785, 1787 (citing John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7 (2001)); see also David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97, 115–17 (2013); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 15 (2006); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 183 (2001); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 366 (1994); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 34 (1994).

86. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892); Driesen et al., *supra* note 12, at 1799–1800 (citing 3 NORMAN J. SINGER & J.D. SHAMBLE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 58:6 (7th ed. 2008)); Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 961 (2005); Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003–04 Term*, 42 HOUS. L. REV. 565, 574 (2005); Note, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1229 (2017).

87. See Lin, *supra* note 86, at 574; Craig, *supra* note 86, at 973–74. The extreme form of purposivism is rarely employed, and *Holy Trinity* has not been cited by the Supreme Court in decades. See Note, *supra* note 86, at 1228; John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1312–13 (2010). The more recent version of purposivism is based on Professors Henry Hart and Albert Sacks's legal process theory. See Note, *supra* note 86, at 1228.

88. See Craig, *supra* note 86, at 972; Note, *supra* note 86, at 1228; Molot, *supra* note 85, at 2–3; Lin, *supra* note 86, at 572–73.

89. See Lin, *supra* note 86, at 575–76; Craig, *supra* note 86, at 962; Note, *supra* note 86, at 1228.

90. See Driesen et al., *supra* note 12, at 1801; Manning, *supra* note 85, at 17; Note, *supra* note 86, at 1228; Merrill, *supra* note 85, at 352.

91. See Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1278–79 (2020); Note, *supra* note 86, at 1228.

92. See Driesen et al., *supra* note 12, at 1785–87.

Driesen and his associates were particularly interested in exploring whether there had been a shift in the Court's method of statutory interpretation because the issue was closely related to their examination of the role of ideology and activism in the Court's resolution of the Clean Air Act cases. Some have criticized purposivism on the ground that it gives judges too much power to identify the purpose of a statute in a way that aligns with their ideological view of the appropriate interpretation of the statute.⁹³ Textualists, including Justice Scalia, argue that textualism constrains the ability of judges to adopt interpretations of statutes based on their ideological views since they are limited to reading the statute according to the plain meaning of the text.⁹⁴ Critics of textualism counter that judges can use the canons of statutory interpretation equally adeptly in textualism to interpret statutes in a manner that aligns with their ideology.⁹⁵

In addition to exploring whether Justices used statutory interpretation methods to adopt ideological interpretations of the Clean Air Act, Professor Driesen and his coauthors were interested in examining whether the Court interpreted the law dynamically to adapt to changing views. They noted that the Clean Air Act "reflects a rights-based view of environmental law that enjoyed broad bipartisan and public support for at least twenty years. . . . [But] this view has become less popular among both elites and politicians."⁹⁶ The goal of the Clean Air Act is "to protect public health and the environment, rather than to achieve a balance between environmental protection and competing considerations," such as cost.⁹⁷ Over time, though, political and elite opinions shifted to embrace cost-benefit analysis in environmental policymaking.⁹⁸ Accordingly,

93. See *id.* at 1800–01; W. Matt Morgan, *What Did They Mean?: How Principles of Group Communication Can Inform Original Meaning Jurisprudence and Address the Problem of Collective Intent*, 23 WM. & MARY BILL RTS. J. 1215, 1224 (2015); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1176 (2011); Craig, *supra* note 86, at 962; Lin, *supra* note 86, at 574–76 (discussing the criticism of the use of legislative history to identify statutory purpose); Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117, 131 (1995); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 250–51 (1992). However, others argue that the failure to consider a statute's purpose when interpreting it can lead to judicial activism. See, e.g., Matthew B. Todd, *Avoiding Judicial In-Activism: The Use of Legislative History to Determine Legislative Intent in Statutory Interpretation*, 46 WASHBURN L.J. 189, 189 (2006).

94. See Driesen et al., *supra* note 12, at 1800–01; Lin, *supra* note 86, at 575–76, 580; ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23 (1997).

95. See Craig, *supra* note 86, at 972; Lin, *supra* note 86, at 580–81, 601–02; Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 649 (1992); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1331 (1990).

96. Driesen et al., *supra* note 12, at 1799.

97. *Id.* at 1788.

98. See *id.* at 1792–95. The law and economics movement strongly influenced environmental policy-makers in the 1980s and later. *Id.* at 1792–93. Political opinion eventually shifted toward cost-benefit analysis as well. *Id.* at 1794–95.

Driesen and his colleagues were interested in exploring whether the Court interpreted the law dynamically to adapt to those changing political and elite views regarding cost-benefit analysis⁹⁹ and climate change.¹⁰⁰

Based on their review of the twenty Supreme Court Clean Air Act cases, Professor Driesen and his colleagues noted an evolution in the Court's interpretation of the law along many dimensions progressing from the Burger Court to the Rehnquist and Roberts Courts. In the 1970s, during the era of the Burger Court, Driesen and his colleagues found that the Court

tended to follow statutory purpose and text and usually issued unanimous or nearly unanimous opinions The Court also freely relied upon structure and legislative history. . . . And the Court only acted contrary to statutory purpose where specific text or a constitutional value pushed in that direction. . . .

. . . Purposivism seems to have led the Court to decisions that often followed the [Clean Air Act]'s philosophy.¹⁰¹

They noted that the Court focused on the technology-forcing nature of the statute and its goals as well as congressional silence regarding the consideration of costs.¹⁰² They also noted that "in most of the cases considered during that period, the Court granted certiorari in order to resolve conflicts among the circuits."¹⁰³

In the 1980s as the Burger Court gave way to the Rehnquist Court, Driesen and his colleagues found that the Court moved away from purposivism as a method of statutory interpretation.¹⁰⁴ However, instead of moving toward textualism, they found that the Court's Clean Air Act decisions in the 1980s "evinced a judicial pursuit of policy goals that are unmoored from statutory text and purpose. Indeed, almost all of them form[ed] . . . a judicially crafted common law on attorneys' fees."¹⁰⁵ Many of the decisions stood in tension with the policies of the statute.¹⁰⁶ Driesen and his colleagues also found that the Court's decisions were no longer unanimous or nearly unanimous.¹⁰⁷ Instead, they found that the Court's decisions often tracked ideological lines.¹⁰⁸

Driesen and his colleagues used Martin–Quinn scores, a measure of judicial ideology widely used by political scientists, to categorize the opin-

99. *Id.* at 1799.

100. *Id.* at 1797–98. While political and elite opinion support cost–benefit analysis, Driesen notes that "political opinion has recently departed markedly from educated elite opinion, which tends to favor some action on global climate disruption." *Id.* at 1798.

101. *Id.* at 1807, 1810 (footnotes omitted)

102. *See id.* at 1803–04.

103. *Id.* at 1802.

104. *See id.* at 1810.

105. *Id.* (footnote omitted).

106. *Id.*

107. *See id.* at 1816.

108. *Id.*

ions in their study as ideologically ordered or ideologically disordered.¹⁰⁹ Martin–Quinn scores define a spectrum from conservative to liberal and locate Justices along the spectrum based on their voting history. Ordered opinions indicate that the Justices voted in a case as would be predicted by the ordering of their Martin–Quinn scores.¹¹⁰ Disordered opinions indicate that at least one Justice voted in a way that would not be predicted by the ordering of their Martin–Quinn scores.¹¹¹ Thus, an opinion will be disordered when, if the Justices are placed in a straight line from left to right, “at least one Justice jumped over one or more neighboring colleagues to join with colleagues further away in ideological space.”¹¹²

When Driesen and his colleagues examined the remaining Rehnquist Court decisions for the period from 1990 to 2004, they found that the Court, as predicted, shifted firmly to textualism.¹¹³ Despite the textualist supporters’ claims that textualism prevents activist judging, Driesen and his colleagues found that the decisions during this era continued the ideological divide that began in the 1980s.¹¹⁴

Finally, as Driesen and his colleagues reviewed the Roberts Court opinions for the period from 2005 to 2016, they concluded that the Court adopted a dynamic method of interpreting the Clean Air Act that was not always based on the text of the statute or its purpose but was usually based on ideology instead.¹¹⁵ In adapting the Clean Air Act to the problem of climate change, they found that the conservative textualist Justices abandoned text and that the Court’s rulings “divided mostly along ideological lines, except where a clear (albeit countertextual) precedent based on previous quasi-constitutional judicial policymaking brought them together.”¹¹⁶ In adapting the Clean Air Act to elite and political views favoring cost-benefit analysis, they found that the Court again interpreted

109. *See id.* at 1819. *See generally* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 *POL. ANALYSIS* 134 (2002) (describing the methodology for calculating and using Martin–Quinn scores). The scores are commonly used as a means for measuring voting disorder. *See* Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, *Measuring Deviations from Expected Voting Patterns on Collegial Courts*, 5 *J. EMPIRICAL LEGAL STUD.* 819, 829 (2008). However, the methodology has not escaped some criticism. *See* Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 *MO. L. REV.* 79, 120–23 (2010).

110. Driesen et al., *supra* note 12, at 1819.

111. *Id.*

112. *Id.* For the 2018 Supreme Court term, Justice Thomas had the most conservative Martin–Quinn score, 3.085, while Justice Alito had the next most conservative score, 1.739. *See* Andrew D. Martin & Kevin M. Quinn, *Martin–Quinn Scores: Measures*, U. MICH., D141, D487 <https://mqscores.lsa.umich.edu/measures.php> [<https://perma.cc/59TV-5JXR>] (select “2018 MQ Scores Data” from “Legacy Data Files” list). Thus, if eight Justices joined an opinion and Justice Alito was the sole dissenter, the opinion would be ideologically disordered because Justice Thomas, the most conservative Justice, joined with other more liberal Justices, while Justice Alito, in essence, jumped over Justice Thomas to dissent alone.

113. *See* Driesen et al., *supra* note 12, at 1819, 1824–25.

114. *See id.* at 1823.

115. *See id.* at 1842–43.

116. *Id.* at 1835.

the law dynamically to incorporate those principles—regardless of whether the interpretation was supported by the text or purpose of the statute—and that the Justices generally divided in the cases along ideological lines.¹¹⁷

B. A REVIEW OF THE SUPREME COURT'S NEPA JURISPRUDENCE

While Professors Driesen, Keck, and Metroka examined the Supreme Court's statutory interpretation methodology when they reviewed the Court's Clean Air Act jurisprudence, Professor Richard Lazarus took a different approach when he reviewed the Court's treatment of NEPA over the first forty years of the law's existence.¹¹⁸ Instead, he focused his analysis on the litigation strategies employed in the cases heard by the Court and the nuances of the opinions issued by the Court.¹¹⁹

At the time Lazarus conducted his review, academics had traditionally noted that the federal government had won each of the seventeen NEPA cases decided on the merits by the Court and that the Court had never granted a petition for review that was submitted by an environmental group.¹²⁰ Those trends led many academics to suggest that the Court was anti-environmental, or at least anti-NEPA.¹²¹

Lazarus's deeper review of the cases, however, uncovered a different reality. His analysis unearthed a Court that was neither anti-environment nor anti-NEPA. When he examined the environmental petitions that were denied by the Court, he concluded that the nature of the petitions made it unlikely that the Court would grant them in most cases for three reasons. First, NEPA cases generally apply in the context of case-by-case adjudication and usually do not raise broader national issues.¹²² Second, NEPA petitions from environmental groups generally appear insignificant to the Court because the environmentalists lost their challenge below; thus, the lower courts in those cases have not awarded extraordinary relief to stop activity of allegedly national importance.¹²³ Finally, when the petitions reach the Court, the federal agency's action has normally progressed to a stage where the NEPA procedures that were not followed likely would not affect the agency's action, even if the Court intervened and required the agency to follow the procedures.¹²⁴ Professor Lazarus also noted that the Court had not granted any petitions for review of NEPA cases submitted by business interests, except when the Solicitor General was also petitioning for review in the case on behalf of a federal

117. *See id.* at 1835–42.

118. Lazarus, *supra* note 29.

119. *See id.* at 1511.

120. *See id.* at 1510. At the time of the study, the Court had rejected 111 petitions from environmental challengers. *See id.* In most of the NEPA cases decided on the merits, the Court reached a unanimous decision in favor of the federal government. *See id.* at 1521.

121. *See id.* at 1511, 1523–24.

122. *See id.* at 1532.

123. *See id.* at 1533.

124. *See id.* at 1533–34.

agency.¹²⁵

When Professor Lazarus reviewed the decisions that the Court issued on the merits, he found that, in order to prevail, the Solicitor General abandoned arguments made in the lower courts in many cases; the government made important concessions on the requirements of NEPA in many cases; the Court's opinions were frequently narrow and tied to the facts of the case before it; and many of the opinions contained significant dicta favorable to environmentalists.¹²⁶ Based on his analysis, Lazarus concluded that "[t]here were many important environmental victories within [the NEPA] losses, which have since played a role in NEPA continuing to serve as one of the nation's most important environmental statutes."¹²⁷

Focusing on individual Justices, Lazarus noted that while environmentalism was perhaps Justice Douglas's greatest passion, he was not an effective advocate on the Court for environmental issues.¹²⁸ Justice Marshall, on the other hand, was fairly influential in environmental cases and wrote opinions for the Court in a significant number of environmental cases, even though he was not generally viewed as particularly interested in environmental issues.¹²⁹

IV. METHODOLOGY FOR THIS ARTICLE

While this Article was inspired by analyses of the Supreme Court's Clean Air Act and NEPA decisions, the methodology utilized for this Article aligns more closely with that of Professor Driesen and his colleagues than that of Professor Lazarus. As the data set for this study, I chose to focus on all of the Supreme Court decisions that involved statutory interpretation of the Clean Water Act since the law's enactment in 1972.¹³⁰ During that period, the Court issued opinions in thirty cases, with its most recent opinion being issued in the 2019 term.¹³¹ The Burger Court, which spanned the first fourteen years of the study period, issued thirteen of the opinions.¹³² The Rehnquist Court issued the fewest number of Clean

125. *See id.* at 1526.

126. *See id.* at 1512–13, 1534–36.

127. *Id.* at 1585.

128. *See id.* at 1571–72. Lazarus noted that Justice Douglas was a loner on the Court rather than a consensus-builder and that his personality repelled other Justices. *See id.* at 1572. Lazarus wrote "his single-minded desire to further a particular public policy was wholly transparent and likely undermined any possible credibility he might otherwise have had on such matters based on his clear expertise." *Id.*

129. *See id.* at 1573.

130. The data set excluded Supreme Court Clean Water Act cases where the Court did not address statutory interpretation questions. *See, e.g.,* Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 173–74 (2000) (addressing standing and mootness); Tull v. United States, 481 U.S. 412, 427 (1987) (addressing right to a jury trial).

131. *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020).

132. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116 (1985); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980); *Costle v. Pac. Legal Found.*, 445 U.S. 198 (1980); *Crown*

Water Act opinions, handing down seven over the nineteen years of the Court.¹³³ Finally, the remaining ten opinions were issued during the fifteen years of the study period that coincide with the Roberts Court era.¹³⁴

I was interested in comparing the Court's statutory interpretation methods in Clean Water Act cases to its statutory interpretation methods in Clean Air Act cases and in other cases more generally along many dimensions. Accordingly, each case was coded for twenty-seven different variables, including the statutory provision at issue; whether the challenged action involved a regulation or a decision made through adjudication; the identity of the petitioner; the identity of the original challenger and nature of the challenge; whether there was a circuit split below; the circuit from which the case arose; whether the lower court decision was affirmed or reversed; the voting alignment in the cases, including the author(s) of the majority, concurring, and dissenting opinions; whether the Court primarily considered legislative history, purpose, or text in its analysis; whether the Court used *Chevron* analysis to resolve the statutory interpretation question, and if so, whether the Court resolved the issue at Step One or Step Two; whether the Court adopted the position supported by the government; whether the decision was ideologically ordered; and whether the decision could be characterized as one supporting an environmental position.¹³⁵

V. THE DECLINE OF PURPOSIVISM AND § 101(A)

A review of the Supreme Court's Clean Water Act opinions from 1972 through April of 2020 revealed a pronounced shift in the Court's statutory interpretation from the Burger Court through the Rehnquist and

Simpson Pulp Co. v. Costle, 445 U.S. 193 (1980) (per curiam); E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977); EPA v. California *ex rel.* State Water Res. Control Bd., 426 U.S. 200 (1976); Train v. Colo. Pub. Int. Rsch. Grp., Inc., 426 U.S. 1 (1976); Train v. Campaign Clean Water, Inc., 420 U.S. 136 (1975) (per curiam); Train v. City of New York, 420 U.S. 35 (1975).

133. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001); PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700 (1994); U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992); Arkansas v. Oklahoma, 503 U.S. 91 (1992); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987); Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987).

134. *Cnty. of Maui*, 140 S. Ct. 1462; Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018); Decker v. Nw. Env't Def. Ctr., 568 U.S. 597 (2013); L.A. Cnty. Flood Control Dist. v. Nat. Res. Def. Council, Inc., 568 U.S. 78 (2013); Sackett v. EPA, 566 U.S. 120 (2012); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009); Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644 (2007); Rapanos v. United States, 547 U.S. 715 (2006) (plurality opinion); S.D. Warren Co. v. Me. Bd. of Env't Prot., 547 U.S. 370 (2006).

135. See Stephen M. Johnson, *Clean Water Act Statutory Interpretation Cases in the Supreme Court—1972 to 2020*, ENV'T L. TCHR. CLEARINGHOUSE, [hereinafter *CWA Spreadsheet*], <https://www.envirolawteachers.com/cwaspreadsheet.html> [https://perma.cc/DE25-WACY] (follow "Download the Excel Spreadsheet here" hyperlink).

Roberts Courts.¹³⁶ While the Court focused heavily on legislative history and the Clean Water Act's water quality protection purpose during the Burger Court, the Roberts Court rarely examined those sources when interpreting the law.¹³⁷ To the extent that the Court has discussed the purpose of the law over time, it is also significant to note that while the Burger Court frequently focused on the water quality protection goals of § 101(a), the Rehnquist and Roberts Courts have increasingly cited the protection-of-states'-rights policy of § 101(b) in lieu of, or in addition to, the water quality purposes of § 101(a).¹³⁸ As Professor Driesen found in the Clean Air Act context, in Clean Water Act cases, the Court has also moved from an era of unanimity to an era where the opinions are fractured and usually divided along clear ideological lines.¹³⁹ While Driesen found the Court engaging in dynamic statutory interpretation throughout the Roberts era when interpreting the Clean Air Act, the Court did not seem to adopt a similar approach when reviewing the Clean Water Act. There was, however, a clear shift in the Court's resolution of Clean Water Act cases during the Rehnquist era, when the Court began to focus much more directly on limiting federal power and protecting states' rights.¹⁴⁰ That trend continued through the Roberts Court. Finally, fewer and fewer of the Court's decisions over time can be considered to be "environmental" in the sense of protecting the environment.¹⁴¹

A. CONSIDERATION OF LEGISLATIVE HISTORY OR PURPOSE

Perhaps the most dramatic shift in the Court's statutory interpretation of the Clean Water Act over time is the shift away from consideration of the statute's purpose and legislative history and the embrace of textualism. The shift is most apparent with respect to consideration of legislative history. Although the Burger Court based many decisions primarily on the text of the Clean Water Act, the Court routinely cited the legislative history of the statute to support its interpretation of the law.¹⁴² The Burger Court cited legislative history in ten of the thirteen opinions that it handed down.¹⁴³ In fact, in *Train v. Colorado Public Interest Research*

136. The Chief Justices have been major players in the Court's statutory interpretation of the Clean Water Act since its enactment. Chief Justices Burger, Rehnquist, and Roberts have joined or written the majority opinions in every single Clean Water Act case that was decided while they served as Chief Justice. *Id.* Although there was no majority opinion in the *Rapanos* case, Justice Roberts joined the plurality opinion in that case. *Id.*

137. *See infra* Sections V.A, V.B.

138. *See infra* Section V.B.

139. *See infra* Section V.C.

140. *See infra* Section V.D.

141. *See infra* Section V.E.

142. *See CWA Spreadsheet, supra* note 135.

143. *Id.* One of the three cases where the Court did not cite legislative history was a per curiam opinion in *Train v. Campaign Clean Water, Inc.*, 420 U.S. 136 (1975). Although the Court did not cite any legislative history in that opinion, it was a companion case to *Train v. City of New York*, 420 U.S. 35, 36 (1975), a case in which the Court *did* cite legislative history, and the *Campaign Clean Water* Court held simply that the case was controlled by *Train v. City of New York*. *See Campaign Clean Water*, 420 U.S. at 138.

Group, Inc., the Court relied almost exclusively on the law's legislative history to overturn the Tenth Circuit's decision, which had concluded—based on a plain meaning analysis—that the term pollutant included radioactive materials, including those regulated under the Atomic Energy Act.¹⁴⁴ The Rehnquist Court continued the Burger Court's practice and cited the Clean Water Act's legislative history to support its statutory interpretation in five of the seven cases that it decided.¹⁴⁵ By contrast, the Roberts Court almost never discusses legislative history in its Clean Water Act opinions. Until the Court's 2020 decision in *County of Maui v. Hawaii Wildlife Fund*,¹⁴⁶ the Roberts Court had cited legislative history in only one of the nine Clean Water Act cases.¹⁴⁷ With the citation in *County of Maui*, the Roberts Court has now cited legislative history in 20% of its opinions—a far cry from the practice of the Burger and Rehnquist Courts, where legislative history was generally cited in more than 70% of the Clean Water Act cases.¹⁴⁸

Similarly, the Court has significantly reduced its consideration and discussion of the Clean Water Act's purposes when interpreting the statute over time. While the Burger Court relied heavily on the plain meaning of the terms in the Clean Water Act when interpreting the law, it also bolstered its statutory interpretation with citations of the law's purpose in nine of the thirteen opinions that it handed down.¹⁴⁹ The focus on the law's purposes began to decline during the era of the Rehnquist Court, when the Court focused on the purposes of the law in only four of the seven cases that it decided.¹⁵⁰ The decline has accelerated in the Roberts Court, which has discussed the purposes of the law to interpret the statute in only three of the ten cases it has decided.¹⁵¹ If there is—as some academics have suggested—a shift back to purposivism in the Roberts Court, it is not yet apparent in the Court's Clean Water Act decisions.¹⁵²

144. *Train v. Colo. Pub. Int. Rsch. Grp., Inc.*, 426 U.S. 1, 9–11, 23–25 (1976).

145. *See CWA Spreadsheet*, *supra* note 135.

146. *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020).

147. *See CWA Spreadsheet*, *supra* note 135.

148. *Id.*

149. *See id.* Although the Burger Court didn't discuss the purpose of the Clean Water Act in *Train v. Campaign Clean Water, Inc.*, 420 U.S. 136 (1975), the Court's per curiam opinion in that case held that the case was controlled by *Train v. City of New York*, 420 U.S. 35 (1975), a case which did discuss the purposes of the Clean Water Act. *See supra* note 143.

150. *See CWA Spreadsheet*, *supra* note 135. The Court also mentioned § 101(a) in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004), but the reference was included simply as boilerplate to describe the structure of the statute. The Court did not focus on the purpose of the statute in resolving the issue in the case.

151. The Court also mentioned § 101(a) in *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 602 (2013), and *National Ass'n of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 624 (2018), but the reference in each case was included simply as boilerplate to describe the structure of the statute. The Court did not focus on the purpose of the statute in resolving the issue in either case.

152. However, the Court's most recent decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468, 1473–76 (2020), has a strong purposivist tone that does not appear in any of the other Roberts Court Clean Water Act decisions, except perhaps in *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 383–84 (2006).

B. CHANGING NATURE OF THE FOCUS ON PURPOSE

While the Court's reduced focus on the purposes of the Clean Water Act in interpreting the statute is unfortunate, what is more troubling to supporters of the law's water quality purposes is that, in recent opinions, when the Court discusses the purposes of the law, it is much more likely to discuss § 101(b)'s policy to protect states' rights than it is to discuss the law's broad water quality protection purposes in § 101(a). Although the Court has cited § 101(a) in almost twice as many cases as it has § 101(b) over the past half century,¹⁵³ the Court has cited § 101(b) almost as frequently as it has cited § 101(a) since Justice Rehnquist assumed the mantle as Chief Justice in 1986.¹⁵⁴ Citations to § 101(b) were rare in the Burger Court. Other than a footnote in *Train v. Colorado Public Interest Research Group, Inc.*,¹⁵⁵ in every case in which the Burger Court discussed the purposes of the Clean Water Act, the Court focused on the water quality protection goals of § 101(a).¹⁵⁶

The Burger Court played an important role in the early development of the law, adopting interpretations of the law that advanced its technology-forcing, water quality protecting purposes. In *E. I. du Pont de Nemours & Co. v. Train*, the Court relied heavily on the purpose of the law to find that because Congress intended uniformity in the EPA's technology-based effluent limits, they should be adopted through rulemaking, as opposed to adjudication.¹⁵⁷ In *EPA v. National Crushed Stone Ass'n*, the Court rejected an argument that the agency should provide variances from technology-based effluent limits because the Court concluded that a variance would undercut the purpose of the law and the effluent limits.¹⁵⁸ The Court acknowledged that the decision would be costly for regulated entities, but wrote,

Because the 1977 limitations were intended to reduce the total pollution produced by an industry, requiring compliance with [best practi-

153. The Court has cited § 101(a) in thirteen cases. See *City of New York*, 420 U.S. at 45; *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976); *Costle v. Pac. Legal Found.*, 445 U.S. 198, 202 (1980); *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 69 (1980); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985); *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 105–06 (1992); *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994); *S. Fla. Water Mgmt. Dist.*, 541 U.S. at 102; *S.D. Warren Co.*, 547 U.S. at 385; *Decker*, 568 U.S. at 602; *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring); *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 624; *Cnty. of Maui*, 140 S. Ct. at 1468.

The Court has cited § 101(b) in seven cases. See *State Water Res. Control Bd.*, 426 U.S. at 206–08; *Train v. Colo. Pub. Int. Rsch. Grp., Inc.*, 426 U.S. 1, 9–11, 23–25 (1976); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166–67, 173 (2001); *Rapanos*, 547 U.S. at 722–23; *S.D. Warren Co.*, 547 U.S. at 386; *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 650 (2007); *Cnty. of Maui*, 140 S. Ct. at 1471.

154. The Court has cited § 101(b) in six cases since 1986 and has cited § 101(a) in eight cases. See cases cited *supra* note 153 that postdate 1986.

155. *Colo. Pub. Int. Rsch. Grp., Inc.*, 426 U.S. at 16 n.13.

156. See *CWA Spreadsheet*, *supra* note 135.

157. *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 130–32 (1977).

158. *Nat'l Crushed Stone Ass'n*, 449 U.S. at 69, 75–77.

cable technology] standards necessarily imposed additional costs on the segment of the industry with the least effective technology. If the statutory goal is to be achieved, these costs must be borne or the point source eliminated.¹⁵⁹

The Burger Court also relied heavily on the § 101(a) purposes of the Clean Water Act when it held in *United States v. Riverside Bayview Homes, Inc.* that the federal government could regulate wetlands that are adjacent to traditional navigable waters.¹⁶⁰ Adopting a classic purposivist approach, the Court wrote,

Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. . . . [T]ogether they . . . support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within the meaning of § 404(a). Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles, and it is essential that discharge of pollutants be controlled at the source."¹⁶¹

While the Burger Court rarely cited § 101(b) in its Clean Water Act opinions, the Rehnquist Court cited § 101(b) in almost as many cases as it cited § 101(a).¹⁶² In *International Paper Co. v. Ouellette*, the Court stressed the importance of state authority to regulate water pollution under the Clean Water Act when the Court concluded that the law did not preempt state common-law actions.¹⁶³ Similarly, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Court discussed the Clean Water Act's § 101(b) policy of protecting states' rights when it limited the federal government's jurisdiction over certain isolated waters, finding that it was necessary to read the statute narrowly to avoid infringing on traditional state responsibilities in planning and developing land and water uses.¹⁶⁴ That was the first time

159. *Id.* at 78.

160. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985).

161. *Id.* at 132–33 (fifth alteration in original) (citation omitted).

162. *See CWA Spreadsheet, supra* note 135. The Rehnquist Court cited § 101(b) in two cases and cited § 101(a) in three cases. *See id.* The only case in which the Rehnquist Court relied on § 101(a) in any significant way to support its reading of the Clean Water Act was *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 105–06 (1992). In that case, the Court upheld the EPA's decision to include discharge limits in a Clean Water Act permit to protect the water quality of downstream states, in part because the limits advanced the water-quality protection purposes of § 101(a). *See id.* at 104–06.

163. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490–91, 493–97 (1987).

164. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166–67, 173 (2001).

that the Court gave precedence to the policies of § 101(b) over the water quality protection purposes of § 101(a) when they conflicted.

The shift in the focus on the purposes of the law has been most apparent, however, in the Roberts Court. To the extent that the Roberts Court has focused on the water quality protection purposes of § 101(a) to interpret the Clean Water Act, it has done so only when the interpretation of the law also advances the policies of § 101(b), and the Court has routinely stressed the importance of both sections in interpreting the law.¹⁶⁵ In *S.D. Warren Co. v. Maine Board of Environmental Protection*, for instance, the Court held that § 401, requiring state certification for federal permits, applied to a license for a hydroelectric power project because it advanced the water quality protection purposes of the law *and* the policy of the law to protect states' rights to regulate water quality.¹⁶⁶ Similarly, when the Court in *County of Maui v. Hawaii Wildlife Fund* held that the Clean Water Act requires permits for discharges through groundwater into navigable waters that are “the functional equivalent of a direct discharge from the point source into navigable waters,” the Court adopted the test as a tool to accommodate the dual objectives of protecting water quality under § 101(a) and recognizing the role of states to regulate groundwater under § 101(b), since groundwater was not directly regulated under the Act.¹⁶⁷ In an additional case, *Rapanos v. United States*, a plurality of the Court narrowly interpreted “waters of the United States” under the Act in order to advance the policy of § 101(b), even though the narrowed interpretation would conflict with the water quality protection goals of § 101(a).¹⁶⁸

The Court's discussion of purpose in Clean Water Act cases has changed in another important way over the years. As Professor Driesen and his colleagues noted with respect to the Clean Air Act cases, when the Burger Court issued decisions that could be seen as departing from the water quality protection purposes of the Clean Water Act, the Court usually attempted to justify its decisions as based on clear-statement canons or as somehow being consistent with the purposes of the law.¹⁶⁹ For instance, when the Court held in *Costle v. Pacific Legal Foundation* that the EPA could limit the opportunity for public hearings on § 402 permits, the Court noted that Congress intended to provide for public participation and transparency in the permitting process; nonetheless, the Court

165. While the Court cited § 101(a) in two cases where it did not cite § 101(b), it cited § 101(a) in those cases only in boilerplate language describing the structure of the statute and did not focus on the purpose in interpreting the statute in those cases. *See supra* note 150.

166. *S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 385–86 (2006).

167. *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468–73 (2020).

168. *Rapanos v. United States*, 547 U.S. 715, 737 (2006) (plurality opinion). Addressing the reliance of Justice Kennedy's concurring opinion on § 101(a) as the basis for a “significant nexus” limit to jurisdiction over “waters of the United States” under the Clean Water Act, the plurality wrote, “clean water is not the only purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions.” *Id.* at 755–56 (emphasis omitted).

169. *See Driesen et al., supra* note 12, at 1843.

argued that “the regulations the EPA has promulgated to implement this congressional policy are fully consistent with the legislative purpose.”¹⁷⁰ Similarly, when the Court held in *Weinberger v. Romero-Barcelo* that courts are not required to enjoin pollution discharges that violate the Clean Water Act, the Court wrote,

Although the ultimate objective of the [Clean Water Act] is to eliminate all discharges of pollutants into the navigable waters by 1985, the statute sets forth a scheme of phased compliance. . . . This scheme of phased compliance further suggests that this is a statute in which Congress envisioned, rather than curtailed, the exercise of discretion.¹⁷¹

Likewise, when the Court held in *Chemical Manufacturers Ass’n v. Natural Resources Defense Council* that the EPA could issue variances from effluent limitations for toxic pollutants despite seemingly clear language in the statute that prohibited such variances, the Court wrote, “Neither are we convinced that [EPA-developed fundamentally different factor (FDF)] variances threaten to frustrate the goals and operation of the statutory scheme set up by Congress. . . . [The variances are], essentially, not an exception to the standard-setting process, but rather a more fine-tuned application of it.”¹⁷²

The Rehnquist Court’s opinions followed a similar pattern. When the Court held in *United States Department of Energy v. Ohio* that the federal government could not be forced to pay civil penalties under the Clean Water Act except to coerce compliance with a judicial order, the Court relied on clear-statement canons regarding sovereign immunity.¹⁷³ Similarly, when the Court limited the federal government’s jurisdiction over certain isolated waters in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Court relied on clear-statement canons regarding federalism and avoiding potentially unconstitutional interpretations of statutes.¹⁷⁴

When the Roberts Court interprets the Clean Water Act in ways that seem to conflict with the water quality purposes of the law, however, the Court no longer seems to feel any obligation to justify its readings of the statute as compelled by clear-statement canons or to explain its decisions as somehow consistent with the purposes of the law. Instead, the Court ignores the purposes of the law in its analyses or focuses on the § 101(b) policy of the statute as a more compelling goal, generating vigorous dissents from a cadre of Justices usually focusing on the water quality protection goals of § 101(a).¹⁷⁵

170. *Costle v. Pac. Legal Found.*, 445 U.S. 198, 216 (1980).

171. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 316 (1982).

172. *Chem. Mfrs. Ass’n v. Nat. Res. Def. Council*, 470 U.S. 116, 129–30 (1985).

173. *See U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992).

174. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 171–74 (2001).

175. *See, e.g., Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 301–02 (2009) (Ginsburg, J., dissenting, joined by Stevens & Souter, JJ.); *Entergy Corp. v.*

C. FROM CONSENSUS TO IDEOLOGY

The Supreme Court's resolution of Clean Water Act disputes parallels the Court's resolution of Clean Air Act disputes in another important way. In interpreting both statutes, the Court has moved from an era of consensus at the time of the laws' original enactments to an ideological divide in interpreting the laws today.

During the Burger era, eight of the thirteen Clean Water Act opinions (61%) were unanimous decisions, and eleven were joined by at least seven Justices.¹⁷⁶ That consensus dissolved quickly in the Rehnquist era, given that only one of the seven opinions issued by the Rehnquist Court was unanimous and almost half of the decisions (three out of seven) were issued with a five-Justice majority.¹⁷⁷ The Roberts Court has found consensus more frequently than the Rehnquist Court did—with the Roberts Court issuing four unanimous decision out of ten—but has been deeply divided in three of the six nonunanimous cases, with these three having been decided by either a plurality or a five-Justice majority.¹⁷⁸

More importantly, though, as consensus on the Court regarding Clean Water Act issues has eroded, there has been a marked increase in ideological decision-making by the Court. I followed the same approach as Professor Driesen and his colleagues, using Martin–Quinn scores to analyze the Court's opinions and classify them as ideologically ordered or disordered.¹⁷⁹ As Professor Driesen and his colleagues concluded, I found that the Court's movement away from a purposivist approach to a textualist approach in interpreting the Clean Water Act corresponded to an increase in ideological ordering of the Court's opinions.¹⁸⁰ To the extent that ideological ordering of opinions correlates with ideological decision-making or activist decision-making, this analysis suggests that textualism does not reduce the likelihood of activist or ideological decision-making by judges.

During the Burger Court era—in which the Court frequently examined and discussed the purposes of the Clean Water Act—there were eight unanimous opinions, and all of the five nonunanimous decisions were ideologically disordered.¹⁸¹ As the Rehnquist Court moved away from purposivism, or at least began to recast the central purpose of the Clean Water Act, the Court reached one unanimous decision, four ideologically

Riverkeeper, Inc., 556 U.S. 208, 245 (2009) (Stevens, J., dissenting, joined by Souter & Ginsburg, JJ.); Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 673–95 (2007) (Stevens, J., dissenting, joined by Souter, Ginsburg & Breyer, JJ.); Rapanos v. United States, 547 U.S. 715, 787 (2006) (Stevens, J., dissenting, joined by Souter, Ginsburg & Breyer, JJ.).

176. See *CWA Spreadsheet*, *supra* note 135.

177. See *id.*

178. See *id.* However, four of the Court's last five opinions have been unanimous or filed with only one dissent. See *id.*

179. See Driesen et al., *supra* note 12, at 1843.

180. See *infra* notes 181–84.

181. See *CWA Spreadsheet*, *supra* note 135.

ordered decisions, and only two ideologically disordered opinions.¹⁸² The shift to ideological decision-making has been the most pronounced, however, in the Roberts Court. Of the six decisions that were not unanimous, five were ideologically ordered.¹⁸³ Only one nonunanimous decision was ideologically disordered.¹⁸⁴

D. THE RISE OF STATES' RIGHTS

While Professor Driesen and his colleagues found that the Supreme Court has adopted a dynamic means of interpreting the Clean Air Act so as to respond to climate change and political and elite views favoring cost-benefit analysis,¹⁸⁵ such a shift is not apparent in the Court's Clean Water Act decisions. Instead, beginning with the Rehnquist Court, the Court's opinions evince a shift toward a focus on limiting federal power and protecting states' rights when interpreting the statute.¹⁸⁶ This is an approach that many academics have attributed to the Rehnquist Court in a wide variety of cases,¹⁸⁷ and it was very apparent in the Clean Water Act context.

During the Burger Court era, three of the first four cases involved interests of states,¹⁸⁸ but none of the other nine decisions by the Court involved any discussion of states' rights, including *Weinberger v. Romero-Barcelo*, which involved a lawsuit brought by the Governor of Puerto Rico and would have seemed to be a natural vehicle for some discussion about federalism.¹⁸⁹ Although limits on federal authority and protection of states' rights were not crucial issues in most of the Clean Water Act decisions by the Burger Court, they took center stage during the Rehnquist era. Five of the seven Clean Water Act cases decided by the Court centered on issues that had a strong impact on states' rights, and the Court's opinions in four of those five cases supported the rights of the states.¹⁹⁰ In those cases, the Rehnquist Court held that the Clean Water

182. *See id.*

183. *See id.* The divide was most conspicuous in the early years of the Roberts Court, with many 5–4 decisions pitting Justices Thomas, Alito, Scalia, Roberts, and Kennedy against Justices Breyer, Souter, Stevens, and Ginsburg.

184. *See id.* In *Decker v. Northwest Environmental Defense Center*, Justice Scalia filed a solitary dissent, moving past two more conservative Justices (Thomas and Alito) who joined the majority opinion. 568 U.S. 597, 616 (2013).

185. *See* Driesen et al., *supra* note 12, at 1843.

186. *See infra* notes 188–94 and accompanying text.

187. *See infra* notes 238–51 and accompanying text.

188. *See* *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 201 (1976) (addressing the authority of states to require federal facilities to obtain permits from states); *Train v. Campaign Clean Water, Inc.*, 420 U.S. 136, 137 (1975) (*per curiam*) (addressing allotment of grant funds to states and local governments for publicly owned waste treatment works); *Train v. City of New York*, 420 U.S. 35, 41 (1975) (same).

189. *See* *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 307 (1982).

190. *See* *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 723 (1994); *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 611 (1992); *Arkansas v. Oklahoma*, 503 U.S. 91, 94 (1992); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

Act (1) did not preempt state common-law actions,¹⁹¹ (2) authorized the EPA to include conditions in § 402 permits to protect the water quality of downstream states,¹⁹² (3) authorized states to include minimum stream flow requirements in federal permits through the § 401 certification process,¹⁹³ and (4) limited federal jurisdiction over waters that are primarily regulated by states.¹⁹⁴ The focus on states' rights continued in the Roberts Court, as the first three Clean Water Act cases decided by the Court involved states' interests, and in each case, the majority or plurality ruled in a way that favored the states' interests.¹⁹⁵ However, none of the remaining seven cases decided by the Roberts Court since then had involved any discussion of states' rights until the recent decision in *County of Maui v. Hawaii Wildlife Fund*, where the Court discussed states' authority to regulate groundwater under the Clean Water Act.¹⁹⁶ That decision largely preserved the states' authority, though it authorized federal regulation over some discharges into navigable waters that flow through groundwater.¹⁹⁷

E. DO THE COURT'S DECISIONS PROTECT THE ENVIRONMENT?

In the almost half century since Congress enacted the Clean Water Act, only about one-third of the Supreme Court opinions interpreting the law have adopted a reading of the statute that could be characterized as "pro-environment" in the sense that the opinion advances the water quality protection goals of the Clean Water Act or adopts a position advocated by environmental groups.¹⁹⁸ During the Burger era, when the Court first began interpreting the law, five of the thirteen decisions (about 40%) could be characterized as pro-environment.¹⁹⁹ There were several notable environmental victories during the Burger era, including decisions that prevented the EPA from limiting funding for sewage treatment plants,²⁰⁰ upheld the agency's authority to set technology-based standards by regulation (and to do so without providing variances for new sources),²⁰¹ upheld the EPA's decision not to authorize variances from best practicable

191. See *Int'l Paper Co.*, 479 U.S. at 497.

192. See *Arkansas*, 503 U.S. at 106–07.

193. See *PUD No. 1*, 511 U.S. at 723.

194. See *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 174.

195. See *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 649 (2007) (finding that the Endangered Species Act does not impose additional limits on delegation of § 402 programs to states); *Rapanos v. United States*, 547 U.S. 715, 737–38 (2006) (plurality opinion) (limiting federal jurisdiction over nonnavigable tributaries, in light of concerns regarding interference with states' rights); *S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 373 (2006) (finding that § 401 certification applies to federal license for hydroelectric power generation).

196. See *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1471–73 (2020).

197. *Id.*

198. See *CWA Spreadsheet*, *supra* note 135. Ten or eleven of the thirty opinions could be characterized as pro-environment. See *infra* notes 199–211.

199. See *CWA Spreadsheet*, *supra* note 135.

200. See *Train v. Campaign Clean Water, Inc.*, 420 U.S. 136, 137–38 (1975) (per curiam); *Train v. City of New York*, 420 U.S. 35, 38–39, 41 (1975).

201. See *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977).

technology standards based on economic factors,²⁰² and upheld the government's authority to regulate wetlands adjacent to traditional navigable waters.²⁰³

The winning percentage for the environment was highest during the Rehnquist era, in which three or four of the seven decisions could be characterized as pro-environment,²⁰⁴ including decisions finding that the law did not preempt state common-law remedies,²⁰⁵ that the EPA could include conditions in § 402 permits to protect the water quality of downstream states,²⁰⁶ that states could include minimum streamflow conditions in § 401 certifications for federal permits,²⁰⁷ and that permits could be required for pollution discharges that pass through a non-point source from a point source to navigable waters.²⁰⁸ Many of the Court's decisions that advanced states' rights coincidentally advanced the water quality protection goals of the Clean Water Act.

Although eight or nine of the twenty cases decided during the Burger and Rehnquist eras could be characterized as pro-environment, very few of the cases decided during the Roberts era meet that standard.²⁰⁹ Of the ten opinions issued by the Court, only the cases of *S.D. Warren Co. v. Maine Board of Environmental Protection* (finding that § 401 certification applies to federal hydroelectric power licensing)²¹⁰ and *County of Maui v. Hawaii Wildlife Fund* (finding that § 402 permits are required for activities that are the "functional equivalent" of a direct discharge to navigable waters from a point source)²¹¹ would qualify as pro-environment. The Roberts Court's 20% pro-environment record is the major reason why the Court's overall record hovers around 30%, whereas the record during the Burger and Rehnquist eras was closer to 40% or 50%.

As the Court's decisions have more consistently strayed away from pro-environmental outcomes, the rhetoric used by the Court has changed as well. In the early years of the Clean Water Act, the Burger Court's opinions rarely complained about unfair burdens imposed by the law on regulated entities. Instead, the Court's opinions frequently expressed support for the EPA's efforts to implement a massive regulatory statute with limited resources. For instance, when the Court in *Costle v. Pacific Legal Foundation* upheld the EPA's decision to limit opportunities for public hearings for § 402 permits, the Court wrote,

[E]ach year the EPA grants about 100 requests for adjudicatory hearings under the [National Pollutant Discharge Elimination Sys-

202. See *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 85 (1980).

203. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

204. See *CWA Spreadsheet*, *supra* note 135.

205. See *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

206. See *Arkansas v. Oklahoma*, 503 U.S. 91, 106–07 (1992).

207. *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 723 (1994).

208. See *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 104–05 (2004).

209. See *CWA Spreadsheet*, *supra* note 135.

210. *S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 373 (2006).

211. *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020).

tem (NPDES)] program, issues about 2,200 permits, and takes thousands of actions with respect to permits. Affirmance of the Court of Appeals' rationale obviously would raise serious questions about the EPA's ability to administer the NPDES program.²¹²

Similarly, when the Court in *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.* upheld the EPA's decision to grant variances from effluent limits for discharges of toxic chemicals, the Court wrote,

[T]he availability of FDF variances makes bearable the enormous burden faced by EPA in promulgating categories of sources and setting effluent limitations. Acting under stringent timetables, EPA must collect and analyze large amounts of technical information concerning complex industrial categories. Understandably, EPA may not be apprised of and will fail to consider unique factors applicable to atypical plants during the categorical rulemaking process, and it is thus important that EPA's nationally binding categorical pretreatment standards for indirect dischargers be tempered with the flexibility that the FDF variance mechanism offers, a mechanism repugnant to neither the goals nor the operation of the Act.²¹³

While the Burger Court frequently expressed sympathy for the EPA and upheld many agency actions that would impose costly requirements on regulated entities,²¹⁴ the Roberts Court has frequently criticized the federal government's imposition of regulatory burdens through environmental laws on businesses and individuals. Consider, for instance, the plurality's description of the § 404 permitting program in *Rapanos v. United States*:

The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.²¹⁵

Similarly, in *Entergy Corp. v. Riverkeeper*, the Court held that the EPA could consider costs in setting standards for cooling water intakes because the law certainly should not be interpreted "as to require the EPA to require industry petitioners to spend billions to save one more fish or

212. *Costle v. Pac. Legal Found.*, 445 U.S. 198, 215 (1980) (citations omitted).

213. *Chem. Mfrs. Ass'n v. Nat. Res. Def. Council*, 470 U.S. 116, 132–33 (1985) (footnotes omitted).

214. *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985) (requiring permits for discharges of dredged or fill material into wetlands adjacent to traditional navigable waters); *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 85 (1980) (EPA is not required to provide variances from effluent limits based on best practicable technology); *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138–39 (1977) (EPA not required to provide variances from effluent limits for new sources).

215. *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion).

plankton.”²¹⁶ In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, the Court held that slurry discharges required a permit under § 404 instead of § 402, in part because the Court was concerned about the difficulty for dischargers to determine whether the material would be “subject to one of the many hundreds of EPA performance standards.”²¹⁷ Finally, in *Sackett v. EPA*, the Court held that the EPA’s administrative orders could be reviewed in court because the Court wanted to avoid an interpretation that would authorize the agency to “strong arm[] . . . regulated parties into ‘voluntary compliance.’”²¹⁸ The Roberts Court opinions adopt an antiregulatory rhetorical tone noticeably absent in the early Supreme Court decisions interpreting the Clean Water Act.

VI. GENERAL OBSERVATIONS ABOUT THE SUPREME COURT’S TREATMENT OF ENVIRONMENTAL LAW

There is some disagreement among academics regarding the Supreme Court’s general attitude toward environmental law. Professor Daniel Farber, for instance, has argued that the Court has been largely irrelevant and ineffectual in shaping environmental law because the Court generally hears cases with quirky facts that do not raise issues of broad significance, avoids deciding cases on the merits, and—when it does decide cases on the merits—defers to agencies or resolves issues on narrow technical grounds.²¹⁹ Others have argued that the Court has been openly hostile to environmental law in its rulings²²⁰ or that its rulings are gradually eroding environmental law.²²¹ Professor Richard Lazarus does not believe that the Court has been hostile to environmental law; instead, he argues that the Court has been indifferent to the goals of environmental law and has not appreciated environmental law as a distinct area of law.²²² Nevertheless, he raises concerns that the Court’s indifference to those goals can lead to substantial losses in environmental quality and public health.²²³ Based on his review of 240 environmental law cases decided by the Supreme Court between 1969 and 1998, Lazarus warned that the voting records of the Justices indicated that the Court was becoming less responsive to environmental concerns over time.²²⁴ A few years later, Professor

216. *Entergy Corp. v. Riverkeeper*, 556 U.S. 208, 226 (2009).

217. *Coeur Alaska v. Se. Alaska Conservation Council*, 557 U.S. 261, 276–77 (2009).

218. *Sackett v. EPA*, 566 U.S. 120, 131 (2012).

219. See Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547, 548, 560–62 (1997).

220. See Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court’s Environmental Law Decisions*, 42 VAND. L. REV. 343, 421 (1989).

221. See Lin, *supra* note 86, at 568.

222. See Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 706 (2000).

223. *Id.* at 706–07.

224. *Id.* at 708, 735–36. In addition to scoring the Justices on their environmental voting records, Lazarus examined which Justices wrote the most majority opinions in environmental cases and which Justices joined the majority most frequently in environmental cases. During the study period, Justice White wrote the most opinions (thirty-six) by a large margin, but his opinions did not exhibit any environmental ethic. *Id.* at 709. In fact, Lazarus

Albert Lin warned that the Supreme Court was gradually eroding environmental law by employing textualism, various tools of statutory interpretation, and principles of federalism.²²⁵ A similar pattern is apparent from the review of the Court's Clean Water Act opinions through the current term, which increasingly fail to protect the environment or advance the law's water quality protection goals.²²⁶

Although academics disagree about the Supreme Court's overall attitude toward environmental law and its long-term effect on the development of environmental law, they do agree on many issues, and my findings regarding the Clean Water Act cases are consistent with many of their more general findings regarding environmental law. For instance, many academics have observed the central role that the Supreme Court and lower federal courts played in shaping environmental policy in the 1970s and 1980s by interpreting the federal environmental laws to promote their environmental protection purposes.²²⁷ The Burger Court was instrumental in the implementation of the Clean Water Act in its early years, reviewing almost as many challenges to the law in the first fourteen years after it was enacted as the Rehnquist and Roberts Courts reviewed in the subsequent twenty-four years.²²⁸

Despite the early aggressive review of the environmental laws, academics have noted that the Court's role in interpreting those laws to advance their purposes has waned over time. Professors Robert Glicksman and Christopher Schroeder suggest that several factors influenced the shift in the Court's attitude toward reviewing environmental laws in the 1980s and beyond.²²⁹ First, they argue that public choice theory replaced the legal process theory in the political landscape, so that the legislative process was viewed more skeptically after the 1980s, and courts were less likely to issue opinions that focused on implementing the purposes of legislation.²³⁰ Second, they argue that there was a shift in the attitude toward agencies in the 1980s from distrust based on agency capture to confidence

argues that his "opinions fail to suggest that the environmental dimension of the case played any independent role in the Court's decision or reasoning." *Id.* While Justice White wrote the most opinions in environmental cases during the study period, Justice Kennedy joined with the majority most frequently during the study period, voting with the majority in more than 96% of the cases. *Id.* at 713.

225. See Lin, *supra* note 86, at 571–72. Lin warned that the Court was, as forecast by Professor Farber, acting as an immune system toward environmental regulation, not eliminating it but subsuming it within the existing legal order and minimizing change beyond Congress's express mandates. See *id.* at 634 (citing Farber, *supra* note 219, at 563–68).

226. See *supra* Section V.E.

227. See Stephen M. Johnson, *The Brand X Effect: Declining Chevron Deference for EPA and Increased Success for Environmental Groups in the 21st Century*, 69 CASE W. RESV. L. REV. 65, 66–67 (2018); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ENV'T L. REP. 10637, 10637–38 (2005); Lazarus, *supra* note 222, at 704; Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 L. & CONTEMP. PROBS. 249, 256 (1991).

228. The Burger Court reviewed thirteen challenges, while the Rehnquist and Roberts Courts reviewed seventeen challenges combined. See *CWA Spreadsheet*, *supra* note 135.

229. See Glicksman & Schroeder, *supra* note 227, at 256–57.

230. *Id.*

in the expertise and accountability of agencies.²³¹ That shift was embodied in the Supreme Court's *Chevron* decision, which encouraged courts to defer to agency interpretations of statutes when the statutes are unclear.²³² Finally, they argue that the shine had worn off environmental values by the 1980s, so they were treated as coequal with other values, and there was no reason for courts to aggressively review EPA decisions to protect those values.²³³ Professor Robert Percival suggests another reason for the Court's disengagement from aggressive review of environmental statutes based on his review of the papers of Justice Blackmun.²³⁴ Percival notes that the historical papers reflected that the Justices were uncomfortable with the complicated nature of the complex environmental statutes²³⁵ and that the *Chevron* doctrine was "in part a product of the Justices' difficulty understanding the complexities of the [Clean Air Act]."²³⁶ Regardless of what caused the shift in the Court's review of environmental law generally, the shift was apparent in the review of the Clean Water Act cases, as the Court significantly reduced its focus on interpreting the law to carry out its water quality purposes since the Burger era.²³⁷

The Court's shift toward hearing more Clean Water Act cases involving states' rights and focusing more on the § 101(b) policy of the Clean Water Act during the Rehnquist era is also not surprising in light of the Court's history. The revival of federalism is often cited as a signature feature of the Rehnquist Court.²³⁸ From the time of the New Deal until the Rehnquist Court, the Supreme Court rarely sought to limit federal authority in favor of state authority, and the Court did not invalidate any federal law from 1936 until 1995 as exceeding Congress's enumerated powers.²³⁹ However, Justice Rehnquist was a strong advocate for limiting federal power and strengthening state power from the time he joined the Court in 1972,²⁴⁰ and he was joined in his crusade by a stable voting bloc shortly

231. *Id.* at 257, 286–88, 295.

232. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).

233. *See* Glicksman & Schroeder, *supra* note 227, at 257.

234. *See* Percival, *supra* note 227, at 10638.

235. *Id.* at 10644, 10663. According to Percival, "The Blackmun papers show a Court whose Justices often express bewilderment, or even contempt, for the new laws and the regulatory programs they spawn." *Id.* at 10663.

236. *Id.* at 10663.

237. *See supra* Section V.B.

238. *See* Mark Latham, *The Rehnquist Court and the Pollution Control Cases: Anti-Environmental and Pro-Business?*, 10 U. PA. J. CONST. L. 133, 135–36 (2007); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 907–08 (2006); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 2 (2004); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 76 (2001); Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 13–14 (2001); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 438 (2002).

239. *See* Latham, *supra* note 238, at 146–47; Adler, *supra* note 31, at 379; Percival, *supra* note 227, at 10646.

240. *See* Percival, *supra* note 227, at 10646. Justice Rehnquist's appointment corresponds to the time at which many of the major federal environmental laws were first enacted, and he had many opportunities to shape the development of those laws over his

after he took over as Chief Justice.²⁴¹

The Rehnquist Court reinvigorated federalism by issuing several decisions that imposed limits on federal authority under the Commerce Clause or the Spending Clause and limited preemption of state regulatory authority.²⁴² In addition, the Court deemphasized reliance on the *Chevron* doctrine and used other statutory interpretation tools, such as the canon to avoid interference with traditional state responsibilities, to limit federal authority in favor of states.²⁴³ Many of those cases were decided by a single vote, with the same 5–4 voting split in each case.²⁴⁴ As noted above, the Court used many of those approaches in the Clean Water Act context,²⁴⁵ although there was only one Clean Water Act case where the Court divided along its traditional lines.²⁴⁶

In light of the Rehnquist Court's philosophical shift, some commentators labeled the Court as anti-environment and pro-business, and were concerned that the Court could cripple federal environmental regulation.²⁴⁷ Others were more sanguine and argued that, although the Court's opinions created opportunities to significantly weaken environmental laws, the Court generally did not strike down major provisions of envi-

thirty-three years on the Court. See James R. May & Robert L. Glicksman, *Justice Rehnquist and the Dismantling of Environmental Law*, 36 ENV'T L. REP. 10585, 10585–86 (2006). He authored eighty-four opinions in environmental cases over his career, more than any other Justice. *Id.* at 10586.

241. Of particular importance in the shift on the Court was the replacement of Justice Marshall with Justice Thomas in 1992. See Percival, *supra* note 227, at 10637–38. From 1994 until 2005, there was no change in the membership of the Court, and Chief Justice Rehnquist was able to rely on his colleagues to hand down multiple decisions that reinvigorated federalism. *Id.* at 10650–51; see also Latham, *supra* note 238, at 144–47; Adler, *supra* note 31, at 379; Young, *supra* note 238, at 2–4 (discussing the decade long service of the members of the Court at the time and the limits on federal authority adopted by the majority voting bloc over that time). When the nine Justices of the Rehnquist Court served together for a decade, it was the longest time that any group of Justices had served together since the 1820s. See Young, *supra* note 238, at 5–6, 6 n.11 (citing Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 577 (2003)).

242. See Adler, *supra* note 31, at 379, 389–90; May & Glicksman, *supra* note 240, at 10586–87, 10615; Latham, *supra* note 238, at 144, 146–47.

243. See Adler, *supra* note 31, at 389; May & Glicksman, *supra* note 240, at 10586, 10590, 10593–96, 10600; Latham, *supra* note 238, at 144, 146–47.

244. Justices O'Connor, Scalia, Kennedy, and Thomas usually joined the Chief Justice in the majority, with Justices Stevens, Souter, Ginsburg, and Breyer dissenting. See Smith, *supra* note 238, at 914–15; Young, *supra* note 238, at 6.

245. See *supra* Section V.D.

246. See *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001). Although there were two other Clean Water Act cases that were decided with a majority of five Justices, neither involved the traditional 5–4 split with Justices Stevens, Souter, Ginsburg, and Breyer dissenting. See *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 52 (1987); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 483 (1987).

247. See Latham, *supra* note 238, at 133–34; May & Glicksman, *supra* note 240, at 10586–87, 10615; Jeffrey G. Miller, *The Supreme Court's Water Pollution Jurisprudence: Is the Court All Wet?*, 24 VA. ENV'T L.J. 125, 125 (2005); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENV'T L. REV. 1, 4 (2003); see also Adler, *supra* note 31, at 379–80, 403–05, 420–21.

ronmental laws or otherwise fundamentally dismantle the laws.²⁴⁸ This was true in the Clean Water Act context as well. Other than the *Solid Waste Agency of Northern Cook County* decision, which imposed significant limits on federal jurisdiction over the nation's waters,²⁴⁹ most of the Rehnquist Court's Clean Water Act decisions advanced the water quality protection goals of the law while empowering states.²⁵⁰ Although the Rehnquist Court heard the fewest Clean Water Act cases, its record for issuing decisions that favor the environment is better than that of the Burger or Roberts Courts.²⁵¹

VII. CONGRESS'S DIMINISHING ROLE IN OVERSEEING THE IMPLEMENTATION OF THE CLEAN WATER ACT

Coinciding with the Supreme Court's shift away from interpreting the Clean Water Act to advance its water quality purposes, Congress has greatly reduced its oversight of the implementation of the law, as well as most other environmental laws. In the 1970s, Congress not only adopted most of the major federal environmental laws with broad bipartisan support but also kept a close eye on judicial interpretation of the laws and routinely passed legislation to affirm or overrule court decisions.²⁵² In that way, Congress ensured that the laws would continue to be enforced to achieve their rights-based purposes.²⁵³

However, at least since the 1990s, Congress has disengaged from that practice. There have been no new major federal environmental laws and only one major amendment to federal environmental laws in three decades, and Congress has not enacted legislation to overturn or affirm judicial interpretations of the federal environmental laws in nearly as long.²⁵⁴ Professor Driesen and his colleagues made similar findings in their review of the Supreme Court's Clean Air Act decisions,²⁵⁵ and Professors Matthew Christiansen and William Eskridge found that Congress has rarely acted to overturn judicial interpretations of any statute—

248. See Latham, *supra* note 238, at 153–54, 165–66, 175–78; Adler, *supra* note 31, at 385–87.

249. See *Solid Waste Agency of N. Cook Cnty.*, 531 U.S. at 162.

250. See *supra* Section V.D.

251. See *supra* Section V.E.

252. See Zellmer, *supra* note 5, at 2323, 2328–35; Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 621, 624–25 (2006); see also Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1317 (2014) (discussing congressional overrides in general, rather than limited to the context of environmental laws).

253. See Zellmer, *supra* note 5, at 2340.

254. See Lazarus, *supra* note 252, at 621–22, 629; Zellmer, *supra* note 5, at 2324 (noting the lack of congressional action in the environmental arena since 1990, despite environmental catastrophes like the Deepwater Horizon oil spill and specifically noting the lack of congressional response to judicial interpretations of the Clean Water Act). The only major amendment to a federal environmental statute was the Frank R. Lautenberg Chemical Safety for the 21st Century Act, passed in 2016 to amend the Toxics Substances Control Act. See Pub. L. No. 114-182, 130 Stat. 448 (codified as amended at 15 U.S.C. § 2601).

255. See Driesen et al., *supra* note 12, at 1851–52.

environmental or otherwise—since 1999.²⁵⁶

To the extent that Congress has adopted any changes to the environmental laws, it has increasingly relied on using the appropriations process to impose ad hoc, temporary limits on federal agencies' use of funds to enforce policies that a small minority of Congress oppose.²⁵⁷ The appropriations process does not provide for the meaningful public deliberation and debate that surrounded the initial adoption of the federal environmental laws.²⁵⁸ Academics suggest several reasons for the reduction in congressional overrides and the shift to appropriations legislation as a vehicle to address environmental matters, including declining bipartisanship, a distrust of science, and a belief that agencies have greater expertise in the complex arena of environmental matters and have the ability, pursuant to the *Chevron*²⁵⁹ and *Brand X*²⁶⁰ decisions, to fix judicial errors in interpreting the environmental laws, as long as courts have not held that the laws provide clear answers to the environmental disputes.²⁶¹ As Professor Richard Lazarus has noted, though, congressional disengagement is particularly problematic in the area of environmental law since there is a need to fine-tune environmental regulation to implement the laws effectively.²⁶²

The general trend across environmental law observed by academics has played out in the Clean Water Act context as well. The law was enacted with overwhelming bipartisan support in the House and Senate in

256. See Christiansen & Eskridge, *supra* note 252, at 1318–19, 1340 (finding that congressional overrides fell dramatically after a “golden age” from 1991–1999); Adam Liptak, *In Congress's Paralysis, a Mightier Supreme Court*, N.Y. TIMES, Aug. 20, 2012, at A10; Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013). Christiansen and Eskridge also found that Congress has not acted to override any Supreme Court decision interpreting an environmental statute since 1998. See Christiansen & Eskridge, *supra* note 252, at 1368–69.

257. See Lazarus, *supra* note 252, at 632–33, 638, 647–48. Lazarus suggests that the shift to the appropriations process has been caused by changes in congressional rules, the demise of bipartisanship, and increased politicization of the appropriations and budgetary processes. *Id.* at 622. Lazarus uses the compilation of “Anti-Environmental Riders” from around the turn of the 21st century as an example for this manner of appropriations. *Id.* at 647.

258. *Id.* at 632–33.

259. *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

260. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

261. See Christiansen & Eskridge, *supra* note 252, at 1343–44, 1385–87 (addressing partisanship in congressional overrides and deference to agencies in fixing judicial mistakes); Zellmer, *supra* note 5, at 2326, 2372–73 (regarding congressional partisanship, disdain for science, and heated rhetoric demonizing environmental regulation); Lazarus, *supra* note 252, at 622 (identifying the lack of partisanship as one of the reasons for the shift to the appropriations process). See Johnson, *supra* note 227, at 78–81, for a discussion of agencies' powers to overturn judicial interpretations of statutes after *Brand X*. Professor Sandra Zellmer also suggests that Congress's failure to act in the environmental arena is caused, in part, because many of the pressing environmental problems of the 1970s have been addressed, and the remaining problems are more complex and more controversial. See Zellmer, *supra* note 5, at 2372–73. She also suggests that the political parties no longer perceive that there is the same level of public support for environmental laws as existed in the 1970s. *Id.* at 2374–77.

262. See Lazarus, *supra* note 252, at 630, 662.

1972,²⁶³ and for the first decade and a half after it was enacted, Congress vigilantly observed judicial implementation of the law and routinely passed laws to affirm or overturn decisions by the Supreme Court and lower federal courts interpreting the law. For instance, after the Supreme Court held in *EPA v. California ex rel State Water Resources Control Board* that federal facilities were not required to obtain § 402 permits from states with delegated programs,²⁶⁴ Congress amended the law to overturn the decision.²⁶⁵ Then, when the Court held in *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.* that the EPA could issue variances from effluent limits for toxic pollutants despite seemingly clear statutory language prohibiting such variances,²⁶⁶ Congress amended the law to explicitly authorize the variances.²⁶⁷ During the first decade and a half of the Clean Water Act's existence, Congress also took action in response to judicial interpretations issued by the lower federal courts. For instance, after the D.C. Circuit in *Natural Resources Defense Council, Inc. v. Costle* struck down EPA regulations that exempted various point sources from the permit requirements of the Clean Water Act,²⁶⁸ Congress amended the law to exempt some agricultural activities from regulation as point sources.²⁶⁹ Similarly, after the U.S. District Court for the District of Columbia in *Natural Resources Defense Council, Inc. v. Train* approved a settlement in a lawsuit challenging the EPA's regulation of toxic water pollutants,²⁷⁰ Congress used the settlement as a model for amendments to the law that dramatically changed the approach used to address those pollutants.²⁷¹

Since the 1990s, however, Congress has not made any changes to the Clean Water Act to affirm or overturn interpretations of the law by the Supreme Court or lower federal courts.²⁷² Congress's lack of action is not due to a lack of opportunities, though. After all, the Court has issued four opinions regarding the Clean Water Act jurisdiction over "waters of the United States," and Congress has not taken any action to affirm or overturn those decisions (unless one views congressional inaction to be approval of judicial precedent).²⁷³ Similarly, Congress has not taken any

263. See *supra* note 40.

264. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 227–28 (1976).

265. See Clean Water Act of 1977, Pub. L. No. 95-217, §§ 60, 61(a), 91 Stat. 1566, 1597–98 (codified as amended at 33 U.S.C. § 1323).

266. *Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 133 (1985).

267. See Water Quality Act of 1987, Pub. L. No. 100-4, § 306, 101 Stat. 7, 35 (codified as amended at 33 U.S.C. §§ 1314, 1317).

268. *Nat. Res. Def. Council, Inc., v. Costle*, 568 F.2d 1369, 1383 (D.C. Cir. 1977).

269. See Clean Water Act of 1977, Pub. L. No. 95-217, § 33(b), 91 Stat. 1566, 1577 (codified as amended at 33 U.S.C. § 1362).

270. *Nat. Res. Def. Council, Inc., v. Train*, Nos. 2153-73, 75-172, 75-1698, 75-1267, 1976 U.S. Dist. LEXIS 14700, at *8–9 (D.D.C. June 9, 1976).

271. See Water Quality Act §§ 301–02.

272. See Zellmer, *supra* note 5, at 2339–46 (discussing congressional silence in the wake of numerous Supreme Court Clean Water Act decisions).

273. See *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 624 (2018); *Rapanos v. United States*, 547 U.S. 715, 757 (2006) (plurality opinion); *Solid Waste Agency of N. Cook*

action when it is clear that the law is not meeting its objectives, as is evident regarding the regulation of non-point source pollution.²⁷⁴

For decades, Congress has failed to act despite strong public support for greater protection of the nation's waters. In a 2019 Pew Research poll, 68% of respondents felt that the federal government was not doing enough to protect the water quality of rivers, lakes, and streams.²⁷⁵ And 63% of respondents felt that stricter environmental regulations were worth the cost.²⁷⁶ Similarly, in a 2017 "Survey of American Fears" conducted by Chapman University, respondents identified pollution of oceans, rivers, and lakes as the number three fear, trailing only government corruption and healthcare.²⁷⁷ This public sentiment is not new: in a 2011 Gallup poll, three out of four respondents said they worry about pollution of rivers, lakes, and reservoirs,²⁷⁸ and in 1997, *Money Magazine* subscribers identified clean water as the number two priority (out of forty-one priorities identified) in evaluating places to live.²⁷⁹ Although environmentalists might find it regrettable that Congress has not acted to respond to those public concerns, some commentators argue that supporters of clean water are fortunate that Congress has not taken any action because congressional action would likely weaken—rather than strengthen—the law.²⁸⁰

VIII. SHIFT IN FEDERAL ADMINISTRATION AND IMPLEMENTATION OF THE CLEAN WATER ACT

Water quality could still be protected under the Clean Water Act, despite the Supreme Court's trend away from interpreting the law to fulfill its § 101(a) goals and Congress's disengagement in oversight of the law, so long as the federal agencies aggressively interpret and administer the law to carry out its water quality protection goals, especially in light of

Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173–74 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985). Professor Sandra Zellmer argues that, in addition to those decisions, Congress has ignored several other important Clean Water Act decisions that have established broad, sweeping requirements, including the *Sackett* and *Coeur Alaska* decisions. See Zellmer, *supra* note 5, at 2340–47.

274. See *supra* notes 71–77 and accompanying text.

275. Cary Funk and Brian Kennedy, *How Americans See Climate Change and the Environment in 7 Charts*, PEW RSCH. CTR. (Apr. 21, 2020), <https://www.pewresearch.org/fact-tank/2020/04/21/how-americans-see-climate-change-and-the-environment-in-7-charts/> [<https://perma.cc/59UP-Y8DE>].

276. *Id.* The issue is partisan, however, as 81% of Democrats and independents who lean Democrat support stricter regulation, while only 45% of Republicans and independents who lean Republican support stricter regulation. *Id.*

277. Mitch Tobin, *Water Pollution near Top of America's Fears*, WATERPOLLS.ORG (Dec. 4, 2017), <https://waterpolls.org/chapman-fears-survey-2017> [<https://perma.cc/F9BB-99TW>].

278. See Zellmer, *supra* note 5, at 2378.

279. See Caputo, *supra* note 34, at 10574 n.9.

280. See Zellmer, *supra* note 5, at 2327. Professor Sandra Zellmer argues that congressional inaction may be preferable because (1) the existing statutory framework is strong, (2) Congress is subject to capture by regulated entities, and (3) the courts can invalidate agency action that is contrary to the Clean Water Act or is arbitrary and capricious. *Id.* at 237984.

the deference that should be accorded to the agencies' statutory interpretation under *Chevron* and *Brand X*.²⁸¹

Chevron deference has made a difference when the Supreme Court has applied it in interpreting the Clean Water Act. In seven of the eight cases where a majority of the Court relied on *Chevron* to resolve the statutory interpretation issue, the government's interpretation prevailed.²⁸² The government's 87% success rate in those *Chevron* cases is significantly better than the government's 64% success rate in Clean Water Act cases decided before *Chevron* or its 60% success rate in cases decided after *Chevron* where *Chevron* was not applied.²⁸³ Thus, if the government was aggressively interpreting the Clean Water Act to carry out its § 101(a) goals and if courts were routinely applying *Chevron* to resolve statutory interpretation questions, federal agencies could slow the erosion of the protection of the nation's waters under the Clean Water Act.

However, over the past few decades, the Supreme Court and lower federal courts have created exceptions to *Chevron* and have increasingly avoided the use of *Chevron* to review agencies' statutory interpretations.²⁸⁴ Indeed, the Court has not utilized the *Chevron* analysis in any of the Clean Water Act cases decided since 2009.²⁸⁵

Even if the Court were continuing to use the *Chevron* analysis to review statutory interpretation issues under the Clean Water Act, the environment would not necessarily benefit, because the federal government

281. See *supra* note 261 and accompanying text. Studies have generally found that the government's position is upheld in about three-fourths of the statutory interpretation cases when courts apply *Chevron* analysis. See Johnson, *supra* note 227, at 69–71; Christopher H. Schroeder & Robert L. Glicksman, *Chevron, State Farm, and EPA in the Courts of Appeals During the 1990s*, 31 ENV'T L. REP. 10371, 10377 (2001) (EPA prevailed in 75.7% of *Chevron* challenges in federal appellate courts in the 1990s); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30–31 (1998) (federal agencies prevailed in 73% of *Chevron* challenges in federal appellate courts between 1995 and 1996); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017); (federal appellate courts upheld agency interpretations in 77.4% of *Chevron* cases decided between 2003 and 2013).

282. See *CWA Spreadsheet*, *supra* note 135. Not surprisingly, in all of the cases where the Court upheld the government's position, it resolved the statutory interpretation question at Step Two of *Chevron*, and in all of the cases where the Court rejected the government's position, it resolved the statutory interpretation question at Step One. See *id.* Although a plurality of the Court, citing *Chevron*, struck down the government's interpretation of the Clean Water Act in *Rapanos v. United States*, 547 U.S. 715, 739 (2006), an equal number of dissenting Justices upheld the government's interpretation under *Chevron* in that case. *Id.* at 810. Accordingly, it is not included in the CWA Spreadsheet as a case where the Court upheld or struck down the government's interpretation under *Chevron*.

283. See *CWA Spreadsheet*, *supra* note 135. The Court upheld the position supported by the government in seven of the eleven cases that the Court decided prior to the *Chevron* decision and upheld the position supported by the government in six of the ten post-*Chevron* cases where the Court did not use the *Chevron* analysis. See *id.*

284. See Johnson, *supra* note 227, at 77–78, 80–81 (discussing the erosion of *Chevron* deference in the Supreme Court and lower federal courts as well as judicial criticism of the doctrine and legislative attempts to rescind it); Note, *supra* note 86, at 1238–43 (discussing the “major questions” doctrine and the Court's increasing practice of ignoring *Chevron* without comment); Zellmer, *supra* note 5, at 2384 (noting that federal courts are now “more sympathetic to conservative, antiregulatory arguments than progressive ones”).

285. See *CWA Spreadsheet*, *supra* note 135.

has *not* been interpreting and administering the law to achieve its § 101(a) water quality protection goals. The Trump Administration focused heavily on deregulation and interpreting the law to provide much more authority to states in lieu of the federal government, as is apparent in the recent navigable waters protection rule and guidance regarding regulation of point source discharges through groundwater.²⁸⁶ Even before the Trump Administration took power, though, there was a significant change in the nature of the actions that the Supreme Court reviewed under the Clean Water Act: in more and more cases, the government was advocating for positions advanced by regulated entities, and these positions seemed at odds with the law's water quality protection goals.²⁸⁷ When that is coupled with the Court's increasing focus on § 101(b) and congressional inaction, none of the three branches of government have been working to advance the goals of § 101(a).

During the early years of the Clean Water Act in the Burger era, almost half of the cases heard by the Supreme Court involved either challenges to strict government regulation or limits on challenges to government action.²⁸⁸ The pattern was even more pronounced during the Rehnquist era, when five of the seven cases heard by the Court involved challenges to strict government regulation or limits on challenging government action.²⁸⁹ The Roberts Court stands in stark contrast to the Burger and Rehnquist Courts, though. During the Roberts era, most of the Court's cases involved challenges to government action that reduced regulatory burdens.²⁹⁰

286. See *supra* notes 22–23 and accompanying text.

287. See *infra* notes 288–302 and accompanying text.

288. See *CWA Spreadsheet*, *supra* note 135. Six of the thirteen cases decided by the Court involved challenger to strict government regulation or limits on challenges to government action. See *id.* The cases that involved challenges to strict government regulation were *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Milwaukee v. Illinois*, 451 U.S. 304 (1981); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980); and *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). See *CWA Spreadsheet*, *supra* note 135. The cases that addressed limits on the ability to challenge government actions were *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) and *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980). See *CWA Spreadsheet*, *supra* note 135.

289. See *CWA Spreadsheet*, *supra* note 135. The cases that involved challenges to strict government regulation were *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994); *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987); and *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). See *CWA Spreadsheet*, *supra* note 135. The case that addressed limits on challenging government action was *Department of Energy v. Ohio*, 503 U.S. 607 (1992). See *CWA Spreadsheet*, *supra* note 135.

290. See *CWA Spreadsheet*, *supra* note 135. Six of the ten cases in the Roberts Court involved challenges to government action that reduced regulatory burdens. See *id.* Those cases were *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020); *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597 (2013); *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 568 U.S. 78 (2013); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009); and *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). See *CWA Spreadsheet*, *supra* note 135.

The federal government's role in the Clean Water Act cases that are heard by the Court has also changed dramatically over the years. During the Burger Court, the United States was frequently the petitioner to the Court, or at least a party: in eleven of the thirteen cases heard by the Burger Court, the United States was the petitioner or cross-petitioner, and in one of the remaining two cases, the EPA was a party.²⁹¹ After the Burger era, however, the United States has rarely been the petitioner in Clean Water Act cases²⁹² and was a party in only about half of the other cases.²⁹³

Although the United States has participated less frequently as a petitioner or party in Clean Water Act cases over the years, the government has continued to play an important role in those cases, frequently filing amicus briefs. In the cases where the United States has not been a petitioner or party, the government has increasingly filed briefs supporting the positions advanced by regulated entities, rather than the positions advanced by environmental groups. During the Burger Court, there were no cases where the United States filed an amicus brief in support of positions advanced by regulated entities, and the United States was a co-petitioner with regulated entities in only two of the thirteen cases heard during that era.²⁹⁴ During the Rehnquist era, the United States filed amicus briefs supporting the position advanced by regulated entities in one case but filed opposing briefs in three other cases.²⁹⁵ In the Roberts Court, though, the United States has been a co-petitioner with regulated entities or filed amicus briefs in support of those entities in six of the ten cases and filed an amicus brief opposing the position advanced by regulated entities in only a single case.²⁹⁶

As the government has shifted to support the arguments advanced by regulated entities, the government has had great success persuading the Court to adopt interpretations of the statute that favor those entities. During the Roberts era, until the Court rejected the United States' position in *County of Maui*, the Court upheld the positions advanced by the

291. See *CWA Spreadsheet*, *supra* note 135.

292. *Id.* The United States was only the petitioner in two of the seven cases during the Rehnquist era and one case (out of ten) during the Roberts era. *Id.* The federal government was last a petitioner in 2007, in the *National Ass'n of Home Builders* case. *Id.*

293. *Id.*

294. *Id.* The United States and regulated entities were co-petitioners in the cases of *Middlesex County Sewerage Authority* and *Chemical Manufacturers Ass'n*. *Id.*

295. *Id.* The United States opposed the position taken by regulated entities in *International Paper, Co.*; *Gwaltney of Smithfield*; and *PUD No. 1* and supported the position taken by regulated entities in the *Miccosukee Tribe of Indians* case. *Id.*

296. *Id.* The United States was a co-petitioner with regulated entities in *National Ass'n of Home Builders* and filed amicus briefs supporting regulated entities in *Entergy Corp.*; *Coeur Alaska, Inc.*; *Los Angeles County Flood Control District*; *Decker*; and *County of Maui*. *Id.* The only case in which the United States filed an amicus brief opposing the position taken by regulated entities was *S.D. Warren Co.*, the first Clean Water Act case of the Roberts Court. *Id.*

government, supporting regulated entities, in all five cases.²⁹⁷ Until *County of Maui*, there was a clear pattern in the Roberts Court: When the government supported the arguments advanced by regulated entities, the government won.

Over the past fifteen years, the Roberts Court has gone to great lengths to uphold the government's positions in Clean Water Act cases when the government is advocating for regulated entities. In three of the cases, the Court cited *Auer v. Robbins*²⁹⁸ to support its ruling, despite the fact that the *Auer* doctrine has been falling out of favor more generally with the Court over time.²⁹⁹ None of the Clean Water Act cases decided by the Rehnquist or Burger Courts relied on *Auer* or its predecessor, *Bowles v. Seminole Rock & Sand Co.*³⁰⁰ As noted above, when the government has supported the positions advanced by regulated entities in the Roberts Court, the Court has upheld those positions in 83% of the cases.³⁰¹ Over the fifty-year history of the Clean Water Act, though, the Supreme Court has generally upheld positions supported by the government in only 67% of the cases.³⁰²

A few other facts regarding the Supreme Court's review of Clean Water Act cases over the past half century deserve mention. First, none of the thirty Clean Water Act statutory interpretation cases came to the Court through a petition from an environmental or public interest organization.³⁰³ Second, the Supreme Court reversed 83% of the lower court decisions that it reviewed.³⁰⁴ Appeals from federal courts fared worst, as the Court reversed 89% of those decisions while upholding the only two

297. *Id.* The Court adopted the position advanced by the government, supporting regulated entities, in the *National Ass'n of Home Builders; Entergy Corp.; Coeur Alaska, Inc.; L.A. County Flood Control District; Decker*; and *County of Maui* cases. *Id.*

298. 519 U.S. 452 (1997).

299. *See Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 601 (2013); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 274–75 (2009); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 672 (2007). For a discussion of the erosion of *Auer* deference, see Christopher S. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 *GEO. J.L. & PUB. POL'Y* 103, 105–08 (2018).

300. *See generally* 325 U.S. 410 (1945).

301. *See supra* note 297 and accompanying text.

302. *See CWA Spreadsheet, supra* note 135. The Court upheld positions supported by the government in twenty of the thirty cases. *Id.* The percentage at which the Court upheld positions supported by the government was highest during the Rehnquist Court (71%—five of seven cases), followed by the Burger Court (69%—nine of thirteen cases) and the Roberts Court (60%—six of ten cases). *See id.* In cases where the government was a party, the government's position has prevailed in 65% of the cases (thirteen of twenty), but its winning percentage has steadily declined from the Burger Court (75%—nine of twelve cases) through the Rehnquist Court (67%—two of three cases) to the Roberts Court (40%—two of five cases). *See id.*

303. *See CWA Spreadsheet, supra* note 135.

304. *Id.* The Court reversed twenty-five of the thirty decisions from lower courts. *Id.* In two of the cases where the Court affirmed the lower court, the Court actually only affirmed the decisions in part, while reversing in part. *Id.* The 83% reversal rate in Clean Water Act cases is higher than the 60%–75% reversal rate that academics have cited as the norm for the Supreme Court across the board over several decades. *See Lazarus, supra* note 29, at 1523.

decisions that were appealed from state courts.³⁰⁵ Finally, a brief word about the Justices. Justice White wrote the most majority opinions in the Clean Water Act cases (six), although an equal number of his opinions could be characterized as favoring the position of environmental interests as those opposing the position of environmental interests.³⁰⁶ Justice Stevens wrote the most dissents (seven) in the Clean Water Act cases by a long shot, considering that no other Justice authored more than one dissent.³⁰⁷ Finally, Justice Stevens's voting record was the most consistently pro-environmental record of the Justices, as he voted in a manner that could be characterized as favoring the position of environmental interests in 86% of the cases.³⁰⁸

IX. CONCLUSION

Congress set ambitious goals in 1972 when it enacted the Clean Water Act. For the first few decades after its enactment, Congress and the Supreme Court worked with the federal agencies administering the law to interpret and implement it in ways that advanced those goals. Unfortunately, though, over time all three branches of government have been less diligent in ensuring that the law's water quality purposes are being advanced. The Court shifted its statutory interpretation focus to textualism and, to the extent that it examines the purposes of the law, the Court now focuses more frequently on the policy of the law regarding the protection of state rights than the protection of the biological, physical, and chemical integrity of the nation's waters. In addition, as the Court shifted to textualism, its opinions became more clearly divided along ideological lines. Further, as the Court has issued fewer and fewer decisions that can be viewed as pro-environment in the Clean Water Act context, the Court has increasingly adopted antiregulatory rhetoric in its opinions. The shift in the Court's analysis of Clean Water Act cases has coincided with Congress's disengagement in overseeing the law and a shift in the approach taken by federal agencies in interpreting the Act toward a focus on § 101(b) as opposed to the water quality protection goals of § 101(a).

Although this convergence among the three branches may seem bleak, the Court's decision in the *County of Maui* case was a positive break from

305. See *CWA Spreadsheet*, *supra* note 135. Since two of the three federal appellate court decisions that were affirmed by the Court were affirmed in part and reversed in part, only one federal appellate decision was fully affirmed by the Court. *Id.* That case, *Train v. City of New York*, was the first case decided by the Court and was a companion case to *Train v. Campaign Clean Water, Inc.*, where the Court reversed the appellate court's decision. *Id.* In contrast to the review of federal appellate court decisions, the Court upheld the Washington Supreme Court's decision in *PUD No. 1* and Maine Supreme Judicial Court's decision in *S.D. Warren Co. Id.*

306. See *CWA Spreadsheet*, *supra* note 135. Three of Justice White's opinions could be characterized as upholding the position supported by environmental interests, while the other three would not be characterized in that manner. *Id.*

307. *Id.*

308. *Id.* Justice Stevens voted for the position supported by environmental interests in eighteen of the twenty-one cases in which he participated. *Id.*

many of the trends that had been developing over time. Standing against the prevailing trend toward textualism, the Court's decision relied heavily on the purposes of the law to interpret the statute, and for the first time since 2006, the Court bolstered its interpretation with an examination of legislative history. In addition, the opinion was the first of the past nine Clean Water Act statutory interpretation opinions that could be considered as a pro-environment decision, the first in which a regulated entity petitioner lost on appeal, and the first case since 1987 where an environmental group brought the initial challenge that led to the Supreme Court case and the Court's decision benefitted the environmental group. The *County of Maui* decision may be an anomaly, but advocates for clean water can hold out hope that it may signify the beginning of another shift in the Court's Clean Water Act jurisprudence.

