This Land Belongs to You and Me: Thurgood Marshall as Environmental Champion

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Introduction

That Thurgood Marshall was an Olympian figure in civil rights and civil liberties is well-known. Not so well-known is this justice's impressive record of concern for conservation and the environment. His Supreme Court opinions, both in writing for the Court and in dissent, demonstrate a deep and abiding concern for environmental values. That this should accompany his lifelong dedication to civil liberties is thoroughly consistent, for both stem from a recognition that furnishing a better world for the future outweighs commercial and other forms of immediate gratification.

George Orwell half a century ago expressed this linkage with his usual eloquence:

By retaining one's childhood [respect for] such things as trees, fishes, butterflies... one makes a peaceful and decent future a little more probable, and by preaching the doctrine that nothing

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is to be admired except steel and concrete, one merely makes it a little surer that human beings will have no outlet for their surplus energy except in hatred and leader-worship.*

OVERTON PARK: A "FEW GREEN HAVENS"

Early in his career on the Court, Justice Marshall wrote the landmark opinion in Citizens to Preserve Overton Park v. Volpe, holding that federal law barred the destruction of park land to build a federally-financed highway. The United States Department of Transportation approved a proposal to bisect Overton Park, the prime parkland of Memphis, with a six-lane interstate highway. The park includes a zoo, golf course, nature trails, and a 170-acre forest.

Provisions in the Federal-Aid Highway Act and the Department of Transportation Act barred construction of federally-financed roads through parks unless the Secretary of Transportation found "there is no feasible and prudent alternative." In fact, the defendant Secretary had so found in Overton Park, concluding that test was met by his decision that it would be faster and cheaper to build the road through the park than to skirt it. But, as Justice Marshall pointed out, that cannot have been the congressional intent, because usually "considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible." However, "the very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present[]." Thus, the statutory bar on highways through parks, unless no feasible and prudent alternative exists, means the Secretary must show far more than the mere efficiency of building

3 401 U.S. 402 (1971) (holding it was error to permit federally financed highway to run through public park absent formal findings that no other alternative was available and that special efforts had been made to preserve parkland).
4 23 U.S.C. § 138 (1990) (asserting statutory purpose to preserve parkland by mandating Secretary of Transportation to reject construction on such land unless no feasible alternative is available). See 49 U.S.C. § 303 (1996) (stating that it is governmental policy that special efforts should be undertaken to preserve natural beauty of countryside and public parks).
5 Overton Park, 401 U.S. at 411-12 (stating that existence of federal regulations indicated Congress' intent that these factors not have same weight).
6 See Overton Park, at 412-13 (stating that legislative intent mandated Secretary to avoid unnecessary burden on and disruption of urban community).
through a park.

Of even greater long-range significance, Justice Marshall noted that in cases involving public issues, such as the destruction of a park shared by thousands of urban residents, "thorough, probing, in-depth review" by the courts of the administrative agency's decision is required—the "searching and careful" inquiry that has come to be known as the "hard look" doctrine.7

Since Overton Park, the hard look doctrine has become the accepted standard for judicial review of agency decisions in the environmental arena where the stakes are high in terms of the public impact of decision-making.8 This oft-cited decision has become the touchstone for the searching court review mandated when agencies rule on issues affecting numerous lives. William Rodgers has described Overton Park as "the most frequently cited decision in the history of environmental law," rendering the hard look doctrine "a tenet of modern administrative law and a catechism of environmental law."9

**UNION ELECTRIC: "PROMPT ATTAINMENT" OF AIR QUALITY STANDARDS**

Soon after enactment of the Clean Air Act,10 the Supreme Court had to determine whether the United States Environmental Protection Agency ("EPA") could reject a state's plan to improve its air quality on the ground that it imposed too great a burden on polluters. Writing for the Court, Justice Marshall held in *Union Electric Co. v. EPA*,11 that the Agency could only strengthen, not weaken, state plans adopted under the Act. A contrary holding would have greatly vitiated enforcement of the statute and subverted efforts to improve air quality and public health.

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7 See id. at 415-17 (stating that Secretary's actions had to be within scope of his authority and had to follow necessary procedural requirements to withstand judicial scrutiny).


9 WILLIAM H. RODGERS, JR., 1 ENVIRONMENTAL LAW § 3.2 (2d ed. 1987).


Under the Act, the EPA is to identify air pollutants whose emissions "may reasonably be anticipated to endanger public health or welfare," and establish a primary standard for each of those pollutants "requisite to protect public health."12 In addition, the Agency must set a secondary standard designed to protect the public welfare by preventing damage to crops, forests and the like. Thereafter each state is to adopt a state implementation plan ("SIP") indicating how it intends to attain these standards for each of these pollutants.13

Missouri's SIP for sulfur dioxide was approved by the EPA and promptly challenged by a major electric utility as economically and technologically infeasible—in other words, too severe. Justice Marshall, writing for a unanimous Court, rejected that challenge, holding, based on the Act's legislative history, that "Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a state implementation plan."15 Otherwise, he wrote, the Act would not be an effective "remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution."16 As he noted, the Act's "requirements are of a 'technology-forcing character,' . . . and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible."17

Justice Marshall rebuffed the utility's argument that a SIP that "calls for proceeding more rapidly than economics and the available technology appear to allow . . . must be rejected as not 'practicable'" under the Act.18 As he noted, the provision requiring plans to attain the Act's secondary standard "as expeditiously as practicable" (in

12 42 U.S.C. §§ 7408 (a)(1)(A), 7409 (b)(1) (1995). The named criteria pollutants include sulfur dioxide, nitrogen oxide, photochemical oxidants that lead to smog, carbon monoxide, particulate matter (fly ash and soot) and lead. See id.
14 See Union Electric Co. v. EPA, 427 U.S. 246, 270-71 (1976) (Powell, J., concurring) (Powell, J., filed concurring opinion, in which Burger, C.J., joined, which expressed concern over "potentially devastating consequences" of shutdown of electric power plants should Act impose "inflexible demands that may be technologically impossible to meet").
15 Union Electric Co., 427 U.S. at 256.
16 See id.
17 See id. at 257 (citing Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 91 (1975)).
contrast to specific timetables for meeting the primary standard) does not mean the EPA “may consider claims of impossibility in assessing a state plan.”\(^\text{19}\) A state is free to “engage in technology forcing and adopting a plan more stringent than federal law demands,” he wrote—as Missouri did.\(^\text{20}\) He went on to reject the argument that states may not adopt plans more stringent than federal law requires, noting that the Act in fact encourages states to go further where they find it appropriate.\(^\text{21}\)

A state, the Justice noted, may take claims of economic and technological infeasibility into account in formulating its SIP. A source of pollution is free to challenge the SIP in the state’s courts if aggrieved. In addition, a governor may request a postponement from the date for compliance with the primary standard if that official finds compliance is not feasible.\(^\text{22}\) In the end, however, the Act mandates that “consideration of such claims will not interfere substantially with the primary goal of prompt attainment of the national standards.” A different result, the Court held, “would frustrate congressional intent.”\(^\text{23}\)

It is noteworthy that Justice Marshall struck a blow for air quality and public health while at the same time upholding the right of the states to exceed congressional requirements under the Act. Though not normally a defender of states’ rights against federal power,\(^\text{24}\) he rose to support the states’ ability to go further than the federally-mandated standards in safeguarding the quality of their air.

Union Electric has become a major precedent in construing the Clean Air Act broadly and sustaining the states’ power under the

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\(^{19}\) See id. at 260-61.

\(^{20}\) See id. at 260-61; see also 42 U.S.C. § 7410(a)(2)(A) (1995) (indicating each plan shall include economic incentives as well as schedules and timetables for compliance).

\(^{21}\) See Union Electric Co., 427 U.S at 265.


\(^{23}\) See Union Elec. Co., 427 U.S. at 268-69. See generally 42 U.S.C. § 7401(b) (1995) (listing Congress’ purposes of Clean Air Act); Exxon Mobil Corp. v. EPA, 217 F.3d 1246 (9th Cir. 2000) (stating purpose of Clean Air Act); Bunker Hill Co. Lead & Zinc Smelter v. E.P.A., 658 F.2d 1280, 1284 (9th Cir. 1981) (noting purpose of Clean Air Act was to regulate and reduce air pollution).

Act to maintain and improve air quality in keeping with the congressional intent.25

**Strycker's Bay: Agencies Should Reduce Environmental Impacts**

A long-standing controversy involving the National Environmental Policy Act26 ("NEPA") simmered for a decade as to whether that statute requires federal agencies to achieve environmental goals in their decision-making. The Act, adopted in 1969, requires all federal agencies performing, funding, or licensing actions significantly affecting the environment to weigh the environmental effects of those actions as well as alternatives and possible measures to mitigate those effects.27 The mechanism to achieve those goals is the environmental impact statement ("EIS") that agencies are to prepare in those situations. It was not clear whether, having considered these environmental consequences, the agency had to in fact choose the environmentally preferable course of conduct. That is, it was unclear whether the NEPA was substantive as well as procedural.28

Some early decisions suggested that the Act had a substantive dimension. Relying on the Act's mandate that "to the fullest extent possible[,] the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this" Act,29 some federal courts took the view that NEPA "makes environmental protection a part of the mandate

25 See Duquesne Light Co. v. E.P.A., 166 F.3d 609, 611 (3d Cir. 1999) (stating SIP's must be approved by EPA Administrator if they meet minimum requirements of Clean Air Act); Concerned Citizens of Bridesburg v. E.P.A., 836 F.2d 777, 780 (3d Cir. 1987) (finding states may make SIPs more stringent than necessary to achieve national air quality standards); Florida Power & Light Co. v. Costle, 650 F.2d 579, 581 (5th Cir. 1981) (noting states are "at liberty" to devise particular components of their pollution control plans, but so long as they are adequate to meet standards mandated by EPA, they must be approved); Friends of the Earth v. Potomac Elec. Power Co., 419 F. Supp. 528, 533 (D.C. Cir. 1976) (noting state plans may contain control strategies involving emissions limitations more stringent than those necessary to meet minimal requirements of primary and secondary ambient air quality standards).


of every federal agency and department." The Act directs agencies to "use all practicable means . . . to improve and coordinate federal plans, functions, programs and resources to the end that the Nation may . . . attain the widest range of beneficial uses of the environment without degradation [or] risk to health or safety"—language suggesting that Congress intended NEPA to mandate substantive decision-making by agencies to reduce harmful environmental impacts.

In its first decision as to whether NEPA was substantive, the Supreme Court reached an ambiguous result. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the Court found that the Act authorized the Nuclear Regulatory Commission to adopt a rule which would mandate consideration of nuclear waste disposal questions in nuclear power plant licensing decisions. This result seemingly produced a substantive dimension to NEPA. The Court, however, rejected a claim that the Commission's Advisory Committee on Reactor Safeguards should recast a report on the risks of nuclear waste "in terms understandable to a layman," noting that any defects in that report did not warrant overturning the entire agency decision to license the power plants at issue. The Court then added "one further observation," castigating the Court of Appeals for nullifying the Commission's actions based on the report's flaws, and concluding that "NEPA does set forth significant substantive goals for the

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30 Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (stating that federal agencies such as Atomic Energy Commission are compelled to take environmental values into account). See, e.g., Scherr v. Volpe, 466 F.2d 1027, 1031 (7th Cir. 1972) (stating that through enactment of these procedural requirements, Congress has not only permitted, but has compelled federal agencies to take environmental values into account); Colorado Public Interest Research Group, Inc. v. Hills, 420 F. Supp. 582, 587 (D. Colo. 1976) (stating that NEPA requires that all agencies comply to fullest extent possible). But see Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289, 321 n.20 (1975) (questioning Calvert Cliffs' interpretation of statute).


33 *See Vermont Yankee*, 435 U.S. at 548; *see also* 5 U.S.C. § 553(c) (1996) (outlining rule-making procedures for federal agencies under Administrative Procedure Act).

34 *See Vermont Yankee*, 435 U.S. at 556–58 (stating that publication was subsidiary to main function of providing technical advice).
Nation, but its mandate is essentially procedural."\(^3\)

Two years later, with the stage thus set, the Court had to deal squarely with the issue of whether the Act imposed substantive requirements on agencies. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*\(^3\) involved a federally-funded public housing development. The Department of Housing and Urban Development (HUD) maintained it had adequately weighed alternative sites for this largely low-income housing project. The Second Circuit, however, ordered HUD to reconsider other locations to avoid "crowding low-income housing into a concentrated area," holding that NEPA provided "substantive standards necessary to review the merits of agency decisions.[.]"\(^3\) The Supreme Court summarily reversed in a terse per curiam opinion, dispatching the notion that NEPA contains substantive mandates. Citing dicta from *Vermont Yankee* that NEPA is "essentially procedural," the Court ruled that "the Court of Appeals' conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations" was misguided.\(^3\) "On the contrary," the Court held that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'"\(^3\)

Justice Marshall alone dissented. He perceived that the issue before the Court was "far more difficult than the per curiam opinion suggests," and he stated that "*Vermont Yankee* does not stand for the broad proposition that the majority advances today."\(^4\) As he

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\(^3\) *Id.* at 557, 558; see also Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289, 319 (1975) (noting procedural obligation to give written consideration to environmental issues of major federal actions created under NEPA); see also Consol. v. Federal Maritime Comm'n, 383 U.S. 607, 620-21 (1966) (discussing appropriate standard for judicial review of agency decisions).

\(^3\) *Id.* at 557, 558; see also Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289, 319 (1975) (noting procedural obligation to give written consideration to environmental issues of major federal actions created under NEPA); see also Consol. v. Federal Maritime Comm'n, 383 U.S. 607, 620-21 (1966) (discussing appropriate standard for judicial review of agency decisions).

\(^3\) See *Strycker's Bay, 444 U.S. at 227* (citing *Vermont Yankee, 435 U.S. at 558*).

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\(^4\) *Strycker's Bay, 444 U.S. at 228-29* (Marshall, J., dissenting).
pointed out, the comment in *Vermont Yankee* that NEPA is "essentially procedural" arose in the context of a "further observation" by that Court. "Thus," he went on, "*Vermont Yankee* does not stand for the proposition that a court reviewing agency action under NEPA is limited solely to the factual issue of whether the agency 'considered' environmental consequences." He argued that HUD's refusal to look at an alternative site because of a supposed two-year delay of the project should be examined under the hard-look doctrine of *Overton Park*. The courts, in reviewing agency decisions, are not limited "to the essentially mindless task of determining whether an agency 'considered' environmental factors even if that agency may have effectively decided to ignore those factors in reaching its conclusion."

At this crucial turning point in environmental law, Justice Marshall alone got it right. His view of NEPA is plainly supported by the congressional intent, expressed by the Act's sponsor, Senator Henry M. Jackson, on the Senate floor as "a declaration that we do not intend as a government or as a people to initiate actions which endanger the continued existence or the health of mankind [or] do irreparable damage to the air, land and water which support life on earth." Had this reading of the Act prevailed, NEPA would have been a far more effective weapon to prevent environmental harm by federal agencies. In vivid contrast to the Supreme Court majority's narrow view of NEPA, many state statutes modeled on NEPA expressly provide, or have been construed, to require agencies to substantively mitigate environmental damage, not just discuss it. Instead, federal courts have continued to regard NEPA as procedural only and to reject claims that agencies need to actually mitigate environmental harm. In contrast, Justice Marshall's view...
as the lone dissenter would have achieved the true intent of NEPA, and led to far more effective environmental protection by federal agencies.

**AMERICAN PETROLEUM INSTITUTE: SAFEGUARDING THE WORKPLACE**

Another long-standing struggle in environmental law turns on whether government agencies must weigh the monetary costs to industry of reducing exposure to toxic substances against the risks created by that exposure. Clearly, risks of exposure have to be assessed. But some representatives of industry and legal scholars have argued that costs ought to be directly weighed against benefits to health. This approach has come to be known as cost-benefit analysis, and its proponents argued in a pair of cases before the Supreme Court that federal statutes mandated its use in adopting regulations for workplace exposure to hazardous chemicals.

*Industrial Union Department, AFL-CIO v. American Petroleum Institute* involved a standard adopted by the Secretary of Labor under the Occupational Safety and Health Act (OSHA) to control exposure to benzene, a carcinogenic by-product of oil refining. The statute requires the Secretary to set "the standard which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health[.]") The standard is to be determined by the Occupational Safety and Health Administration, also known as OSHA, a division of the Department of Labor.

444 U.S. at 227 (noting NEPA is "essentially procedural" and role of courts is to insure that agency has followed procedure of considering environmental consequences but may not interject in areas wholly within executive's discretion); Vermont Yankee Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978) (stating NEPA establishes substantive goals, but imposes on agencies duties that are essentially procedural).


The Government took the view that the Act required companies to restrict carcinogen exposure to "an exposure limit at the lowest technologically feasible level that will not impair the viability of the industries regulated."\(^\text{52}\) Since a standard was defined in the Act as one "reasonably necessary or appropriate to provide safe or healthful employment,"\(^\text{53}\) the Fifth Circuit annulled the rule as failing that test. It ruled the Act does not give "unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of costs," and that the Secretary, therefore, had to determine "whether the benefits expected from the new standard bore a reasonable relationship to the costs that it imposed."\(^\text{54}\)

A narrow majority of the Supreme Court affirmed. Justice Stevens, writing for a four justice plurality, agreed with the Fifth Circuit that the Act "requires the Secretary to find, as a threshold matter, that the toxic substance in question poses a significant health risk[.]")\(^\text{55}\) Until that finding is made, he concluded, the Court need not decide "whether the Court of Appeals correctly held that there must be a reasonable correlation between costs and benefits, or whether, as the federal parties argue, the Secretary is then required . . . to promulgate a standard that goes as far as technologically and economically possible to eliminate the risk."\(^\text{56}\)

The plurality went on to rule that the agency had not adequately shown that lowering exposure to benzene would likely reduce the

\(^{52}\) See Industrial Union, 448 U.S. at 607.


\(^{54}\) Industrial Union, 448 U.S. at 614 (quoting American Petroleum Institute v. OSHA, 581 F.2d 493, 502-03 (5th Cir. 1978)); see also Frank B. Cross, Beyond Benzene: Establishing Principles For a Significance Threshold on Regulatable Risks of Cancer, 35 EMORY L.J. 1, 4-\(^5\) (Winter 1986) (discussing Supreme Court's 1980 decision in Industrial Union Dep't, AFL-CIO v. American Petroleum Inst. which focused attention on authority of federal administrative agencies to regulate occupational health and safety).

\(^{55}\) Industrial Union, 448 U.S. at 614-15 (1980); see also Cross, supra note 55, at 13-14 (discussing acceptable risk thresholds with regards to exposure to occupational carcinogens).

\(^{56}\) Industrial Union, 448 U.S. at 615; see also Victor B. Flatt, OSHA Regulation of Low-Exposure Carcinogens: A New Approach to Judicial Analysis of Scientific Evidence, 14 U. PUGET SOUND L. REV. 283, 285-86 (Winter 1991) (discussing Occupational Safety and Health Act in which Congress gave to Secretary of Labor power to set occupational safety and health standards at level that "most adequately assures, to extent feasible, on basis of best available evidence, that no employee will suffer material impairment of health or functional capacity"). See generally 29 U.S.C. § 655 (b)(5).
risk of cancer.\textsuperscript{57} It criticized OSHA for rejecting the oil industry's studies that indicated a level of ten parts per million (ppm) was as safe a threshold as the one ppm level set by the agency.\textsuperscript{58} The plurality concluded that "we have no occasion to determine whether costs must be weighed against benefits in an appropriate case."\textsuperscript{59} This view rests on the remarkable conclusion that oil refinery workers exposed to substantial ingestion of benzene—an undisputed carcinogen—are not at "significant risk of harm."\textsuperscript{60} It set up the straw man of "an absolutely risk-free workplace" and then unsurprisingly concluded the Act did not mandate that impossible result.\textsuperscript{61}

Justice Powell, though he joined parts of the plurality opinion, concurred, adopting the Court of Appeals' view that the Act requires a cost-benefit analysis. He concluded "a standard-setting process that ignored economic considerations would result in a serious misallocation of resources and a lower effective level of safety than could be achieved under standards set with reference to the comparative benefits available at a lower cost."\textsuperscript{62} Justice Powell did, though, agree with the dissenters that OSHA properly found the risk to be significant enough to justify controls.\textsuperscript{63}

\textsuperscript{57} See \textit{Industrial Union}, 448 U.S. at 634-35; see also Flatt, supra note 57, at 288 (discussing risk of leukemia from benzene was actually much higher than studies had indicated). See generally \textit{A List of Substances Which May Be Candidates for Further Scientific Review and Possible Identification, Classification, and Regulation as Potential Occupational Carcinogens}, 45 Fed. Reg. 53672, 53672-74 (1980); see also \textit{Regulation of Potential Carcinogens}, 29 C.F.R. § 1990.143 (1990) (developing regulation proceedings for Category I and II potential occupational carcinogens).


\textsuperscript{59} See \textit{Industrial Union}, 448 U.S. at 640. See generally Cross, supra note 55, at 44-54 (discussing proposed principles for defining significant risk threshold, which includes comparative average risk, maximum individual risk, occupational vs. environmental risks and general societal preferences).

\textsuperscript{60} \textit{Industrial Union}, 448 U.S. at 642; see also Flatt, supra note 57, at 289-91 (discussing "substantial evidence" requirement to prove significant risk of harm).

\textsuperscript{61} \textit{Industrial Union}, 448 U.S. at 647.


\textsuperscript{63} See \textit{Industrial Union}, 448 U.S. at 666. Justice Powell notes the requirement discussed in
Chief Justice) Rehnquist concurred on the separate ground that the Act unlawfully delegated legislative authority to the agency—a contention not successfully voiced since a pair of long-discredited decisions from the Pleistocene era of administrative law.64

It again fell to Justice Marshall to write the dissent, in which Justices Brennan, White and Blackmun joined. He began by noting that "a court is not permitted to distort a statute's meaning in order to make it conform with the Justices' own views of sound social policy"—and this "decision flagrantly disregards these restrictions on judicial authority."65 The result, he pointed out, will be "that the Federal Government's efforts to protect American workers from cancer and other crippling diseases may be substantially impaired."66 As he commented, nowhere does the OSHA statute mandate that the Secretary of Labor must find a risk to workplace health be "significant" before he can act—a conclusion motivated by "the plurality's solicitude for the welfare of regulated industries."67 Since the existing medical evidence may not justify the finding of "significant risk" that the plurality, though not Congress, insisted upon, this approach "would place the burden of medical uncertainty squarely on the shoulders of the American worker, the intended beneficiary of the . . . Act."68

In embracing this approach, Justice Marshall adopted the precautionary principle of environmental protection: the salutary

64 See Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935) (holding that section of National Industrial Recovery Act unconstitutionally delegated legislative power to executive branch); J.W. Hampton, Jr. & Co. v. U.S., 276 U.S. 394, 408-409 (1928) (holding that § 315 of 1922 Tariff Act was valid because it gave President means to execute law rather than authority to make law). But see American Trucking Ass'n v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (per curiam) (attempting to reincarnate non-delegation doctrine by suggesting that doctrine requires EPA to articulate intelligible principle when applying factors used to determine public health concerns connected with air pollution), cert. granted, 120 S. Ct. 2193 (2000). See generally 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3:15 (2d ed. 1978) (criticizing Panama Refining and J.W. Hampton decisions and non-delegation doctrine).


66 Industrial Union, 448 U.S. at 688 (Marshall, J., dissenting); see also Harvard Law Review Association, supra note 65, at 245 (stating that Justice Marshall found evidence in record to establish that concentrations of benzene lower than 10 ppm were hazardous to health).

67 Industrial Union, 448 U.S. at 690 (Marshall, J., dissenting).

68 Industrial Union, 448 U.S. at 690 (Marshall, J., dissenting); see also Cherrington, supra note 63, at 95 (quoting § 651(b) of Occupational Safety and Health Act).
rule that when scientific evidence is unresolved, government regulation should protect human health and environmental integrity. As the Rio de Janeiro Declaration of 1992 was later to phrase it, "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." 69 This approach has driven several international agreements to further environmental protection, including the Biodiversity Convention and the treaty to protect the atmosphere’s ozone layer from damage resulting from chlorofluorocarbons (CFCs). 70

Justice Marshall, not one to mince words, went on to reject the plurality’s view of the record as “both extraordinarily arrogant and extraordinarily unfair” – arrogant because the justices “presume[d] to make [their] own factual findings” while they simply shrugged off the agency’s expertise. 71 He then catalogued the Secretary of Labor’s consistent findings of heightened risk of cancer resulting from workplace exposure to benzene. 72 He contrasted OSHA with statutes in which Congress specifically mandated a cost-benefit analysis, 73 and aptly characterized the decision as “a usurpation of decision-making authority that has been exercised by and properly belongs with Congress and its authorized representatives.” 74 He ended his dissent by describing the plurality’s approach as a return to the judicial activism of the Lochner 75 era, when the Court blithely

71 See Industrial Union, 448 U.S. at 695 (Marshall, J., dissenting).
72 See id. at 698-99. Justice Marshall discussed studies in numerous countries showing causal relation between benzene and leukemia. Further, he criticized the plurality’s characterization that the Secretary’s finding that benzene is carcinogenic as the same “Draconian policy,” and went on to list the diverse witnesses who presented contrary evidence. See id. at 696.
74 Industrial Union, 448 U.S. at 712 (Marshall, J., dissenting); see also Aviation West Corp. v. Washington State Dept. of Labor and Indus., 980 P.2d 701, 711 (Wash. 1999) (agreeing with Justice Marshall’s dissent in Industrial Union, and criticizing plurality’s distortion of statute’s meaning to impose their own policy views).
75 See Lochner v. New York, 198 U.S. 45, 64 (1905) (invalidating state law limiting working hours for bakers as infringement on freedom of contract and due process rights). But see Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (holding that state law making debt adjustment misdemeanor violated neither equal protection nor due process, and stating that doctrine that
struck down legislation to safeguard the workplace:

[A]s the Constitution "does not enact Mr. Herbert Spencer's Social Statics," *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), so the responsibility to scrutinize federal administrative action does not authorize this Court to strike its own balance between the costs and benefits of occupational safety standards. I am confident that the approach taken by the plurality today, like that in *Lochner* itself, will eventually be abandoned, and that the representative branches of government will once again be allowed to determine the level of safety of health protection to be accorded to the American worker.\(^7\)

In this prediction Justice Marshall was prescient. The following year, in *American Textile Manufacturers' Institute v. Donovan*,\(^77\) the Court resoundingly read OSHA not to require a cost-benefit analysis. In that case, involving a workplace standard for exposure to cotton dust, the agency met the threshold finding of significant risk imposed by the plurality in the *Petroleum Institute (Industrial Union)* decision. The majority opinion by Justice Brennan leaned heavily on Justice Marshall’s earlier dissent.\(^78\)

**THE SURFACE MINING CASES: KEEPING WATERS CLEAR AND FARMLAND PRODUCTIVE**

During the same term as *American Textile*, the Court was faced with a brace of district court decisions overturning the Surface Mining Act,\(^79\) a first-magnitude environmental protection statute enacted in 1977. The Act stemmed from Congressional recognition,
after a decade of exhortation by environmental advocates, that the states had failed to effectively control the dire damage caused by unregulated strip mining. These effects included, as the Congressional findings noted, "causing erosion and landslides, . . . contributing to floods, . . . polluting the water, [and] destroying fish and wildlife habitats[."

The mining states, succumbing to the vast economic and political influence of the industry, either failed to enact laws to control these abuses or neglected to enforce them vigorously. The reports of the Congressional committees, following lengthy hearings, portrayed "unreclaimed lands, water pollution, erosion, floods," as well as "[a]cid drainage which has ruined an estimated 11,000 miles of streams; the loss of prime hardwood forest and the destruction of wildlife habitat by strip mining; the degrading of productive farmland," along with "[l]andslides, siltation and sedimentation of river systems[."

The Act is, as Congress described it, designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." It authorizes the Secretary of the Interior to adopt interim rules requiring mine operators to restore lands to their prior condition and approximate original contour, replant vegetation and control flooding, erosion and spoil disposal. Thereafter, states may regulate strip mining through programs approved by the Secretary. In states without approved programs, the Secretary is to adopt permanent rules and require permits.

The coal producers challenged the Act as beyond the power of

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83 See 30 U.S.C. § 1265(b) (2000); see also Bragg v. Robertson, 72 F. Supp. 2d 642, 646 (S.D. W. Va. 1999) (stating that § 1265(b)(3) "requires coal mining operators 'as [sic] a minimum' to 'restore the approximate original contour of the land.'"); Amerikohl Mining, Inc. v. United States, 899 F.2d 1210, 1211 (Fed. Cir. 1990) (stating that § 1265(b) "requires mine workers to restore the . . . land to a condition which supports the land's original or better use . . .").
84 See 30 U.S.C. §§ 1251(b), 1253, 1254; Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1086 (6th Cir. 1981) (citing § 1251(b) generally, regarding Secretary's power to promulgate regulations for state programs, and to implement federal programs where state programs are absent.); see also In re Permanent Surface Mining Regulation Litigation, 1980 U.S. Dist. LEXIS 17722, at *4, (D.D.C. 1980) (stating, "if a state fails to submit its own program, or the state program is disapproved, then the federal regulations govern surface coal mining operations for the state.").
Congress under the Commerce Clause and as an invasion of the states' reserved powers under the Tenth Amendment. Writing for the Court in *Hodel v. Virginia Surface Mining & Reclamation Association*, Justice Marshall upheld the Act, noting the weighty effects on interstate commerce identified by Congress. In particular, he sustained restrictions on steep slope mining against the claim that they "interfere[d] with the States' 'traditional governmental function' of regulating land use," holding the congressional power reached these widespread commercial activities with their devastating consequences. He went on to reject a claim that the Act amounted to an unconstitutional taking of property without compensation, ruling that the statute does not prohibit surface mining but simply regulates it, thus negating the basis for any claim that the Act deprives the plaintiffs of all economically viable use of their property. In any event the plaintiffs, he noted, were free either to seek a variance from the rules or to show the Act constitutes a taking of a particular parcel, in contrast to this challenge to the facial validity of the entire law.

That this decision was not, one might say, a run-of-the-mine one was evident in the fractures on the Court. Justice Powell concurred but expressed great concern that much of the Act was "written with little comprehension of its potential effect on [the] rugged area" of western Virginia to which it would in part apply, where, he felt, "[t]he cost of restoration in some situations could exceed substantially the value of the coal." Justice Rehnquist, joined in

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86 *Hodel*, 452 U.S. at 284-85.
87 See *Hodel*, 452 U.S. at 295-97 (reasoning that Surface Mining Act did not constitute taking because owners were not prevented from putting their coal bearing land to other uses, nor prohibited from steep slope mining entirely, as Act merely made mining companies responsible for restoring land to approximately same condition it was in before mining began); *cf. Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980) (holding California zoning ordinance which restricted owner's potential use of five acres of land not to be taking of property); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978) (holding city ordinance restricting owner of Grand Central Station from fundamentally altering structure not to be taking).
88 The Court believed that if plaintiffs would have asserted their right to request a variance from the approximate original counter requirement, or a waiver from the surface mining restrictions, a mutually acceptable solution could have been reached. See *Hodel*, 452 U.S. at 297.
89 See *Hodel*, 452 U.S. at 307 (Powell, J., concurring). Justice Powell contended that the Court's interpretation of the Commerce Clause, U.S. CONST. art. I. § 8, cl. 3, "over many years," had undoubtedly given Congress the power to enact such legislation as the Surface Mining Act. See *id*. at 305. Justice Powell refused to consider the taking question for the reason the plaintiffs had not identified a single piece of property which had been taken by the Act. See *id*. However, he seemed sympathetic to the miners' plight by noting Virginia's most
large measure by Chief Justice Burger, also concurred but cautioned at some length that “Congress in regulating surface mining has stretched its authority to the 'nth degree.'”

Justice Marshall again wrote for the Court in *Hodel v. Indiana,* upholding the Act against a claim that its provisions requiring mine operators to restore prime farmland to equal or higher levels of yield exceeded congressional power. He held “Congress was entitled to find that the protection of prime farmland is a federal interest that may be addressed through Commerce Clause legislation.” As he pointed out, “Congress adopted the Surface Mining Act in order to ensure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety.” Justice Rehnquist and Chief Justice Burger again concurred on narrower grounds.

These decisions allowed the Surface Mining Act, legislation vital to safeguarding the water, hillsides and farmland of several states, including scenic Virginia and West Virginia, to take effect unimpeded. The Act has saved huge acreage of agricultural land from destruction and protected mountains, rivers, streams, fish and wildlife habitat, as well as lifting an enormous political barrier that had thwarted state legislation to control the ravages of uncontrolled strip-mining.

**JAPAN WHALING: SAVING A SPECIES**

Since 1946, the United States, together with the other nations that
had historically engaged in whaling, has been a party to the International Convention for the Regulation of Whaling. The Agreement limits the number of whales that may be killed, recognizing the threat of continued whaling to their existence. It is enforceable in the United States through the Pelly Amendment to the Fishermen’s Protective Act of 1967, which directs the Secretary of Commerce to certify to the President whenever a country’s citizens act to “diminish the effectiveness of an international fishery conservation program[.]” The President then may order the Secretary of the Treasury to bar any imports of fish products from the offending country.

Japan’s repeated violations of quotas set by the International Whaling Commission under the treaty prompted the Secretary of Commerce to certify these offenses to the President. However, no action was taken. In response, Congress adopted the Packwood Amendment, explicitly requiring the Government to reduce by half an offending nation’s fishery allocation within the United States’ fishery conservation zone.

In 1984, Japan derailed this process through an agreement with the Secretary of Commerce. In return for Japan’s pledge to meet the Commission’s limits in the future, the Secretary of Commerce agreed that Japan’s limited short-term whaling, though clearly in excess of the treaty’s levels, would not “diminish the effectiveness” of the treaty. This led to a suit by conservation groups claiming Japan’s violations did diminish the treaty’s effectiveness, and therefore the Secretary of Commerce was required by the statute to so certify, triggering the sanctions.

The Court ruled, 5 to 4, in *Japan Whaling Association v. American Cetacean Society*, that the Secretary’s obligation to certify Japan’s violations to the President was not mandatory. Justice White wrote for the Court that the Secretary had discretion to decide whether to certify violations to the President. Congress, he concluded, had neither defined “diminish the effectiveness” nor expressly mandated certification.

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99 *See Japan Whaling Ass’n.*, 478 U. S. at 222-23 (holding that no statutory definition exists for “diminishes the effectiveness” for Secretary to use in making certification decision and that statutory language does not direct automatic certification).
Justice Marshall wrote for the four dissenters. His opinion began:

Since 1971, Congress has sought to lead the world, through the repeated exercise of its power over foreign commerce, in preventing the extermination of whales and other threatened species of marine animals. I deeply regret that it will now have to act again before the Executive Branch will finally be compelled to obey the law.

In his view, the majority “reached an erroneous conclusion on a matter of intense worldwide concern.” As he noted, the Secretary of Commerce himself had found Japan’s excess whaling did diminish the treaty’s effectiveness. The Secretary then backtracked, concluding that even though Japan had diminished the effectiveness of the treaty, “he would prefer to impose a penalty different from that which Congress prescribed[.]” In short, “[t]he Secretary would rewrite the law,” and the majority opinion endorsed that revision. The result, as he pointed out, was “that this Court is empowering an officer of the Executive Branch, sworn to uphold and defend the laws of the United States, to ignore Congress’ pointed response” to the threatened extinction of these majestic species.

CONCLUSION

This evidence of Justice Marshall’s deep and abiding concern for the environment is corroborated by other examples. In Gwaltney of Smithfield v. Chesapeake Bay Foundation, he wrote for the Court that a citizen suit under the Clean Water Act requires the plaintiff to

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100 See id. at 241. Justices Brennan, Blackmun and Rehnquist joined in his opinion.
101 See id. at 241-42 (Marshall, J., dissenting); see also National Association of Home Builders v. Babbitt, 130 F.3d 1041, 1046 (D.C. Cir. 1997) (validating congressional use of Commerce Clause in attempt to protect endangered species).
103 Japan Whaling Ass’n., 478 U.S. at 245 (emphasis in original).
104 See Japan Whaling Ass’n., 478 U.S. at 246.
105 See id. at 249-50.
assert a continuing or present violation, but rejected Justice Scalia's view that the Act, as construed by the Court, improperly "create[s] a peculiar new form of subject-matter jurisdiction" in which plaintiffs need not prove injury.108 According to Justice Scalia, a citizen plaintiff must actually prove, not just allege, a present violation of the Act in order to defeat a motion to dismiss for lack of standing. Justice Marshall responded that the Act, in the Solicitor General's words, "reflects a conscious sensitivity to the practical difficulties of detecting and proving chronic episodic violations of environmental standards," so that requiring proof of ongoing injury in order to establish standing would hobble citizen suits severely.109 This view has recently been adopted by the Court in Friends of the Earth v. Laidlaw Environmental Services.110

In United States v. Dion,111 Justice Marshall, writing for a unanimous Court, held killing a golden eagle, a crime under the Endangered Species Act112 and Eagle Protection Act,113 was not excused under treaties with Indian tribes. He found these statutes protecting this threatened species showed a clear congressional intent to abrogate whatever earlier treaty rights may have existed. Again, in Chemical Manufacturers' Association v. Natural Resources Defense Council,114 he wrote the dissent from a ruling that the EPA could issue variances to industry from the Clean Water Act's

108 Gwaltney, 484 U.S. at 67 (Scalia, J., concurring and dissenting; Justices O'Connor and Stevens joined in this opinion). See also Mattoon v. City of Pittsfield, 980 F.2d 1, 6 (1st Cir. 1992) (reaffirming Justice Marshall's interpretation of statute requiring citizen suits to have "continuous or intermittent violation"). See generally Allen v. Wright, 468 U.S. 737, 751 (1984) (stating constitutional minimum for standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

109 See Gwaltney, 484 U.S. at 65 (citing Brief of United States 18); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (stating requirements for petitioner to satisfy standing under Article III to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"); North and South Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991) (confirming notion that literal enforcement of statute limiting citizen suits would not only be undesirable, it would be absurd; stating "Court must strive to provide an alternative meaning that avoids the irrational consequence").

110 528 U.S. 167 (2000); see Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 154 (4th Cir. 2000) (distinguishing environmental cases from other kinds of litigation over issue of standing, stating that in these cases "standing inquiry must reflect the context in which the suit is brought."); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992) (stating that "desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing").


requirements controlling toxic pollutants.\textsuperscript{115} He argued that the statute barred modifications in order to "most directly and completely accomplish the congressional goal ... of an effective toxic control program[.]"\textsuperscript{116} In a lengthy and vigorous dissent, he noted that "when Congress has attached great importance to certain environmental goals, we have disallowed exceptions even in the absence of an explicit statutory ban."\textsuperscript{117}

Similarly, Justice Marshall struck a major blow for energy conservation in \textit{American Paper Institute, Inc. v. American Electric Power Service Corp.},\textsuperscript{118} by upholding the Federal Energy Regulatory Commission's rules requiring electric power producers to buy power generated by independent producers at its true cost. This decision greatly encouraged consumers to generate power, reducing the need for costly and environmentally harmful power plant construction. The rules halted the previous practice of utilities refusing to buy excess power generated by independents, a great barrier to independent production. As the Commission noted in a statement relied on by the Court, "ratepayers and the nation as a whole will benefit from the decreased reliance on scarce fossil fuels, such as oil and gas, and the more efficient use of energy."\textsuperscript{119}

Justice Marshall's environmental opinions generally eschew broad, impassioned generalities about the need for environmental protection. Nonetheless, they demonstrate a powerful commitment to those goals, expressed in a wide variety of decisions involving most of the arenas of environmental law: air and water quality, hazardous chemicals, endangered species, energy conservation, and more. He clearly recognized the safeguarding of our natural resources and environment as a major concern and consistently


\textsuperscript{116} Chemical Mfr's, 470 U.S. at 142 (noting Congress' goal to keep environment safe from toxic pollution even in consideration of high costs of abiding by strict pollutant control standards).


\textsuperscript{118} 461 U.S. 402 (1983) (holding that Federal Energy Regulatory Commission did not exceed its authority in promulgating two rules regulating electric power companies for benefit of environment).

\textsuperscript{119} See \textit{American Paper}, 461 U.S. at 406 (citing Commission's order promulgating rule at issue).
wrote in support of efforts by both government and its citizens to further those objectives. This was totally congruent with his concerns over civil liberties and civil rights.

Chief Justice William Rehnquist was to eulogize Justice Marshall as a "stout champion of individual rights."120 Far less widely acclaimed, but just as much a part of his fibre, was his devotion to safeguarding our natural environment as George Orwell presciently noted,121 a concern inextricably linked to protecting human rights.


121 See Crick, supra note 3, at 129, 303-04 (depicting Orwell's love of nature, its importance, and inability of bureaucracy to interfere with it); see also Michael Shelden, Orwell: The Authorized Biography 398 (1991) (noting Orwell's love of environment through his writing on significance of trees).