

THE LIMITS OF POLITICAL JURISPRUDENCE IN CANADA AND THE
UNITED STATES

A Dissertation

Presented to the Faculty of the Graduate School

of Cornell University

in Partial Fulfillment of the Requirements for the Degree of

Doctor of Philosophy

by

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August 2007

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Cornell University 2007

This dissertation analyzes some of the ways in which “constitutional architecture” shapes jurisprudence in Canada and the United States, with a particular focus on appellate court decisions related to aboriginal and environmental law. The purpose of the comparison is to consider how the differences between parliamentary government and American-style “separation of powers” affect the nature of judicial power, as well as how differences in the language of the Canadian and American constitutionalism shape the direction of law in the two countries. In contrast to those political scientists who interpret law as being driven by political factors, this dissertation emphasizes the ways in which institutional structures place limits on the scope of judicial ideology and judicial activism. In other words, political jurisprudence takes place within the limits established by constitutional architecture. The project is based on an analysis of environmental and aboriginal law decisions decided by the Supreme Courts of Canada and the United States between 1985 and 2007, as well as an analysis of environmental policy cases decided by American and Canadian federal courts of appeal. The key conclusion is that constitutional differences, not ideology, explain the differing opportunities for the “judicialization” of environmental and aboriginal policy in Canada and the United States. In the USA, the separation of powers is the principal source of judicialization of environmental policy; in Canada, the Parliamentary system restrains the ability of an otherwise activist judiciary to shape the implementation of environmental law. In regards to aboriginal policy, in contrast, the Canadian constitution has provided a basis for judicial activism. The cases of environmental and

aboriginal law illustrate that, in Canada and the United States, institutional constraints continue to determine the limits of political jurisprudence.

BIOGRAPHICAL SKETCH

Ryan Robert Hurl was born in Niagara Falls, Ontario, Canada, in the winter of 1973. He has worked in a variety of occupations, including that of newspaper-delivery boy, dishwasher, vendor of hot dogs, and “assistant lecturer” of political science at a large state university with an excellent football team. He attended the University of Toronto prior to his graduate studies at Cornell, and he has also lived in New York City (the Bronx and Queens), Florence (very briefly), and Gainesville, Florida. He currently lives in Toronto with his wife, Margaret Kohn, and two sons, Noah and Zachary Hurl-Kohn, and holds a position as Visiting Assistant Professor at the University of Toronto.

To my parents,
Robert and Janet Hurl

ACKNOWLEDGMENTS

I would like to thank the Andrew Mellon Foundation for the generous support they have provided during my graduate education at Cornell. My dissertation committee—Theodore Lowi, Elizabeth Sanders, and Martin Shefter—provided crucial guidance for this project. In their own work and teaching, each is a model of intellectual honesty and dedication to scholarship. I thank them for the support they have shown me, and I will continue in my attempts to live up to their example. I would also like to thank the teachers at the University of Toronto—in particular, Richard Day and Clifford Orwin—who first aroused my interest in political science, as well as those at Cornell University—in particular, Nancy Hirschman, Isaac Kramnick, Richard Bense, and Geoff Waite—who helped guide my education in Ithaca. My largest intellectual debt is owed to my committee chair, Jeremy Rabkin, who provided unflagging encouragement and unfailing patience in overseeing this project. Any virtues that this dissertation exhibits can find their roots in his skilled teaching and guidance; as for its faults, I claim full responsibility.

Most of all, I would like to thank my wife, Margaret Kohn, for the kindness and love she has shown me as I have worked on my Ph.D. I would also like to thank Noah and Zachary Hurl-Kohn, who (I hope) are looking forward to spending more time with their father. To Zach, I wish you the best of luck as you continue to work on your own, rather mysterious dissertation.

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CHAPTER ONE:
INTRODUCTION: ENVIRONMENTAL LAW AND ABORIGINAL RIGHTS
IN CANADA AND THE UNITED STATES

In the Spring of 2007, the United States Supreme Court rendered a decision in the case of *Massachusetts v. EPA*,¹ in which a variety of state governments and environmental groups asked the court to push the national government to regulate “greenhouse gases” such as carbon dioxide. One might have thought that the issue of “global warming” would not come under the Court’s jurisdiction, for the same reason that one would not expect the court to develop its own foreign policy. The issue of global warming is, after all, a global problem. Solving this problem, or even living with it, depends upon the actions (and inactions) of all governments, or at least all major governments in the fully industrialized or developing worlds. As in the case of other global problems, solutions can only be reached through inter-government negotiation and compromise, and it is not clear whether courts can contribute much if anything to this process. Much like the case of foreign policy, the problem of global warming raises complex issues that are not readily comprehended even by those who have benefited from three years of law school. Yet the American Supreme Court—or at least a majority of its justices—argued that, due to the dictates of the Clean Air Act and its amendments, the court could not avoid taking a part in the debate over global warming. Regardless of the wisdom of having lawyers intervene into complex matters of science and policy, the position of the majority was not completely implausible as an interpretation of the law.

¹ *Massachusetts v. EPA*, SUPREME COURT OF THE UNITED STATES, 127 S. Ct. 1438; 167 L. Ed. 2d 248; 2007.

The plaintiffs sought a declaration that, given the current state of scientific knowledge about the effects of carbon dioxide emissions on global warming, the Environmental Protection Agency must initiate plans to regulate green house gas emissions from automobiles. The courts were asked to initiate a major development in public policy, despite (or because of) Congress' inability to reach conclusions on green house gas emissions, despite the vast impact that such regulations would have on America's automobile dependent economy, and despite the international dimensions to the issue. What did matter was the following language of the Clean Air Act:

The [EPA] [***16] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. . . .

Given this statutory language, the majority argued that the EPA had not provided a sufficient explanation for its decision not to regulate the four green house gases identified by the plaintiffs. EPA had argued that its own decisions could not possibly affect the advance of global warming, as the increase in global temperatures was a consequence of developments occurring in all industrial and developing nations. In addition, the EPA argued that carbon dioxide is not a kind of pollutant covered by the Clean Air Act. Both arguments were dismissed by the Court. Relying extensively on its interpretation of scientific consensus, but even more extensively on the language of the Clean Air Act, the Supreme Court ruled that the EPA's inaction on greenhouse gas regulation was unlawful.

Environmentalists undoubtedly regard this ruling as an important victory, and are understandably unconcerned with the legal niceties of the case. For those more concerned with the proper scope of judicial power, *Massachusetts v. EPA* is a clear

example of judicial overreach. But it would be difficult, in this instance, to argue that the court was ignoring or creating the law. The majority of five made the plausible argument that the Environmental Protection Agency had in fact been given the power, under federal law, to regulate greenhouse gas emissions from automobiles; and if it had the power, circumstances dictated that it had to act. This had been the position of two of the EPA's general counsels in 1998 and 1999 under the Clinton administration. Under the Bush administration, EPA officials came to the opposite conclusion, arguing that there was nothing in the Environmental Protection Act that gave the EPA the power to regulate "greenhouse gases." Even if the EPA did possess the authority to regulate gases such as carbon dioxide, it would not have been prudent for it to do so, as Congress was attempting to address the very complex issues raised by global warming through new (though certainly not always successful) legislative initiatives. The majority's position in *Massachusetts v. EPA* was that, as a matter of law, the Clinton administration had been correct. Though green house gases may not have been of specific concern to the legislators who created the EPA and its subsequent amendments, the regulation of such gases fell within the EPA's power. This did not mean that the EPA would necessarily be forced by the court to issue specific regulations of automobile emissions. But the EPA could no longer avoid addressing the issue of carbon dioxide emissions from automobiles and their contribution to global warming. Congress had already given it the responsibility to investigate and, if necessary, regulate pollutants that affected the environment, and the contemporary scientific consensus was that green house gases were pollutants of that kind. Thus, the majority opinion cannot simply be dismissed as judicial law-making, or as an example of the "capture" of the Court by environmentalist interest groups and their allies. The intervention of the judiciary was enabled by the language of American environmental law which was written to constrain the discretion of executive officials and experts.

Whether it makes sense for courts to intervene into such a complicated policy arena is an entirely separate question. For better or worse, the American political system has structured environmental policy in such a way that it invites the exercise of judicial power.

Reports of the “demise of environmentalism” in American law have, after *Massachusetts v. EPA*, been revealed as premature.² While it is certainly the case that there is a coterie of judges opposed to the judicialization of environmental policy, the advocates of judicial deference in environmental policy are apparently outnumbered on the Supreme Court (at least in regards to some momentous issues, such as the scope of EPA duties). They are unlikely to gain reinforcements in the immediate political future, even if one of the sitting liberal justices should choose to leave the bench. Personnel, in *Massachusetts v. EPA* as in so many other cases, seemed more important than precedent.

The demise of environmentalism in American law was exaggerated, at least in part, because some scholars overestimated the impact of judicial precedent or “stare decisis,” the principle that courts should generally stick to the rules laid down in earlier decisions. The scope of environmentalism in American law was not settled by precedents from the Rehnquist and Burger eras, precedents which seemed to confirm that courts should exercise extreme deference when evaluating the discretionary and scientific decisions of bureaucratic policy-makers.³ In addition, the majority in *Massachusetts v. EPA* did not conform to those precedents which established a more restrictive conception of legal standing, precedents which appeared to raise further

² Michael Greve, *The Demise of Environmentalism in American Law*. Washington: AEI Press, 1996.

³ E.g. *Chevron v. Natural Resources Defense Council, Inc.* 467 US S. Ct. 837 (1984) see also Cass Sunstein “Law and Administration After Chevron.” *Columbia Law Review*. Vol. 90, No. 8. (Dec. 1990) pp 2071-2120.

hurdles against those who might wish to direct public policy through litigation.⁴ Those who thought that the heyday of environmentalism in American law was over by the late 1990s were, perhaps, guilty of excessive legal idealism. Environmental litigation continues in American courts, and it continues to succeed on occasion, despite the decisions of the Burger and Rehnquist courts that attempted to limit the legal bases for environmental litigation.

Massachusetts v. EPA might give pleasure to environmentalists, but it is likely to make us more cynical about the role of courts. The Supreme Court, in this case, seems to simply mirror the public debate over environmentalism. Or, to use a slightly different metaphor, the case reveals the court to be simply another arena for ideological combat. The dissenting justices would argue, to the contrary, that their position had little or nothing to do with the science of global warming or political differences over environmentalism. Yet, for many observers, the political persuasion of the four dissenting justices cannot escape notice. Surely it is not a coincidence that only Justices Scalia, Thomas, Roberts, and Alito, conservatives all, found legal reasons to rule in favor of the Bush Administration. *Massachusetts vs. EPA*, in other words, can be seen as yet another illustration of the political character of contemporary law and courts. While politics may not determine all aspects of judicial decision-making, when momentous questions reach the courtroom—the proper response to global warming, say, or the selection of the President of the United States—partisan lines are drawn, and the meaning of law and the outcome of legal cases depends upon the political affiliations and preferences of judges. If we wish to know how the courts will resolve these major issues, then we need only to inquire into the ideologies or “political preferences” of judges.

⁴ E.g. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) see also Cass Sunstein “What’s Standing After Lujan? Of Citizen Suits, ‘Injuries,’ and Article III.” *Michigan Law Review*, Vol. 91, No. 2 (Nov. 1992) pp 163-236.

The connection between politics and law is important, and obvious. Less obvious is the way in which institutions—the structure of government, and the nature of law itself—place limits on the politics of jurisprudence. Particularly in the contemporary era, when the political and the ideological aspects of jurisprudence are highlighted by both scholars and journalists, it is easy to overlook or downplay the ways in which institutional structures constrain judicial power. The best way to remind us how institutions limit political jurisprudence is to compare how different kinds of political institutions shape the law. Comparisons between Canadian and American jurisprudence are particularly useful in this regard. If we compare American courts with courts in Canada, courts that operate in a very similar culture but in a very different institutional environment, it is easier to discern the ways in which judicial decision-making is shaped by political institutions and ultimately by the law itself.

For instance, if we take a political perspective on courts and law, we might expect that environmental activism would be at least as prevalent in Canadian law as in American. But this is not the case. Environmentalism is a popular cause in Canada,⁵ but courts have rarely become its champion. The Canadian environmental record is not so great that environmentalists could ask for nothing more from the courts; in fact, Canadian environmental protections are probably less effective, and less severe, than are the equivalents in the United States. Yet one searches in vain for the equivalent to *Massachusetts v. EPA* in Canadian law—that is, an example of litigation initiating major changes in the substance and direction of environmental policy. Even when the issues are not as complex and momentous as global warming, it is difficult to find examples of environmental interest groups winning litigation campaigns against government decision-makers in Canada. If legal decisions really are determined by

⁵ Judith I. McKenzie, *Environmental Politics in Canada: Managing the Commons into The 21st Century*. Oxford University Press: London, 2002. pp 91-99.

politics and ideology, it is somewhat curious that the left-leaning Canadian polity has produced a judiciary that is so hesitant to endorse or advance one of the most central left-leaning political causes. What accounts for this relative absence of environmentalism in Canadian jurisprudence? And what does this absence tell us about the relationship between politics and law?

The timidity of the Canadian judiciary in environmental policy cannot be ascribed to a general unwillingness to intervene into political matters. The Constitution Act of 1982 and the Canadian Charter of Rights and Freedoms introduced “American style” judicial activism into the Canadian political system, and in many instances Canadian courts have made rulings that emulate or exceed the liberal jurisprudence of the Warren and Burger courts. Consider, for instance, the role played by Canadian courts in aboriginal law. In contrast to the example of environmental policy, Canadian courts have transformed the relationship between “First Nations”—aboriginal peoples—and the Canadian state. The best example of the Court’s transformative role in aboriginal policy is *Delgamuukw v British Columbia*,⁶ a complicated land claim case decided in 1997. While the case did not resolve the specific land claims of the Gitksan and Wet’suwet’en Nations who initiated the litigation, the court’s opinion did elaborate a broad conception of “aboriginal title” that would form the basis for subsequent litigation. The implications of the expansive definition of aboriginal title were immediately seized upon by aboriginal leaders and academic commentators. According to some legal academics, the Court’s definition of aboriginal title confirms not only ownership rights over land, but also the existence of an inherent right of self-government for aboriginal people.⁷ A summit of First Nations

⁶ *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.).

⁷ E.g. Kent McNeil “Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty.” *Tulsa Journal of Comparative and International Law*. Volume 5, 1998. pp 278-98 The idea of an inherent right of aboriginal self-government is by no means a marginal idea amongst aboriginal leaders and legal elites. Less than sufficient attention has been paid to the practical details

leaders informed the federal government that, as a consequence of the *Delgamuukw* decision, the court had confirmed aboriginal title to the whole of British Columbia, along with “complete authority, jurisdiction, and decision-making in our territories and over our resources.”⁸ *Delgamuukw* certainly did not resolve the various problems of aboriginal-state relations in Canada, but through this decision and others like it the court has shaped the options and expectations of both aboriginals and state elites. Unlike the case of environmental policy, Canadian courts have not been hesitant to play a leading role in aboriginal rights and aboriginal policy.

The situation in American jurisprudence is different. American courts have not followed the Canadian example in reforming the relationship between Native Americans and the state. Academic commentators are not sanguine about the potential for a transformative aboriginal rights jurisprudence in the United States.⁹ The simplest explanation for this situation is that the litigation prospects of Native Americans have been hampered by the strength of conservative jurists on the court—individuals such as Justice Clarence Thomas and Justice Antonin Scalia, joined recently by allies such as Chief Justice Roberts and Justice Samuel Alito, as well as their occasional compatriots such as Justice Anthony Kennedy, the recently deceased Chief Justice Rehnquist, and the recently retired Justice Sandra Day O’Connor. According to this line of thinking, the American Supreme Court has played a limited role in the

of implementing this right: “(T)he amount of attention paid by the First Nation political elite and scholarly supporters of their position to the search for a viable political and constitutional arrangement with the non-Aboriginal majority is minimal compared to the effort and advocacy devoted to self-determination, self-government, and a third order of government.” Alan Cairns, *First Nations and the Canadian State*. Kingston: Queen’s University, The Institute of Inter-Governmental Relations, 2005 p. 31.

⁸ The Globe and Mail, 17 February 1998, p. A-18, quoted in Gurston Dacks, “British Columbia after the *Delgamuukw* Decision: Land Claims and Other Processes.” *Canadian Public Policy*. Volume 28, No. 2, (June, 2002) pp 239-255.

⁹ Steven Paul McSloy, “The Miner’s Canary: A Bird’s Eye View of American Indian Law and Its Future.” *New England Law Review*, Volume 37, (Spring, 2003).

development of aboriginal rights for reasons that would also lead us to expect the American Supreme Court to overturn *Roe v. Wade*, support extraordinary acts of executive power in the war on terror, expand protections for property rights, and so on. The absence of progressive aboriginal rights jurisprudence can be explained in political terms. This situation could be reversed with changes in Congress and the Presidency, changes that would ultimately lead to more liberal appointees and thus to a jurisprudence more supportive of aboriginal claims.

The problem with this political interpretation of American aboriginal rights jurisprudence is simple as well: the so-called “conservatives” on the American Supreme Court are often joined by their more “liberal” colleagues in their opinions that limit and circumscribe the scope of aboriginal claims. At least for the last decade and half, liberal justices on the American Supreme Court— Justices Stevens, Souter, Breyer, and Ginsburg—have refrained from developing an ambitious aboriginal rights jurisprudence. There is no body of dissenting aboriginal rights doctrine that merely awaits the appointment of Ronald Dworkin or Lawrence Tribe so as to become the law of the land. This explains why some of the most prominent proponents of aboriginal rights jurisprudence have aimed their venom at American Supreme Court justices who are usually seen as reliable votes for liberal political positions.¹⁰ The obstacles to Canadian-style judicial intervention into aboriginal policy seem to lie within American law itself, and not merely in the political balance of power on the court. Perhaps this is why some legal scholars suggest that only appeals to authorities outside of the American constitutional and legal tradition can lead to an American revolution in aboriginal rights.¹¹ It would be premature to suggest that a revolution in aboriginal

¹⁰ Robert A. Williams, *Like A Loaded Weapon: The Rehnquist Court, Indian Rights, and the legal history of racism in America*. Minneapolis: University of Minnesota Press, 2005.

¹¹ E.g. Note, “International Law as an Interpretive Force in Federal Indian Law.” *Harvard Law Review*, Vol. 116, No. 8, (June, 2003) pp 1751-1773.

rights will never occur within American law. But it would be overly simplistic to say that this revolution has been foreclosed solely because of the presence of conservative or “new right” justices on the American Supreme Court.

The divergence between Canadian and American jurisprudence in environmental and aboriginal law is worthy of note, not merely because they touch upon two of the central issues in contemporary political life, but also because of what the differences tell us about the nature and limits of political jurisprudence. If courts are primarily driven by politics, we would expect that judges who support aboriginal rights would also support environmentalism, and vice versa. This is because support for aboriginal interests (or the interests of minority groups in general) and environmentalism are in many ways central, particularly in contemporary North America, to what it means to be politically liberal or left-leaning.¹² A general divergence between Canadian and American jurisprudence in the last three decades would not be surprising for those who interpret courts in purely political terms. Canada has consistently elected more left-leaning governments during this era, and presumably this would lead to a more left-leaning judiciary. This is what makes the differing responses of the Canadian and American courts to environmental and aboriginal litigation so intriguing: it shows that the politics of jurisprudence does not always develop in ways we might expect, in this era where so many have become cynical or at least “realistic” about the dependence of law upon politics. Despite the undoubted significance of political ideology and preferences, constitutional structures and legal norms continue to place constraints on the powers of courts, and they explain

¹² E.g. Richard Ellis, “Romancing the Oppressed: The New Left and the Left Out.” *Review of Politics*. Volume 58, Number 1, (Winter, 1996) pp 109-154. Ellis notes the strong connection between environmentalism and support for indigenous peoples as a defining marker of the “new left” that emerged in the post-1960s era: “Among the strongest contemporary manifestations of the of this perennial egalitarian tendency is the radical environmental movement, whose adherents routinely argue that dispossessed indigenous peoples offer an authentic model of a truly ecological society.” p. 118.

some of the important differences that separate the jurisprudence of Canada and the United States.

1.1 Political Institutions and the Limits of Political Jurisprudence: Two Facets of Constitutional Architecture

The central insight of the advocates of political interpretations of jurisprudence—whether mid-20th century legal realists, the advocates of the “attitudinal” and “rational choice” models in political science, or the proponents of critical legal studies—is that the language of law cannot constrain judicial discretion. I am not proposing that a pure legal model of judicial decision making provides a better explanation for the decisions made by judges. My argument is that we cannot understand judicial politics unless we pay attention to how institutional structures or “constitutional architecture” provide differing opportunities for judges to exercise their policy preferences. “Constitutional architecture” is not simply another term for law: rather, it refers to the ways in which laws are made, the ways they are enforced, and how these features either inhibit or enable judicial policy-making. But legal language is part of constitutional architecture as well, and the proponents of political jurisprudence often overstate the interpretive flexibility of Constitutional documents. By paying attention to the different rights that are provided protection by the Canadian and American constitutions, we can see that, in some instances, the inclusion of specific rights in a political institution’s constitutional architecture can shape how courts influence policy.

There are two general ways in which institutions or “constitutional architecture” might shape the politics of jurisprudence in Canada and the United States: first, the structure and relationship of the law-making and policy-implementation process, and secondly, the specific language of constitutional rights-

provisions. The law-making and law-enforcement process—the way in which legislatures create law and policy, and the relationship between the legislative branch and the executive branch—are of course very different in Canada and the United States. Differing means of law-creation and law-enforcement have the potential to create very different opportunities for “law interpretation.” There are at least 2 key ways in which the differences between the Canadian Parliamentary system and the American “separation of powers” system affect the scope of judicial power:

1) Statutory language and executive discretion: The American Congress has a greater incentive to place restraints upon executive discretion, due to the fact that the executive is a separate institution not directly accountable to the legislature. In many instances, different political parties will control the legislative and executive branches, and this gives Congress an additional motive to shackle executive discretion through law. Two of the most common ways in which this occurs are through increasing the detail and specificity of law, and by allowing private groups to play a role in enforcing public law.

2) The limited legitimacy of bureaucratic discretion in the American administrative state.

Despite the fact that Congress has incentives to cabin executive discretion as much as possible, it is impossible to eliminate the discretionary character of public policy in the modern state. Given what the public wants the state to accomplish, Congress cannot possibly create all of the various rules and restrictions that govern the activities of individuals and organizations. Most law-making (euphemistically referred to as “rule-making” or “policy-making”) is thus undertaken by executive branch bureaucracies. However, the legitimacy of bureaucratic decision-making is hampered by the separation of the executive and legislative branches. American courts are less inclined to regard administrative interpretations of American law as authoritative, because the

administrators are not even theoretically accountable to the legislative branch. American courts have an institutional justification for intervention into administrative politics that is not available to courts in parliamentary systems of government. Thus, when they decide to challenge executive discretion, American courts plausibly claim that they must play a central role in insuring executive fidelity to legislative intentions. In a parliamentary system, where the executive is directly responsible to the legislature, it is more difficult for courts to sustain this claim.

The differences between the parliamentary government and the American separation of powers system are likely to lead to different patterns of statutory interpretation in Canadian and American courts. The opportunities for judicial intervention into environmental policy are affected by these most general features of government in Canada and the United States. In regards to aboriginal rights, however, we find a different facet of constitutional architecture: here, the Canadian Constitution Act of 1982 confers explicit protections for aboriginal rights, while the American Constitution is largely silent on the status of Indian rights and Indian treaties. My argument is that the recognition of aboriginal rights in the Canadian Constitution has provided Canadian courts with a necessary pre-text for the exercise of power in aboriginal policy, a pre-text that is not available in regards to environmentalism. In the American constitutional order, aboriginal rights have not been “constitutionalized.” This does not mean that judicial power and judicial politics are irrelevant in the area of aboriginal policy. The same tensions that promote judicial power in other areas—the tension between executive discretion and legislative intent, the tension between national and state policies—also provide opportunities for judicial power and displays of judicial politics in aboriginal law. But the judicial role in the development of aboriginal rights in the United States has been limited, because courts must operate under a different set of institutional limits. While the Canadian constitution allows and

even demands that courts determine the scope and substance of aboriginal rights, in American law, courts are constrained by the absence of explicit constitutional protections for Indian rights.

The general absence of “environmental activism” in Canadian jurisprudence, and the general absence of “aboriginal rights activism” in American law, is a product of institutional differences between the two nations, not the political balance of power on the courts or the idiosyncratic policy preferences of judges. My intent in this study is not to deny the role of politics in judging, however. There is no doubt that political preferences, beliefs, ideologies, and personal experience colors the ways in which judges interpret the law. As there is no way to eliminate the opportunities for judicial discretion that emerge from gaps in the law, confusion in legal language, or conflicts between various laws, it is always unrealistic to expect that politics is completely irrelevant to judging. But it is also unrealistic to ignore the real differences that separate judges from other political actors. It is important to recognize the inevitability of judicial politics, without being overwhelmed by the inevitable role that politics plays in law. By paying attention to the institutional structures that variously enable or inhibit judicial power, we can gain a better appreciation of the limits of political jurisprudence.

1.2 Outline

In chapter two, I explain in greater detail why a comparison of Canadian and American aboriginal rights and environmental law decisions can help to illustrate the limits of political jurisprudence. Theorists of judicial politics who focus solely on the American polity are tempted to emphasize the political influences on courts, as they study courts that operate in only one institutional setting. By looking at some of the ways courts operate in differing political regimes, we can better appreciate the ways in

which institutions affect what issues become the subject of judicial power and judicial discretion. Those few comparativists who, in recent years, have paid attention to the role of courts, have tended to focus on the similarities between judges in various regimes, or to interpret the scope of judicial power as a consequence of social factors. The Canadian and American regimes are typically regarded as “converging” towards a single model of judicial power; differences in judicial outcomes can be explained as a consequence of political struggles, as opposed to institutional differences. In contrast, I argue that a comparison of judicial politics in Canada and the United States reveals that differences in constitutional architecture help explain some of the continuing differences between the jurisprudence of Canada and the United States.

Chapter three deals with various aspects of Indian law in Canada and the United States. In this section I compare all of the cases dealing with aboriginal legal claims (based upon aboriginal rights, treaty rights, and statutory claims) decided by the Canadian and American Supreme Court between 1985 (when the Canadian Constitution Act of 1982 and the Charter of Rights and Freedoms went into effect) and 2006. My central claim is that Canadian constitutional reforms have created a greater space for judicial activism regarding aboriginal legal claims, particularly in the area of aboriginal and treaty rights. However, the court’s support for aboriginal claims remains limited in many respects—the more expansive interpretation of aboriginal rights in the previous two decades is not a result of the court having been “captured” by aboriginal interest groups or their supporters in the legal academy. The aboriginal law decisions in the United States Supreme Court during this period illustrate that aboriginal litigants are constrained by politics and by law. Unlike the case in the Canadian Supreme Court, there are clearer “voting blocs” in American Indian law, composed of judges with distinctly different levels of support for aboriginal legal claims. But even amongst American judges who are most likely to support aboriginal

claims, there are few signs of support for anything like the Canadian revolution in aboriginal rights.

In chapter four, I examine a variety of environmental law decisions in Canadian and American courts. My argument is that the Canadian parliamentary system creates fewer opportunities, and fewer justifications, for intervention into environmental policy-making by Canadian courts. While Canadian courts have adopted some legal innovations that led, in American politics, to a massive increase in the exercise of judicial power through statutory interpretation, those innovations have not had a similar effect in Canada. Canadian courts tend to adopt a deferential approach to government power in environmental law that follows the “centralization” and “governing coalition” theories of judicial decision making.¹³ American courts, in contrast, are more likely to support challenges to the environmental decisions made by executive bureaucracies such as the EPA. However, these decisions do not mirror the intense partisan differences over environmental policy that are a significant source of tension in American politics. Rather, the decisions show a pattern in which judges are motivated primarily by a desire to restrain executive discretion and insure fidelity to Congressional intent. The kinds of disputes that exist in environmental law decisions by judges do not simply reflect the partisan differences over environmental policy that are so evident amongst elected politicians and “issue networks.” The environmental law decisions of American appellate courts, for the most part, do not reveal the influence of either “green” or “free market” approaches to environmentalism. The problems of political activism emerge not because courts are imposing their own policy preferences, but because of the way American courts have constructed the scope of judicial power, the way they have conceptualized the Congressional-

¹³ E.g. Martin Shapiro, *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press, 1986; Robert Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker.” *Journal of Public Law*, Vol. 6, (1957).

Presidential relations, and the way in which they understand the requirements of the rule of law.

This comparison of environmental and aboriginal law in Canadian and American courts shows that differing institutional environments create different forms of judicial power, and differing opportunities for “rights revolutionaries.” Environmental law decisions in Canadian and American courts show that the political differences between the two nations continue to create differing opportunities for judicial activism. The continuing deference of Canadian courts towards environmental policy-makers, despite some shifts in the Court’s approach to procedural questions, helps to illustrate how the rise in judicial activism in Canada is in fact constrained by the Constitution and the Charter, and is not merely a consequence of the judicial usurpation of power. This is not intended to discredit critics of the Court’s Charter jurisprudence. However, in response to those who criticize the judicial activists for “making law,” I argue that the environmental law decisions of Canadian courts illustrates that the activism of courts seems to depend on the opportunities that have been given them.

In aboriginal law, in contrast, Canadian courts have been empowered by the “interpretive flexibility”¹⁴ of the Constitution Act of 1982, which has empowered courts to transform aboriginal law (though not necessarily the conditions of aboriginal peoples) and encouraged aboriginal litigants to seek judicial enforcement and elaboration of their rights. The limited development of aboriginal rights in United States is a consequence of both political divisions and constitutional constraints. Without the kind of constitutional transformations that occurred in Canada, it is unlikely that the success of Native Canadian litigants could be repeated in American courts, even if “conservative” justices are one day replaced by “liberals.” The

¹⁴ Christopher Manfredi, *Feminist Activism in the Supreme Court: legal mobilization and the Women’s Legal Education Action Fund*. Vancouver: UBC Press, 2004.

Constitution, and the legal precedents built upon it, stand in the way of an American aboriginal rights revolution, not only specific judges.

CHAPTER TWO: THE INSTITUTIONAL LIMITS OF JUDICIAL POLITICS

The insight that courts and judges are political is not new. Perhaps it is no longer even shocking. Martin Shapiro's discussion of the American judiciary as just another potential venue for interest group politics was, in the early 1960's, intended to be impish, if not scandalous.¹⁵ Several decades of judicial activism and scholarly debunking of "legalism" have made his observations appear less jarring. Scholars and the public are accustomed to the idea that interest groups attempt to influence policy through the legal system. Similarly, the notion that the political beliefs and preferences of judges shape how they respond is common wisdom for students of judicial politics in the academy and in journalism. But if Shapiro's example leads the reader to think about the functional similarities between the various branches of government—that is, the ways in which legislators, executive officials, and judges are similar insofar as they are makers of policy—it is also crucial to consider how the forms of government shape what kinds of policies can be made and by whom. Political scientists have focused on how courts are similar to other political institutions, and this has been a fruitful corrective to the ever present danger of excessive legal idealism. But it is also crucial to remember that courts engage not in politics simply, but in judicial politics. In comparison with other political actors, courts face specific constraints in regards to their ability to enforce their decisions, in regards to the kinds of decisions they have the opportunity to make, and in regards to the kinds of decisions that they are willing to make. No interest group will ever appeal to courts in order to declare a war, and no court would ever endorse a litigant who wanted a judicial order to bring a conflict to

¹⁵ Martin Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence*. New York: Free Press of Glencoe, 1964.

an end. The issue of foreign policy is the starkest reminder of the limits placed upon judicial politics, whatever the desires and preferences of judges. If we wish to understand what courts do, it is necessary to pay attention to how institutional structures create opportunities for courts to exercise power, and how, in some areas of politics, institutional features prevent courts from exercising much power at all.

My comparison of American and Canadian judicial power will attempt to assess some of the ways institutional differences between these two nations shape the exercise of judicial power. I do not claim to refute the theories that stress the inherently political character of Supreme Court decision-making; indeed, I accept that the role of political ideology is central to judicial decision making. I am even inclined to think that it would be politically salutary for Americans and Canadians to be more cognizant of the political dimensions of law-enforcement and judging. However, the view that courts are *only* determined by politics is also unconvincing, or rather, it is misleading to see this as a complete explanation of judicial decision making. Before turning to a discussion of how institutions shape judicial power, and how this can be illustrated through a comparison of the jurisprudence of aboriginal rights and environmental law in Canada and the United States, it is worthwhile to consider the “political” approach to judicial decision-making in more detail, in order to appreciate its insights and to understand its limits.

2.1 Explaining the Politics of Jurisprudence

Within political science, the “attitudinal model” refers to a half-century old research tradition which claims that the legal decisions of courts are determined by the policy preferences of judges. In contrast to legal scholars who emphasize the role of precedent and constitutional language, the attitudinalists marshaled an impressive array of data which suggested that jurisprudence exists, for the most part, as an

elaborate smoke-screen for judges who, consciously or not, make decisions based upon their own political preferences.

The attitudinal model has been described as the reigning research paradigm for those political scientists who study law and courts.¹⁶ The idea that jurisprudence can be reduced to the psychology of individual judges (as manifested in their political preferences) is certainly not the only variety of “political” interpretations of law. Some political scientists suggest that Supreme Court decisions tend to track shifts in public opinion.¹⁷ Others focus on the connections between Supreme Court justices and the “governing regimes” that they are part of.¹⁸ All of these approaches are rooted in the idea that judicial-decision making, at least for appellate courts, is driven by considerations of public policy, whether idiosyncratic and personal or connected to shifts in the elite and public moods.

Other political scientists have responded to the work of the attitudinalists by emphasizing the ways in which institutions shape and constrain judicial politics. One variant of the “post-attitudinal New Institutionalism” is the strategic or rational choice model of judicial decision-making. The rational choice approach is, in pith and substance, quite similar to the attitudinal model: both are based upon the premise that judicial decisions are rooted in political preferences. However, the proponents of the strategic model emphasize that judges are constrained in pursuing their preferences on

¹⁶ E.g. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*. (Cambridge: Cambridge University Press, 2002).

¹⁷ E.g. Herbert M. Kritzer, “Federal Judges and their Political Environment: The Influence of Public Opinion,” 23 *American Journal of Political Science*, (1979), Willima Mishler and Reginald S. Sheehan, “Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective,” 58 *Journal of Politics* 169 (1996), Roy B. Flemming and B. Dan Wood, “The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods,” 41 *American Journal of Political Science* 468 (1997).

¹⁸ Lucas Powe, *The Warren Court and American Politics*. Cambridge: Harvard University Press, 2001.

account of institutional factors, such as the possibility of appellate review, the process of collegial decision making in appellate courts, and the potential for responses to judicial decisions by other political actors. Thus, while courts are still primarily political, the politics of courts is determined not only by what judges think is politically preferable, but also by what they think is politically possible given their overall political environment.¹⁹

In light of the apparent strength of political interpretations of judicial power, other scholars have attempted to re-assess the ways in which law, constitutional forms, and legal doctrine continue to shape the ways in which courts exercise political power.²⁰ The political implications of this debate are important, even though they are not often stressed by the scholars themselves.²¹ The structure of the judiciary in both Canada and the United States is premised on the idea that courts follow the law, as opposed to creating it. This is an ideal, and one that can never be fully achieved in practice. But the institutional structure of federal courts—in particular, the insulation of judges from direct democratic control after they have been appointed—is based on the premise that courts exercise power in a way that is distinct from other political actors. The fact that impeachment, “court packing,” or any other direct attempt by political actors to affect the courts are usually regarded by the public as illegitimate cannot be reconciled with a judiciary that is solely or even primarily motivated by

¹⁹ For a survey of the development of the “strategic model” of judicial decision-making, see Lee Epstein and Jack Knight, “Toward A Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead.” *Political Research Quarterly*. Vol. 53, No. 3, (September, 2000) pp 625-661.

²⁰ E.g. Howard Gillman, *The Constitution Besieged: The Rise and Decline of Lochner Era Police Powers Jurisprudence*. (Durham: Duke University Press, 1993).

²¹ Consider the following observation by Segal and Spaeth: “Although we live in a representative democracy, the extent to which either representation or democratic elections have force and effect depends on the will of a majority of the nine unelected, life-time serving justices...Although the justices conventionally claim for public consumption that they do not make public policy... the truth conforms to Chief Justice Charles Evan Hughes’s declaration, ‘We are under a Constitution, but the Constitution is what the judges say it is.’” *The Supreme Court and the Attitudinal Model Revisited*, pp 2-3.

political preferences.²² To the extent that courts are motivated purely by political preferences, the legitimacy of the “anti-democratic” aspects of judicial tenure are brought into question.

Whether of the attitudinalist or rational choice school, the proponents of “political jurisprudence” have not, for the most part, emphasized the normative implications of their findings. Perhaps this illustrates their own rational, preference maximizing strategy—that is, scholars who study courts for a living, having come to the conclusion that the major justifications for judicial independence are ill-founded, have chosen not to emphasize or publicize this normative conclusion, thereby insuring that they do not destroy their preferred object of study. While the language of the attitudinalists is mostly dry or “value neutral,” and their methodology mostly technical, their ultimate conclusions are not so different from the more fashionable advocates of “Critical Legal Studies” who dress up their conclusions in Marxist and post-structuralist idioms and are not shy about denouncing the myth of impartial law.²³ In defense of Critical Legal Studies, one could say that its practitioners are alive to the de-legitimizing implications of their arguments, in contrast with the “value neutral” work of their more staid counterparts working in the field of political science. But it is far from clear whether it makes sense for political scientists to be “value neutral” in regards to their findings. If judicial institutions are premised on the partial separation of the judiciary from ordinary political conflict, and if those premises are unfounded, it only makes sense for political scientists to point out the need to re-arrange those institutions.

²² Terri Jennings Peretti, *In Defense of a Political Court*. Princeton: Princeton University Press, 1999.

²³ For a discussion of the relationship between political interpretations of law (such as legal realism) and the eventual move towards radicalism made by the Critical Legal Studies movement, see G. Edward White, “The Inevitability of Critical Legal Studies.” *Stanford Law Review*. Volume 36, Number 2, pp 649-672.

For my own purposes, I thought that the insights of political jurisprudence could be usefully extended and developed by examining the expansion of judicial power in Canada, where the legitimacy of judicial review is at least somewhat of an open question. In examining aboriginal and environmental litigation in Canadian and American courts, I expected that the development of law could be explained as a consequence of successful interest group “capture” of like-minded judges; the success or failure of interest group lobbying of the court would ultimately be traced back to the ideology and preferences of judges. Against the legalistic model of judicial decision making, I thought it would be possible to show that both Canadian and American courts are interest group battle grounds, where outcomes are determined not so much by law as by the array of political forces. I expected to write another chapter in the history of political jurisprudence, though unlike the attitudinalists and their rational choice counterparts, I was eager to stress the unavoidable normative conclusions of political jurisprudence: the idea of an independent judiciary, the idea that judges should be insulated from political pressures, or that they somehow represent neutral arbiters of law and rights, is every bit as mythical as the divine right of kings.

My anticipated conclusions turned out to be incorrect, because I underestimated the influence of political institutions—constitutional structure and constitutional language, or “constitutional architecture”—which limit and structure judicial power in ways that cannot be accounted for by a purely political understanding of jurisprudence.

2.2 A Global Rights Revolution or a Globalized Juristocracy? Judicial Power in a Comparative Context

My initial hunch was that a comparison of judicial power in Canada and the United States would illustrate Alexis de Toqueville’s view that democratic societies

are, over time, likely to become hostile to forms, that is, the particular ways of doing things in law, politics, and society that structure our actions, and prevent the direct expression of power or even desire. According to Toqueville, “men living in democratic ages do not readily comprehend the utility of forms; they feel an instinctive contempt for them.”²⁴ He argued that, in consequence, the public in democratic societies would become increasingly hostile towards, or at least impatient with, the political, social and legal forms that placed obstacles in the path of popular will. The unfortunate paradox was that, as government became more powerful, society would both be in greater need of political and legal forms for the protection of liberty, and more likely to chafe at the restraints those forms imposed.

What de Toqueville did not anticipate was the way in which courts would aid and abet the assault on the forms of government and law. He anticipated that the assault on political and legal forms would come from majorities eager to violate individual rights, not from courts. According to contemporary critics of judicial power, the key form of liberal democratic government is self-government, and it is this which is potentially most threatened by judicial power. Thus, while I did not think that “political jurisprudence” could account for the role of the judiciary in American and Canadian political history as a whole, it appeared that Toqueville’s ideas about the weakness of forms in democratic societies could help us to understand why jurisprudence became increasingly politicized in the 20th century.

The politicization of courts and the judicialization of politics have expanded in many countries since the mid-20th century, but nowhere has this development been more prominent than in Canada and the United States.²⁵ My question was whether the

²⁴ Alexis de Toqueville, *Democracy In America*, Translated by Harvey Mansfield and Delba Winthrop. Chicago and London: University of Chicago Press, 2000. Book 4, p. 669.

²⁵ C. Neal Tate and Torbjorn Vallinder, editors. *The Global Expansion of Judicial Power*. New York: NYU Press, 1995.

breakdown in legal and political forms—in particular, the collapse of the distinction between what courts can decide and what they cannot, the distinction between political issues and “cases and controversies in law”—was leading to a convergence between Canada and the United States regarding the political power of courts. A convergence in the role of the judiciary might not be the same as a convergence in the outcomes in the court rooms of North America, due to the greater strength of left-wing liberalism in Canada and thus to the left-leaning character of the Canadian judiciary. However, I expected that the forms and developments of Canadian legal liberalism would parallel the high tide of American legal liberalism. In Canada, I expected to see the subterranean transformation of judicial power that America had experienced decades earlier, transformations that could not be directly connected to the language of the Constitution Act and the Charter of Rights and Freedoms, or the intentions of those who created it.

The transformation of judicial power in the United States in the late 20th century proceeded along four separate but related fronts. Most prominent was the transformation in the judiciary’s approach to enumerated and implied rights related to the rights of criminal suspects, freedom of speech and expression, equality rights, and the right to privacy.²⁶ It is these aspects of constitutional law which have drawn the attention of Canadian “Charterphobes,” as the principles of the “rights revolution” have migrated North in the post-Charter era. Secondly, the American courts transformed what it means for something to be a legal case, and what it meant for someone to have a legal claim. In other words, they transformed the rules of

²⁶ Aside from freedom of speech, these are the major areas addressed in Gerald Rosenberg’s assessment of the American Supreme Court’s judicial activism, *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press, 1991. In response to the question that is the sub-title of his book, Rosenberg’s answer is a no. The most plausible defense of the *legitimacy* of the Court’s new approach to enumerated and implied rights that developed over the course of the Warren and Burger Courts, is Bruce Ackermann’s *We The People, Volume Two: Transformations*. Cambridge: Harvard University Press, 1998.

justiciability related to standing, adverseness, mootness, political questions, etc.²⁷

Third, American courts became more active through interventions in administrative law and statutory interpretation, largely (though not entirely) as a consequence of choices made by Congress.²⁸ Finally, the courts became more willing to use their power not only to prevent government action that was un-Constitutional or illegal, but to prescribe specific policy solutions for legal violations, and to oversee the implementation of those solutions.²⁹

Other authors who have studied the growing role of courts in political life have tended to focus on the similarities between the development of judicial power in Canada and the United States.³⁰ In fact, the similarities between the “rights revolution” in Canada and the United States—successful revolutions both, in contrast with the partial or abortive revolutions in judicial power that have occurred in Britain and India—was one of the central themes in Charles Epp’s aptly titled *The Rights*

²⁷ For a good discussion of this topic and its relationship to the expanded power of the court, and thus the increased controversies over judicial appointments, see Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Appointments*. New York: Norton Press, 1994.

²⁸ Martin Shapiro *Who Guards the Guardians? Judicial Control of Administration*. Athens, Ga.: University of Georgia Press, 1988, Jeremy Rabkin, *Judicial Compulsions: How Public Law Distorts Public Policy*. (New York: Basic Books, 1989; R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights*. Washington, D.C.: Brookings Institution, 1994.

²⁹ E.g. Donald Horowitz, *The Courts and Social Policy* Washington, D.C.: The Brookings Institution, 1977, Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy-Making and the Modern State*. Cambridge: Cambridge University Press, 2000, Ross Sandler and David Schoenbrod, *Democracy by Decree*. New Haven: Yale University Press, 2003.

³⁰ E.g. Ran Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard University Press, 2004 In his comparative analysis of the rise of judicial power, Hirschl argues that the common thread of “judicialization” is the desire of political and “influential economic stakeholders” (p. 213) to shelter decisions from popular decision-making. Hirschl’s “hegemonic preservation thesis” does not address the way judicial power functions in different institutional contexts—a consequence of the fact that he only looks at parliamentary systems of government that have introduced judicial review in recent decades. Canadian critics of judicial power have also tended to focus on the ways in which judicial review in Canada has mirrored American constitutional developments (e.g. W.A. Bogart. *Good Government? Good Citizens? Courts, Politics, and Markets in a Changing Canada*. Vancouver: UBC Press, 2005, pp 30-31).

Revolution.³¹ The similarities between the development of judicial power in Canada and the United States, according to Epp, are a result of the confluence of three factors:

- 1) the presence, in both nations, of court-empowering constitutional documents;
- 2) the rise of an activist, pro-rights judiciary; and
- 3) the development of a legal support structure composed of activists, lawyers, and governments that are willing to support them.

Thus while it is true that not all rights revolutions are the same, the rights revolutions that have occurred in Canada and the United States have been more similar than any other. They did not occur at the same time—the expansion of judicial power in Canada in areas such as criminal rights, abortion rights, and freedom of expression had to wait, according to Epp, for the introduction of the court-empowering Constitution Act of 1982 and the introduction of the Canadian Charter of Rights and Freedoms—but they have followed along similar paths.

While political scientists have in recent years paid increased attention to the conditions that allow for increased judicial power, the ways in which “rights revolutions” *differ* in those places where they occur has not been as thoroughly explored. We know that rights revolutions are occurring around the globe, but we know less about how different institutional and cultural contexts affect the revolutionary process. Even if Epp’s conditions for a “rights revolution” are fulfilled, we cannot be sure that the expansion of judicial power will take the same form in different institutional contexts. There are some reasons to anticipate a convergence of rights revolutions, however. The influence of the American legal academy shapes the consciousness of judges around the world, though its influence is particularly prominent in Canada; according to H.W. Arthurs, the influence of the United States is

³¹ Charles Epp, *The Rights Revolution*. Chicago: University of Chicago Press, 1998.

a recurring theme in the history of Canadian legal education.³² The pressure groups that play such a vital role in Epp's explanation are often part of international issue networks.³³ The circulation of information and individuals through these networks helps to solidify their ideological similarities and unify their programmatic goals. Given the fact that the legal elites who fuel the worldwide rights revolutions are so homogenous, it seems possible that when the conditions for a rights revolution exist, the "legal support structure" will push for similar kinds of changes within the governing regime.

Epp's comparative study of the development of judicial power can be read as a supplement to the attitudinal and rational choice models of political jurisprudence. While acknowledging the role of judicial ideology, *The Rights Revolution* stresses that the capacity of courts and the willingness of judges to make policy depends on both institutional and social pre-conditions, such as court-empowering constitutions that enshrine fundamental rights, and legal support structures that help to advance novel understandings of those rights. Epp also suggests that, in light of his analysis, concerns with the anti-democratic character of judicial power are exaggerated, as courts are only able to exercise power if other political actors take steps to empower courts. Thus, Epp explains not only why courts become politically active in some times and places but not others; he is also able to address, if not resolve, the question of the legitimacy of judicial power in democratic societies.

³² H.W. Arthurs, "The Political Economy of Canadian Legal Education." *Journal of Law and Society*. Volume 25, Number 1, p. 15.

³³ E.g. Robert Rohrschneider and Russell Dalton, "A Global Network? Transnational Cooperation Amongst Environmental Groups." *The Journal of Politics*. Volume 64, Number 2. May 2002. pp 510-533.

The development of judicial power analyzed (and celebrated)³⁴ by Epp has of course been subject to varying levels of criticism and scrutiny. In the United States, critics of judicial power have focused on both the legitimacy and the effectiveness of judicial activism, usually (though certainly not always) from the conservative end of the political spectrum.³⁵ In Canada, left and right-wing “Charter-phobes” are almost equally prominent. Left wing critics tend to argue that the rise of judicial power has been part of a project to insulate elites from populist pressure on economic issues.³⁶ Those on the right are undoubtedly pleased that courts have not imposed a greater degree of socialism on Canadian citizens, but they have otherwise found little to applaud in the Court’s Charter jurisprudence. Conservative critics have applied the doctrinal criticisms developed in the United States to the jurisprudence of the Supreme Court, and have found post-Charter Canadian jurisprudence similarly wanting in terms of its fidelity to the text of the Constitution, its underlying philosophical justifications,

³⁴ Epp’s can be read as an attempt to address the theoretical problems with modern judicial activism—in particular, the claim that non-interpretivist judicial review is suspect in a democracy because of its counter-majoritarian character: “Constitutional rights in general, and rights revolutions in particular... rest on a support structure that has a broad basis in civil society.” (Epp, *The Rights Revolution*, p. 199) His argument is as follows: constitutional rights provisions unless a legal support structure (litigants, interest groups, public interest lawyers, academics) exists to mobilize those rights; such a legal support structure will be weak unless it is provided government support; government support for the legal support structure that makes “rights revolutions” possible undercuts the claim that those rights revolutions are counter-majoritarian.

³⁵ E.g. John Agresto, *The Supreme Court and Constitutional Democracy*. Ithaca: Cornell University Press, 1984, Christopher Wolfe *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*. Lanham, Md.: Rowan and Littlefield, 1994., Matthew Franck *Against the Imperial Judiciary: The Supreme Court vs. The Sovereignty of the People* Lawrence: University Press of Kansas, 1996 For examples of theoretical criticisms of judicial power from a liberal perspective, see Mark Tushnet, *Taking the Constitution Away from the Courts*. Princeton: Princeton University Press, 1999 Jeremy Waldron, *The Dignity of Legislation* Cambridge: Cambridge University Press, 1999.

³⁶ E.g. Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*. Toronto: Thompson Press, 1994. Consider also the views of Ran Hirschl: “As long as representative political-decision making institutions were kept safely in the hands of the established social circles... parliamentary sovereignty was praised by politicians and constitutional theorists alike as the most sacred of democratic values....As political representatives of the established interests started to lose control of these institutions (at different times in different polities), they started to worry about the ‘tyranny of the majority.’” (Hirschl, *Towards Juristocracy*, p. 217).

and its tendency to actually expand the scope of state power. The ultimate conclusion of right-wing Canadian critics is, in essence, that the Courts have become “captured” by organized interests and, perhaps most alarmingly, even captured by the legal academy itself.³⁷

Conservative Charter critics have focused on the ways in which the Canadian Supreme Court has been influenced by liberal American jurisprudence in areas of law such as criminal rights, abortion, women’s rights, and freedom of speech.³⁸ In regards to some issues, such as criminal disenfranchisement and gay rights, the Canadian Supreme Court has endorsed liberal or progressive positions that have not received the same recognition in American courts.³⁹ The proponents of the “rights revolution” have responded to these criticisms along two different fronts. First, there is the position of the “rights fundamentalists,” who argue that the Supreme Court’s Charter jurisprudence reflects a correct understanding of fundamental rights, in the sense that the framers of the Constitution Act of 1982 endorsed an evolutionary, court-centered approach to Constitutional law.⁴⁰ A second group of scholars have argued that Charter critics—and the rights fundamentalists—have exaggerated the extent to which the

³⁷ E.g. F.L. Morton and Troy Riddell, “Reasonable Limitations, Distinct Society, and the Canada Clause: Interpretive Clauses and the Competition for Constitutional Advantage.” *Canadian Journal of Political Science*. Volume 31, Number 3, (April, 1998) pp 467-493.

³⁸ E.g. Christopher Manfredi, *Judicial Power and the Charter*. (Toronto: McLelland and Stewart, 1993); F.L. Morton *Pro-Choice vs. Pro-Life: Abortion and the Courts in Canada* Norman, Ok: University of Oklahoma Press, 1992; F.L. Morton and Avril Allen, “Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada.” *Canadian Journal of Political Science*. Volume 34, Number 1, 2001 pp 55-84.

³⁹ Christopher Manfredi, “Judicial Review and Criminal Disenfranchisement in Canada and the United States.” *The Review of Politics*, Volume 60, Number 2, 1998 pp277-305 Jason Pierceson, *Courts, Liberalism, and Rights: Gay Law and Politics in Canada and the United States*. Philadelphia, Pa.: Temple University Press, 2005.

⁴⁰ E.g. David Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review*. Toronto: Carswell, 1990. Lorraine Weinrib, “The Supreme Court of Canada and Section One of the Charter.” *The Supreme Court Law Review*. Volume 10, 1998 pp 469-513 and “Canada’s Constitutional Revolution: From Legislative to Constitutional State.” *Israel Law Review*. Volume 33, Number 1, 1999 pp 13-50.

Courts have undermined Parliamentary sovereignty. These scholars suggest that Parliament has played a more active and voluntary role in the development of rights policies; post-Charter jurisprudence has thus emerged through a “dialogue” between Courts and the elected branches of government.⁴¹

The debate over judicial power in Canada has taken place over issues that are generally familiar to American students of Constitutional law and legal politics; the complaints of the critics ultimately turn on philosophical issues about the meaning and scope of rights, and thus any complaint that courts have engaged in illegitimate activism in regards to freedom of speech, women’s rights, or the rights of suspects turns into an argument over “original intentions,” living constitutionalism, and the source and foundations of rights. The debate over American judicial activism has often proved most fruitful, however, when scholars have considered how courts have exercised power over public policy in ways that are not clearly connected to the individualistic, rights-oriented issues that are the traditional domain of the courts.⁴² While the attempts to assess the “policy impact” of courts end up being as controversial as more theoretical and doctrinal debates over the legitimacy of judicial activism, they have helped to illustrate the full scope of judicial power in American politics. It also raises the question of whether Canada, which has experienced something like an American rights revolution, is likely to experience all aspects of the American revolution in judicial power. Similarly, it is useful to consider whether the

⁴¹ Janet L. Hiebert, *Charter Conflicts: What Is Parliament’s Role?* Montreal: McGill-Queen’s University Press, 2002; James B. Kelly, *Governing with the Charter*. Vancouver: UBC Press, 2005.

⁴² cf the work of Horowitz, Rabkin, Melnick, Sandler and Schoenbrod, and Feeley and Rubin. It is interesting to note that, in shifting to a defense of judicial activism that is entirely based on the politically beneficial outcomes of that activism, Feeley and Rubin argue that the theoretical criticisms leveled against judicial activism—that it violates principles of federalism, the separation of powers, and the rule of law—are correct: “the admitted divergence between the judiciary’s actions and accepted legal principles reveals an underlying weakness in those principles...Judicial policy-making, by virtue of its brute existence, thus casts doubt not only on the individual principles, but on the general image of law and government from which they are derived.” *Judicial Policy-Making and the Modern State*. p. 336.

textual differences between the Canadian and American constitutions limit judicial power in ways that cannot simply be explained by the differing ideologies or policy preferences of judges. In assessing these issues, we can shed light not only on the concerns of scholars who study the relative influence of constitutional architecture and political ideology in judicial decision making, but also on the legitimacy of judicial power. As I will explain next, environmental law and aboriginal rights provide two useful cases for assessing the role of “constitutional architecture” in Canadian and America courts.

2.3 The Separation of Powers, Parliamentary Government and Constitutional Language

The expansion of judicial power in the United States came about not merely as a consequence of new judicial approaches to questions of fundamental rights, but also as a consequence of new judicial approaches to statutory interpretation and executive power. Thus, it is useful to consider whether the very different institutional architecture of the Canadian political system presents differing obstacles (or opportunities) for judges engaged in interpreting statutes and evaluating executive law-enforcement and policy implementation. While many rights recognized by the Canadian Charter of Rights and Freedoms paralleled those found in the American Bill of Rights,⁴³ the repatriation of the Canadian Constitution in 1982 did not change the parliamentary form of government.⁴⁴ Canadians were given American-style judicial

⁴³ Christopher Manfredi, “The Use of United States Decisions by the Supreme Court of Canada under the Charter of Rights and Freedoms.” *Canadian Journal of Political Science*. Volume 23, Number 3. 1990 pp 499-518.

⁴⁴ For a discussion of “mega-constitutional” politics in Canada, see Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* Toronto: University of Toronto Press, 1992. See also Ronald L. Watts, “Canada: Three Decades of Periodic Federal Crises.” *International Political Science Review*. Vol. 17. No. 4, (Oct, 1996) pp 353-371.

review in 1982, but they were not given the American legislative process, or the American separation of powers. Thus, while authors like Epp, Manfredi, and Morton have focused on the overlap between American and Canadian judicial power in areas such as criminal and abortion rights, they represent only the tip of the legal iceberg in American political life. In addition, the Canadian Charter of Rights and Freedoms differs significantly from the American Bill of Rights. The latter was a product of the sectional and political differences amongst 18th century revolutionaries, the former a product of inter-provincial (and inter-ethnic) negotiations amongst late 20th century political and bureaucratic elites. It is worth considering whether textual differences in constitutional language affect the work of judges, or whether the language of constitutional rights is so malleable that judges are not really restrained by the language and intentions of constitutional framers. To what extent have these continuing institutional differences prevented the “rights revolutions” of North America—or, more accurately, the revolutions in judicial power—from converging?

According to scholars such as Shep Melnick, there are several reasons to think that the American “separation of powers” system creates greater opportunities for the expression of judicial power. Focusing on the differences between the American and British practices, Melnick argues that a variety of factors allow for American courts to engage in judicial activism through statutory interpretation. In contrast with Britain, American courts are considered to have authority equal to administrators in the interpretation of statutory law, and whereas British courts are expected to focus on the ordinary meaning of words in statutes, American courts are much more likely to look to the history, purpose, and spirit of statutes when interpreting them.⁴⁵ As a consequence, judges avail themselves of a wide range of diverging and contrary

⁴⁵ Patrick Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions*. London: Clarendon Press, 1987 pp 100-101.

statements made by elected and unelected officials regarding the meaning of the law and the intentions of Congress, which in turn become the basis for judicial challenges to the statutory interpretations of the executive branch.⁴⁶ These contrary approaches to statutory interpretation are rooted in political differences between the two nations. Parliamentary government, by virtue of the strength of political parties, the respect afforded to the civil service, and the centralization of power within the cabinet, creates a situation which reduces judicial discretion: “Not only is legislation drafted by the ministries, but it is ordinarily passed in much the same form as presented. . . . The legislation that emerges from Parliament also tends to be more coherent and drafted with more care than is the legislation passed by Congress.”⁴⁷ Finally, British judges are aware that decisions a cabinet minister regards as adverse can be readily overturned through corrective legislation. The American legislative process is far more fragmented, and this often produces statutes that are more ambiguous. While presidents and administrators claim the authority to resolve ambiguities, courts are just as willing to claim that they possess a responsibility to uphold the intentions of Congress. The fragmented legislative process makes it difficult for the elected branches to respond to judicial statutory interpretations. Finally, the complexities of federalism, and the power of judicial review of legislation for violations of Constitutional rights, provide additional avenues for the exercise of judicial power in statutory interpretation.⁴⁸

What are the implications of Melnick’s study of judicial statutory activism in the United States for a comparative study of judicial power in Canada and the United

⁴⁶ E.g. Robert Katzmann, *Institutional Disability: The Saga of Transportation Policy for the Disabled*. Washington, D.C.: The Brookings Institution, 1986.

⁴⁷ R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights*. Washington, D.C.: The Brookings Institution, 1994 p. 10.

⁴⁸ *Ibid* pp 11-13.

States? The most important is that the capacity for judges to exercise power depends upon the legal or Constitutional environment that they find themselves in. Despite the introduction of the court-empowering Constitution Act of 1982 (and, in particular, the Charter of Rights and Freedoms) the power of Canadian courts is likely to be restricted by the parliamentary forms of government. Canadian courts have always played a role in adjudicating the respective spheres of federal and provincial influence, and thus as in the American system, Canadian federalism has long been a basis for judicial power.⁴⁹ The introduction of the Charter has empowered courts to engage in review of legislation for rights violations, which has allowed Canadian courts to follow the American “rights revolutions” in a large numbers of areas. But the legislative process in Canada still remains parliamentary; in fact, the legislative process has become increasingly centralized in the Prime Minister’s Office in recent decades.⁵⁰ In regards to statutory interpretation, this highly centralized legislative process creates less space for the assertion of judicial power, space that is created in American law by the tensions between the executive and the legislative branch, the chaotic nature of the legislative process, and the relative weakness of political parties and party leaders. Melnick’s institutional analysis of the sources of American statutory judicial activism implies that, while American and Canadian courts might converge in areas of enumerated rights in the post-Charter era, the two political systems still offer very different opportunities for the expression of judicial power in regards to statutory interpretation. Thus, based upon these institutional considerations, we have reasons to suspect that environmental policy-making by Canadian courts will be quite limited,

⁴⁹ E.g. Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* Toronto: University of Toronto Press, 1993 p. 42 See also Ronald L. Watts, “The American Constitution in Comparative Perspective: A Comparison of Federalism in Canada and the United States.” *The Journal of American History*. Vol. 74, No. 3 (December, 1987) pp 769-792.

⁵⁰ Donald Savoie, *Governing from the Center: The Concentration of Power in Canadian Politics*. Toronto: University of Toronto Press, 1999.

regardless of what we might expect based upon the broader ideological predispositions of those judges.

Charles Epp's analysis in *The Rights Revolution* provides a necessary corrective to the attitudinal model by explaining the conditions under which courts emerge from political dormancy. Yet the role played by America's separation of powers system in promoting judicial power gives us reason to suspect that not all rights revolutions will be the same. The institutional architecture of the American polity creates opportunities for judicial power that will not exist in the same form in the Canadian parliamentary system of government. However, the Canadian constitution provides some avenues for judicial power that are not present in the American constitution. The written constitutions of Canada and the United States provide protections for rights that are broadly similar, but one of the most obvious differences between the two can be seen in the treatment of aboriginal treaties and aboriginal rights.

Stated briefly, the Canadian Constitution Act of 1982 made both aboriginal treaties and un-enumerated aboriginal rights part of the nation's "higher law." Unlike many of the rights protected by the Canadian Charter of Rights of Freedoms, judicial determinations of aboriginal rights cannot be overturned through recourse to the "notwithstanding clause" by provincial legislatures and the federal Parliament. Those who lobbied for and those who approved these protections for aboriginal rights in the Constitution Act were not certain what the content of those rights would be. But the explicit constitutional protections for aboriginal rights provided a legal basis for judicial intervention into aboriginal policy that is not present in the American constitutional order. The status and rights of American Indian tribes have always been uncertain. Native Americans are neither citizens in the ordinary sense, nor treated as separate peoples; in the famous and puzzling words of Chief Justice John Marshall,

the Indians in the United States are “domestic dependent nations.” American policy towards the Indian tribes has been characterized by a variety of different approaches over time: military conflict and forced expulsion in the early 19th century, accommodation and the promotion of assimilation in the late 19th and early 20th century, and recognition and support for the continuing existence of the special political status of Native Americans in the late 20th century. What has not changed, however, is the dominant role played by Congress in determining the status of Indian tribes. In practice, this means that the treaties and “aboriginal rights” that are part of Canada’s “higher law” are, in America, more akin to statutes. Treaties between the American government and Native American tribes can be altered and abridged by unilateral Congressional action. The plenary power of Congress in aboriginal policy leaves considerable potential for judicial influence, in the sense that courts must still adjudicate between conflicting claims of Congress, the executive branch, and state governments. The Canadian constitutional system, however, provides a much broader basis for judicial interventions into aboriginal policy.

From the perspective of the “attitudinal model,” the presence or absence of specific constitutional provisions should matter very little, if at all. Judges who wish to advance or retard the legal claims of Native Americans or Canadians will have not trouble finding constitutional provisions upon which to hang their rhetorical hats. What matters is not the constitutional text, which can be interpreted in a manifold if not infinite number of ways, but whatever individual justices might happen to think about the proper scope of aboriginal legal claims.⁵¹ The claim that I will defend is that, at least in the context of aboriginal rights, institutional constraints rooted in

⁵¹ I note again the similarity, in the study of law, between the staid social scientists and their literary-theoretical equivalents in law schools and English departments (e.g. Stanley Fish), all of whom are in agreement over the radically indeterminate character of textual interpretation, and the priority of politics over law in judicial decision making.

constitutional politics place limits on political jurisprudence. The patterns of aboriginal rights decisions making in Canadian and American courts, as in the case of environmental law, cannot be accounted for without paying attention to the role played by institutional architecture.

2.4 Evaluating the Limits of Political Jurisprudence: How a Cross-National Study of Aboriginal and Environmental Law Illustrates the Significance of Political Institutions

The institutional structures that this study will consider are the differences between the Canadian and American constitutions, both in the sense of the specific rights recognized or framed by these instruments, and the ways in which the two country's differing legislative processes, and differing executive-legislative relationships, create different spaces for judicial activism. The central argument is that the exercise of judicial power in Canada and United States diverges in aboriginal law and environmental law because of the continuing significance of constitutional differences between the two nations—differences that have been reduced, but not eliminated, by the “rights revolutions” of the late twentieth century.

The comparison also helps to illustrate some of the limits of purely political interpretations of judicial decision making, because the patterns of Canadian and American environmental and aboriginal law do not follow the patterns that one would expect to see, assuming that the courts are guided primarily by their policy preferences. What would we expect from a purely political court? That is, what would we expect to from political jurisprudence, if judicial attitudes, preferences, and ideologies were more important than institutional and legal factors? A political court would reveal judges who decisions that are, by and large, ideologically consistent across issues. If we know that the American Supreme Court is staffed by a

conservative majority, we can expect that the court will tend to reach conservative conclusions in a broad range of controversial cases; if a liberal majority on the court comes to predominate, the reverse will be true.

One might object that “conservative” and “liberal” are too broad, and too ill-defined, to provide useful guidance in assessing the predispositions of judges. The first response to this objection is that the concepts of “liberal” and “conservative” predispositions are useful, even if they are imperfect. Political scientists should not be too quick to simply dismiss these popular terms of political discourse when considering judicial politics. Despite the imprecision of ideological classifications, they do capture something about the way individuals orient themselves towards political life. In commenting on the synergy amongst various progressive movements in the 1960s, Samuel Huntington observed that “an individual or group that has a specific concern with one particular reform also usually has a generally reformist weltanschauung which induces the individual or group to be favorably disposed to all reforms.”⁵² While not all supporters of labor unionism support gay marriage (to give but one example), ideological classifications are useful in describing political attitudes.

It is not necessary to give a comprehensive definition of liberalism and conservatism in order to ascertain the political meaning of liberalism in relation to environmentalism and issues affecting native North Americans. The common sense answer is that “liberals” will tend to support both “green causes” and the claims of minority groups such as Indians; conservatives are far more likely to be suspicious of those causes and claims. Scholars have mostly confirmed this common sense

⁵² Huntington, *American Politics: The Promise of Disharmony*, New York: Belnap Press, 1981 p. 110.

conclusion.⁵³ Most importantly for this study, environmentalism and aboriginal rights (or perhaps minority rights in general) are both “post-materialist” issues associated with the rise of “new politics” in the post-1960s era. Post-materialism is a concept that is used to explain the shift away from “class based” politics that has occurred in many industrial democracies. If materialist politics is based upon conflicts over how to expand the economic pie (and how to divide it up amongst economic classes), post-materialist politics centers on the cultural claims or “identity politics” of groups that are not defined strictly by class (women, gays and lesbians, minorities) as well as the consequences of economic growth (such as consumer protection and environmentalism.) Just as we expect that broad public support for environmentalism would be joined with broad public support for aboriginal rights, so too would we expect that, if jurisprudence is determined by ideology, then courts that produce pro-environmental decisions will also tend to support aboriginal rights claimants. So, just as American and Canadian politics have become (too a great extent) constituted by conflicts between the post-materialist left and the still materialist right, so too will judicial politics be characterized by the same schism.

The first supposition of this study, then, is that support for environmentalism and for aboriginal rights tend to be linked. The second is that the ideological differences between Canada and the United States are minimal. Canada differs from the United States in the way that New York state differs from the United States as a

⁵³ “Environmental concern” (“the degree to which people are aware of environmental problems and support efforts to solve them...” R.E. Dunlap and R.E. Jones, “Environmental attitudes and values.” in R. Fernandez-Ballesteros, editor, *Encyclopedia of Psychological Assessment* Volume One. Sage Publishers, London. p. 365) has been shown to be positively associated with left-wing or liberal political attitudes (e.g. J.D. Skrentny, “Concern for the Environment: A Cross-National Perspective.” *International Journal of Public Opinion Research* Volume 5, Number 4, 1993. pp 335-352). Few studies have found any strong relationship between occupational sector, social class, or income and environmental concern (e.g. Dietz T., et al. “Social structural and social psychological bases of environmental concern.” *Environment and Behavior*, 30(4) 1998.

whole—both are more liberal, but not fundamentally different.⁵⁴ So, while it is true that both libertarian anti-statism and religious conservatism have a greater presence in the American ideological spectrum, there is little reason to think that Canadian liberal elites have fundamentally different policy preferences than American liberals.

The case I want to make is thus based upon certain assumptions about the nature of political ideology in North America. Assumption #1 is that “liberalism” tends to imply support for aboriginal rights and a tendency to support environmentalism. Assumption #2 is that the meaning of liberalism, and the preferences of liberals, is to a considerable extent consistent across national boundaries in North America. Given the patterns of judicial decision-making identified in this study, an attitudinal or political explanation of the patterns of

⁵⁴ Mildred A. Schwartz, in her *Party Movements in the United States and Canada* (Lanham, Md.: Rowan and Littlefield, 2006) also suggests that a Canadian-American comparison allows for the consideration of the effects of institutional differences (e.g. the absence of primary elections in Canadian politics) because of the close similarities between northern American states and Canadian provinces in terms of “culture, economics, and voter dispositions.” p. 15 See also Mildred Schwartz, “Canadian Policy Studies in Comparative Perspective,” in *Policy Studies in Canada: The State of the Art* ed. Laurent Dobuzinskis, Michael Howlett, and David Laycock. Toronto: University of Toronto Press, 1996. Consider as well the conclusion of Mebs Kanji and Neil Nevitte in their study of attitudes towards authority in Canada and the United States: “The two cultures are virtually indistinguishable when it comes to their protest inclinations, their confidence in governmental institutions, their support for worker expressiveness and their views on parent-child relations.” Mebs Kanji and Neil Nevitte, “Who are the most deferential: Canadians or Americans?” in *Canada and the United States: Differences that Count*. ed. David M. Thomas Peterborough, ON: Broadview Press, 2000 Other studies that emphasize the increasing similarities between the political values of Canadians and Americans include D. Baer, E. Grabb, and W. Johnston, “Reassessing Differences in Canadian and American Values.” in *Images of Canada: The Sociological Tradition*. ed. J. Curtis and I Tepperman Scarborough, ON: Prentice-Hall Canada, 1999., J.P Alston, T.M. Morris, and A Vedlitz, “Comparing Canadian and American Values: New Evidence from National Surveys.” *American Review of Canadian Studies* Volume 26, Number 3, 1996 pp 301-314.

There is an emerging literature on the supposedly increasing ideological and cultural differences between Canada and the United States. Michael Adams, in *Fire and Ice: The United States, Canada, and the Myth of Converging Values* (Toronto: Penguin, 2003) makes the argument that the cultural differences between Canada and the United States have been markedly distinct in the past, and are not converging despite the increased similarities between the Canadian and American political systems that have resulted from Canada’s court-empowering Constitution Act of 1982. Phillip Resnick’s more scholarly *The European Roots of Canadian Identity* (Peterborough, Ontario: Broadview Press, 2005) also endorses the view on the significance of cultural differences between the two countries, albeit in a more qualified form. My own view is closer to that of Christian Boucher (“Canada-U.S. Values: Distinct, Inevitably Carbon Copy, or Narcissism of Small Differences? *Horizons* Vol. 7, No. 1 (2004).

aboriginal and environmental law in Canada and the United States would have to be based upon the following claims:

a) The greater support for aboriginal litigants, as opposed to environmental interests, in the Canadian Supreme Court shows that judges have an ideological predisposition to support aboriginal claims, but not the goals of environmentalist groups.

b) Liberal or moderate justices on the American Supreme Court have policy preferences (regarding aboriginal and environmental policy) that are the reverse of their liberal or moderate Canadian counterparts.

This political interpretation, I will argue, is difficult to sustain. In regards to environmental law and aboriginal rights, the differences between Canadian and American jurisprudence can be explained only if institutional differences are taken into account.

I do not claim to refute political interpretations of judicial decision-making, or to challenge the attitudinalist's legitimate feeling of pride in having identified that ideological variables predict a great deal of judicial decision-making. However, I will suggest that the Canadian and American political systems afford different opportunities for political activism—and what this means, in substantive political terms, is that while Canada has experienced something like the American “rights revolution” in areas such as criminal law, abortion policy, and freedom of speech, it is unlikely to undergo the full American experience of an “imperial judiciary” that arbitrates a vast range of policy questions. All rights revolutions are not the same. Canadian courts have been empowered by Constitutional changes, and they have converged with American courts in some ways, but the power exercised by Canadian courts is still restrained by Constitutional language, and by the constitutional form of parliamentary government.

In regards to aboriginal law, the most salient aspects of “constitutional architecture” are those special protections for aboriginal rights that are so prominent in the Canadian Constitution Act of 1982, protections that are absent in the explicit language of the American constitution. It is this constitutional difference which explains the prominence of the Canadian judiciary in the development of aboriginal rights. Unlike the case of aboriginal law, there is no reason to think that the transformative effects of the Constitution Act and the Charter of Rights and Freedoms should extend to environmental law—unless we assume, as some do, that the Charter of Rights and Freedoms has emboldened judges to invent rights as they see fit, in response to interest group pressures. Judicial activism in environmental law, in Canada, would be a troubling development, judged from the perspective of legal or constitutional legitimacy. The underlying political conditions that promote judicial deference in statutory interpretation were not altered by the re-patriation of the Canadian constitution. As the Canadian constitution contains no environmental equivalent to the aboriginal rights specifically protected in Section 35 of the Constitution Act, there is no legal reason to think that Canadian environmental law decisions would be encompassed by Canada’s rights revolution. If the environmental law decisions of the Canadian courts have been revolutionized, if courts have engaged in an environmental rights revolution, then it would be further support for Canadian Charter critics and those who see the courts as engaged in an essentially political, policy-making role guided by their own policy preferences. It is possible that the Canadian Supreme Court, which has uniformly adopted an evolutionary approach to questions of rights, and which has transformed crucial areas of public policy in the post-Charter area, does not endorse the agenda of environmentalist litigants. What I will try to illustrate instead is that the differing levels of judicial intervention in Canadian and American environmental policy is connected to the continuing

differences between parliamentary and Presidential-Congressional governments, differences that have not been affected by Canada's rights revolution in the Charter Era.

The method and goals used in this project are similar in some ways to Howard Gilman's *The Constitution Besieged*, a study of the "laissez-faire" jurisprudence in late 19th and early 20th century America.⁵⁵ The common interpretation of this era—repeated by progressive jurists and scholars of various stripes—is that federal courts were dominated by anti-statist ideologues, influenced by Social Darwinism and Manchester-school economics, who waged a judicial war against the development of the modern state. Through a careful analysis of the legal arguments used by judges, and the patterns of judicial decision-making, Gilman demonstrates that courts during this era were not motivated by any particular animus against state power as a whole. Instead, their decisions reflected long established legal rationales, rooted in the political theories of the Founding generation and developed by early 19th century jurists, regarding the proper form of national and state regulatory power. Courts invalidated government actions that attempted to confer economic benefits on some at the expense others. The fact that the vast majority of state and federal regulations were upheld when subjected to judicial challenge illustrates the limits of purely political interpretations. What Gilman did in *The Constitution Besieged* was to ask a simple question: "If courts are political, and if the dominant narrative about judicial ideology during the laissez-faire era are correct, what would we expect to see in the jurisprudence of this era?" The answer to this question is that we would expect to see courts that are inveterately opposed to statism; what Gilman found instead was a jurisprudence that circumscribed state power in a consistent, principled, and infrequent manner.

⁵⁵ Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner-Era Jurisprudence*. Durham: Duke University Press, 1994.

This study of environmental and aboriginal law in Canada and the United States asks a similar question, and comes to a similar conclusion: the actual pattern of judicial decision-making in these areas of law confound expectations based upon political interpretations of jurisprudence. This study challenges contemporary myths about judicial power, myths that have been promoted, perhaps unintentionally, by scholars who emphasize the political character of decision-making. Political preferences and ideology certainly play a role in jurisprudence, but a comparison of environmental and aboriginal law in Canada and the United States illustrates that institutional forms continue to place limits on political jurisprudence.

CHAPTER THREE:
THE LIMITS OF ABORIGINAL LAW IN CANADA AND THE UNITED
STATES, 1985-2007

Canada and the United States share not only a similar liberal political culture, they also share a common “Machiavellian” foundation: they exist as nations because they displaced the various aboriginal peoples who inhabited North America prior to the arrival of European settlers.⁵⁶ There are some differences between the colonial experience in Canada and the United States. The displacement of Indian tribes by the United States was more violent and bloody than was the case in Canada, though this does not give Canadians any grounds for self-righteousness. The expansion of the Canadian state preceded the expansion of the Canadian settlers, and this made “winning the west” a fairly orderly process.⁵⁷ This happened only because the north of the continent was not particularly attractive to any settlers prior to the very late 19th century, if then.⁵⁸ In addition, the aboriginal peoples who lived in what was to become Canada were much less numerous than their counterparts in the South.⁵⁹ Whether through a process orderly or disorderly, the native peoples of the Dominion of Canada and the Republic of the United States found their lands diminished by the expansion of the settler societies. But native peoples were not simply conquered, and not simply

⁵⁶ One commentator has described the difference between the colonization of Canada and the United States as follows: “An oversimplification, though not much of one, would be to say that the historical difference between American and Canadian handling of their native populations was that the United States decimated theirs by war, Canada theirs by starvation and disease.” C.E.S Franks, “Indian Policy: Canada and the United States Compared.” in Cook and Lindau, editors, *Aboriginal Rights and Self-Government*. McGill University Press: Montreal, 2000 p. 227.

⁵⁷ Jeanne Guillemin, “The Politics of National Integration: A Comparison of United States and Canadian Indian Administrations.” *Social Problems*, Volume 25, Number 3, (February, 1978).

⁵⁸ “Land, Labour and Capital in Pre-Confederation Canada.” pp 44-46 in Gary Teeple, *Capitalism and the National Question in Canada*. University of Toronto Press, 1972.

⁵⁹ Franks, “Indian Policy: Canada and the United States Compared.” p. 235.

eliminated. In both Canada and the United States, they remained both separate from the emerging settler societies, and subject to them; in the words of Chief Justice John Marshall, aboriginal peoples were “domestic dependent nations” in both Canada and the United States.⁶⁰

This anomalous legal arrangement—nations within a nation—created a similar set of legal questions and problems in Canada and the United States. How should the “settler states” address the displacement of peoples that accompanied the founding of their societies? Is this a problem that should be solved by extending equal citizenship to Native Americans and Native Canadians?⁶¹ Or do native communities deserve, as a matter of right, certain distinct privileges under the law?⁶² The answers to these questions have consequences that extend beyond aboriginal communities themselves, especially insofar as they touch upon question of rights to land and natural resources. A comparison of how Canadian and American courts deal with these issues can also help to illustrate the nature of judicial power and judicial politics.

Unlike the case of environmental policy, Native Americans and Native Canadians can both lay claim to specific Constitutional recognition of their special status. The American Constitution’s commerce clause implicitly recognizes the existence of aboriginal communities as distinct nations, while the Canadian constitution is even more direct in its recognition of the special constitutional status of

⁶⁰ This phrase was first used by Marshall to describe the status of American Indians in *Cherokee Nation v. Georgia* SUPREME COURT OF THE UNITED STATES, 30 U.S. 1; 8 L. Ed. 25; 1831.

⁶¹ Tom Flanagan, *First Nations? Second Thoughts*. McGill University Press: Montreal, 2000; Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State*. UBC Press: Vancouver, 2000.

⁶² E.g. Michael Murphy, “Culture and Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?” *Canadian Journal of Political Science*. Vol. 34, Number 1 (Mar. 2001) pp 109-129.

aboriginals.⁶³ In fact, the Canadian Constitution Act of 1982 places aboriginal rights into a particularly privileged category of rights. Section 35 of the Constitution Act, which “constitutionalizes” both the treaty rights and unwritten aboriginal rights of Native Canadians, exempts these rights from the Section 33 “notwithstanding clause,” which empowers both provincial and federal governments to exempt legislation from challenges based upon the Charter of Rights. Thus it is not merely the case that aboriginal rights in Canada are recognized more explicitly than in the United States. Aboriginal rights are, in some ways, not subject to the lingering elements of parliamentary sovereignty that place potential limits on other aspects of judicial activism.⁶⁴

The status and rights of aboriginals and aboriginal communities raise political questions that are central to debates over the meaning of citizenship, multi-culturalism, and even the legitimacy of the modern state. The dispossession of native peoples by settler societies, if not the outright conquest and slaughter of those peoples, remains one of the bleakest episodes in the history of North America, rivaled only by the history of slavery and Jim Crow. Traditional justifications for conquest, dispossession, and genocide are no longer regarded as legitimate; we no longer trust the old stories of

⁶³ The precise status of Indian tribes in American law has been fraught with ambiguities. But one point has been clear and relatively uncontroversial (at least from the perspective of judges and officials who act in the name of the American state): whatever powers that belong to Indian tribes are still subordinate to the power of Congress. As Justice Marshall said in regards to the anomalous position of Indian tribes, their “rights to complete sovereignty, as independent nations, were necessarily diminished” by the establishment of sovereignty by the European powers in the New World. (*Johnson v. M’Intosh* SUPREME COURT OF THE UNITED STATES, 21 U.S. 543; 5 L. Ed. 681; 1823. For a discussion of the Marshall Court’s treatment of the legal claims of Native Americans, see Jill Norgren, *The Cherokee Cases: two landmark decisions in the fight for sovereignty*. Norman, OK: Oklahoma University Press, 2004.

⁶⁴ For a variety of reasons, the use of the Section 33 override clause has proven enormously controversial. Some commentators have suggested that a constitutional convention against the use of the clause has emerged (Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*. Toronto: Oxford University Press, 1991. p. 147) For a defense of and a discussion of the political sources of opposition to Section 33, see Christopher Manfredi, *Judicial Power and the Charter* Toronto: McLelland and Stewart, 1993 pp 188-212.

how the West was won. Yet it is far from clear whether or how the settler societies of North America should respond to historical injustices committed against Native Americans and Native Canadians.

There are, broadly speaking, two ways in which the state has attempted to respond to the injustices of the “settler contract,” the doctrine that the property and lives of native North Americans were not fully deserving of protection under the law.⁶⁵ Until very recently, the “progressive” or “liberal” position emphasized the need for assimilation of native communities within liberal democratic society as a whole, a process which would allow for the native culture to sustain itself in the same manner as other ethnic groups.⁶⁶ The liberal assimilationist position has been attacked on the grounds that Indians have not in fact accepted the sovereignty of the state, and that there are specific legal protections for the autonomy of native communities (embodied

⁶⁵ For a relatively sympathetic (though still critical) treatment of some of the ideological justifications for European colonization of the New World, see Flanagan, *First Nations? Second Thoughts* pp. 48. The idea that European colonization of North America was justified by the limited civilizational development of Indians has been rejected even by critics of aboriginal rights such as Flanagan; more theoretically interesting is the claim that many aboriginal tribes did not possess the attributes of sovereignty due to lack of a state or fixed territories—the doctrine of “terra nullius.” In practice, this doctrine has of course been applied to settled agricultural communities as well as to stateless peoples; in the Berlin conference of 1885, for instance, European states declared all of sub-Saharan Africa to be “terra nullius.” Most contemporary scholars regard the doctrine of terra nullius to be irrelevant to the question of aboriginal rights and self-government. E.g. James Tully, “A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada.” in *Aboriginal Rights and Self-Government: the Canadian and Mexican experience in North American Perspective*. Montreal and Ithaca: McGill-Queen’s University Press, 2000 pp 39-72. Tully argues that once the “Eurocentric biases” of colonialism are abandoned, it is necessary to conclude that “Aboriginal peoples should be recognized as equal, coexisting, and self-governing nations” (p. 43).

⁶⁶ For discussion of the early assimilationist stage of American Indian policy, see Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1890-1920*. Lincoln: University of Nebraska Press, 1984. Interestingly, American Indian policy retreated from the assimilationist paradigm well before Canada, during the New Deal Era. For this period, see Lawrence C. Kelly *The Assault on Assimilation: John Collier and the Origins of Indian Policy Reform*. Albuquerque: University of New Mexico Press, 1983. American policy shifted towards assimilation once again by the 1950s, and this second period of tribal “termination” itself came to an end by the late 1960s. See Dan Russell, *A People’s Dream*. Vancouver: UBC Press, 2000. pp 28-29. In Canada, the assimilationist paradigm for Indian policy was the mainstream or progressive position until well into the 1960s; the alternative tended to be neglect, benign or otherwise. See Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State*. Vancouver: UBC Press, 2000 pp 47-77.

in both treaties and constitutional documents) that give them the right to a distinct status in North American society.⁶⁷ Even those who reject the doctrine of “terra nullius,”⁶⁸ however, encounter difficulties establishing the precise scope of native rights. The meaning of constitutional provisions, even recently adopted provisions such as the Canadian Constitution Act of 1982, are ambiguous, as are many of the relevant treaties (some centuries old) that provide the basis for aboriginal territorial claims.⁶⁹

The aboriginal rights cases that raise the most significant legal and political stakes are those dealing with the ownership of land. From the perspective of aboriginal litigants, the resolution of their claims have the potential to provide some form of redress for the sins of colonization, as well as the potential to restore economic well-being and perhaps even some form of political autonomy to native communities. Yet there are significant legal and political obstacles to these claims. It can be difficult, in many instances, to determine what ownership of land meant for peoples who did not live under a system of written law. Even if title can be established, there is the question of why claims of this kind are not barred by relevant statutes of limitation. Furthermore, and even more significantly, there is the problem of those who currently occupy the land. While it might seem painful and costly for governments to transfer

⁶⁷ Patrick Macklem, *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press, 2001.

⁶⁸ The doctrine, developed in various ways, which asserted that aboriginal peoples of the “New World” lacked the attributes of sovereignty, and thus new world territory could be seized legitimately by European states. For a discussion, see Anthony Pagden, “Human Rights, Natural Rights, and Europe’s Imperial Legacy.” *Political Theory*. Vol. 31, No. 2, pp 171-199.

⁶⁹ Dan Russell, an aboriginal lawyer, has observed that Section 35 of the Constitution Act provided both good news and bad news for the aboriginal peoples of Canada: “The good news was that they were recognized within the Constitution as Aboriginal peoples, but the bad news was that they had no understanding of what was intended by this new statute. Although they now had their respective Aboriginal and treaty rights recognized and entrenched, no one knew what this meant legally or practically.” Dan Russell, *A People’s Dream: Aboriginal Self-Government in Canada*. Vancouver: UBC Press, 2000 p. 5 The uncertainty extended to the federal and provincial governments as well.

public land and resources to aboriginal peoples (whether based on statutory, treaty, or claims to aboriginal title to land) there is at least some connection between the “legal personality” which committed the wrong and the legal personality being held to account. The sovereign that violated rights in the past is still in the relevant measure the same sovereign who stands before the courts today. For individual land owners, however, the justice of being forced to pay for the decades-old crimes of others is far more in doubt.

My goal here in this chapter, however, is not to resolve the question of what Indian law should be. Rather, it is to consider how two sets of judicial institutions, sharing a similar legal and political heritage, address a similar set of problems regarding the status of aboriginal peoples. The central question I will consider is whether the differing Constitutional institutions of Canada and the United States create differing patterns in Supreme Court aboriginal rights decisions, or whether those patterns can best be explained by political divisions within the courts themselves. The central argument is that, particularly in regards to aboriginal rights (rights to certain practices, immunities from state regulation, and title to land not based upon specific written commitments such as treaties or statutes) and treaty rights, the Canadian courts have endorsed an “aboriginal rights” revolution.⁷⁰ In particular, the Courts have adopted novel standards of evidence that make it easier for Native Canadians to sustain claims to aboriginal and treaty rights. In the United States, this aboriginal rights revolution has not taken place, and this cannot simply be explained as a consequence of the political composition of the court and the ideological preferences

⁷⁰ For the official statement that nicely encompasses “aboriginal rights orthodoxy” amongst Canadian academic, legal, and progressive political elites, see Canada, *Report of the Royal Commission on Aboriginal Peoples* 5 vols. Ottawa: Canada Communication Publishing Group, 1996. The thrust of the massive report is simple: aboriginal peoples have the right to cultural and political autonomy in Canada. For an in-depth analysis of the report, see Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State*. UBC Press: Vancouver, 2000. pp 116-152.

of American Supreme Court justices. This is because justices that are usually regarded as having left-leaning or liberal preferences in other contexts have not uniformly endorsed the expansion of aboriginal rights. It is not the case that the initiation of an American aboriginal rights revolution merely awaits the appointment of more liberal judges (or the “evolution” of more conservatives sitting on the court). It is true that there are some judges who have endorsed “revolutionary” approaches to Indian law; however, the willingness of judges to endorse Indian claims varies in response to legal factors, even when the underlying policy dimensions are the same. This is because, in American Indian law, aboriginal and treaty rights are ultimately subordinate to Congressional sovereignty—and thus the willingness of judges to endorse aboriginal claims will vary, depending upon the legal environment created by Congressional statutes and actions of the national government. This is not to deny that there are no “attitudinal” dimensions to American and Canadian Indian law. As I will show, the limits that Canadian courts in particular have placed upon the aboriginal rights revolution stem from a desire to balance aboriginal claims against the political imperatives of both provinces and national governments; the Canadian Supreme Court has not been “captured,” at least not completely, by the academic proponents of aboriginal sovereignty in Canadian law schools and philosophy departments. But the differences between Canadian and American Indian law must be traced to the differences between Canadian and American constitutionalism, not simply to differences in the policy preferences of judges.

I have chosen to focus on how the Canadian and American courts have dealt with 3 different kinds of issues in Indian law:

1. The status of “aboriginal rights” and “aboriginal title,” legal claims that are not rooted in specific Constitutional provisions, treaties, or statutes, but rather in judicially-crafted doctrines.

2. Treaty interpretation.

3. Statutory Interpretation.

The specific terms of the Canadian Constitution—not simply the politics of Canadian justices—has affected the development of Indian law in Canada, particularly in relation to aboriginal rights, aboriginal title, and treaty interpretation. Support for aboriginal claims in American Courts has, since the mid-1980s, been more limited than in Canada. The most obvious political explanation for these divergent developments is that American courts were in the process of being transformed by the “New Right” during this period. It is not the case, however, that votes in cases dealing with Indian follow clear political patterns. If we want to understand the actual patterns that emerge in American Indian law, we must pay attention to the ways in which the votes of judges are shaped by differing legal cues. Canadian courts operate in an environment that is much more hospitable to aboriginal legal claims, and this is not simply an environment that the courts have created themselves. The American Supreme Court’s Indian law opinions show that the court is constrained not by judicial political ideologies—or at least, not only by judicial ideologies—but by a Constitutional framework that provides much weaker support for aboriginal claims.

3.1 Aboriginal Law Decisions in the Supreme Court of Canada and the Supreme Court of the United States

Between 1985 and 2006, the first two decades of the “Charter Era” in Canadian politics, The Supreme Court of Canada has decided 43 cases dealing with the claims of aboriginal litigants (or cases in which aboriginal organizations were parties).⁷¹ During the same period, the United States Supreme Court decided 63 cases

⁷¹ See Appendix A, “Aboriginal Law Cases in the Supreme Court of Canada, 1985-2007”

of a similar nature.⁷² The cases involve disputes between aboriginal litigants and the national government, state or provincial governments, private parties or organizations, or other aboriginal individuals; the types of cases are summarized in Table 1:

Table 1: Aboriginal Litigants in the Canadian and American Supreme Courts.

Aboriginal litigants vs.:	National Government	Provincial or State Government	Private Parties or Organizations
Canada	10	30	2
United States	15	36	10

In order to get a sense of the kinds of issues that have been raised in these cases, it is useful to divide them up into the underlying claims being made on behalf on aboriginal tribes and individuals (as well the legal issues at stake in those few cases which deal with aboriginal rights, even though the parties are not themselves aboriginal tribes or individuals). I have grouped both the Canadian and American cases into three broad categories, based upon the central legal claims raised by the parties:

1. Treaty Claims.
2. Statutory Claims.
3. Constitutional or Aboriginal Rights Claims.
4. Procedural Claims.

⁷² See Appendix B, “Aboriginal Law Cases in the Supreme Court of the United States, 1985-2007.” The cases were assembled by conducting keyword searches on Lexis Nexis (for the American Supreme Court) and the Canadian Legal Information Institute website for the Canadian Supreme Court using the terms “aboriginal,” “aboriginals,” “First Nations,” “Indian,” and “Indians.” I then selected all of those cases in which an aboriginal tribe or individual was a party to a case, as well as those cases in which an issue related to the jurisdiction or rights of aboriginals was at stake even though the parties were not themselves aboriginal tribes.

Table 2 illustrates the frequency of the different kinds of claims raised in 43 cases decided by the Canadian Supreme Court and the 62 cases decided by the American Supreme Court.

Table 2: Issues in Aboriginal Law Cases in the Supreme Court of Canada and the Supreme Court of the United States.

	Treaty	Statutory	Aboriginal Rights Claims	Procedural	Constitutional Rights
Canada	9	14	14	4	2
USA	7	41	10	1	7

The Canadian court resolved 46 legal issues in these cases, and it supported the position of aboriginal litigants or interveners on 20 of those issues.⁷³ Aboriginals thus succeeded on 43% of their legal claims. In the United States, the court resolved 65 legal questions, supporting the position of aboriginal litigants or amici on 19 of those issues, for a success rate of 29%. The success rate for Canadian aboriginal litigants in these cases is higher than the overall success rate for Charter claims in the Canadian Supreme Court (which is 33%⁷⁴), but lower than the success rate for the major women’s legal advocacy group in Canada (LEAF) which had a success rate of 70% in the 50 legal issues which it contested before the Canadian Supreme Court between 1985 and 2000.⁷⁵ Tables 3 and 4 summarize judicial voting patterns in aboriginal law cases in the Canadian and American Supreme Courts between 1985 and 2007:

⁷³ I have interpreted 2 of those wins as “partial,” as the Court did not entirely endorse the legal position of the aboriginal litigants.

⁷⁴ James B. Kelly, “The Charter of Rights and Freedoms and the Re-balancing of Liberal Constitutionalism in Canada, 1982-1997.” *Osgood Hall Law Journal*, Number 37, 1999: p. 641.

⁷⁵ Christopher Manfredi, *Feminist Activism in the Supreme Court: legal mobilization and the Women’s Legal Education Action Fund*. Vancouver: UBC Press, 2004. p.20.

Table 3: Individual Judicial Support for Aboriginal Litigants: Canada.

Justice	Issues Decided	Ruling in Favor of Aboriginal Litigant	Ruling Against Aboriginal Litigant	% Support for Aboriginal Litigants	(+) = Liberal on Civil Rights; (-) = Conservative^a
Dickson	6	5	1	83%	lib
Beetz	2	1	1	50%	con
Estey	2	1	1	50%	con
McIntyre	3	2	1	66%	con
Chouinard	2	1	1	50%	con
Wilson	5	5	0	100%	lib
LeDain	1	1	0	100%	con
Lamer	24	9	15	38%	lib
LaForest	20	7	13	35%	con
L'Heureux-Dube	24	14	10	58%	lib/con
Sopinka	18	9	9	50%	lib/con
Gonthier	30	11	19	37%	con
Cory	24	10	14	42%	con
McClachlin	36	16	20	44%	lib
Stevenson	2	1	1	50%	con
Iacobucci	24	9	15	38%	lib
Major	23	7	16	30%	con
Binnie	17	10	7	59%	lib
Bastarache	14	5	9	36%	con
Arbor	7	2	5	29%	lib/con
LeBel	12	5	7	42%	lib
Deschamps	8	5	3	63%	con
Fish	7	4	3	57%	lib
Abella	5	4	1	80%	lib
Charron	5	3	2	60%	lib
Rothstein	2	1	1	50%	con

Total Votes on Issues Decided = 313

Votes for Aboriginal Legal Position = 118 (37%)

Votes Against Aboriginal Legal Position = 195

^a Sources: Charles Epp, *The Rights Revolution*, p. 169.

Table 4: Individual Judicial Support for Aboriginal Litigants: Supreme Court of the United States, 1985-2006

Justice	Issues Decided	For	Against	Neutral	% Support	Ideology
White	36	9	27		25%	lib/con
Marshall	30	20	9	1	67%	lib
Brennan	27	16	10	1	59%	lib
Burger	12	5	7		42%	con
Blackmun	38	22	15	1	58%	lib
Powell	17	8	9		48%	lib/con
Stevens	65	18	46	1	28%	lib
Rehnquist	65	10	55		15%	con
O'Connor	65	20	44	1	31%	lib/con
Scalia	54	7	47		13%	con
Kennedy	45	7	38		18%	lib/con
Souter	38	15	23		39%	lib
Thomas	35	2	33		6%	con
Ginsburg	29	10	19		35%	lib
Breyer	26	9	17		35%	lib
Roberts	1		1		0%	

Total Votes on Issues Decided = 583

Total Votes in Favor of Aboriginal Litigants = 178 (43%)

Total Votes Against = 405

There are several interesting things to note about the voting and outcomes on these issues. First, the fact that the American court resolved fewer issues in favor of aboriginal litigants, despite casting a slightly higher percentage of votes for them, suggests that the American court is more deeply divided over aboriginal rights questions. Table 4 indicates that these divisions run along ideological lines, at least to some extent. The absolute number of victories tells us little about the overall significance of these cases; a more detailed look into the substance of the decisions is necessary to fully evaluate them. What is revealed in the comparison between the Canadian and American cases is that the Canadian court, because of the more explicit

endorsement of “aboriginal” and treaty rights in the Constitution Act, has been able to shape a legal regime that is more hospitable to aboriginal legal claims. We might expect that the more limited successes of aboriginal litigants in the United States Supreme Court can be explained in political terms, that is, as a consequence of the policy preferences of conservative majorities on the Court. This is only part of the story.

3.2 Aboriginal Rights in Canada

In the following section, I will discuss those claims made by aboriginal litigants which are *not* based upon specific treaties, statutes, but instead are based upon un-enumerated “aboriginal rights.”⁷⁶ The first thing to note is that the development of the law of aboriginal rights has been more prominent in Canada, both in terms of the number and significance of the cases. But the court has not endorsed the full scope of the aboriginal rights agenda, as articulated by the litigants themselves and their academic supporters. Some scholars have suggested that Canadian courts have become “the vanguard of the intelligentsia,” and the case of aboriginal law shows both the strengths and limits of this criticism.⁷⁷ The development of aboriginal rights in Canada over the past two decades is a clear case of “judicial activism,” in the sense that the Supreme Court influenced important areas of public policy (most particularly, resource development) and has crafted novel doctrines of law while doing so. But it is not a case of judicial “capture” by interest group litigants.

⁷⁶ For the most thorough theoretical defense of the aboriginal rights, see Patrick Macklem, *Indigenous difference and the Constitution of Canada*. Toronto: University of Toronto Press, 2001.

⁷⁷ The term “vanguard of the intelligentsia” is taken from F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party*. Peterborough, Ontario: Broadview Press, 2000 p. 129 While Morton and Knopff are certainly correct about the tendency of the legal academy to support judicial activism, and the variety of ways the legal academy influences the Supreme Court, the case of aboriginal law shows that legal elites have only limited influence over Canadian law. For a discussion of the widespread support for aboriginal sovereignty in the legal academy, see Flanagan, *First Nations? Second Thoughts*. Montreal and Ithaca: McGill-Queen’s University Press, 2000. pp 1-2.

Secondly, the patterns of aboriginal law decisions in the American Supreme Court s do not parallel Canadian developments. This is not because conservative majorities on the Supreme Court have prevented a more robust conception of aboriginal rights. Liberal justices, particularly in the past two decades, have typically not articulated an ambitious conception of aboriginal rights even in dissent. In fact, in some of the very few cases where the court has adopted novel approaches to the un-enumerated, judicially-crafted rights of aboriginals, conservative judges can be found to support race-based legal privileges. The divergence between American and Canadian aboriginal rights jurisprudence can be traced, rather, to the differing Constitutional protections for aboriginal rights in the Canadian Constitution Act of 1982. Without the more robust protections for aboriginal rights found in this recently adopted “higher law” of Canadian politics, it is unlikely that there would have been Canadian rights revolution. This is not to say that, in supporting new interpretations of aboriginal rights the Canadian Supreme Court has been merely “following the law.” The Supreme Court has been making the law, not interpreting it, because those who created the Constitution Act were themselves uncertain about the full scope of Section 35.⁷⁸ The law, however, provided a basis for aboriginal rights activism that is not available to American judges who might be politically inclined to support stronger versions of aboriginal rights. I turn now to that Constitutional basis of Canadian aboriginal rights activism: Section 35 of the Constitution Act of 1982.

In Canada, prior to the adoption of the Constitution Act of 1982, aboriginal rights were subject to the normal pressures of the political process. Some judges were willing to extend considerable protections to aboriginal rights claims.⁷⁹ But in general,

⁷⁸ Douglas Sanders, “The Indian Lobby.” in Keith Banting and Richard Simeon, ed. *Canada Notwithstanding: Federalism, Democracy, and the Constitution Act*. Toronto: Methuen Press, 1983. Pp 301-333.

⁷⁹ Canadian judges were already beginning to change their views on aboriginal rights before the Charter was born—before it was even a twinkle in Pierre Eliot Trudeau’s eye. This is shown in the

parliamentary sovereignty was thought to trump treaty rights in those instances where the federal government found it necessary or convenient to do so. The Charter revolutionized this political arrangement, despite the occasional attempts of Canadian politicians to foreclose broad readings of aboriginal rights.⁸⁰ Though aboriginal rights were not initially a central concern of Trudeau's constitutional repatriation campaign,

case of *Calder v. Attorney General of British Columbia* 34 D.L.R. (3d) 145; 1973, one of the most important—in fact, one the only—pre-Charter cases that deal with the question of aboriginal title (the claim to a special kind of property right in land that is based upon traditional use and occupation of land by native peoples.). The importance of *Calder* lies not only in the influence it had on subsequent Indian-Government relations in Canada, but also in what it tells us about the nature of judicial politics in Canada.

The suit that was the basis of *Calder* was brought by members of the Nishga nation, which was comprised of four Indian bands from North Western British Columbia. The Nishga sought a declaration stating that their title to their ancestral land in British Columbia had never been lawfully extinguished. Their suit was dismissed at trial, as was their subsequent appeal to the British Columbia Court of Appeal. At the Supreme Court, the Nishga's appeal was dismissed in a closely divided vote. Three of the justices—Juson, Martland, and Ritchie—dismissed the appeal on its merits, while three others—Hall, Laskin, and Spence, voted to grant the Nishga their requested declaration. The deciding vote was cast by Justice Pigeon, who dismissed the appeal on jurisdictional grounds not directly related to aboriginal title.

Though the Nishga lost in court, the divided decision in *Calder* pushed the federal government to initiate a comprehensive land claims process to settle issues of aboriginal title regarding lands that had not been ceded by treaty. This represented part of the Trudeau government's retreat from its liberal—assimilationist aboriginal policy, articulated just four years earlier in the 1969 "White Paper." In many ways, the decision started to transform elite consensus on the status of Indians. The "progressive" position of the Liberal party once focused on the need for cultural adaptation and modernization; in the aftermath of *Calder*, the Liberal party very quickly moved to adopt a more "multi-cultural" perspective on aboriginal affairs, based upon the continued existence of distinct aboriginal communities, special aboriginal rights, and perhaps even a third-tier of government for native peoples. The *Calder* case, well before the establishment of Sec. 35 of the Canadian Charter, was able to influence aboriginal policy even though the decision itself was not a decisive victory for the Nishga.

This case provides one piece of evidence in support of the "court party" thesis of scholars such as Morton and Knopff, insofar as it shows that judges were willing to initiate part of the "rights revolution" without any direct impetus from the political branches of government or, more significantly, without any specific constitutional provisions to base their decisions on. One might object that the viewpoint of the dissenting justices, though "activist" in some sense, may nevertheless have been a legally correct recognition of Canada's unjust expropriation of aboriginal land, land which had been ceded to Indian peoples by actions of the imperial government. There was certainly some merit to the dissenters' position. Yet given the complexity and ambiguity of the evidence presented, it was quite easy to make a plausible case either for or against the Nishga's claim. The dissenting justices, relying on centuries old legal documents, laid the basis for a massive change in public policy. Bora Laskin, a dissenter in *Calder*, even suggested in his constitutional law textbook that provincial laws were not applicable to native communities—a position entertained by no one before him, and very few afterwards. The *Calder* case and its impact are discussed in Thomas Flanagan, *First Nations? Second Thoughts*. Montreal and Ithaca: McGill-Queen's University Press, 2000 and Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State*. Vancouver: UBC Press, 2000.

⁸⁰ Sanders, "The Indian Lobby," pp 325-33.

aboriginal groups exerted great pressure in order to get their concerns onto the constitutional agenda.⁸¹ This effort was not in vain.

The new Charter would incorporate two sections which addressed the status of aboriginal peoples. The first, Section 25, is primarily defensive in character; its purpose is to insure that the new rights established by the Charter do not undermine the special status of aboriginals. Aboriginal groups had worried that the individualistic thrust of Charter rights might be employed against the group-based rights of aboriginal communities, and Section 25 was intended to allay this fear. This section has been the subject of little judicial commentary since its inception. Few cases have arisen in which individuals have challenged aboriginal practices on the basis of Charter rights and thus its impact has remained limited and unexplored.

Far more significant to both aboriginals and Canadians as a whole is Section 35 of the Constitution Act of 1982, which insulates aboriginal rights not from the Charter claims but from parliamentary interference. The crucial clause of Section 35 reads as follows: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” One might question whether this clause created any constitutional changes at all. The Canadian government had always recognized aboriginal rights— but it had also maintained that it possessed the power to alter and amend those rights.⁸² The Canadian Supreme Court has chosen to interpret this clause as an almost complete repudiation of parliamentary sovereignty in the area of aboriginal rights. After the Charter, the federal government can no longer alter aboriginal rights at will. This fairly loose gloss of Section 35 has achieved a secure

⁸¹ Cairns, *Citizens Plus*, pp 47-53.

⁸² For a challenge to the notion that Crown sovereignty vis a vis aboriginal peoples existed prior to the Constitution Act of 1982, see Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self Government in Canada*. Montreal and Kingston: McGill-Queen’s University Press, 1990.

status in Canadian Constitutional law, but this was only the starting point of the Court's interpretive work. The question of exactly what rights are protected by Section 35 is not answered within the Charter itself; neither does the Charter explain how the existence and scope of those protected rights are to be ascertained. Subsequent interpretations of "existing aboriginal and treaty rights" have illustrated the Supreme Court's deft ability to respect the letter of the constitutional text while maximizing the Court's power.

The protections available to aboriginal rights claimants were restricted by the language of Section 35 to those rights that were "existing" when the Charter was adopted. Section 35 was not, on its face, meant to resurrect rights that had been extinguished by actions of the federal government since 1867. Within the context of this institutional constraint, the court still had the capacity to develop of vigorous aboriginal rights jurisprudence. To begin with, the question of whether or not a right had been extinguished in the pre-Charter ear was subject to controversy. The court eventually established a strict standard for determining if parliament had intended to extinguish a right. This was not particularly controversial. Few people would object to the principle that the government should express its intention clearly when abridging previous commitments. More controversial was the question of what kinds of evidence Indian litigants could use to prove the existence of "existing rights," particularly when those rights were not traced to specific treaty commitments.

The first major development of aboriginal rights jurisprudence in the post-Constitution Act era was the case of *R. v. Sparrow*.⁸³ In this case, an aboriginal man was charged with violating the conditions of the fishing license that had been granted to his band. Sparrow's case was based on the claim that the regulations in question violated an aboriginal fishing right, a non-enumerated right that, despite not being

⁸³ *R.v. Sparrow* 1990 CanLII 104 (S.C.C.)

based upon any specific treaty commitments, was nevertheless protected under Section 35 of the Constitution Act. Section 35(1) states that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

According to the trial judge, no individual could claim an aboriginal right unless it was supported by a “special treaty, proclamation, proclamation, contract, or other document,” a position that had been established in pre-Constitution Act cases by the British Columbia Court of appeal, in particular the case of *Calder v. Attorney General of British Columbia* (1970).⁸⁴

The British Columbia Court of Appeal took a slightly different perspective on Sparrow’s claim. The court ruled that Sparrow’s claim did not need to be based upon any specific treaty commitments, and it rejected the Crown’s argument that longstanding national fishing regulations had extinguished the right. However, the Court argued that the existence of the aboriginal right did not preclude national regulation. The right had not been extinguished, but Parliament’s power to regulate the time, place and manner of fishing, including fishing under an aboriginal right, remained in place. In essence, the court ruled that the right included a purpose (the right to fish for “food purposes,” liberally construed to allow fishing beyond subsistence needs) but not a right to determine how best to fish—that decision, for aboriginals and everyone else, would be made by the state. But, as a consequence of Section 35, the court ruled that aboriginal fishing rights entitle aboriginal groups to have priority over the interests of other groups.⁸⁵ Sparrow appealed this decision to the Supreme Court, arguing that aboriginal fishing rights should encompass immunity from even those government regulations aimed at conservation. The Crown, in a cross-appeal, argued that the lower court had erred in holding that the aboriginal

⁸⁴ See the discussion in *R. v. Sparrow* 1986 CanLII 172 (BC C.A.).

⁸⁵ *R.v. Sparrow* (BCCA, 1986).

fishing right in question had not been “extinguished” prior to the adoption of the Constitution Act.⁸⁶

The first question that the Supreme Court addressed was the meaning of “existing aboriginal rights” under Section 35 of the Constitution Act. In regards to fishing rights, at least, it was impossible to read Section 35 to mean that existing forms of regulations of rights were “frozen” in their pre-1982 forms. This would constitutionalize an incredibly complex patchwork of regulations, regulations that differ not only between but within provinces, and require constitutional amendments in order to adjust fishing regulations in response to changing technological and conservation needs.⁸⁷ As to whether or not the “right” existed at all, the Court stated that the right was based upon the long existence of the Musqueam Indians as an organized society in the area of the Fraser River, and the fact that “the taking of salmon was an integral part of their lives, and remains so to this day.”⁸⁸ As to whether this traditional right had been extinguished by government legislation, the central issue was whether or not the increasing intrusiveness of regulation since the 1870’s had extinguished the right despite the absence of express declaration of this intent by

⁸⁶ The political and ideological stakes in this case were not clear cut. The national government (which was at this time controlled by the Progressive Conservative party) was supported not only by half a dozen provincial governments, but also by the British Columbia Wildlife Federation and the United Fisherman and Allied Workers’ Union. The interests not only of governments, but also environmentalist and labor groups, were at odds with the claims of Sparrow and the First Nations organizations which supported him. I point this out as an illustration of the problems involved in any studies of “judicial behavior” that purport to evaluate outcomes along a “conservative” vs. “liberal” axis.

⁸⁷ For a discussion of some of the complexities of Canadian fisheries policy see R. Quentin Grafton and Daniel E. Lane, “Canadian Fisheries Policy: Challenges and Choices” *Canadian Public Policy*. Vol. 24, No. 2 (June, 1998) pp 133-147.

⁸⁸ The significance of salmon, for the Musqueam, went beyond the “food purposes” referred to by the lower courts. According to Dr. Suttles, the anthropologist who provided expert evidence in the case, for the Musqueam people “The salmon were held to be a race of beings that had, in “myth times”, established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual.” The Court did not specify, in this case, whether the spiritual dimension of the Musqueam’s fishing practices was essential to the aboriginal right claim.

Parliament. The government's position was that the comprehensive regulations of the Fisheries Act had in fact extinguished the aboriginal fishing rights claimed by Sparrow; the right did not "exist" in 1982, and was thus not protected under Section 34 of the Constitution Act.⁸⁹ The Court did not accept the Crown's argument that regulation equaled extinguishment. The government's position was based upon the traditional notion that common law rights—of which aboriginal rights were previously thought to be a part—were subordinate to the legislative power of parliament. Now, the Court argued that the extinguishment of aboriginal rights only occurred when Parliament directly expressed its intention to extinguish those rights. There were no such statements in the various iterations of the national Fisheries Act that had been in place since Confederation in 1867.

Did the aboriginal right include the right to commercial fishing, as opposed to fishing for food and spiritual purposes? The Court recognized that this was the most serious question, in the sense that it was likely to have the most serious economic and environmental consequences. The Court did not rule directly on this broader issue, as Sparrow's claim dealt only with regulations that interfered with non-commercial fishing. The Court noted that the aboriginal fishing right could very well extend to commercial fishing:

Government regulations governing the exercise of the Musqueam right to fish, as described above, have only recognized the right to fish for food for over a hundred years. This may have reflected the existing position. However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can however regulate the exercise of that right, but such regulation must be in keeping with s. 35(1).

⁸⁹ *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313.

In other words, this issue would be decided by Courts, not by Parliament.

One way to interpret the Court's decision in the Sparrow case is that the Court used Section 35 to carve out a new, more expansive role for Canadian courts in Canadian aboriginal policy, an outcome that was made possible by the text of the Constitution Act of 1982 but not one that was mandated by that text or by the intentions of its framers.⁹⁰ The principle of law—first announced by the American Supreme Court in the 19th century—that ambiguities in treaties and statutes should be resolved in favor of Indians was transposed into the interpretation of the Constitution Act. But also note that government power to regulate was not denied by the Court. Rather, the court argued that, once conservation needs were taken into consideration, aboriginals would be entitled to a special claim on natural resources.

Proponents of aboriginal sovereignty—that is, those who argue that First Nations in Canada should exist as separate, self-governing nations—are, understandably, often critical of cases such as *Sparrow*. Some, such as Dan Russell, argue that the jurisprudence of the Canadian Supreme Court has not been affected by the aboriginal rights provisions of the Constitution Act. The Sparrow decision, in reaching the conclusion that aboriginal rights are not absolute, but are in fact still subject in some instances to federal and provincial regulation, treated aboriginal rights with less deference than other rights protected by the Charter.⁹¹ It is worth noting, however, that the Charter of Rights and Freedoms explicitly recommends a “balancing” approach to all rights contained in the Charter: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to

⁹⁰ Note the fact that the opinion makes no references to the “original understanding” of Section 35, or debates over the meaning of Section 35 during the re-patriation process. Numerous references are made, however, to academic interpretations of the significance of Section 35.

⁹¹ Russell, *A People's Dream Aboriginal Self-Government in Canada*, Vancouver: UBC Press, 2000 pp 78-79.

such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁹² Thus, the approach taken by Court in *Sparrow* cannot be said to be entirely without Constitutional warrant. The fact that commentators such as Russell find fault with the Court’s failure to promote aboriginal sovereignty does not undercut my claim that the courts were engaged in judicial activism. But it does serve to remind us of the relative modesty of that activism. The Canadian Supreme Court has been forced to address the issues raised by Section 35, and it has responded by fashioning new legal doctrines—but those doctrines are shaped by the broader, more deferential principles announced in the Charter, not necessarily by the theorists of aboriginal. The aboriginal rights revolution initiated in *Sparrow*, as is befitting the actions of a Canadian court, was a quiet revolution.

The case of *R. v. Sparrow* helped to establish a new and more expansive understanding of aboriginal rights in Canadian law. In order to facilitate the further validation of aboriginal rights claims, the Supreme Court of Canada has changed the evidentiary standards that must be met in order to prove the existence of aboriginal rights. The justification offered by the court might seem bizarre in other legal contexts. The judicial syllogism went as follows: in order to establish the existence of aboriginal rights (whether practices that are inherent to aboriginal culture—and therefore exempt from some aspects of government regulation—or claims to aboriginal title in land) evidence must often be drawn from times and cultures that did not employ written records. Given this fact it is extremely difficult for aboriginal rights claimants to meet the evidentiary standards that are found in other areas of law such as torts, contracts, etc. Therefore, the rules of evidence must be relaxed if aboriginal groups are to have any of their claims validated in court. This conclusion may seem fair. But the rules of

⁹² *Canadian Charter of Rights and Freedoms*, Section 1.

evidence developed in Anglo-American law have a logic of their own. Difficulties ensue when courts abandon those rules, even if it is in the pursuit of social justice.⁹³

The role of evidentiary standards in evaluating aboriginal rights claims was dealt with most extensively in the case of *Delgamuukw v. British Columbia*, decided by the Supreme Court in 1997.⁹⁴ This case was based upon a claim to aboriginal title over 58,000 square kilometers in the interior of British Columbia, by the Gitskan and Wet'suwet'en peoples. The claim was based upon the historical use of the land by the Native Canadian tribes, as opposed to specific treaty commitments—it was, in other words, a claim to “aboriginal title.”⁹⁵ The court would not come to rule on the validity of this specific claim of the Gitskan and Wet'suwet'en, but it would explain the contours of aboriginal title, and what would be necessary (and allowed) in order to establish claims to aboriginal title.

Aboriginal title is described by the court and later commentators as “sui generis,” alone of its kind, unlike property rights as usually understood in the common law. The claim to aboriginal title was a claim to far more than ownership, though in some ways aboriginal title is encumbered in ways that fee simple title is not.⁹⁶ The source of aboriginal title had been unclear from prior cases. In the *Delgamuukw* case, the court asserted that aboriginal title was rooted in the recognition of aboriginal title

⁹³ For a discussion of the problems of evidence surrounding the practice of plea bargaining in the criminal process, see Hadley Arkes, *Beyond the Constitution*. Princeton: Princeton University Press, 1990. pp 173-206.

⁹⁴ *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.).

⁹⁵ See Jennifer E. Dalton, “Aboriginal Title and Self-Government In Canada: What is the true scope of comprehensive land claim agreements?” *Windsor Review of Legal and Social Issues*. Vol. 29 (Dec. 2006).

⁹⁶ The basic characteristics of aboriginal title, as asserted by the Court in *Delgamuukw*, are as follows: 1) It is a right to exclusive use; that use does not need to be confined to traditional aboriginal practices, but uses must not be incompatible with traditional aboriginal practices. 2) It is inalienable to anyone except the Crown 3) It is held communally For a discussion of the some of the problematic economic consequences of aboriginal title, see Flanagan, *First Nations? Second Thought*, pp 185-186.

found in the Royal Proclamation of 1763, the common law notion of possession and occupation, and “systems of aboriginal law” which pre-dated contact and British sovereignty. The key to this assertion was the idea that the common law—with its notion of occupation as proof of possession—was only one possible source of proof of aboriginal title; other forms of land use, not normally regarded as proof of possession in the common law, could be used establish claims to aboriginal title. To demonstrate aboriginal title, it was necessary to show that the Native group had exclusive occupancy of the land at the time when Crown sovereignty was first asserted. However, the Supreme Court had overturned the lower courts’ ruling on this question, on the grounds that the trial and appellate courts had rejected the use of “oral histories” as evidence in determining the basis for aboriginal title.

The problem of using oral histories is similar to the problem of hearsay evidence. Hearsay evidence is limited in criminal cases for fairly obvious reasons. Such evidence is difficult to corroborate, easy to distort, and even subject to misrepresentation without any ill-intention on the part of the witness. Similarly, the use of extrinsic sources in contract disputes is supposed to be confined, as much as possible, to those instances where the terms of the contract are unclear. This is because it is almost impossible to determine which extrinsic sources are relevant. Even if the relevant sources can be agreed upon, the evidence they provide is likely to be indeterminate and contradictory. And even more important is the fact that individuals, businesses, and organizations sign the terms of the contract alone— they do not reach any agreement about the meaning and relevance of the universe of extra-contractual information that might possibly reveal the true meaning of their agreements.

The use of extrinsic sources has become routine in the area of statutory interpretation, particularly in the United States, and here the problems involved in

moving beyond the text have been amply demonstrated.⁹⁷ Ambiguities in legislative debates, conflicting statements of intent, diverging media pronouncements, and even outright fraud usually obstruct judicial attempts to reconstruct the true intention of legislators. All of these evidentiary issues— in criminal law, contract law, and statutory interpretation— emerge out of conflicts where the relevant individuals are (usually) present, the relevant documents are available (and often recently drafted), and the relevant actions (a crime, the drafting of a contract, the enacting of a law) have occurred in the relatively recent past. This is rarely the case in questions involving aboriginal rights, and this is what makes the relaxation of evidentiary standards in aboriginal rights cases so contentious.

The Supreme Court did not actually resolve the issue— the worst possible outcome for all, according to some commentators.⁹⁸ Instead, the Court decreed that a new round of litigation was required— though it also suggested that negotiation would be preferable— on the grounds that the trial judges had failed to properly interpret the oral evidence offered by the Indian tribes. The Court did not provide any detailed explanation of how this evidence—consisting of oral traditions, stories, and sometime myths about land use in Northern B.C.—should be evaluated by the Court, except to say that it had to be placed on equal footing with “official” records and documentation. By laying down this interpretive principle, however, the court revolutionized—at least potentially—the scope of aboriginal title claims.

Yet despite the innovations in law introduced by the Canadian Supreme Court in its aboriginal rights jurisprudence, the Court has by no means endorsed the

⁹⁷ E.g. Antonin Scalia, *A Matter of Interpretation*. Princeton: Princeton University Press, 1997.

⁹⁸ This is because property rights were left undefined in the area affected by the decision, making development impossible. Had the land and resource rights simply been assigned to the native community, this would not have been the case. See Owen Paul Lippert, *Beyond the Naas Valley: national implications of the Supreme Court's Delgamuukw decision*. Vancouver: Fraser Institute, 2000.

approach to aboriginal rights agenda as articulated by legal scholars and advocates for aboriginal rights.⁹⁹ This is important to note, because many critics of judicial activism in Canada have argued that the legal support structure of academics and public interest lawyers has become a transmission belt between the academy and the courts, which allows for the development of policies that would not be endorsed by elected officials. The Supreme Court of Canada has, on the basis of Section 35 of the Constitution Act, taken further steps in developing aboriginal rights than has the American Supreme Court. But in many ways it has still proceeded cautiously, much to the disappointment of the advocates of aboriginal rights.

In developing the jurisprudence of aboriginal rights, the Canadian Supreme Court has placed significant limits on the scope of those rights.¹⁰⁰ The most significant limit that the Court has placed upon aboriginal rights protected by Section 35 is the idea that those rights must be related to the traditional culture and practices of native peoples.¹⁰¹ The decision which announced this more restrictive aspect of section 35 jurisprudence was *R. v. Van der Peet*,¹⁰² another case based on a challenge to the legitimacy of Parliamentary fishing regulations. In evaluating the rights claim in this case, the court reiterated the position from *Sparrow* that while aboriginal rights could no longer be extinguished, they could still be subjected to regulation. The Court went beyond the *Sparrow* decision, however, in its description of what kinds of activities

⁹⁹ E.g Patrick Macklem, *Indigenous Difference and the Constitution of Canada* Toronto: University of Toronto Press, 2001; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* Toronto, University of Toronto Press, 2002.

¹⁰⁰ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* (Toronto: Irwin Law, 2001. p. 172); L. Dufriamont, "From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada." *University of Toronto Faculty Law Review*, Volume 58, Number 3, 2000.

¹⁰¹ In regards to aboriginal title, land use can depart from aboriginal practices, but must not be incompatible with traditional practices.

¹⁰² *R. v. Van der Peet* 1996 CanLII 216 (S.C.C.)

could be construed to be aboriginal rights: “To be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”¹⁰³ Two judges dissented from this opinion, arguing that the “frozen rights” approach to aboriginal rights would unduly constrain the freedom of native communities to adapt to changing economic circumstances. The majority opinion, according to Justice L’Heureux-Dube, treated aboriginal culture as if it was an artifact that had to be preserved and isolated from the broader culture as a whole, as if the only purpose of aboriginal rights was to preserve native cultures as museum pieces.

There are three other aboriginal rights cases which produced dissenting opinions. L’Heureux Dube and McLachlin, the dissenting justices in *Van Der Peet*, also dissented in the case of *R. v. NTC Smokehouse*, which dealt with the validity of federal fishing regulations.¹⁰⁴ The basis of their dissent was, as in *Van der Peet*, their objection to the restrictive or “frozen” conception of aboriginal rights advanced by the majority. In the final case in which L’Heureux Dube and McLachlin cast dissenting votes together, they found themselves voting against the aboriginal claimant. In *R. v. Nikal*, the majority overturned a conviction for violation of fisheries regulations on the grounds that the regulations violated aboriginal rights.¹⁰⁵ L’Heureux Dube and McLachlin agreed that the regulations violated aboriginal rights, but they did not think that this gave individuals the right to refuse to apply for licenses which had many provisions that were perfectly valid. The dissents of L’Heureux Dube and McLachlin may well have been motivated by their policy preferences, but if so, those preferences do not reflect simple partisan divisions, or invariable preferences for certain categories

¹⁰³ C.J. Lamer, majority opinion, *R v. Van der Peet* 1996 CanLII 216 (S.C.C.).

¹⁰⁴ *R. v. NTC Smokehouse Ltd.* 1996 CanLII 159 (S.C.C.).

¹⁰⁵ *R. v. Nikal* 1 996 CanLII 245 (S.C.C.).

of litigants. Despite their support for a very expansive, evolutionary conception of aboriginal rights, L’Heureux Dube and McLachlin were not led to subordinate all other legal considerations to the imperatives of Section 35.

There is also some indication that L’Heureux Dube and McLachlin were willing to accept the *Van der Peet* test as the law, despite their initial opposition to its approach to aboriginal rights. In the case of *R. v. Pamajewon*, a First Nations band in Ontario argued that, on the basis of the aboriginal right to self-government, it should be exempt from Ontario gaming regulations.¹⁰⁶ Under the *Van der Peet* test, this argument could not hold: casino gaming may be one of the most effective means of economic development for Indian tribes, but no anthropologist could convincingly demonstrate that it was an integral part of pre-contact aboriginal culture. L’Heureux Dube and McLachlin both joined the majority in this case, despite their initial rejection of the “frozen rights” approach to Section 35.

The connection that the Court has drawn between aboriginal rights and traditional aboriginal practices is the most serious limitation on the aboriginal rights revolution in Canadian law. Thus, in many instances, the victories won by aboriginal litigants are ambiguous. Consider the case of *R v. Bernard*, decided in 2006.¹⁰⁷ In this case, the Court ruled, in a unanimous decision, that Indians have the right to harvest wood on their traditional territory—that is, they have a right to harvest wood free from provincial regulation. The court has not simply immunized Native Canadians from resource regulations, however. Instead, the Court has displaced provincial governments as the overseers of natural resource policy. This is because the Court has empowered itself to determine whether the exercise of aboriginal rights are in fact compatible with traditional aboriginal culture. In *R v. Bernard*, the court implied that

¹⁰⁶ *R. v. Pamajewon* 1996 CanLII 161 (S.C.C.).

¹⁰⁷ *R. v. Bernard* 2005 CanLII 43 (S.C.C.).

the right to harvest wood would not extend as far as the right to conduct commercial wood harvesting (or the power to license wood harvesting.) The right to harvest wood for personal uses, free from provincial regulation, is not inconsiderable; but it nevertheless falls short of the full goals of aboriginal litigants. The Court, while endorsing some expansive understandings of aboriginal rights, has not so much been captured by the aboriginal rights community as much as it has simply asserted judicial control over issues once left to the process of political negotiation and compromise.

This assertion of judicial control over aboriginal affairs, through the device of connecting aboriginal rights claims to traditional aboriginal culture, is in some ways the worst of all possible outcomes, regardless of one's general political perspective on aboriginal self-government. The court's decision manages to run counter to the logic of both liberal multi-culturalism and classical liberal economic rationality. For the proponents of multi-culturalism, the notion that Courts could determine what traditional practices are, or that aboriginal rights should not include the power to develop new economic practices, are both deeply "problematic." From the perspective of economic rationality, it is entirely possible that the collective interest of Canadian society as a whole would actually be better served in many instances by granting aboriginal groups more clearly defined rights over natural resources. This is because the benefits (e.g. employment) that come from development (e.g. mining, logging, etc.) exist whether the underlying resources are owned by the province or by aboriginal tribes.

While cases such as *R. v Sparrow* indicated that the Court was willing to play a revolutionary role in aboriginal rights cases, and cases such as *Delgamuukw* suggested that Court was not afraid to court political controversy when dealing with the claims of First Nations, it would be wrong to exaggerate the scope and successes of aboriginal rights litigation in Canadian Courts. The program announced in *Sparrow*

was sharply curtailed by *Van der Peet*, and the court—usually in unanimous decisions—has not been willing to push forward novel understandings of aboriginal rights, or expand the notion of aboriginal rights to include the right to self-government or sovereignty. But while the development of aboriginal rights in Canada has been modest compared to the utopian speculations of academic theorists,¹⁰⁸ Canadian courts have been more receptive to aboriginal rights claims than have American courts. Interestingly, this is not only a consequence of the power and influence of right-wing conservatives on the American court.

3.3 Aboriginal Rights in the United States and the Limits of the Hidden Law: Tribal Sovereign Immunity, Civil and Criminal Jurisdiction, Taxation and Regulatory Powers

There are few parallel cases from the American Supreme Court which deal with the question of “aboriginal rights” in the sense of un-enumerated rights and powers of aboriginal peoples. Yet while aboriginal litigation in the United States is dominated by issues of treaty and (especially) statutory interpretation, the issue of aboriginal rights is not entirely absent. The legal status of Indian tribes in the United States has always been ambiguous. The term often used for their status is “quasi-sovereign,” (a phrase that might seem to fall into the same category as “quasi-pregnant”). Chief Justice John Marshall in the early 19th century, used the term “domestic dependent nations” to designate the status of Indian tribes.¹⁰⁹ What this implied regarding the powers and rights of Indian tribes has never been entirely clear. For the most part, American courts have asserted that the federal government has

¹⁰⁸ E.g. Patrick Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination.” *McGill Law Journal*, Vol. 36, No. 1 pp 382-435.

¹⁰⁹ Jill Norgren, *The Cherokee Cases*. Norman: University of Oklahoma Press, 2004 pp 101-103.

plenary legislative power over Indian tribes, a situation that was also the case in Canada prior to the adoption of the Constitution Act of 1982. However, American courts have also entertained the idea that Indian tribes have common law rights that, while ultimately subordinate to federal sovereignty, may in some circumstances help to determine the scope of tribal power in areas such as the jurisdiction of courts, tax immunity, and the taxation powers of Indian tribes.¹¹⁰ Thus while the American Constitution does not give explicit recognition to the existence of aboriginal rights, there are American equivalents to the Canadian cases that deal with the existence and scope of the “hidden law” of Indian peoples.

In the absence of explicit Constitutional protections for this hidden law, however, the American Supreme Court has taken only limited steps to expand the scope of aboriginal rights. According to some scholars, the absence of an American revolution in aboriginal rights can be traced to political sources: the rise of conservative justices on the Supreme Court is the main, and perhaps the only, obstacle to a transformation in Native American that would parallel the transformations that have occurred in Canada and Australia.¹¹¹ I will argue that the absence of an aboriginal rights revolution in American jurisprudence cannot be traced to the rise of conservative justices to prominence on the Supreme Court. While there are divisions amongst Supreme Court justices on the scope of aboriginal rights, those divisions do not follow any clear political pattern. American and Canadian Indian law has developed in different directions as a consequence of the differing status of aboriginal rights and aboriginal peoples in their written constitutions. In Canada, the few words contained in the text of Section 35 of the Constitution Act provided a pre-text for the

¹¹⁰ F. Cohen, *Handbook of Federal Indian Law*. Washington, D.C.: US Government Printing, 1982. pp 486-493.

¹¹¹ E.g. Robert A. Williams, Jr. *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*. Minneapolis: University of Minnesota Press, 2005.

development of a robust aboriginal rights jurisprudence. The absence of an equivalent foundation in the American Constitution has prevented a similar aboriginal rights revolution from emerging in America. It is not for nothing that Native Canadians devoted so much time and energy to the process of Canadian constitutional negotiation—as opposed to simply lobbying for more sympathetic judges. The repatriated Canadian constitution created an expanded space for the recognition of aboriginal rights, one that does not exist—at least not to the same extent—within the American constitutional order.

Consider the example of tribal sovereign immunity. This is a court developed doctrine, first articulated in the early 20th century, based upon the implications of the semi-sovereign status of American Indian tribes recognized by state constitutions.¹¹² It is roughly analogous to the doctrine of state sovereign immunity, with the notable exception that tribal sovereign immunity can be altered and abridged by federal law. American Supreme Court cases dealing with sovereign immunity reveal some interesting divisions amongst the justices, divisions that do not fall along the assumed political fault lines that so often divide the Court.

Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.,¹¹³ decided in 1998, is the only case in which Native Americans won a legal victory at the Supreme Court level on the basis of an aboriginal rights claim. In this case, the majority of the court (consisting of Kennedy, O'Connor, Breyer, Rehnquist, Scalia, and Souter) ruled that the Kiowa Tribe enjoyed sovereign immunity from breach of contract suits in state courts even in regards to “off reservation” business dealings. The court did not

¹¹² For a discussion of tribal sovereign immunity, see Kirsten Matoy Carlson, “Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies.” *Michigan Law Review*. Vol. 101, No. 2 (Nov., 2002) pp 569-601.

¹¹³ *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, SUPREME COURT OF THE UNITED STATES 523 U.S. 751; 118 S. Ct. 1700; 140 L. Ed. 2d 981; 1998.

deny the power of Congress to extinguish or alter the tribe's legal immunity from suits in state court, but argued instead that Congress had not clearly extinguished this aspect of tribal sovereignty. Justice Stevens, joined by Ginsburg and Thomas in dissent, argued that the extension of tribal immunity had never been applied in the context of off-reservation activity, and the court should refrain from extending the doctrine of tribal sovereign immunity to such circumstances. In the one case since 1985 in which the Court endorsed a novel understanding of un-enumerated aboriginal rights, the voting of the justices does not seem to follow any clear political pattern.

It is worthwhile to consider the substance of the arguments in *Kiowa*, in order to assess the legal sources of disagreement that created such unexpected voting coalition on the court. The suit emerged from disagreements between the Kiowa and Manufacturing Technologies over the sale of stock; the tribe, having defaulted on payment for the stock, was sued in an Oklahoma state court. The tribe moved to have the case dismissed for lack of jurisdiction, but both the trial and appellate court found that the Kiowa did not enjoy immunity from suit for breaches of contract involving off-reservation commercial conduct. According to the Oklahoma Court of Appeals, the decision to exercise jurisdiction by Oklahoma over other sovereigns, whether Indian tribes or sister states, was a matter of comity; because the state holds itself open to breach of contract suits, it may allow its citizens to sue other sovereigns acting within the state. According to Kennedy, this argument was invalid because it was based upon the assumption that state sovereign immunity was co-extensive with the sovereign immunity of Indian tribes: "In *Blatchford*, we distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not parties to the 'mutuality of concession' that 'makes

the States' surrender of immunity from suit by sister States plausible.”¹¹⁴ Thus tribal immunity is a matter of federal law, and is not subject to diminution by the States. Kennedy paused to note that there was “reason to doubt the wisdom of perpetuating the doctrine” of tribal sovereign immunity, as the economic activities of Native American tribes became more intertwined with society as a whole. However, Kennedy thought that this was a decision best left to Congress, which possessed the power to shape the court-created contours of tribal sovereign immunity. For the courts to restrict tribal sovereign immunity in this instance, on the basis of its own assessment of the role of Indian tribes in the modern American economy, would be to usurp Congress’ policy-making role.

Stevens began his opinion with a forceful rejection of the majority’s premise that tribal sovereign immunity can exist absent specific statutory or treaty commitments: “There is no federal statute or treaty that provides petitioner, the Kiowa Tribe of Oklahoma, any immunity from the application of Oklahoma law to its off-reservation commercial activities. Nor, in my opinion, should this Court extend the judge-made doctrine of sovereign immunity to pre-empt the authority of the state courts to decide for themselves whether to accord such immunity to Indian tribes.”¹¹⁵ The courts had not merely declined to act, but had in fact extended the doctrine of sovereign immunity by allowing it to cover off-reservation activity—a conclusion even more troubling given the fact that the Court had ruled in some cases that sovereign immunity did not even extend to on-reservation activity.¹¹⁶

¹¹⁴ Justice Kennedy, majority opinion, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies* SUPREME COURT OF THE UNITED STATES 523 U.S. 751; 118 S. Ct. 1700; 140 L. Ed. 2d 981; 1998.

¹¹⁵ Justice Stevens, dissent, *Kiowa Tribe v. Manufacturing Technologies Inc.* SUPREME COURT OF THE UNITED STATES 523 U.S. 751; 118 S. Ct. 1700; 140 L. Ed. 2d 981; 1998.

¹¹⁶ E.g. *Puyallup Tribe, Inc. v. Department of Game of Washington* SUPREME COURT OF THE UNITED STATES 433 U.S. 165; 97 S. Ct. 2616; 53 L. Ed. 2d 667; 1977.

The key thing to note about the politics of the *Kiowa* decision is that they are distinctively legal politics, that is, disputes about the meaning and implications of law. From a political perspective, the issue turns on questions of economic rationality and economic fairness (for those who make contracts with Native American tribes), and questions about the justification for the unique status of Native American tribes in light of their particular historical experiences. As we will see, Justice Stevens will not hesitate to endorse aboriginal claims based upon statutes and treaties—cases where the bottom-line “policy issues” are more or less identical as in the *Kiowa* case. And this is the crucial point to note: the votes of justices, and the outcomes of Indian law cases, shift in response to the various ways in which *Congress* has recognized, restricted, or extinguished aboriginal rights. This is not to say that there are no political differences over the meaning of Native American rights in the American Supreme Court. But the scope of judicial politics is shaped not simply by judicial preferences regarding the advantages and disadvantages of Indian sovereignty.

The court has only rarely crafted expansive understanding of tribal civil jurisdiction, or tribal immunity from the civil jurisdiction of state courts. Between 1985 and 2006, the United States Supreme Court decided 8 cases which dealt with the civil jurisdiction of tribal courts and tribal sovereign immunity from civil claims in state courts. The court ruled in favor of tribal claims in 2 out of 8 of the cases. In the six cases in which the court ruled against tribal claims, not a single justice voted against the outcome of the case.

Again, this is not to suggest that there are no political fault-lines on the court in regards to the scope of tribal sovereign immunity—though in some cases, those fault lines are only apparent in the reasoning used by various justices, not by the outcome of the specific questions before the court. In the case of *Nevada v. Hicks*, for instance, the court was divided not over the outcome of the case, but over the broader question of

tribal civil jurisdiction over non-members (including state law enforcement officials).¹¹⁷ The case dealt with a civil action against a state official, who obtained tribal and state search warrants in order to investigate the house of a tribe member suspected of off-reservation hunting violations. The tribe member brought an action in tribal court against Nevada games wardens for trespass, abuse of process, and violations of civil rights. In response, the state brought an action in the District Court, seeking a declaratory judgment that the tribal court lacked jurisdiction. The District Court granted summary judgment for the tribe member, and the decision was upheld on appeal to the 9th circuit court. On subsequent appeal, the Supreme Court ruled that the tribal court did not have jurisdiction in the case. But the five separate opinions written in the decision reveal some of the fissures that exist on the court regarding questions of tribal sovereignty.

Justice Scalia, joined by Rehnquist, Kennedy, Souter, Thomas, and Ginsburg, argued that the general principle in adjudicating questions of tribal jurisdiction was that tribes lack jurisdiction over non-members: “where non-members are concerned, the ‘exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes.’”¹¹⁸ The crux of the matter was that the scope of tribal sovereignty was not connected to territory—the fact that the allegedly tortious activity took place on tribal lands did not necessarily establish tribal sovereignty. While Indian tribes have the right to create laws for tribal governance insofar as this affects the relationships amongst tribe members, this does not give the tribe jurisdiction over state officials who are acting to enforce state laws that apply to tribal members. Just as federal

¹¹⁷ *Nevada v. Hicks* SUPREME COURT OF THE UNITED STATES 533 U.S. 353; 121 S. Ct. 2304; 150 L. Ed. 2d 398; 2001.

¹¹⁸ Justice Scalia, majority opinion, *Nevada v. Hicks* SUPREME COURT OF THE UNITED STATES 533 U.S. 353; 121 S. Ct. 2304; 150 L. Ed. 2d 398; 2001.

enforcement of legitimate federal laws does not impair state governments, state enforcement of legitimate state laws does not impair the capacity of tribes to govern themselves.

In a concurring opinion, Justices Souter, Thomas, and Kennedy laid down an even more restrictive interpretation of tribal civil jurisdiction, arguing that tribal civil jurisdiction does not extend to non-members. The justification for this narrow reading of tribal jurisdiction lay in both the complexity of tribal law and the questionable independence (in some circumstances) of tribal courts.¹¹⁹ Souter's opinion went beyond the narrow question presented to the court—the question of tribal court jurisdiction over state officers enforcing state law—and imposed a more stringent understanding of tribal court jurisdiction. Ginsberg and O'Connor thought the broader issue should be left undecided, while Breyer and Stevens wished to adopt a more lenient interpretation. Stevens had also voted in dissent in the two cases where a majority of the court had voted in favor of a more expansive interpretation of tribal sovereign immunity and civil jurisdiction, which raises a further obstacle to any purely political interpretation of the Court's decision in these cases. What guided Stevens' opinions in both the *Hicks* and *Kiowa* cases was a territorial conception of tribal sovereignty, not a preference or aversion for the interests of Indian tribes.

The Court's decision in *Kiowa* is an exception to the general rule that the American Supreme Court has been hesitant to expand the scope of aboriginal rights, in regards to court-crafted doctrines regarding tribal sovereign immunity and civil jurisdiction. The divergent developments of aboriginal rights jurisprudence in Canada and the United States seems to confirm the significance of constitutional politics. The debate over aboriginal rights in Canadian courts takes place on an entirely different

¹¹⁹ For a particularly harsh criticism of this aspect of Souter's opinion, see Robert A. Williams, Jr. *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*. Minneapolis: University of Minnesota Press, 2005 p. 143.

Constitutional playing field, not because of the political preferences of a majority of Canadian judges, but because Section 35 of the Constitution Act of 1982 provided a basis for a re-thinking of the relationship between aboriginal rights, the doctrine of extinguishment, and the power of Parliament. There has been no parallel development in American law, but this is not because of the triumph of “the new right” in American courts, as even liberal appointees have declined to develop a doctrine of aboriginal rights in dissent. In the few cases which advanced and developed the aboriginal right to sovereign immunity, conservative justices on the American Supreme Court actually endorsed a notion of aboriginal rights more radical in some respects than the position of the Canadian Supreme Court. In declining to connect tribal sovereign immunity to traditional aboriginal lands or traditional aboriginal practices, Scalia and Rehnquist endorsed a position rejected by the liberal majority on the Canadian Supreme Court. Table 5 summarizes the American Supreme Court cases that have addressed the state of tribal sovereign immunity:

Table 5: Tribal Jurisdiction and Sovereign Immunity in the American Supreme Court, 1985-2007.

Case and Year	Issue(s)	Outcome for Native American litigants, amici	Majority	Dissent
Iowa Mutual Insurance v. LaPlante et al, 1987	i) Is a federal court required to exercise diversity jurisdiction, where case with same parties is pending in trial court?	Win	Marshall, J., Rehnquist, Brennan, White, Blackmun, Powell, O'Connor, and Scalia, JJ.	Stevens
Ok. Tax Commission v. Graham, 1989	Has a federal question been properly pleaded in dispute over application of state taxes to Indian gaming venture?	Loss	Unanimous	
Ok. Tax Commission v. Citizen Band Potawatomi, 1991	1. May a state that has not asserted jurisdiction over Indian Land under Public Law 280 collect taxes for on-reservation sales of cigarettes to non-members? 2. Did the tribe waive its sovereign immunity by filing an action for injunctive relief?	1. Loss 2. Win	Unanimous	
Strate v. A-1 Contractors, 1997	Can tribe member (widow of tribe member) sue company that she had an accident with on federal highway on Indian reservation in tribal court?	Loss	Unanimous	
Kiowa Tribe v. Manufacturing Technologies, 1998	Is the Kiowa tribe subject to a breach of contract suit in Oklahoma courts?	Win	Kennedy, J., Rehnquist, O'Connor, Scalia, Souter, Breyer, JJ.	Stevens, Thomas, Ginsburg

Table 5 (Continued).

Case and Year	Issue(s)	Outcome for Native American litigants, amici	Majority	Dissent
EL PASO NATURAL GAS COMPANY, v. LAURA NEZTSOSIE ET AL, 1999	Does Price-Anderson Act establish federal court jurisdiction for torts for regarding nuclear waste?	Loss	Unanimous	
C & L ENTERPRISES, INC., v. CITIZEN BAND POTAWATOMI INDIAN TRIBE, 2001	Has tribe waived sovereign immunity regarding contract dispute?	Loss	Unanimous	
NEVADA, ET AL. v. FLOYD HICKS, ET AL, 2001	Does a tribal court have jurisdiction over civil claims against state official	Loss	Unanimous	
INYO COUNTY, CALIFORNIA, v. PAIUTE-SHOSHONE INDIANS, 2003	Can a state search an Indian casino as part of an investigation of welfare fraud?	Loss	Unanimous	

Number of Cases: 8

Number of Legal Questions Decided Regarding Tribal Sovereign Immunity and Court Jurisdiction: 9

Number of Victories for Aboriginal Litigants: 2 (one unanimous, one with dissents by Stevens, Thomas, Ginsburg)

Number of Losses: 6 (all unanimous)

3.4 Treaty Interpretation and Aboriginal Rights in the Supreme Courts of Canada and the United States

Treaty interpretation in Canada, much like the interpretation of aboriginal rights, is an exercise in Constitutional interpretation. Treaty rights have the status of higher law, and cannot even be altered through recourse to the “notwithstanding clause” which allows both provincial and federal parliaments to limit the impact of Charter rights. Treaty interpretation, in the United States, is more akin to statutory interpretation. Any interpretation of American courts can be altered by the national government—though Congressional reaction to judicial statutory and treaty interpretation is much more complicated in the American context due to the familiar obstacles in the American legislative process.

Since the adoption of the Constitution Act of 1982, The Canadian Supreme Court has ruled on 9 cases that deal with the interpretation of treaties between Native Canadians and the Crown, all 9 of which address the application of hunting, fishing, or logging regulations to aboriginals. The court ruled in favor of aboriginal litigants in 5 of these cases, and all but 3 of the cases were decided unanimously. The questions that emerge in cases dealing with treaty rights are similar to those that deal with aboriginal rights, as both treaty rights and aboriginal rights are accorded constitutional protections under Section 35 (that is, they cannot be altered by ordinary legislation, or even by the legislative override of the “notwithstanding clause). However, only those aboriginal and treaty rights that were “existing” at the time of the adoption of the Constitution Act are afforded the protections of Section 35. Therefore, in ruling on these claims, courts must determine not only what rights are at stake, but also whether those rights have been extinguished.

One might imagine that determining the nature of aboriginal rights would be a more complex, more contested, and more subjective endeavor than determining the

meaning of treaty rights, as the latter are actually based upon written agreements. This turns out not to be the case. Just as Canadian courts re-shaped the law of evidence in dealing with aboriginal rights claims, so too have the courts re-shaped the law of evidence in dealing with treaty claims. In fleshing out the meaning of Section 35 of the Constitution Act, the Canadian courts have created a novel approach to treaty interpretation that has few parallels in American jurisprudence.

In interpreting how Section 35 should be applied to aboriginal treaty rights in Canada, the court has adopted what might be called an evolutionary approach; in Canada, the metaphor used for this approach is often that of the “living tree.”¹²⁰ Under this approach, the meaning of treaties cannot be understood solely in relation to the specific terms or understandings that were held at the time that they were signed. Rather, the scope of treaty rights must be evaluated in light of evolving historical circumstances. For instance, in the case of *R. v. Sioui*, the court ruled that the descendants of Huron Indians had the right to camp, cut trees, and make fires for ceremonial purposes in the provincial parks of Quebec.¹²¹ The “treaty” in this case was a one-paragraph “note of safe conduct” issued to a band of Hurons by an English General in 1760.¹²²

The case of *R. v. Marshall* best exemplifies the Court’s approach to treaty interpretation; it is also the treaty case that has drawn the most attention, due to its potential for affecting the regulation of fisheries in the Maritimes.¹²³ Marshall was charged with selling 463 pounds of eels without a license. The only question was

¹²⁰ Alan C. Cairns, “The Judicial Committee and its Critics.” *Canadian Journal of Political Science*. Vol. 4, No. 3 (Sept., 1971) pp 301-345.

¹²¹ *R. v. Sioui* 1990 CanLII 103 (S.C.C.).

¹²² Flanagan, *First Nations? Second Thoughts* Montreal and Ithaca: Queen’s-McGill University Press, 2000. p. 137.

¹²³ *R. v. Marshall* 1999 CanLII 665 (S.C.C.).

whether or not he possessed a treaty right to catch and sell eels, under the treaties of 1760-61 between the Mik-Maq Indians and the British crown. The terms of the treaty said nothing about a right to trade, and as a consequence the trial court and the Nova Scotia Court of Appeal ruled against Marshall. The Supreme Court, in a 5-2 decision, ruled that the lower courts had erred in not taking into account extrinsic evidence in interpreting the terms of the treaty, in particular, the oral terms of the agreement that had shaped the Mik Maq people's understanding of the agreement. As Justice Binnie observed in his majority opinion:

It seems clear that the words of the March 10, 1760 document, standing in isolation, do not support the appellant's argument. The question is whether the underlying negotiations produced a broader agreement between the British and the Mik Maq, memorialized only in part by the Treaty of Peace and Friendship, that would protect the appellant's activities that are the subject of the prosecution.¹²⁴

In order to interpret the scope of Mik Maq treaty rights, therefore, it was necessary not only to interpret the treaty, but also to interpret how the Mik Maq people had understood the terms of the treaty and the negotiations that lay, somehow, underneath the treaty.

The lower courts had rejected the use of extrinsic evidence in treaty interpretation, but Justice Binnie found three reasons to object to this position. First, even in a modern commercial context, extrinsic evidence can be used to show that written contracts do not necessarily contain all of the terms of the contract.¹²⁵ Secondly, while in the commercial context, extrinsic evidence is admissible in order to resolve textual ambiguities in the written contract, the same rules do not apply to treaty interpretation, where "historical" and "cultural" context can be used "even

¹²⁴ Justice Binnie, majority opinion, *R. v. Marshall* 1999 CanLII 665 (S.C.C.).

¹²⁵ Binnie did not address the problems that emerge, even in contemporary cases, from the use of extrinsic evidence in interpreting commercial contracts.

absent any ambiguity on the face of the treaty.” Finally, the treaty had been concluded verbally, but only afterwards written up the crown. The majority accepted the position of Marshall, on the basis of the extrinsic provided by academic historians, anthropologists, and the oral traditions and folk tales of the Mik Maq.

In dissent, Justice McLachlin (joined by Justice Gonthier) argued that there was no way to read the trade clauses of the 1760-1761 treaties as conferring a general right to trade. The dissenting justices did not reject the “liberal” approach to treaty interpretation that had been the general practice in Canadian (and American) law—they accepted that doubtful or ambiguous provisions of treaties should be interpreted in favor of the aboriginal signatories.¹²⁶ Nor did they reject the use of extrinsic evidence in treaty interpretation. Yet given the fact that the specific trading clause of the 1760 treaties only established an obligation for the Mik Maq to trade exclusively with the British, it was impossible to establish a general right to trade regardless of the historical and cultural context. It was unlikely that the Mik Maq had failed to understand the terms of the treaty as written. Though the European language they were most fluent in was French, the British negotiators had employed French missionaries as translators, missionaries who had deep familiarity with the Mik Maq. What made the majority’s decision most difficult to understand was that the treaty involved a surrender by the Mik Maq of their trading autonomy. That an agreement in 1760 to trade only with the Crown could be converted into immunity from federal regulation in 1999 was difficult to accept.

The 1999 *Marshall* decision showed that a majority of the Court was willing to creatively re-construct treaty rights in order to advance aboriginal interests. Later cases would illustrate that there would be limits to the evolutionary re-construction of

¹²⁶ Peter S. Heineke, “Chevron and the Canon Favoring Indians” *University of Chicago Law Review*. Vol. 60, No. 3/4 (Summer, 1993) pp 1015-1042.

treaty rights. In 2005, in the consolidated cases of *R. v. Bernard/R v. Marshall*, individual members of the Mik Maq tribes of New Brunswick claimed that the treaties which conferred immunity from fishing regulations also conferred immunity from logging regulations.¹²⁷ The Court ruled, in a unanimous opinion, that the claims to immunity from logging regulations were not a “logical evolution” of the traditional trading practices of the Mik Maq. The distinction between the claim to immunity from logging regulations and the claim to treaty immunity from fishing regulations was that the Mik Maq had not engaged in commercial timber harvesting in the 1760s. While the Court had been willing to transform a several hundred year old treaty agreement into immunity against modern fishing regulations, it still relied on a theory of treaty rights that limited the scope of judicial creativity.

The Canadian Supreme Court, in interpreting aboriginal treaties, has occupied the middle ground between the critics and the proponents of aboriginal sovereignty. Critics of aboriginal sovereignty have argued against the expansive “evolutionary” approach to treaty rights, suggesting that this allows courts to essentially invent new privileges for aboriginal tribes. Conversely, the supporters of aboriginal sovereignty have argued that the treaties entered into by the Crown implicitly support the idea that tribes should be treated as separate, self-governing nations. The courts have followed neither the critics nor supporters of aboriginal sovereignty. For better or worse, the Court has been guided by the implications of Section 35 of the Constitution, and the broader regime change that came about as a consequence of adopting the Charter of Rights and Freedoms. While there were no clear signals from the ratifying debates over what the participants expected from the aboriginal rights provisions of the Constitution Act, those provisions had to mean something—and in the absence of any clear original intent, the Courts had to assume the role of creators of constitutional

¹²⁷ *R v. Marshall; R. v. Bernard* 2005 CanLII 43 (S.C.C).

meaning. Conservative critics of the Canadian Supreme Court may well be right that this is a disastrous way to make law and policy. But it is also important to remember that, in relation to the Court's interpretation of aboriginal and treaty rights, the Canadian Supreme Court has not served as the vanguard of the aboriginal rights intelligentsia. The Court has clearly engaged in activism in developing its treaty interpretation jurisprudence, but that activism was promoted by the terms of the Constitution Act and the relative silence of its framers on the meaning of Section 35. While many of the particulars of that jurisprudence are theoretically unconvincing, it is difficult to argue that it is illegitimate. The Court has resisted the much broader claims of aboriginal rights activists, and placed reasonable limits on the scope of aboriginal treaty claims, and in doing so it has found a way to respect the text of the Constitution Act without unduly infringing on the traditional powers of Parliament and the Provinces.

The central difference between treaty interpretation in Canada and the United States is the presence of Section 35 of the Canadian Constitution Act of 1982. Section 35 grants Canadian courts considerable power, based upon the interpretation of treaty or aboriginal rights, to influence the relationships between Native Canadians and provincial and federal governments. In the United States, treaties between Native American tribes and the federal government do not have the same protected status. Table 6 summarizes the United States Supreme Court aboriginal law cases, decided between 1985 and 2006, which addressed issues of treaty interpretation:

Table 6: Native American Treaty Interpretation Cases in the U.S. Supreme Court, 1985-2006.

Case/Year	Issue(s)	Outcome for Aboriginal Litigants	Majority	Dissent
Oregon v. Klamath, 1985	Were the hunting and fishing rights conferred by an 1864 treaty extinguished by a subsequent agreement in 1901?	Loss	Stevens, J., Burger, White, Blackmun, Rehnquist, and O'Connor, JJ.	Marshall, Brennan
United States v. Dion, 1985	Does a tribal member have a treaty right not to be subjected to Endangered Species Act?	Loss	Unanimous	
United States v. Cherokee Nation of Oklahoma, 1987	Does a tribe's treaty-based right to riverbed deposits entitle it to be exempt from federal navigational servitude?	Loss	Unanimous	
South Dakota v. Bourland, 1993	Does a tribe have a treaty based right to regulate non-members on reservation lands that had been acquired by the state for a dam project?	Loss	Thomas, Rehnquist, White, Stevens, O'Connor, Scalia, Kennedy, JJ.	Blackmun, Souter
Oklahoma Tax Commission v. Chickasaw Nation, 1995	Do tribal members have a treaty based right to exemptions from i) fuel sold on reservation ii) wages paid to members who live off-reservation	i) Win ii) Loss	i) Unanimous ii) Rehnquist, Ch. J., and Scalia, Kennedy, and Thomas, Ginsburg	ii) Breyer, Stevens, O'Connor, Souter
Minnesota v. Mille Lac Band of Chippewa Indians, 1997	Does the tribe have usufructuary rights, based upon 1837 treaty?	Win	O'Connor, Stevens, Souter, Ginsburg, and Breyer	Kennedy, Thomas, Rehnquist, Scalia
State of Arizona v. State of California, 2001	Does a tribe have treaty rights to water from Colorado river?	Win	Stevens, Scalia, Kennedy, Souter, Ginsburg, and Breyer	Scalia, Thomas, O'Connor

The American Supreme Court decided 7 cases which raised 8 questions of treaty interpretation between 1985 and 2006, and the Court ruled in favor of aboriginal treaty claims on 3 of those issues. But there is no American equivalent to the *Marshall* case: that is, a case which established new approaches to the use of evidence such as oral histories to guide treaty interpretation. The key question is whether the Constitutional differences between Canada and the United States help account for this difference. The Supreme Court cases that involve interpretations of Indian treaties yield a somewhat mixed answer to this question. Unlike the cases dealing with tribal sovereign immunity and the jurisdiction of tribal courts, treaty interpretation cases have produced clearer ideological divisions on the American Supreme Court. But even so, the shifting votes of American Supreme Court justices indicate that judges are motivated not by the underlying policy issue—whether or not tribal power should be extended vis a vis state and national governments—but the legal issues that surround treaty interpretation: the degree of ambiguity in the terms of the treaties, and the question of whether Congress has acted to abrogate treaty rights.

The central principle of Indian treaty interpretation in American law is that ambiguous issues should be resolved in favor of Indian tribes.¹²⁸ Differences emerge amongst justices over what issues are in fact ambiguous. For example, in *Oregon v. Klamath Indian Tribe*,¹²⁹ the Klamath tribe argued that, based upon the terms of the treaty that established its original reservation, it maintained the right to fish and hunt free from state regulations in lands that it had ceded to the United States in 1901. Writing for the majority, Justice Stevens (joined by Burger, White, Blackmun, Rehnquist, and O'Connor) ruled that, because the 1864 treaty did not establish any

¹²⁸ Francis Prucha, *American Indian Treaties: The History of a Political Anomaly*. Berkeley: University of California Press, 1994. p. 386.

¹²⁹ *Oregon v. Klamath* SUPREME COURT OF THE UNITED STATES 473 U.S. 753; 105 S. Ct. 3420; 87 L. Ed. 2d 542; 1985.

special hunting and fishing rights outside the boundaries of the reservations, no such rights continued to exist in the lands that were ceded in 1901. The absence of any explicit discussion of hunting and fishing rights in the 1901 agreement could not be interpreted as a sign that the parties did not intend to extinguish hunting and fishing rights; the natural presumption was that, when the land was transferred, the rights were extinguished. The essential weakness of the Tribe's position, according to Stevens, was that it assumed that hunting and fishing rights were somehow separate from the reservation itself. Though the court was willing to consult the historical record of negotiations in order to evaluate how the tribe had understood the treaty, it was not willing to adopt the evolutionary approach to treaty interpretation that was on display in Canadian cases such as *R v. Sioui* and *R. v. Marshall*.¹³⁰

In a dissenting opinion, Justice Marshall (joined by Justice Brennan) argued that the majority opinion, while consistent with the "boilerplate" language of the 1864 Treaty and 1901 Agreement, discarded one of the central facets of Indian treaty cases: Indian treaties should be interpreted as they were likely understood by the tribe and, when in doubt, ambiguities in treaty law should be resolved in favor of Indians. The cession of land in 1901 contained no record of any negotiations regarding hunting and fishing rights, and thus it was reasonable to conclude, with the Klamath, that the tribe had not intended to surrender those rights. The central difficulty with Marshall's argument is that, like the majority of the Canadian Supreme Court in *Marshall* case, it was based on the presumption that the Indian tribes in question were not capable of articulating and defending their interests in negotiations with governments. The Klamath in the early 20th century were much more likely than the Mik Maq in the late 18th to be well apprised of their legal interests: they were English speakers, they had

¹³⁰ Francis Prucha, *American Indian Treaties: The History of a Political Anomaly*. Berkeley: University of California Press, 1994 p. 407.

long experience with the treaty process and government negotiation, and they had access to legal counsel (not merely French Canadian missionaries like the Mik Maq.) Based on the “silence” of the 1901 text regarding off-reservation hunting rights, Marshall wanted to read those rights into existence close to 100 hundred years after the initial agreement and transfer of land had taken place. But in support of his position, Marshall suggested that the payment received by the tribe for the land ceded in 1901 had to be interpreted as compensation—compensation for the failure of the government to prevent incursions by settlers, hunters, and trappers into land that was part of the initial reservation established in 1864. While the tribe accepted that it formally transferred title to those lands in accepting compensation, they continued to hunt, trap, and fish on the land free from state regulation. The actions of the Klamath suggested that they understood the 1901 Agreement to involve a transfer of land, but not an extinguishment of their hunting and fishing rights.

Marshall’s position was not entirely unprecedented in American constitutional law. The court had always recognized that hunting and fishing rights—in particular, the right to special protections from state regulation for Indian tribes—could exist independently from claims to land. But in most cases, this was thought to depend upon specific treaty provisions, or upon specific actions by Congress. There was one precedent that stood for the proposition that rights could survive by implication, even when a reservation was fully terminated: the case of *Menominee Tribe of Indians v. United States*.¹³¹ The Menominee Tribe had been granted a reservation in the 1854 Treaty of Wolf River, a reservation that included hunting and fishing rights. By the 1950s, the tribe was made subject to a new round of federal termination policy, which was to bring to an end their traditional status (and exemption from state regulations)

¹³¹ *Menominee Tribe of Indians v. United States*. SUPREME COURT OF THE UNITED STATES 391 U.S. 404; 88 S. Ct. 1705; 20 L. Ed. 2d 697; 1968.

by 1961. The question in this case was whether the termination of the reservation had also extinguished hunting and fishing rights that had been recognized in the 1854 Treaty of Wolf River. The Termination Act of 1954, which had led to the creation of a tribal corporation to manage tribal property, as well as the creation of a new county government in Wisconsin that coincided with the boundaries of the reservation, also provided that “the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.” Thus the state argued that its hunting and fishing regulations should apply to tribal members.

A majority of the Court argued that the Termination Act had not extinguished the hunting and fishing rights of the Menominee, on account of Public Law 280 which had been passed by the same Congress that passed the Termination Act of 1954. Public Law 280, which created procedures for the extension of state jurisdiction over Native American tribes, also stated that “Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.”¹³² The Court concluded that Public Law 280 protected the existing treaty rights to hunting and fishing, notwithstanding the Termination Act. The dissent of Justices Stewart and Black—representatives, according to some, of the emerging styles of conservatism on the Court¹³³—argued that express language of the Termination Act had to govern the Court decision. That Act had explicitly terminated the special status of the Menominee, including their hunting and fishing rights, and Public Law 280 was not

¹³² David Wilkins and K. Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law*. Norman: University of Oklahoma Press, 2001. p. 132-133.

¹³³ Thomas Keck, *The Most Activist Supreme Court in History*. (Chicago: University of Chicago Press, 2004) pp 102-103.

intended to qualify this expression of the government's termination policy; Public Law 280 was meant to deal with state jurisdiction in Indian country, while in this case the "Indian Country" in question was no longer in existence.

The contrasting cases of *Klamath* and *Menominee* suggest a plausible, political explanation for the evolution of the American Court's approach to treaty interpretation: that is, liberal justices in the Warren Era, who were willing to adopt expansive understandings of aboriginal treaty rights, were gradually replaced by Justices modeled on the likes of Frankfurter, Stewart, and Black—that is, justices who placed a higher premium on either deference to Congress and state governments, or fidelity to the explicit terms of Congressional treaties. It is important to remember, however, that a preference for one mode of treaty interpretation over another is still a legal rationale, one that cannot be reduced to a policy preference for greater Native American autonomy.

The *Klamath* case is certainly an example of the unwillingness of the American Supreme Court, in marked contrast to the Canadian Supreme Court, to depart from the text of treaties in deference to claims regarding the intentions of those who made the treaties. The breakdown of voting in that case—with holdovers from the Warren Era opposed to the new appointees of the Rehnquist and Burger Era—suggests a political or "attitudinal" interpretation of the outcome. But it is important to note the limits that even liberal dissenters placed upon their support for aboriginal interests. Even justices who advocated expansive interpretations of treaty rights, such as Marshall and Brennan in the *Klamath* case, did not see fit to "constitutionalize" Indian treaty rights; that is, render them immune from extinguishment by federal action. The Court has made no move to push the boundaries of Native American sovereignty, and its traditional subordination to Congress. It is also the case that, even in interpreting

treaties, justices are not infinitely flexible in their attempts to endorse either Native American interests or the prerogatives of state and federal governments.

For instance, in the case of *United States v. Dion*,¹³⁴ Marshall authored an opinion, for a unanimous court, which upheld the conviction of several Native Americans for the killing of golden eagles, in violation of the Endangered Species Act. This decision overturned the ruling by the Court of Appeals that the hunting of golden eagles by Yankton Sioux Indians was protected by an 1858 Treaty. In another unanimous case, *United States v. Cherokee Nation of Oklahoma*,¹³⁵ the court ruled that the Cherokee's treaty rights to riverbed mineral deposits did not entitle them to compensation for damages caused by a federal navigational improvement project. These cases illustrate some of the complexities involved in coding the outcomes of legal cases: who can say which is the "liberal" or "conservative" position, in a conflict between the cultural rights of aboriginals and the desire to protect threatened wildlife? Or consider the *Cherokee Nation* case: would an opinion that endorsed the Cherokee's claim to compensation have been a "liberal" outcome, if it implied an expansive understanding of the protections for property rights and compensation entitlements under the Fifth Amendment? These cases show that interpretive principles advocated by Marshall and Brennan were just that—principles that were meant to guide approaches to treaties, not rhetoric designed to help advance a specific conception of "Indian policy."

The divisions that exist regarding treaty interpretation in the American Supreme Court emerge most clearly in cases dealing with the scope of tribal power to

¹³⁴ *United States v. Dion* SUPREME COURT OF THE UNITED STATES 476 U.S. 734; 106 S. Ct. 2216; 90 L. Ed. 2d 767; 1986.

¹³⁵ *United States v. Cherokee Nation of Oklahoma* SUPREME COURT OF THE UNITED STATES 480 U.S. 700; 107 S. Ct. 1487; 94 L. Ed. 2d 704; 1987.

tax and regulate non-members. The case of *South Dakota v. Bourland*,¹³⁶ which dealt with a claim by the Sioux Tribe to regulate hunting and fishing rights on reservation lands that had been acquired by the federal government as part of a dam construction project, illustrates the division on the Court over whether tribal rights have been extinguished, and the question of how explicit Congress must be when it extinguishes Native American treaty rights. The majority ruled that the federal government's acquisition of the land had implicitly extinguished any treaty-based tribal claim to govern those lands, while the dissenting justices argued that any abridgement of native sovereignty had to be expressly declared an unequivocal. The case is a departure from the "resolve ambiguous issues in favor of tribes" principle, an example of what some scholars have called the "subjectivist turn" in American Indian law. Even if this is so, the "subjectivist turn" has not yielded neat political divisions in the court's approach to Indian treaty interpretation.

In *Oklahoma Tax Commission v. Chickasaw Nation*,¹³⁷ the Court unanimously agreed with the Chickasaw's claim, based upon federal treaties, to an exemption from an Oklahoma motor fuels tax. The Court split 5-4 over whether the same treaties prohibited Oklahoma from imposing income taxes on Indians who worked but did not reside on reservation. The majority opinion, joined by Justices Thomas, Scalia, Kennedy, and Rehnquist, was written by Justice Ginsburg. On the one hand, the case illustrates that, contrary to some claims, the Rehnquist Era court (and Rehnquist-era conservatives) have not usurped the policy-making role of Congress—the court has simply maintained a "geographic" approach to the problem of state-tribal relations, tying the rights of Indian individuals to territory and place of residents, not their status

¹³⁶ *South Dakota v. Bourland* SUPREME COURT OF THE UNITED STATES 506 U.S. 1031; 113 S. Ct. 808; 121 L. Ed. 2d 682; 1992.

¹³⁷ *Oklahoma Tax Commission v. Chickasaw Nation* SUPREME COURT OF THE UNITED STATES 515 U.S. 450; 115 S. Ct. 2214; 132 L. Ed. 2d 400; 1995.

as Indians. This may well be the preferred policy position of the majority: neither too much protection from state taxation from the tribes, nor too little. But the position adopted by the court is not part of a crusade to eliminate the special status of the tribes, or to enforce assimilation and uniform citizenship rights—however attractive those policies might be to those of a conservative or libertarian bent.

There are instances in which majorities on the American Supreme Court adopt “Canadian” approaches to treaty interpretation, in the sense that they adopt interpretations of treaty rights that undermine long settled legal expectations regarding the scope of state power and tribal sovereignty. This is not a consequence—or rather, only a consequence—of a desire to empower Native American tribes. The case of *Minnesota vs. Mille Lac Band of Chippewa Indians*¹³⁸ illustrates that the outcome of treaty interpretations turn on the ambiguities of treaty language, and the ambiguities of federal actions and laws held to have abrogated Indian treaties. In this case, the court endorsed the Chippewa’s claim to possess hunting, fishing, and gathering rights in lands that had been ceded to the United States in an 1837 Treaty. There were three hurdles to the Chippewa’s claims, that is, three possible actions by the federal government undercut their claim to usufructuary rights on off-reservation land: an 1850 executive order that (amongst other things) claimed to revoke those rights, and 1855 Treaty which stated that the Chippewa relinquished “any and all right, title and interest, of whatsoever nature” in the land in the question, and the admission of Minnesota as a state. Writing for the majority, O’Connor, joined by Stevens, Souter, Ginsburg, and Breyer, argued, first, that the 1850 executive order was not authorized by Congress or by any inherent executive authority; secondly, the history of negotiations surrounding the 1855 Treaty revealed that it was not intended to annul the rights in question; and finally, that the admission did not annul those rights, as there

¹³⁸ *Minnesota vs. Mille Lac Band of Chippewa Indians* SUPREME COURT OF THE UNITED STATES 526 U.S. 172; 119 S. Ct. 1187; 143 L. Ed. 2d 270; 1999.

was no explicit discussion of extinguishment of those rights in the Congressional enabling act, and as the rights were reconcilable with state sovereignty.

Political divisions certainly exist in this case, but this is not because of the underlying policy dimensions of the case (should Native American tribes be granted more power or less?) but because of the constitutional issues raised in this particular case. At root, where the majority saw much ambiguity in the treaty of 1837, the dissenters saw very little. Thomas, joined by Scalia, Rehnquist, and Kennedy, argued that the executive order, later treaty, and admission of Minnesota into the Union all had the effect of extinguishing the rights claimed by the Chippewa bands of Mille Lac. The majority had argued that the executive order had lacked Congressional authorization, and thus had no effect on earlier treaty rights; Thomas did not point to inherent executive authority, but rather to the relevant terms of the treaty: “The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States.”¹³⁹ Thus, the majority ignored the fact that treaties themselves can be the basis of Presidential power. According to Thomas, the faulty premise of the majority’s opinion was only the starting point; the court had to make further dubious interpretive moves in order to reach its final conclusion. The majority pushed its creative power to the limit in order to endorse the Chippewa’s claims, but it is in many ways the exception that proves the rule. Creative mis-reading in treaty interpretation is not on display in every treaty case; neither is the conservative-liberal split in voting that we see in this case. In this occasion, the majority placed a great deal of emphasis upon the split between Presidential action and Congressional authorization—but this is an interpretive move that is only useful, in the

¹³⁹ Justice Thomas, dissenting opinion, *Minnesota vs. Mille Lac Band of Chippewa Indians* SUPREME COURT OF THE UNITED STATES 526 U.S. 172; 119 S. Ct. 1187; 143 L. Ed. 2d 270; 1999.

context of treaty interpretation, when Congress has not made its intentions explicit. Political divisions on the court regarding the scope of Indian sovereignty can only be expressed in some circumstances, circumstances that are circumscribed by law.

Treaty interpretation in the post-Constitution Act era has, in Canada, undergone a revolution. The necessary starting point for the revolution, as in the case of aboriginal rights, is Section 35 of the Constitution Act itself, which provides that the Canadian Courts with the power to be the arbiters of aboriginal policy, should the justices so choose. The privileges accorded by treaties between Parliament and Native Canadians are, under the Canadian Constitution, of a more exalted status than the rights protected by the Charter of Rights and Freedoms. Under the protection of Section 35, the Court has adopted an innovative approach to treaty interpretation, allowing for the use of “oral histories” to determine the content and scope of treaties. This has led to some important victories for First Canadian tribes, and to some serious policy consequences, particularly in the Maritime provinces. But the new approach to treaty interpretation has not led the court to endorse all aboriginal claims, even though the Court has been willing to make itself the final arbiters of aboriginal claims. As in the case of aboriginal rights, the courts have assumed the power to not only determine the meaning of treaties, but also to ascertain how the protections afforded by treaties evolve over time. As the superintendents of evolving treaty rights, the courts have not always served aboriginal interests; but they have consistently endorsed judicial supremacy in aboriginal affairs.

In the United States, the courts have rejected judicial supremacy in treaty interpretation. There has been no attempt, in American Indian law, to challenge the basic presumptions regarding Congressional sovereignty that have governed the relationships between Native Americans and American society since the 18th century. In other words, the constitutional negotiations that led to Section 35 of the

Constitution Act created a different institutional environment for Canadian Courts, one more conducive to the advancement of aboriginal interests. The significance of Constitutional amendments, or failed amendments, is not obvious, and it is certainly not invariant.¹⁴⁰ But in the case of aboriginal rights, the differing constitutional frameworks of Canada and the United States have led Canada to experience a more robust, court-led revolution in aboriginal treaty rights.

3.5 Aboriginal Law and Statutory Interpretation: Land Claims, Taxation, Regulation

The central hypothesis that I have advanced thus far is that the patterns of aboriginal rights decisions in Canada and the United States cannot be explained simply on the basis of the political preferences of the Court's members. Section 35 of the Constitution Act of 1982 provided a textual basis for aboriginal rights activism in Canada that is simply not available for American judges, even for those who might be inclined to support the interests of aboriginal peoples.¹⁴¹ What this means in practice is that the decisions of Canadian Courts, when interpreting aboriginal and treaty rights, are effectively insulated from challenges by national or provincial—something which is not true for many of the rights protected under the Canadian Constitution.

There are several reasons to suspect that the Canadian and American courts will differ in regards to statutory issues that affect aboriginals. In general, American courts are more capable of “statutory activism” than are courts in Parliamentary systems of government. Parliamentary governments have the capacity to respond to

¹⁴⁰ E.g. F.L. Morton, “The Supreme Court’s Promotion of Sexual Education: A Case Study of Institutional Capacity.” *Polity*. Vol. 16, No. 3 (Spring, 1984) pp 467-483.

¹⁴¹ This does not mean that the particular patterns of post-1982 aboriginal rights activism in Canadian courts can be traced to the “Framers” of the Constitution Act. Rather, Section 35 provided a general pre-text for judicial activism, both by recognizing aboriginal and treaty rights AND by insulating those rights from the “notwithstanding clause.”

adverse statutory decisions with relative ease. The American system favors inaction. In addition, the American legislative process is more likely to produce ambiguous laws, which provides another pretext for the exercise of judicial power. Thus, just as Canadian courts are empowered by Section 35 when interpreting aboriginal and treaty rights, American courts have reasons to be emboldened when engaged in statutory interpretation.

There are two major points of consequence that emerge from statutory interpretations affecting Indian policy in the supreme courts of Canada and the United States. First, in the area of statutory interpretation, the American Supreme Court has exhibited some of the creativity that the Canadian Supreme Court has put on display in interpreting aboriginal rights and treaty rights. Secondly, while the Canadian Supreme Court has endorsed some aspects of the aboriginal rights agenda, as seen in cases such as *Delgamuukw* and *Marshall*, the Court has not been “captured” by aboriginal litigants.

The Canadian Supreme Court decided 14 cases between 1985 and 2006 that dealt with statutory rights claims of aboriginal litigants; the Supreme Court of the United States decided 42 cases that dealt with the statutory claims by Native Americans. Aboriginal litigants in Canada won 4 out of 14 cases, while Native Americans won 13 out of 42 cases. In terms of the policy consequences, the statutory victories for aboriginal litigants in Canada were not as significant as cases such as *Delgamuukw* and *Marshall*, which continue to have huge ramifications in British Columbia and Nova Scotia.¹⁴² The statutory victories for aboriginal litigants in Canada came in cases dealing with the garnishment of “on reservation” property for the non-payment of fees, the exemption of unemployment benefits from taxation, the scope of

¹⁴² The *Delgamuukw* and *Marshall* cases a) affected the rights of non-native groups that were not parties to the cases b) introduced new legal standards (in regards to the use of evidence and standards of treaty interpretation, for example).

tribal taxation powers, and the fiduciary duty of the national government regarding transfers of native land. In contrast, many of the statutory cases addressed by the American Supreme Court dealt with issues of considerable importance.

If there has been an aboriginal rights revolution in the United States, it has occurred in the context of statutory activism. Whereas the development of aboriginal rights and treaty rights in the United States has been modest—the Court has not adopted the framework for the use of evidence or interpretation of treaties that was adopted in Canada—claims based on statutory rights have in some instances led the American Supreme Court to adopt new approaches to several legal issues, such as the use of historical evidence, the problem of long-dormant legal claims, and the interpretation of statutes of limitation.

In American jurisprudence, the traditional doctrine of extinguishment that was part of Canadian law prior to the 1980s has remained undisturbed. What this means in practice is that cases that raise questions of aboriginal rights are often decided on statutory grounds. For instance, in the case *Amoco Production Co. et al v. Village of Gambell*,¹⁴³ Native American communities in Alaska challenged the Secretary of the Interior's decision to sell leases for oil and gas exploration, on the grounds that these activities would interfere with aboriginal hunting and fishing rights. This particular claim was similar to the issues raised in Canadian cases such as *Sparrow* and *Delgarmuukw*. While the Native Americans also objected to the decision on statutory grounds, the Supreme Court had to address the question of whether the Alaskan Native Claims Settlement Act had extinguished aboriginal fishing and hunting rights. In the opinion of the district court judge, those rights had indeed been extinguished by virtue of ANCSA; the court of appeals reached a similar ruling on this question. The

¹⁴³ *Amoco Production Co. et al v. Village of Gambell* SUPREME COURT OF THE UNITED STATES 480 U.S. 531; 107 S. Ct. 1396; 94 L. Ed. 2d 542; 1987.

United States Supreme Court decided this case on the narrow issue of whether the relevant federal environmental statutes conferred procedural rights on the native communities, arguing that the 9th circuit had impermissibly extended statutes that were meant to affect public lands in Alaska to cover the continental shelf. The lower courts had attempted to protect aboriginal interests in this case, but not on the basis of aboriginal rights. In some other instances, attempts to defend aboriginal interests through creative statutory interpretation would end up being successful.

The case of *County of Oneida vs. Oneida Indian Nation*¹⁴⁴ illustrates some of the central issues surrounding the statutory rights of aboriginals in the United States. In this case, the Oneida Indian Nation argued that a land transfer between the Oneida and the state had violated federal Indian law. The problem was that this violation was alleged to have occurred in the 1790s. In many ways, the case is similar to the major aboriginal and treaty rights cases in Canada, such as *Delgamuukw* and *Marshall*, cases which were significant because the courts adopted novel approaches to the use of evidence and treaty interpretation, and politically significant because they affected a broad range of economic interests. A similar dynamic was on display in the Oneida case. In order to endorse the claims of aboriginal litigants, the court had to adopt a variety of novel approaches to legal interpretation.

The County of Oneida had appealed the initial district court decision, in which the court declared that the Non-Intercourse Act had been violated by the improper transfer of land in the 1790s. The County did not dispute this ruling, but it did suggest that further barriers stood in the way of the Oneida's claim. The County argued that the Oneidas could not maintain a private cause of action for violations of the Non-Intercourse Act. In addition, they continued to advance the argument that the action

¹⁴⁴ *County of Oneida vs. Oneida Indian Nation* SUPREME COURT OF THE UNITED STATES 470 U.S. 226; 105 S. Ct. 1245; 84 L. Ed. 2d 169; 1985.

was time-barred, that any cause of action had abated, and that the United States had ratified the conveyance. The County was asking the court to look past the initial injustice, the initial violation of statutory law, and instead to focus on the formal rules that were also part of the rule of law. The tribe had existed as an organized entity for the entire period of time, its leaders were educated and politically astute, and thus would have been fully capable of challenging the transfer of land had they thought it invalid. Even if the Non-Intercourse Act had been violated, the passage of 200 years should have ratified the transaction. The Second Circuit court of appeals rejected the County's arguments, with one judge dissenting.

The Supreme Court affirmed the lower court's ruling, in a decision that exhibited some of the usual contorted alliances of contemporary jurisprudence. The first issue addressed by Justice Powell in his majority opinion was whether the tribe could in fact bring the case at all. Lawyer's for the County of Oneida argued that the Oneida were attempting to enforce a public law—the Non-Intercourse Act—which had pre-empted whatever federal common law rights they might have had to contest the conveyance of the land. The District Court and the Court of Appeals had ruled that the Oneida had both a federal common law "right of action" and an implied statutory cause of action under the Non-Intercourse Act. Powell wisely declined to address the second issue—the practice of creating private attorneys general had not been common in the 1790s. But it was not made clear why the federal common law rights of the Indians had not been pre-empted by the Non-Intercourse Act itself. It was this law that had made the transfer of land to New York illegal in the first place. Powell argued that the purpose of the Non-Intercourse Act was not meant to provide a comprehensive scheme for dealing with the transfer and sale of Indian land, on the grounds that the law itself contained no explicit remedial provisions. Furthermore, Powell argued that subsequent Congressional actions showed that the national government did not wish to

pre-empt suits by Indian tribes asserting their property rights: “Nothing in the statutory formulation of this rule suggests that the Indians’ right to pursue common-law remedies was thereby pre-empted.”¹⁴⁵ What Powell left entirely unclear was the purpose of the statute. The government of the 1790s, apparently, had found it necessary to codify the procedures for purchasing Indian land, a law that presumably the national government would have the responsibility to enforce. In Powell’s argument, the statute was not necessary: “the Non-Intercourse simply put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States.”¹⁴⁶ But by simply ignoring the fact that it was a public law at stake, Powell could argue that the Oneida had the right to enforce the requirement for consent.

Having determined that the Oneidas had a federal common law right to bring their claim, Powell quickly dispensed with other objections made by the County. While in most situations the absence of a federal statute of limitations would lead to the application of an analogous state statute of limitations, Powell argued that this could only be done if consistent with the “underlying federal policy,” and the evidence in this case suggested that Congress wished to impose no limitations on Indian land claims. The passage of subsequent laws addressing the transfer of Indian land did not affect the Oneida’s claim, and subsequent national treaties had not explicitly recognized the unlawful 1795 transfers of land. Perhaps the most interesting claim made by the petitioners was that the case was non-justiciable, in the sense that responsibility for Indian relations was an example of “a textually demonstrable

¹⁴⁵ Justice Powell, majority decision, *County of Oneida vs. Oneida Indian Nation* SUPREME COURT OF THE UNITED STATES 470 U.S. 226; 105 S. Ct. 1245; 84 L. Ed. 2d 169; 1985.

¹⁴⁶ Justice Powell, majority decision, *County of Oneida vs. Oneida Indian Nation* SUPREME COURT OF THE UNITED STATES 470 U.S. 226; 105 S. Ct. 1245; 84 L. Ed. 2d 169; 1985.

constitutional commitment of (an) issue to a co-ordinate political department.”¹⁴⁷ But Powell rejected this claim as well. In conclusion, Powell observed, almost in surprise, that “one would have thought that claims dating back for more than a century and a half would have been barred long ago.” But there was in his opinion no insuperable legal barrier to the Oneida’s claim.

The dissent, penned by Justice Stephens and joined by Burger, White, and Rehnquist, argued that barriers to this action either did exist, or had to be created immediately. The first paragraph summarizes the major objections of the dissenters:

In 1790, the President of the United States notified Cornplanter, the Chief of the Senecas, that federal law would securely protect Seneca lands from acquisition by any State or person: “If . . . you have any just cause of complaint against [a purchaser] and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons” . . . The elders of the Oneida Indian Nation received comparable notice of their capacity to maintain the federal claim that is at issue in this litigation. . . . They made no attempt to assert the claim, and their successors in interest waited 175 years before bringing suit to avoid a 1795 conveyance that the Tribe freely made, for a valuable consideration. The absence of any evidence of deception, concealment, or interference with the Tribe’s right to assert a claim, together with the societal interests that always underlie statutes of repose—particularly when title to real property is at stake—convince me that this claim is barred by the extraordinary passage of time. It is worthy of emphasis that this claim arose when George Washington was the President of the United States.¹⁴⁸

The central focus of Stevens’ dissent was the majority refusal to apply any time bar to the Oneida’s claim, on the grounds that it would be inconsistent with federal policy. While the majority may have been correct in its judgment that federal policy aimed, on the whole, to err on the side of protecting the interests of Native American tribes, it failed to consider the effects that the decision would have upon the

¹⁴⁷ Justice Frankfurter, dissenting opinion, *Baker v. Carr* SUPREME COURT OF THE UNITED STATES 369 U.S. 186; 82 S. Ct. 691; 7 L. Ed. 2d 663; 1962.

¹⁴⁸ Justice Stevens, dissenting opinion, *County of Oneida vs. Oneida Indian Nation* SUPREME COURT OF THE UNITED STATES 470 U.S. 226; 105 S. Ct. 1245; 84 L. Ed. 2d 169; 1985.

broader community. If resolving legal ambiguities in favor of Indian tribes was a general federal policy, so too was protecting the stability and integrity of land titles. Given the fact that there had been no legal impediment to the tribe's actions since 1795, the decision of the majority appeared even more suspect.

Stevens also argued that there was a certain degree of paternalism in the majority's reasoning. Powell's argument was based on the premise that the Oneida should not be held to the same standards as other peoples, despite the fact that the group had received formal education since the 1790s, had a sophisticated form of government, and had demonstrated their capacity to petition the government for their grievances. Given the fact that the tribe was self-governing and fully capable of utilizing the legal system, the delay in pursuing their claim was inexplicable.

The Oneida's argument that various congressional statutes (supported by legislative histories) since the 1950s supported their claim was rejected by the dissenters, on the grounds that a) the statutes only referred to actions brought by the United States, b) there was no indication that the statutes were meant to revive claims that had already been barred. Given the lack of clarity regarding Congressional intent, Stevens argued that it made little sense to assume that Congress wished to remove all limitations. Chief Justice Marshall, speaking on the same issue, argued that "it deserves some consideration, that in the absence of an applicable limitation, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws."¹⁴⁹

In the same case, Marshall wrote that in a country where not even treason can be prosecuted after three year, "it could scarcely be supposed that an individual would remain for ever liable to a pecuniary forfeiture."¹⁵⁰ One could argue, along with

¹⁴⁹ Chief Justice Marshall, majority opinion, *Adams v. Woods* SUPREME COURT OF THE UNITED STATES 6 U.S. 336; 2 L. Ed. 297; 1805; 2 Cranch 336.

¹⁵⁰ *Ibid.*

theorists of multi-culturalism, that it might make sense to hold immigrant societies as whole responsible for historical injustices against minority groups, especially in regards to the Indians who conquered and the Africans who were enslaved. But it was not the political community that would, in this instance, be paying the costs for righting ancient wrongs. It would be specific landowners who would be punished for legal violations that had occurred centuries before their birth. In endorsing the aboriginal rights revolution in this case, the majority had evaded both the restraints of the common law and the implications of contemporary multi-cultural theory. It is, however, one of the very few cases in which the Supreme Court of the United States adopted novel approaches to the law in order to endorse the claim of Native American litigants.

The Non-Intercourse Act of the 1790s was a law much honored in the breach; or at least, this was the opinion of a number of additional litigants after the decision of the Supreme Court decision in *County of Oneida v. Oneida*. But the outcome in County of Oneida was not always repeated. The willingness of the Supreme Court to advance an aboriginal rights agenda through “statutory activism” was limited by various legal factors, most notably by the impact of 20th century federal Indian policies. The case of *South Carolina v. Catawba Indian Tribe*¹⁵¹ bore many similarities to County of Oneida. The Catawba claimed that land, which they held by virtue of the 1763 Treaty of Fort Augusta with the English Crown, had been improperly conveyed to South Carolina in 1840s, in violation of the Non-Intercourse Act. The tribe, in an action initiated in 1980, laid claim to a 15 mile tract of land in South Carolina, land that it argued still belonged to the Catawba as the federal government had never properly consented to the transfer of land to South Carolina.

¹⁵¹ *South Carolina v. Catawba Indian Tribe* SUPREME COURT OF THE UNITED STATES 476 U.S. 498; 106 S. Ct. 2039; 90 L. Ed. 2d 490; 1986.

The underlying policy dimensions were essentially identical to County of Oneida: in both cases, an Indian tribe sought restitution for a violation of federal law, in a situation where rectifying that violation would involve disrupting many thousands of present day land owners.

The outcome was different in this case because the validity of the Catawba's claim, unlike the Oneida's, had been altered by federal Indian policy in the 1950s and 1960s, the "termination era" of federal Indian policy in which the national government attempted to normalized the relationship between Indians and state governments.¹⁵² The Catawba Act of 1962 had revoked the tribe's constitution, and established (according to the majority) that special federal services and statutory protections for Indians were no longer applicable to the Catawba; they would be subject to state laws in precisely the same manner as other citizens of South Carolina. The significance of this is that, if the special federal laws dealing with state-tribal relations were no longer applicable to the Catawba, the tribe and its members could not raise claims under the Non-Intercourse Act for violations that had occurred in the 19th century, as such claims would have been precluded by state statutes of limitation.

The lower courts had ruled that the provisions dealing with the applicability of state laws applied only to the individual Catawba tribe members, not to the tribe itself. The majority, while accepting the general principle that ambiguous provisions in Indian law should be resolved in favor of Indian tribes, did not accept the lower court's argument that Congressional intent or Congressional language was ambiguous in this case. Congress had stated that in the Catawba act its intention was to revoke both the tribal constitution and special protections for individual tribe members, and the Court could not ignore the express language of Congress in favor of a convoluted

¹⁵² George Pierre Castile, *Taking Charge: Native American Self-Determination and Federal Indian Policy, 1975-1993*. Tucson: University of Arizona Press, 2006. pp 10-12.

grammatical construction of certain provisions of the law. As Justice Stevens wrote, “it would be most incongruous to preserve special protections for a tribe whose constitution has been revoked while withdrawing protection for individual members of that tribe.”¹⁵³ Thus while the underlying political question was the same in the *County of Oneida* and *Catawba* cases—should courts act to rectify centuries-old violations of the Non-Intercourse Act?—the fact that the Catawba tribe has been subjected to federal termination policy in the 1960s placed them in a weaker legal position. At least, this would seem to explain the shift in votes by Justices Powell and Brennan, both of whom had supported the Oneida’s claim but found themselves voting against the claims of the Catawba.

Justice Blackmun, joined by Justice Marshall and O’Connor, authored the dissenting in the case. Blackmun thought that the Court’s traditional approach to interpreting statutes regulating Indian affairs mandated a ruling in favor of the Catawba. That traditional approach—resolving ambiguities in treaties and statutes in favor of Indian tribes—was itself justified by the fraud and abuse that had characterized the relationship between Indian tribes and settler societies. In the estimation of Blackmun, the 1959 Catawba act did not clearly foreclose the tribe’s claim, because it was not clear that the law applied South Carolina’s statute of limitations to claims that originated prior to the adoption of the Catawba Act. The court, in subjecting the federal law claims of the Catawba to South Carolina’s statute of limitations, was straining to implement an assimilationist policy that Congress had since rejected.

Blackmun’s opinion in this case illustrates that to some extent, how judges view the significance of the early history of American-Indian relations affects their

¹⁵³ Justice Stevens, majority opinion, *South Carolina v. Catawba Indian Tribe* SUPREME COURT OF THE UNITED STATES 476 U.S. 498; 106 S. Ct. 2039; 90 L. Ed. 2d 490; 1986.

decisions in cases affecting the interests of Native Americans. But as a comparison of the Oneida and Catawba cases illustrate, judicial interpretations of the Non-Intercourse Act are sensitive to the facts on the ground, not necessarily driven by the desire of judges to rectify the unfair deals between states and Indian tribes in the 18th and 19th centuries. Other cases dealing with the Non-Intercourse Act illustrate this pattern.

The case of *Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*¹⁵⁴ illustrates some of the complexities that emerged from the application, or non-application, of the Non-Intercourse Act to Indian tribes; it also illustrates the shifting votes of some justices in cases that raise identical issues of policy. This case raised the question of whether not the Non-Intercourse Act applied to transactions between the Pueblo and private parties; what made the question complex was that, for most of the 19th century, the Pueblo were not recognized as a Native American tribe under the Non-Intercourse act, and thus they were entitled to alienate their lands without the need for special federal supervision. The Pueblo received recognition under federal law as a Native American Indian tribe in the early 20th century, thus placing a cloud over the title of the thousands of non-Indians who had purchased parcels of land from them.¹⁵⁵ Congress enacted the Pueblo Lands Act of 1924 in order to address the problem, the stated purpose of which was to “settle the complicated questions of title and to secure for the Indians all of the lands to which they are equitably entitled.” In this case, the court had to address whether the grant of an easement for a telephone line, prior to the 1924 Act, had been in violation of the Non-Intercourse Act, thereby entitling the Pueblo to trespass damages.

¹⁵⁴ *Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana* SUPREME COURT OF THE UNITED STATES 472 U.S. 237; 105 S. Ct. 2587; 86 L. Ed. 2d 168; 1985.

¹⁵⁵ Under the New Mexico Enabling Act of 1910.

The question turned upon whether Congress had intended to apply the Non-Intercourse Act to the Pueblo, in which case approval of alienation of land would have had to come from Congress, as opposed to the Secretary of the Interior. The majority argued that Congress, in taking into account the peculiar history of the Pueblo, had not explicitly stated that the conditions of the Non-Intercourse Act applied to the Pueblo. The dissenting justices (Blackmun, Brennan, and Marshall) argued that the canons of federal Indian law construction dictated a different outcome. First, the majority's opinion rested on the argument that Congress wanted to create, for the Pueblo, a statutory arrangement that was not applied to any other Indian tribe (that is, alienation of unallotted Indian lands, subject only to the supervision of the Secretary of the Interior). While the "awkward and obscure" provisions of the Pueblo Land Act permitted this construction, it did not dictate it. Given the ambiguity of the statutory language, the dissenters argued that the Court should have assumed that Congress wanted to apply the same legal standards to the Pueblo which, under the Non-Intercourse Act, it applied to all other Indian tribes.

The *Oneida*, *Catawba*, and *Pueblo* cases illustrate several interesting aspects of American Indian law, and American judicial politics. Some of the innovative developments in Canadian aboriginal rights and treaty interpretation are mirrored in statutory interpretations of American Indian law, as shown by the Court's treatment of violations of the Non-Intercourse Act. But the scope of the "statutory aboriginal rights" revolution has been constricted, not simply by the presence of a consistently "anti-aboriginal" voting bloc on the court, but rather by the differing statutory issues surrounding the specific cases. The *policy* imposed in the *Oneida* case—the potential expansion of Native American land claims—was rejected by the very same court, when faced with the very different circumstances created by the Pueblo Land Act of 1924 and Congressional termination policy in the 1950s and 1960s. This is not to deny

the “attitudinal” dimensions to the cases. For instance, Marshall and Blackmun in these case consistently upheld aboriginal claims, on the grounds that ambiguities in federal Indian law should always be resolved in favor of Native Americans—and in American law, such ambiguities are not difficult to find. However, this interpretive principle did not dictate the votes of all liberal justices—most notably Justice Brennan, who joined the majority in rejecting the Native American claims in the Catawba case. These cases, and others dealing with the statutory rights of Native Americans, also illustrate an important difference between Canadian and American judicial politics: the way in which legislative politics in the United States creates greater opportunities for judicial activism. This ultimately helps to explain why the Canadian court, which has engaged in a transformation of aboriginal law since the adoption of the Constitution Act, has been unwilling to endorse the substantive claims of environmentalist interest groups.

The legal or Constitutional sources of the American Court’s Indian law decisions are also reflected in cases dealing with the taxation and regulatory powers of Indian tribes, issues that also turn for the most part on questions of statutory interpretation. The American Supreme Court has decided 20 cases dealing with the taxation and regulatory powers of Indian tribes under federal law. In 8 those cases, the Supreme Court granted either a complete or partial victory for the claims made by Native American tribes; in 10 of those cases, the claims were rejected entirely. While these cases are few in number, they are not lacking in significance for that reason—they raise crucial questions about the potential for tribes to maintain and expand their governing powers, questions that raise clear political issues about the relative value of “assimilation” versus “separation and preservation” in Indian policy. The political dimensions of the cases, however, do not seem to have determined the votes of the justices.

The court has refused to “correct” for federal assimilationist policies that have reduced the scope of tribal power. The court, cases such as *Cass County v. Leech Lake Band of Chippewa*¹⁵⁶ and the *City of Sherill v. Oneida Indian Nation*¹⁵⁷ rejected the claims that tribal sovereignty (and thus immunity to local and state taxes) should be granted over parcels of land that had been part of tribal reservations in the past, but had been sold under in accordance with federal assimilationist strategies, only to be repurchased by the tribes in later years. Only one dissenting vote was cast in these cases, by Justice Stevens.¹⁵⁸ The attempt by tribes to overcome the consequences of assimilationist policies aimed at eliminating reservations, policies that are now repudiated by the federal government, has thus been rebuffed by a broad coalition of justices. The forced allotment and assimilation policies of the national government are generally considered one of the more unjust acts of the federal government against Native American peoples, but, on this issue, the court—and the majority of its liberal justices—has not allowed itself to be a forum for the correction of historical injustice.

While the American Supreme Court was unwilling to extend tax immunities of Indian tribes in novel situations, it has been willing to maintain more traditional aspects of Indian tax immunity; the shifting outcomes in these cases show that the decisions of the court are not guided by the underlying policy issue of whether or not Indian tribes should be afforded *any* tax immunities. The taxation and regulatory cases revolve around a series of related questions: do rights to tax exemptions inhere in Indians as individuals, or do those rights inhere in the territorial sovereignty (or, more

¹⁵⁶ *Cass County v. Leech Lake Band of Chippewa* SUPREME COURT OF THE UNITED STATES 524 U.S. 103; 118 S. Ct. 1904; 141 L. Ed. 2d 90; 1998.

¹⁵⁷ *City of Sherill v. Oneida Indian Nation* SUPREME COURT OF THE UNITED STATES 544 U.S. 197; 125 S. Ct. 1478; 161 L. Ed. 2d 386; 2005.

¹⁵⁸ Stevens argued that all land owned by the tribe in its historical tribal reservation qualified as “Indian Country,” and thus could not be taxed without Congressional consent. More on the curious patterns of Stevens’ votes (increasing support for aboriginal claims over time).

accurately, “sovereignty” or “domestic dependent nation status) of Indian tribes. A second set of issues address the question of how to determine the scope of Indian territory, and the jurisdiction of tribes and states over non-Indian individuals and businesses on reservations. Table 7 summarizes the Supreme Court’s taxation and regulatory cases.

The obstacles to any revolution in aboriginal sovereignty can be best observed in the cases that the court decided unanimously. The *Cass County* case (as well as the *City of Sherill* case, in which Justice Stevens was the lone dissenter) limited the ability of Indian tribes to expand their territorial sovereignty through the re-purchase of previously alienated lands. The court has also, in unanimous decisions, rejected the following claims regarding the taxation and regulatory powers and immunities of Indian tribes:

i) limited the power of Indian tribes to tax non-members within their territorial boundaries¹⁵⁹

ii) refused to extend tax exemptions to Indian-owned companies for work done off of their reservations¹⁶⁰

iii) rejected tribal claims to maintain governing authority over alienated lands¹⁶¹

iv) rejected expansive interpretations of “Indian country” thereby limiting the taxation power of certain tribes¹⁶²

¹⁵⁹ *Atkinson Trading Company v. Shirley*, SUPREME COURT OF THE UNITED STATES 532 U.S. 645; 121 S. Ct. 1825; 149 L. Ed. 2d 889; 2001.

¹⁶⁰ *Arizona Department of Revenues v. Blaze Construction*, SUPREME COURT OF THE UNITED STATES 526 U.S. 32; 119 S. Ct. 957; 143 L. Ed. 2d 27; 1999.

¹⁶¹ *South Dakota v. Yankton Sioux Tribe*, SUPREME COURT OF THE UNITED STATES 522 U.S. 329; 118 S. Ct. 789; 139 L. Ed. 2d 773; 1998.

¹⁶² *Alaska v. Native Village of Venetie*, SUPREME COURT OF THE UNITED STATES 522 U.S. 520; 118 S. Ct. 948; 140 L. Ed. 2d 30; 1998.

v) accepted state regulation of on-reservation sales to non-members.¹⁶³

Thus some of the most promising avenues for the expansion of Native American sovereignty, and the privileges of Native American individuals and businesses, have been entirely rejected by almost all of the recent members of the Supreme Court, regardless of their political disposition or orientation.

On the other hand, the court remains committed to certain core aspects of tribal regulatory and taxation powers and immunities, as can be seen in cases in which Native American claims regarding these issues have been upheld unanimously:

i) Indian tribes can impose taxes on mineral lessees without approval of the Secretary of the Interior¹⁶⁴

ii) States cannot impose excise taxes on the sale of lands within Indian reservations¹⁶⁵

iii) An Indian does not have to live on reservation for the presumption against state taxation to be applied in assessing state taxes¹⁶⁶

iv) States cannot tax fuel sold on reservation.¹⁶⁷

¹⁶³ *New York v. Millhelm, Attea, and Bros.* SUPREME COURT OF THE UNITED STATES 512 U.S. 61; 114 S. Ct. 2028; 129 L. Ed. 2d 52; 1994; *Oklahoma Tax Commission v. Citizen Band Potawatomi* SUPREME COURT OF THE UNITED STATES 498 U.S. 505; 111 S. Ct. 905; 112 L. Ed. 2d 1112; 1991.

¹⁶⁴ *Kerr McGee Corp. v. Navajo Tribe of Indians* SUPREME COURT OF THE UNITED STATES 471 U.S. 195; 105 S. Ct. 1900; 85 L. Ed. 2d 200; 1985.

¹⁶⁵ *County of Yakima v. Yakima Indian Nation* SUPREME COURT OF THE UNITED STATES 502 U.S. 251; 112 S. Ct. 683; 116 L. Ed. 2d 687; 1992.

¹⁶⁶ *Oklahoma Tax Commission v. Sac and Fox Nation* SUPREME COURT OF THE UNITED STATES 508 U.S. 114; 113 S. Ct. 1985; 124 L. Ed. 2d 30; 1993.

¹⁶⁷ *Oklahoma Tax Commission v. Chickasaw Nation* SUPREME COURT OF THE UNITED STATES 515 U.S. 450; 115 S. Ct. 2214; 132 L. Ed. 2d 400; 1995.

Table 7: Taxation and Regulatory issues in American Indian Law, the Supreme Court of the United States, 1985-2006.

Case/Year	Issue(s)	Outcome for Aboriginal Litigants	Majority	Dissent
Kerr McGee Corp v. Navajo Tribe of Indians, 1985	Does the Indian Mineral Leasing Act require approval by the Secretary of the Interior for tribal taxes on lessees?	Win	Unanimous (Powell not participating)	
Montana et al v. Blackfeet Indian Tribe, 1985	Can the state government impose taxes on royalties from tribal mineral leasing agreements?	Win	Powell, Burger, Brennan, Blackmun, Marshall, O'Connor	Stevens, White, Rehnquist
California et al v. Cabazon Band of Mission Indians, 1987	Are states and counties are authorized by Public Law 280 to impose gaming regulations on Indian tribes?	Loss	White, Rehnquist, Brennan, Marshall, Blackmun, Powell	Stevens, O'Connor, Scalia
Cotton Petroleum Corp. v. New Mexico, 1989	Can New Mexico impose a severance tax on non-Indian gas/oil facilities on Indian reservation?	Win	Stevens, Rehnquist White, O'Connor, Scalia, and Kennedy	Blackmun, Brennan, Marshall
Brendale v. Yakima Indian Nation, 1989	Do the Yakima have zoning authority over fee lands owned by non-members in i) the reservation's "closed area" and ii) the reservation's "open" area	i) Win ii) Loss	i) O'Connor, Stevens, Blackmun, Brennan, Marshall ii) O'Connor, Stevens, White, Rehnquist, Scalia Kennedy	i) White, Rehnquist, Scalia, Kennedy ii) O'Connor, Stevens, Blackmun, Brennan, Marshall

Table 7 (Continued).

Case/Year	Issue(s)	Outcome for Aboriginal Litigants	Majority	Dissent
Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 1991	1. May a state that has not asserted jurisdiction over Indian Land under Public Law 280 collect taxes for on-reservation sales of cigarettes to non-members? 2. Did the tribe waive its sovereign immunity by filing an action for injunctive relief?	1. Loss 2. Win	Unanimous	
County of Yakima v. Yakima Indian Nation, 1992	Can the county impose i) excise tax and ii) ad valorem tax on land, sale of land that had been allotted under the 1887 Dawes Act?	i) Win ii) Loss	i) Scalia, J., Rehnquist White, Stevens, O'Connor, Kennedy, Souter, Thomas, Blackmun ii) Scalia, Rehnquist, White, Stevens, O'Connor, Kennedy, Souter, Thomas	ii) Blackmun
Oklahoma Tax Commission v. Sac and Fox Nation, 1993	Must an Indian live on reservation for presumption against state tax jurisdiction to be applied, in the context of a challenge to state taxation?	Win	Unanimous	
South Dakota v. Bourland, 1993	Can tribes regulate hunting and fishing rights over non-members in disputed territory?	Loss	Thomas, Rehnquist, White, Stevens, O'Connor, Scalia, Kennedy	Blackmun, Souter
New York v. Milhelm Attea et al, 1994	Is a New York regulatory scheme enacted to prevent non-Indians from purchasing untaxed cigarettes an invalid exercise of a federal regulatory power?	Loss	Unanimous	
Alaska v. Native Village of Venetie, 1998	Are the tribe's ANCSA land "Indian country," therefore entitling the tribe to tax business conducted on the land?	Loss	Unanimous	

Table 7 (Continued).

Case/Year	Issue(s)	Outcome for Aboriginal Litigants	Majority	Dissent
Oklahoma Tax Comm'n v. Chickasaw Nation, 1995	Can the state i) tax fuel sold on reservation and ii) wages paid to Indians who live off of the reservation (claim rooted in 1837 Treaty)?	i) Win ii) Loss	i) Unanimous ii) Rehnquist, Scalia, Kennedy, Thomas, Ginsburg	ii) Breyer, Stevens, O'Connor, Souter
Montana et al v. Crow Tribe of Indians et al, 1998	Can Crow Tribe get restitution for state taxes imposed upon mining company that had leased land from the tribe?	Loss	Ginsburg, Rehnquist Stevens, Scalia, Kennedy, Thomas, and Breyer	Souter, O'Connor
Cass County v. Leech Lake Band of Chippewa Indians, 1998	Is the tribe exempt from county taxation on reservation land that had been sold to individuals but was re-purchased by the tribe? 1855 Leech band given reservation	Loss	Unanimous	
South Dakota v. Yankton Sioux Tribe et al, 1998	Did the Yankton Sioux cede governing authority over land it sold in the 19 th century?	Loss	Unanimous	
Arizona Department of Revenue v. Blaze Construction, 1999	Does federal law pre-empt application of state tax to Indian-owned company?	Loss	Unanimous	

Table 7 (Continued).

Case/Year	Issue(s)	Outcome for Aboriginal Litigants	Majority	Dissent
Atkinson Trading Company, Inc. v. Joe Shirley Jr. et al, 2001	Can Indian Tribe impose a hotel tax on nonmember guests in hotel rooms that were located on non-Indian fee land within exterior boundaries of tribe's reservation?	Loss	Unanimous	
Wagon v. Prairie Band Potawatomi Nation, 2005	Can Kansas impose a gas tax on suppliers for Indian reservation?	Loss	Thomas, Roberts, Stevens, O'Connor, Scalia, Souter, Breyer	Ginsburg, Kennedy
City of Sherrill v. Oneida Indian Nation, 2005	Does open market purchases of land that was previously part of Indian territory restore tax immunity privileges?	Loss	Ginsburg, Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas, Breyer	Stevens

Number of Issues Decided: 23

Issues Decided Unanimously: 12

Number of Wins for Aboriginal Litigants: 7

Number of Losses for Aboriginal Litigants: 16

The key thread that connects the most important of these decisions (i, ii, and iv) is the fact that they deal with state attempts to tax on-reservation activities without explicit federal approval; this is the core of aboriginal tribal sovereignty. Differences emerge—and clearer political divisions as well—over questions of what constitutes “on reservation activity,” and what constitutes federal abrogation of tribal sovereignty.

The question is whether the resolution of more ambiguous issue surrounding the taxation and regulatory powers of Indian falls into clear political patterns. For aboriginal litigants, the unfortunate news is that conservative and moderate judges tend to be more uniformly opposed to expansive interpretations of tribal taxation and regulatory powers than their liberal counterparts are uniform in their support of aboriginal litigants. The following non-unanimous taxation and regulatory cases yielded victories for aboriginal litigants:

i) States cannot impose royalty taxes on on-reservation mineral lessees (Rehnquist, Stevens, White, dissenting).¹⁶⁸

ii) States and counties are not authorized by Public Law 280 to impose gaming regulations on Indian casinos (Stevens, O’Connor, Scalia dissenting).¹⁶⁹

iii)The Yakima Indian tribe has zoning authority over fee land owned by non-members in the “closed” section of their reservation (White, Rehnquist, Scalia, Kennedy dissenting).¹⁷⁰

While it is difficult to make generalizations based on these few cases, the most apparent thing to note about these cases is that opposition to aboriginal litigants comes

¹⁶⁸ *Montana v. Blackfoot Indian Tribe* SUPREME COURT OF THE UNITED STATES 471 U.S. 759; 105 S. Ct. 2399; 85 L. Ed. 2d 753; 1985.

¹⁶⁹ *California v. Cabazon Band of Mission Indians* SUPREME COURT OF THE UNITED STATES 480 U.S. 202; 107 S. Ct. 1083; 94 L. Ed. 2d 244; 1987.

¹⁷⁰ *Brendale v. Yakima Indian Nation* SUPREME COURT OF THE UNITED STATES 492 U.S. 408; 109 S. Ct. 2994; 106 L. Ed. 2d 343; 1989.

from conservative and moderate justices. Yet even so, the shifting votes of conservatives and moderates indicates that individual decisions are dictated not so much by the underlying policy dimensions of the case (e.g. scope of state taxation jurisdiction vis a vis tribes) as by the central legal issue (whether or not national laws have authorized state regulations or taxation.) So, for instance, Rehnquist and O'Connor took opposite positions on the questions of state taxation of on-reservation mineral lessees (O'Connor opposed the state tax, Rehnquist supported it is dissent) and the application of state gaming laws to tribal casinos (Rehnquist opposed the application of the laws, O'Connor supported them in dissent.)*Oklahoma v. Citizen Band Potawatomi*, decided in 1991, is particularly interesting in this regards, because the Court unanimously upheld tribal claims regarding sovereign immunity at a time when many elected officials where beginning to question the wisdom of the doctrine.¹⁷¹

The court rejected Native American claims in the following non-unanimous cases:

i) New Mexico can impose a severance tax on non-Indian on oil and gas facilities located on reservation (Blackmun, Brennan, and Marshall dissenting).¹⁷²

ii) The Yakima Indian Nation does not have zoning authority over fee lands owned by non-members in the “open” section of their reservation (Blackmun, Brennan, Marshall, dissenting).¹⁷³

¹⁷¹ E.g. David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law*. Norman, Okla.: University of Oklahoma Press, 2001 pp 216-220, which discusses the efforts of Republican Senator Slate Gorton to limit tribal sovereign immunity on a wide range of issues.

¹⁷² *Cotton Petroleum Corp v. New Mexico* SUPREME COURT OF THE UNITED STATES 490 U.S. 163; 109 S. Ct. 1698; 104 L. Ed. 2d 209; 1989.

¹⁷³ *Brendale v. Yakima Indian Nation* SUPREME COURT OF THE UNITED STATES 492 U.S. 408; 109 S. Ct. 2994; 106 L. Ed. 2d 343; 1989.

iii) The state can impose an ad valorem tax on the sale of on-reservation land (Blackmun dissenting).¹⁷⁴

iv) Tribes cannot regulate hunting and fishing of non-members in disputed territory. (Blackmun and Souter dissenting).¹⁷⁵

v) States can impose taxes on the wages of tribe members who live off-reservation (Breyer, Stevens, O'Connor, Souter dissenting).¹⁷⁶

vi) The Crow Tribe cannot receive restitution for taxes imposed by state government on a mining company that had leased tribal land (Souter and O'Connor dissenting).¹⁷⁷

vii) A state government can impose taxes on a Native American tribe's gasoline suppliers (Ginsburg and Kennedy, dissenting).¹⁷⁸

Justice Blackmun was the most consistent supporter of aboriginal claims during this period, voting for an expansive interpretation of tribal regulatory and taxation powers in all of the decisions he participated in.¹⁷⁹ His approach to the questions that arose in these cases seems to have been determined either by an "attitudinal" preference for aboriginal interests, buttressed by the long-standing rule of interpretation that ambiguities in law and treaties should be resolved in favor of Native

¹⁷⁴ *County of Yakima v. Yakima Indian Nation* SUPREME COURT OF THE UNITED STATES 502 U.S. 251; 112 S. Ct. 683; 116 L. Ed. 2d 687; 1992.

¹⁷⁵ *South Dakota v. Bourland* SUPREME COURT OF THE UNITED STATES 508 U.S. 679; 113 S. Ct. 2309; 124 L. Ed. 2d 606; 1993.

¹⁷⁶ *Oklahoma Tax Commission v. Chickasaw Nation*, SUPREME COURT OF THE UNITED STATES 515 U.S. 450; 115 S. Ct. 2214; 132 L. Ed. 2d 400; 1995.

¹⁷⁷ *Montana v. Crow Tribe of Indians*, SUPREME COURT OF THE UNITED STATES 524 U.S. 968; 119 S. Ct. 5; 141 L. Ed. 2d 766; 1998.

¹⁷⁸ *Wagnon v. Prairie Band of Potawatomi*, SUPREME COURT OF THE UNITED STATES 546 U.S. 1072; 126 S. Ct. 826; 163 L. Ed. 2d 703; 2005.

¹⁷⁹ Blackmun's support for aboriginal interests was not restricted to the specific issues of taxation and regulatory powers.

American tribes. But Blackmun's expansive understanding of ambiguity was mostly expressed in dissent. The pro-Native American voting block that he formed with Brennan and Marshall was replaced by a cohort of liberal and moderate justices (Stevens, O'Connor, Souter, Kennedy, Breyer, and Ginsburg) whose support for Native American claims was much less consistent. This is not to say that their legal reasoning was inconsistent; on the contrary, it seems as if the voting of liberal and moderate justices in these cases is determined by a different assessment of the "ambiguities" in federal Indian law. It is not possible to reject the "attitudinal" explanation for the decreased support for Native American taxation and regulatory claims that developed over the course of the 1990s. But it is possible to see that the obstacles to an American rights revolution do not come solely from judges that are regarded as conservative or right-wing. Liberal and moderate justices on the American Supreme Court have not followed their Canadian counterparts regarding the scope of aboriginal sovereignty and self-government. One does not need to deny the presence of political considerations to agree that the different legal and Constitutional regimes in Canada and the United States structure the ways judges of similar ideological predispositions approach aboriginal legal claims.

3.6 Conclusion

Since the adoption of the Constitution Act and the Charter of Rights and Freedoms, the Canadian Supreme Court has emulated developments in American Constitutional law in areas such as criminal law, abortion rights, and the rights of women. In its aboriginal rights jurisprudence, the Canadian Supreme Court has upheld the claims of aboriginal litigants more often than has its American counterpart, and more importantly, the Court has handed down a few key decisions that have provided the basis for more expansive aboriginal claims in the future. Looked at in terms of the

overall number of votes for aboriginal legal claims, and the patterns of those votes on the Canadian and American courts, it is impossible to deny that the differences between Canadian and American Indian law over the past two decades is connected to the liberalism of Canadian justices, ultimately rooted in the liberalism of Canada's governing regime. But the patterns of American Indian law, in relation to issues such as tribal sovereign immunity, tribal court jurisdiction, treaty interpretation, and tribal land claims, cannot be explained through politics alone. American Indian law jurisprudence remains within a framework that was developed in the 19th century, in which the rights of Indian tribes are ultimately subordinate to the plenary power of the national government; Canada's post-modern Constitution created a process in which Canadian courts would become the ultimate arbiters of aboriginal legal claims, and the scope of aboriginal sovereignty. Under these two different legal regimes, the scope of legal discretion is very different, and the nature of judicial politics is very different. Political differences seem to emerge in American Indian law in those instances where the intent of Congress or the actions of the federal government are unclear.

CHAPTER FOUR:
THE LIMITS OF ENVIRONMENTAL JURISPRUDENCE IN CANADA AND
THE UNITED STATES

4.1 Introduction

The case of the *Nuclear Energy Institute v. EPA*,¹⁸⁰ decided by the D.C. Circuit Court of Appeals in 2004, dealt with the selection of the Yucca Mountains as a depository site for the nation's nuclear waste. This decision involved a whole host of regulatory bodies working in conjunction with Congress and the President. An additional host of environmental groups and localities joined the state of Nevada in challenging the final decision to locate the depository in the Yucca Mountains. The environmental petitioners in the case argued that the waste storage site would lead to the contamination of the groundwater in nearby communities. Ed Goedhart, a member of Citizen Alert and Nuclear Information, was granted standing to bring the case. According to the court, "although radionuclides escaping from the Yucca repository may not reach Goedhart's community for thousands of years, his injury is "actual or imminent," for he lives adjacent to the land where the Government plans to bury 70,000 metric tons of radioactive waste—a sufficient harm in and of itself." This construal of "actual or imminent harm" was somewhat unusual. What was more troubling was the court's interpretation of the EPA's responsibilities, or rather, the court's willingness to endorse Congress' delegation of executive and legislative power.

Nuclear waste remains deadly for literally millions of years. It boggles the lay mind to imagine how, in the present day, human engineers could aspire to design a

¹⁸⁰ *Nuclear Energy Institute v. EPA*, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 362 U.S. App. D.C. 204; 373 F.3d 1251; 2004.

storage site that would remain safe over such an extended period of time. Yet that is the task that Congress asked executive branch agencies, including the EPA and the Department of Energy, to undertake in regards to the Yucca mountain project. The EPA established that it would attempt to construct a storage facility that could be anticipated to safely contain the material for 10,000 years. While the courts were unwilling to endorse all the various procedural objections made against the decision to locate the waste dump at Yucca Mountain, it did overturn the EPA's decision to set its safety target at 10,000 years. Instead, the court argued that the EPA was required, by statute, to devise a storage site that would be safe not only 10,000 years from now, but into the unimaginably distant future. And that was exactly what the statute seemed to demand, or rather, the political process created by the statute clearly led to that conclusion.

Congress did not directly make it imperative for the EPA to take a million-year, cosmic perspective on the fate of nuclear waste in the Yucca mountains. Instead, Congress asked the EPA to make regulations that were "based upon and consistent" with the recommendations of the National Association of Scientists (NAS), which had been given resources to analyze the problem of long-term nuclear waste storage.¹⁸¹ The EPA argued that the language of the statute did not simply turn the agency into the servant of the NAS, but rather was meant to allow for a certain degree of flexibility in interpreting the findings of the NAS experts. The decision on how to regulate

¹⁸¹ The relevant portion of the 1992 Energy Policy Act reads as follows:

"The [EPA] Administrator shall, based upon and consistent with the findings and recommendations of the National Academy of Sciences, promulgate, by rule, public health and safety standards for protection of the public from releases from radioactive materials stored or disposed of in the repository at the Yucca Mountain site. Such standards shall prescribe the maximum annual effective dose equivalent to individual members of the public from releases to the accessible environment from radioactive materials stored or disposed of in the repository. The standards shall be promulgated not later than 1 year after the Administrator receives the findings and recommendations of the National Academy of Sciences . . . and shall be the only such standards applicable to the Yucca Mountain site."

radioactive materials raised policy questions that lay outside the specific expertise of the NAS scientists, and thus the EPA should be allowed considerable discretion as to how make their regulations “based upon” and “consistent” with the NAS recommendations. While the court unanimously rejected all other petitions made by environmental groups in this case, they were not willing to allow the EPA to depart from the statutory language of the Energy Policy Act. One would have to depart from the ordinary understanding of the English language to suggest that the EPA’s determination of the proper time-horizon for the Yucca mountain site was “consistent” with the recommendations of the NAS.

This case reveals some of the reasons why American courts end up being drawn into the details of the environmental policy-process. Canadian courts and Canadian judges—despite their evident progressive proclivities in other areas of law—have been remarkably hesitant to enter into the domain of environmental policy. This chapter will attempt to assess why this is the case, and how the differing constitutional architecture of the Canadian and American political systems place differing limits on environmental jurisprudence.

One can better understand the significance of the differences between aboriginal law in Canada and the United States by comparing those decisions with developments in environmental law. Looked at in isolation, it is difficult to determine whether the divergence between Canadian and American approaches to aboriginal rights are a consequence of Constitutional differences, or a consequence of judicial ideology. The advocates of the attitudinal model of judicial behavior, for instance, would hypothesize that the transformation of aboriginal law in Canada can be understood as a consequence of changing judicial ideologies, ultimately rooted in the “progressive” understanding of native rights that began to take hold of Canadian elites during this period. There are no institutional features of the American constitutional

system that prevents a Canadian-style aboriginal rights revolution from developing in the United States; the revolution merely awaits the appointment of more sympathetic judges. My argument is that the limits imposed by constitutional architecture can best be seen by comparing aboriginal rights jurisprudence with environmental law jurisprudence in Canada and the United States. This comparison will not reveal the absence of politics in environmental jurisprudence, but it will illustrate that a parliamentary system of government presents very different opportunities for the judicialization of public policy than does a system based upon the separation of powers. As the attitudinal model would predict, the progressivism or liberalism that is evident in Canadian aboriginal rights decisions is also evident, to some extent, in environmental law decisions. But the very nature of the parliamentary system of government prevents Canadian courts from playing more than a limited role in environmental policy, regardless of judicial ideology. To summarize: in the USA, a progressive judiciary has tended and will tend to produce a pro-environment jurisprudence; in Canada, a “progressive” judiciary will, in matters of environmental policy, be much more deferential to the decisions of national policy-makers.

Most commentators in the United States have acknowledged that courts have played a major role in the development of environmental policy.¹⁸² In Canada, the role played by judges in environmental policy has been far less prominent, though it has also been subject to much less study. The key to understanding the differences between the role of Canadian and American courts in environmental policy is to reflect on the difference between “judicial activism” and “judicialization.” While these two words have been used in a variety of different ways, I will use them to refer to two

¹⁸² E.g. Melnick, *Regulation and the Courts: The Case of the Clean Air Act*. Brookings Institution: Washington, 1984 pp 4, 387; Susan Rose-Ackermann. *Controlling Environmental Policy: The Limits of Public Law in Germany and the United States*. New Haven: Yale University Press, 1995.; Bruce A. Ackerman and William T. Hassler, *Clean Coal/Dirty Air*. New Haven: Yale University Press, 1981.

distinct modes of judicial power. Judicial activism occurs whenever judges trump the decisions of other government actors; hence, it makes sense to speak of legitimate or illegitimate acts of judicial activism. Judicialization refers to a narrow range of judicial activism, in which judges do not merely overrule government decisions based upon the dictates of federalism, or fundamental rights, but rather to decisions which override the statutory decisions and even scientific determinations of executive officials. Judicial activism is usually exercised to prevent governments from acting, “judicialization” has the potential to involve courts in the detailed control of vast ranges of public policy.¹⁸³ My argument is that, while both Canadian and American courts have engaged in “judicial activism” in environmental policy (particularly in regards to issues of federalism) the Canadian courts have refrained from “judicializing” environmental policy. This chapter will consider why the Canadian courts, despite the general “progressive” nature of the Canadian judiciary, have not attempted to judicialize environmental policy by examining the constitutional and statutory framework of Canadian environmental policy, the question of legal standing in the Canadian judicial system, and the relationship between courts and administrators within this legal and political structure. At the same time, I will attempt to explain the connection, in the American system, between changes in legal doctrine (the law of standing), the separation of powers, and the judicialization of environmental policy.

The Canadian political system has presented some crucial opportunities for courts to play a role in environmental policy. Canadian courts have developed a pro-

¹⁸³ For examples of judicialization in the United States, see Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government*. New Haven: Yale University Press, 2003; Malcolm Feeley and Edward Rubin, *Judicial Policy-Making and the Modern State*. Cambridge: Cambridge University Press, 1998. Phillip J. Cooper, *Hard Judicial Choices: federal district court judges and state and local officials*. New York and Oxford: Oxford University Press, 1988.

environmentalism jurisprudence, one that mirrors the jurisprudence of liberal American judges, in two central ways. First, the Canadian courts have given an extremely broad reading of federal jurisdiction in environmental policy. Secondly, they have made it easier for aggrieved individuals and environmental groups to raise their claims in court. But the environmental revolution in Canadian law appears to come to an end—for the most part—with changes in jurisdiction and changes in the laws of justiciability. Canadian courts have played a limited role in the development of the substance of environmental policy, whether looked at in terms of rulings that shape the meaning of statutory law or decisions that determine the fate of development projects. Despite the court's willingness to engage the demands of post-materialist litigants in other contexts, the progressivism of the Canadian Supreme Court in regards to environmental policy is constrained by Parliamentary constraints on judicialization.

My main conclusion is that the parliamentary system inhibits judicial statutory activism, in contrast with the American separation of powers, because the Canadian judiciary cannot seriously claim to be the key effective restraint on an executive branch that desires to evade the law and the will of the legislative branch. Or, to put it differently, the problem of executive-legislative conflict does not exist as a constitutional problem in parliamentary governments.¹⁸⁴ Formally, all actions by “The Crown” are supported by Parliament. For a court to claim that “the Crown” is not following Parliamentary will, it must, in a sense, accuse the governing party of false consciousness.¹⁸⁵ The clear and direct link between the legislature and the government

¹⁸⁴ For example, the problem of “divided government” does not play a role in parliamentary systems; in American politics, divided government gives Congress an incentive to constrain executive discretion. Epstein, David and Sharyn O’Halloran. *Delegating Powers*. New York: Cambridge University Press, 1999.

¹⁸⁵ cf. S.L. Sutherland, “Responsible Government and Ministerial Responsibility: Every Reform its Own Problem” *Canadian Journal of Political Science*. Volume 24, Number 1, pp 91-120.

is the key to understanding the deferential approach of Canadian courts to statutory interpretation. The Canadian parliamentary system of government has not foreclosed all opportunities for judicial influence on environmental policy. Nevertheless, Canadian judges have retained a norm of deference towards government decision-makers that often leads them to resist the claims of environmental rights activists.

This chapter will begin by examining some of the similarities between Canadian and American environmental law jurisprudence in the areas of jurisdiction and justiciability. It will then proceed to examine the how their approaches to statutory interpretation and bureaucratic decision-making differentiate the judiciaries of Canada and the United States. First, it is necessary to consider some of the problems involved in assessing and comparing environmental law jurisprudence.

4.2 The Problems of Comparisons in Environmental Law

The great difficulty in analyzing environmental policy lies in assessing the significance of cases—though given the complexities of the issues, it is often difficult enough to assess who has actually won a given case. As some scholars have pointed out, the attempt to quantify the significance of environmental law decisions so as to permit statistical inference is undercut by the inherently subjective nature of any attempt to quantify the significance of environmental decisions.¹⁸⁶ It is even more difficult to evaluate whether or not the claims of environmental groups will actually help to improve environmental protection.

Sutherland argues that responses to the problem of bureaucratic government tend to undermine the capacity of cabinet ministers to control administrative discretion.

¹⁸⁶ R. Shep Melnick, “Environmental Litigation and Institutional Analysis: Wenner and Ackerman & Hassler.” *American Bar Foundation Research Journal*. Vol. 8, No. 3 (Summer, 1983) pp 740-751.

In order to assess the relationship between Canadian and American courts in environmental policy, it is necessary to classify the various ways in which courts can affect the environmental policy process. There are three basic ways in which courts exercise their power in the environmental policy process:

*1. Constitutional Activism*¹⁸⁷

Constitutional activism in Canadian and American environmental policy typically involves decisions regarding federalism; that is, courts can play a role in determining which level of government plays what kind of role in shaping environmental regulation. Theoretically, courts could engage in constitutional activism through the creation of fundamental rights related to environmental quality, though this is an option that has not been taken in either the USA or Canada. However, there are other dimensions of fundamental rights that can place limits on the scope of environmental policy.

2. Legal-Procedural Activism

Legal-Procedural activism refers not to judicial constructions of government powers and individual rights, but rather to the ways in which judges interpret the meaning of legal cases—in other words, judges exercise power in environmental policy by shaping doctrines of justiciability.¹⁸⁸ In environmental law, the most crucial questions regarding justiciability relate to standing—that is, who can bring an environmental policy related claim to court, and under what circumstances.

3. Statutory Activism

¹⁸⁷ I use the term “activism” in a “value-neutral” sense; it is not meant to imply that the exercise of judicial power in environmental decisions are incorrect, but rather is meant to imply that, correct or not, courts can exercise power in environmental policy through these four modes of decision-making.

¹⁸⁸ For a discussion of justiciability and its development in 20th century American law, see Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations*. New York: W.W. Norton and Co., 1994.

Statutory activism refers to judicial rulings which overturn the interpretations of law made by executive officials. Here, activism refers to decisions to challenge the interpretations of statutory law made by executive branch officials and bureaucrats.

Differences in the constitutional architecture of the Canadian and American political systems create differing opportunities to exercise these forms of judicial activism. In the American context, environmental law decisions are more contentious, and judicial votes more divided, than is the case in Canada. But this is not to say that Canadian courts have played no role in shaping environmental policy. Canadian courts have shaped environmental policy primarily through constitutional and legal activism. Statutory activism is far more attenuated. Political structures, in other words, shape the ability of courts to judicialize public policy; in a Parliamentary system, the opportunity to judicialize environmental policy is much more attenuated than in a system based upon the separation of powers.

Differences in environmental policy-making in Canada and the United States makes comparisons of their environmental jurisprudence somewhat complicated. The Canadian Supreme Court has decided relatively few cases addressing environmental issues. This is a result of the relative absence of national environmental laws in Canada. While a full exploration of the reasons for this difference is beyond the scope of this study, scholars have tended to argue that the combination of regionalism (and, the case of Quebec, nationalism and separatism)¹⁸⁹ combined with the resource intensive nature of the Canadian economy, have led provinces to jealousy guard against national regulatory initiatives that might have disparate impacts on different regions. As a consequence, Canadian federal courts have had fewer opportunities to influence national environmental policies. Therefore, while a comparison of Canadian

¹⁸⁹ Grace Skogstad and P. Kopas, "Environmental Policy in a federal system: Ottawa and the provinces." In *Canadian Environmental Policy: Ecosystems, politics, and process*. Ed. R. Boardman. Toronto: Oxford University Press, 1992.

and American Supreme Court decisions can tell us something about how those courts have addressed some of the environmental and general legal issues (such as standing) raised by environmental law cases, it is difficult to draw conclusions because of the relative paucity of comparable cases.

However, if we look at the lower federal appeals courts in the United States, and lower federal appeals courts and provincial courts of appeal in Canada, it is easier to find cases that are comparable. This is because these courts, particularly in the United States, deal with an immense number of cases addressing issues related to the environmental assessment of specific construction, development, and resource extraction projects. The stakes in these cases, in other words, are broadly similar. As we will see, however, Canadian and American courts have very different patterns of decision-making in these cases, patterns which I will argue cannot be explained on the basis of political ideology alone.

In the body of this chapter, I will therefore provide a general assessment or “soft comparison” of environmental law jurisprudence in the Canadian and American Supreme Courts, focusing on the ways in which these decisions exhibit constitutional and legal activism. For the United States Supreme Court, I have collected a sample of environmental law decisions based upon all cases decided by the U.S. Supreme Court between 1985 and 2007 which dealt with the following laws: the Clean Water Act, the Clean Air Act, the National Environmental Policy Act, the National Forest Management Act, and the Endangered Species Act. For the Canadian Supreme Court, I have collected all cases decided by the Court between 1985 and 2007 dealing with the Canadian Environmental Assessment Act and the “Environmental Assessment and Review Process Guidelines Order.”

Michael Howlett conducted a similar study of environmental cases from the period 1984-1990.¹⁹⁰ The cases in this paper are drawn from the period 1990-2007; unlike Howlett, I do not discuss decisions from all provincial appellate courts. The perspective I will offer is therefore not a direct duplication of Howlett's earlier study, but I think it can nevertheless shed some light on several of his conclusions. In brief, I challenge Howlett's argument that Canadian environmental policy is insulated from judicialization due to 1) stricter rules of standing in Canadian courts and 2) the unwillingness of Canadian courts to move beyond statutory interpretation into the realm of "hard looks" at scientific evidence. Howlett's first conclusion has been proven wrong by events in the previous decade and a half. Canadian courts have in fact continued to revolutionize the rules of standing. As I suggested above, the parliamentary system itself continues to constrain courts from regularly challenging executive discretion.

Determining what constitutes an "environmental policy" case is a somewhat subjective process, and for the most part I have simply followed the classification found in Canadian Federal Court reports. Basically, a case was included if a) a federal or provincial minister of the environment or an environmental lobby group was one of the parties or an intervener or b) a federal environmental statute or regulation was considered (e.g. the Canadian Environmental Assessment Act, the environmental assessment review project guidelines order, the Fisheries Act, Northern Inland Waters Act, etc.).¹⁹¹ For the American Supreme Court cases, I conducted Lexis Nexis searches based upon a series of major federal environmental statutes. For the lower court cases dealing with environmental assessment of specific development projects, I

¹⁹⁰ Michael Howlett, "The Judicialization of Canadian Environmental Policy, 1980-1990: A Test of the Canada-United States Convergence Thesis." *Canadian Journal of Political Science*. Volume 27, Number 1, 1994. pp 99-127.

¹⁹¹ Appendix C contains a complete description of the cases.

conducted searches for cases containing “NEPA” in American federal appellate courts (for the years 2006 and 2007). In Canada, I included all environmental assessment cases decided by the Canadian federal courts of appeal between 1990 and 2007, and all environmental assessment cases decided by the courts of appeal in Ontario, BC, and Alberta between 1995 and 2007.

4.3 Constitutional Activism in Canadian and American Environmental Law

Both Canadian and American courts have refrained from establishing “environmental rights” that could act as judicial trump cards in environmental policy making.¹⁹² Yet judicial constructions of constitutional law, particularly in regards to federalism, have had a major impact on environmental policy in both nations. These federalism decisions can be readily interpreted through a political framework. As we would expect from judicial rulings in other areas of law, the more ideologically divided American courts are more likely to be divided about the scope of national government power in matters related to the environment. The more ideologically homogenous Canadian judiciary has, at least in recent decades, been a consistent supporter of national regulatory power, thereby providing a nice illustration of the “centralization thesis” developed by scholars such as Martin Shapiro and Andre Bzdera.¹⁹³ who both argue that high courts tend to act as agents of the central governments which establish and staff them.

¹⁹² For a typical indication of the constitutional aspirations that accompanied the rise of the environmental movement in the United States, see J.Y.P. Jr., “Toward a Constitutionally Protected Environment.” *Virginia Law Review*. Vol. 56, No. 3, (April, 1970.) pp 458-486.

¹⁹³ Andre Bzdera, “Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review.” *Canadian Journal of Political Science*. Volume 26, Number 3 (January, 1993) pp 3-29, Martin Shapiro, *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press, 1981.

The American Supreme Court initially laid the groundwork for national environmental regulation through its post-New Deal jurisprudence, which eased or eliminated previous constitutional limits on the scope of national government regulation. The case of *Hodel v. Virginia Surface Mining and Reclamation Association*,¹⁹⁴ in which a group of oil companies and landowners challenged the Surface Mining Control and Reclamation Act of 1977 is an example of the court's typical approach to national environmental regulation in the post-war era. The court ruled that Congress' determination that there was a relationship between surface mining and interstate commerce had to be accorded deference, and determined that the act was not unconstitutional on other grounds. Congress' goal of preventing competition between states on the basis of environmental standards was ruled to be a legitimate basis for national legislation under the commerce clause. The "rational relationship/reasonable basis" test gave Congress almost complete jurisdiction over all aspects of pollution and the natural environment.¹⁹⁵ However, this expansive interpretation of the commerce clause has been challenged by many conservative jurists.¹⁹⁶ Environmental law decisions in the American Supreme Court often illustrate these continuing divisions in the American court over the scope of national power under the commerce clause.

¹⁹⁴ *Hodel v. Virginia Surface Mining and Reclamation Association* SUPREME COURT OF THE UNITED STATES 452 U.S. 264; 101 S. Ct. 2352; 69 L. Ed. 2d 1; 1981.

¹⁹⁵ For a discussion and critique of the court's post-New Deal approach to federal jurisdiction over environmental issues, see Jonathan H. Adler, "Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation." *Environmental Law*, Vol. 29, No. 1 (Spring, 1999).

¹⁹⁶ Richard H. Fallon, Jr. "The 'Conservative' Paths of the Rehnquist Court's Federalism Decisions." *University of Chicago Law Review*. Vol. 69, No. 2 (Spring, 2002) pp 429-494.

Rapanos v. United States (2006)¹⁹⁷ is one of the few instances in recent decades in which the court has challenged a national environmental regulation on the grounds that it exceeded the powers of Congress under the commerce clause. The court ruled that, contrary to the interpretations of national regulators, certain wetlands located entirely within state boundaries were not subject to national regulations, as they were not part of inter-state commerce. Or rather, four justices (Chief Justice Roberts, and Justices Scalia, Thomas and Alito) rested their decision on commerce clause grounds. The fifth justice in the majority, Justice Kennedy, agreed that the interpretation of the Clean Water Act by the U.S. Army Corps of Engineers in this case was inadequate, but he did not agree with other members of the majority regarding the precise scope of national regulatory power over in-state waters. The dissenting justices—Stevens, Souter, Breyer, and Ginsburg—essentially held to the post-New Deal line that had been established in *Hodel v. Virginia*. The *Rapanos* decision reveals the deep divisions in the court between those who wish to adhere to the post-New Deal precedents which helped to establish a broad basis for federal jurisdiction over environmental issues, and those more conservative justices who wish to return to a more restrictive understanding of the commerce power. However, divisions over the precise scope of the commerce clause in regards to environmental issues are not always drawn along simple “liberal” and “conservative” ideological lines.

In five other instances between 1985 and 2007, the court has been willing to use the commerce clause to limit the regulatory power of state governments. These cases all rested upon interpretations of the “dormant commerce clause” doctrine, according to which the court can invalidate state regulations that aim to restrict

¹⁹⁷ *Rapanos v. United States*, SUPREME COURT OF THE UNITED STATES 126 S. Ct. 2208; 165 L. Ed. 2d 159; 2006.

interstate commerce by penalizing out-of-state businesses.¹⁹⁸ In the case of *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*¹⁹⁹ the court ruled that Michigan's attempt to limit the importation of waste across state and county lines was in violation of the commerce clause. Unlike the *Rapanos* case, the political dimensions of the Fort Gratiot case were not so apparent in the votes of the justices. The majority opinion was joined by Stevens, White, O'Connor, Scalia, Kennedy, Souter, and Thomas, with dissents by Rehnquist and Blackmun. The majority opinion focused upon the ways in which the regulations discriminated against out-of-state commerce, thereby traversing the lines of the "dormant commerce clause," whereas the dissenters thought that the state could defend the restrictions as legitimate environmental safety regulations, even if they might have some impact on trade between the states. Similarly, in the case of *Chemical Waste Management v. Hunt*,²⁰⁰ the court ruled that Alabama's fees on out-of-state waster were impermissible under the commerce clause; Rehnquist was joined in dissent by Justice Blackmun. The case of *Oregon Waste Systems v. Oregon*,²⁰¹ which raised the same issues as the *Chemical Waste Management* case, also saw Rehnquist and Blackmun join together in dissent. In *C & A Carbone Inc. v. Town of Clarkstown*²⁰² (1994), the court dealt with a town ordinance which required that all non-recyclable, non-hazardous waste moving in or

¹⁹⁸ For a discussion and critique of the "dormant commerce clause" jurisprudence, see Martin A. Redish and Shane Nugent, "The Dormant Commerce Clause and the Constitutional Balance of Federalism." *Duke Law Journal*, Volume 1987, No. 4 (Sept. 1987) pp 569-617.

¹⁹⁹ *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, SUPREME COURT OF THE UNITED STATES 504 U.S. 353; 112 S. Ct. 2019; 119 L. Ed. 2d 139; 1992.

²⁰⁰ *Chemical Waste Management v. Hunt*, SUPREME COURT OF THE UNITED STATES 504 U.S. 334; 112 S. Ct. 2009; 119 L. Ed. 2d 121; 1992.

²⁰¹ *Oregon Waste Systems v. Oregon*, SUPREME COURT OF THE UNITED STATES 511 U.S. 93; 114 S. Ct. 1345; 128 L. Ed. 2d 13; 1994.

²⁰² *C & A Carbone Inc. v. Town of Clarkstown*, SUPREME COURT OF THE UNITED STATES 511 U.S. 383; 114 S. Ct. 1677; 128 L. Ed. 2d 399; 1994.

out of the town had to be processed at a designated transfer station. Once again, the voting patterns in the case do not reveal any clear political divisions. The majority, consisting of Kennedy, Stevens, Scalia, Thomas, Ginsburg, and joined in a concurring opinion by O'Connor, ruled that the town ordinance was in violation of the commerce clause. In dissent, Souter, Rehnquist, and Blackmun argued that the ordinance had not been shown to discriminate against out of state business, and that it served a clear public purpose. The final case dealing with dormant clause doctrine and its relationship with environmental regulations is *United Haulers Association v. Oneida-Herkimer Solid Waster Management Authority*²⁰³ (2007), in which the court ruled in favor of a local ordinance that directed all solid-waste generated within the county had to be processed at a local, public processing facility. The majority opinion, written by Chief Justice Roberts and joined by Souter, Ginsburg, Breyer, Scalia, and Thomas, ruled that the regulation was valid as, unlike the cases discussed above, the law did not differentiate between in-state and out-of-state businesses, and thus could be sustained as a legitimate exercise of the state's police power. In dissent, Justices Alito, Kennedy, and Stevens suggested that this ordinance was in violation of the dormant commerce clause, as it discriminated in favor of a state-owned monopoly.

What these cases illustrate is the differing degrees of "politicization" in American commerce clause jurisprudence insofar as it influences environmental policy. *Rapanos* offers a clear example of the conflict between differing conceptions of the scope of national government power, with the justices falling into clear political "blocs" in their voting. The "dormant commerce clause" cases are more difficult to interpret, because the political dimensions are not so clear. This is because the policy objectives of the regulations in question are ambiguous: are the states and towns

²⁰³ *United Haulers Association v. Oneida-Herkimer Solid Waster Management Authority* SUPREME COURT OF THE UNITED STATES 127 S. Ct. 1786; 167 L. Ed. 2d 655; 2007.

aiming to promote environmental health and safety, or are they engaged in a protectionist racket? One could very well argue that, questions of law aside, the votes in each case simply illustrates whether the justices are more concerned with problems of environmental pollution, or more concerned with the problem of state protectionism. Yet there is no clear liberal or conservative position in the three cases dealing with state and local regulation of out-of-state waste; in terms of the question of the scope of national power over the environment, as in the case of many other federalism issues, the political divisions are clearer.²⁰⁴ The role played by the American Supreme Court in determining the scope of state and federal jurisdiction over environmental policy reveals that the court is divided along political lines when dealing with the scope of national power; in regards to the scope of state power, the court is both less divided, and less divided into clearly opposed ideological camps. Stated somewhat differently, the environmental law decisions of the American Supreme Court that deal with the commerce clause (whether dormant or awake) do not seem to revolve around judicial assessments environmentalism. Conservative justices who were willing to strike down national environmental regulations in one context (*Rapanos*) were willing to uphold state environmental regulations (*United Haulers*); liberal justices could be found arguing for extensive national regulatory power in the *Rapanos*' dissent, but they could also be found arguing against state environmental regulations in *Chemical Waste Management*, *Carbone*, and *United Haulers*. The commerce clause decisions in environmental law do not seem to follow a political logic based upon underlying policy preferences; rather, the divisions seem to emerge

²⁰⁴ For a discussion of how the Rehnquist court's federalism jurisprudence relates to broader debates over Constitutional interpretation, see Richard A. Brisbin, Jr. "The Reconstitution of American Federalism? The Rehnquist Court and Federal-State Relations." *Publius*, Vol.28, No. 1 (Winter, 1998) pp 189-215.

from principled legal disagreements over the scope of state and national jurisdiction under the commerce clause.²⁰⁵

The Canadian Supreme Court in the Charter-era has, like the American Court in the immediate post-Ned Deal era, has been a fairly consistent supporter of the expansion of federal regulatory power in regards to the federal government's jurisdiction over environmental policy. Since the adoption of the Constitution Act and the Canadian Charter of Rights and Freedoms, Canadian courts have often exercised power not by directly challenging provincial legislation through judicial invalidation based upon fundamental rights but by re-arranging the federal balance of power. This aspect of judicial politics is often downplayed by those who wish to exculpate Canadian courts from the charge of judicial activism. For instance, James Kelly has argued that the Canadian Charter of Rights and Freedom has not led to an increased uniformity of public policy due to the exercise of judicial review, based upon its relatively infrequent invalidation of provincial statutes.²⁰⁶ Though Kelly shows that judicial disallowance of provincial statutes has not been as widespread as some might lead us to believe, he overestimates the success of his critique of the anti-centralization "Charterphobes." While the Charter may not have caused "rights" to inevitably trump federalism, there are nevertheless many ways in which judges can exercise power without exercising the power of judicial review. Judges exercise power over public policy not simply by declaring laws invalid; in politics, as in war, full frontal assaults of this kind are often not the best strategy. Canadian courts can influence policy in a

²⁰⁵ The environmental law-commerce clause cases thus illustrate the broader point that federalism decisions are often the best indicator of the independent impact of legal reasoning as opposed to political preferences in the judicial process. See Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada*. Vancouver and Toronto: UBC Press, 2006.

²⁰⁶ James B. Kelly, "Reconciling Rights and Federalism during Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982-1999." *The Canadian Journal of Political Science*, Volume 34, Number 2, 2001. pp 321-355.

more innocuous manner by interpreting ambiguous jurisdictional divisions and statutory provisions so as to achieve their desired outcomes. At the very least, the Canadian Constitution and Canadian environmental statutes do not foreclose modes of judicial policy-making that are far more circumspect than judicial review. In regards to environmental policy, the Canadian Supreme Court has interpreted the ambiguous division of powers in the Constitution Act in a manner that consistently favors the national government.

On paper, environmental policy in Canada is a shared jurisdiction of the federal and provincial governments.²⁰⁷ What this means is that for a wide range of environmental issues, both the provinces and the federal government can make plausible claims to be the responsible authority. As a result, Canadian courts have had the opportunity to exercise a great deal of influence over environmental policy through their ability to decide who will decide.

The Canadian Constitution Act makes no reference to the environment itself, but environmental subject matters are intertwined amidst the powers delegated to the federal and provincial governments. Section 92 lists various federal powers that deal with the environment: sea coasts and inland fisheries, navigation and shipping, and federally-owned land and waters all fall under federal jurisdiction. An even broader general power to deal with environmental issues has been discerned in the “POGG” clause of section 91, which grants the federal government the power to make laws for the “peace, order and good government of Canada.” One should note that, in contrast to the text of the American constitution, power over unenumerated matters in Canada devolves to the federal government.²⁰⁸ Federal authority over the environment can also

²⁰⁷ Melody Hessing and Michael Howlett, *Canadian Natural Resource and Environmental Policy: Political Economy and Public Policy*. (Vancouver: UBC Press, 1997) pp 56-60.

²⁰⁸ However, the pro-centralization intentions of the British North American Act of 1867 (Canada’s first constitution) was often stymied by the pro-provincial decisions of the British Judicial Committee of the Privy Council (the highest court of appeal in the Canadian legal system prior to the

be asserted through the treaty making powers, at least theoretically. Thus, through the POGG clause, federal paramountcy, the enumerated section 92 powers, and through treaties, the federal government has the potential to assert authority over a broad range of environmental subjects.²⁰⁹

Much environmental regulation occurs at the provincial level, however.²¹⁰ Section 92 of the Constitution grants provinces control over local waters and undertakings, property and civil rights, local and private undertakings, and provincial lands and resources. Section 92A grants the provinces exclusive jurisdiction over non-renewable resources, a privilege which is jealously guarded by those provincial politicians who fear that national control might be used to “correct” the uneven distribution of natural resources through the various provinces.²¹¹ Yet while it is easy enough to divide up environmental jurisdiction on paper, the environment itself often does not conform to the legal categories of the Canadian constitution. Courts have ample opportunity to determine the exact boundaries of federal and provincial power: the POGG power is subject to practically limitless interpretation; federal treaty powers have a similarly broad potential to reshape constitutional divisions of power; federal

1930s) during the first century of Canada’s existence. See Peter Russell, *Constitutional Odyssey* (Toronto: University of Toronto Press, 1993) pp 41-48; for a defense of the “provincialist” or decentralized conception of Canadian federalism that first emerged in the late 19th century in response to the political forces promoting centralization under the British North America Act of 1867, see Robert Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991).

²⁰⁹ For a discussion of the environmental provisions of Constitution Act, the scope of national regulatory power, and Canada’s political economy, see Marsha A. Chandler, “Constitutional Change and Public Policy: The Impact of the Resource Amendment (Section 92a)” *The Canadian Journal of Political Science*. Volume 19, Number 1, pp 103-126.

²¹⁰ For an analysis of provincial-level environmental policy-making, see Mark Winfield, “The Ultimate Horizontal Issue: The Environmental Policy Experiences of Alberta and Ontario, 1971-1993.” *The Canadian Journal of Political Science*. Volume 27, Number 1, 1994. pp 129-152.

²¹¹ Robert D. Cairns, “Natural Resources and Canadian Federalism: Decentralization, Recurring Conflict, and Resolution.” *Publius*, Vol. 22, No. 1 (Winter, 1992) pp 55-70.

jurisdiction (e.g. over inland fisheries) cannot be neatly separated from provincial jurisdiction (e.g. natural resources) in many if not most instances.²¹²

In the 1980s, the Canadian Supreme Court enacted a partial revolution in federalism, a revolution that had occurred in American law around the time of the new deal. In American law, a series of cases decided by Roosevelt appointees established a very broad understanding of the federal government's "commerce clause" powers; essentially, the court recognized the power of the federal government to regulate any area of national life that was connected to the economy, even if indirectly. In Canada, a more restrictive interpretation of the national government's powers survived the Great Depression, and the courts continued to place significant limits on national regulatory power for several decades afterwards. For instance, the Canadian Supreme Court refused to uphold a national federal wage and price control act in 1976, arguing that such regulations were simply too broad and intermingled with traditional areas of provincial jurisdiction.²¹³ While the national government had several clearly enumerated powers under the British North America Act that were relevant to environmental policy, by the 1980s it still seemed as if the scope of the Canadian federal government's power to regulate the environment were constrained by traditional, court-enforced doctrines of federalism.

Under that traditional understanding of federalism, the power of the federal government to regulate the environment was based upon the power of the national government to regulate trade and commerce between the states, the criminal law power, jurisdiction over seacoast and inland fisheries, power over navigation and

²¹² Katherine Swinton, "Federalism Under Fire: The Role of the Supreme Court of Canada." *Law and Contemporary Problems*. Volume 55, Number 1, pp 121-145.

²¹³ F.L. Morton, "The Constitutional Divisions of Powers with Respect to the Environment in Canada." Ed. K. Holland, *Federalism and the Environment: Environmental Policymaking in Australia, Canada, and the United States*. Westport, Conn.: Greenwood Press, 1996. p. 46.

shipping, and its taxation powers. None of these powers had ever been interpreted by the Court as granting a general regulatory power over the environment. Judges in Canada, as well the Judicial Committee of the Privy Council, had also ruled that international treaties, should they address matters of environmental concern or, indeed, any matter at all, had to respect the federal-provincial balance of power established by the British North America Act. One possible source of national power over the environment was Section 91 of the BNA Act, which gave the national government the power to make laws necessary for the “peace, order, and good government” of Canada. Prior to the 1980s, this provision was interpreted narrowly. Certain kinds of well defined subjects were held to meet the so-called “national dimensions test,” and were therefore valid under Section 91. The court also allowed Section 91 to be invoked on the basis of national emergencies. But neither the national dimensions test nor the emergency powers interpretation of the “POGG” powers conferred a general power to regulate the environment on the national government. At least, that was how the Court had interpreted Canadian Federalism prior to the late 1980s.

The case of *R. v Crown Zellerbach Canada*²¹⁴ initiated an important change in the Court’s approach to the national government’s power over environmental regulation. This case dealt with the applicability of the federal Ocean Dumping Control Act to a paper company whose operation affected provincial sea-waters. The Crown argued that, although water pollution associated with pulp and paper mills had traditionally been seen as part of provincial jurisdiction, the national dimensions of environmental problems justified a new, more expansive interpretation of federal regulatory powers under the POGG clause. A majority of four on the court, against vigorous protests by the governments of British Columbia and Quebec, as well as the dissents of all three francophone judges then sitting on the court, upheld the Ocean

²¹⁴ *R. v. Crown Zellerbach*, 1988 CanLII 63 (S.C.C.).

Dumping and Control Act. In doing so, and it endorsed a “national dimensions” test that would have the potential to grant legitimacy to a wide range of federal environmental policies.

In regards to “constitutional activism,” the key environmental law decisions that address issues of federalism in Canadian and American law can, in some ways, be interpreted as a product of political preferences. In Canada, the courts have acted to expand national jurisdiction in the post-Charter era, much as Roosevelt appointees on the American Supreme Court expanded federal jurisdiction through their re-interpretations of the commerce clause. While it is certainly the case that the presence of greater ideological diversity in the American Supreme Courts leads to greater contention over the scope of federal jurisdiction, the court’s environmental law/commerce clause decisions do not produce neat political divisions in judicial voting. Nevertheless, one pattern is relatively consistent: liberal constitutional activism, in both Canada and the United States, tends to favor increased national regulatory power over the environment. Similarities between liberal approaches to environmental law in Canada and the United States also appear when we consider the issue of legal standing.

4.4 The Greening of Justiciability: Expanding the Scope of Standing in Canada and the United States

The development of environmental law in Canada and the United States, insofar as it relates to the scope of national regulatory power, can easily be interpreted as a political process. In Canada, the courts have been steadfast supporters of the expansion of national power in the post-Charter era, whereas in the States, a more politically divided court has produced a jurisprudence of federalism marked by more contention and serious divisions. A similar pattern can be seen in regards to the rules

of standing in Canadian and American law. Standing is an aspect of the law of justiciability, that part of the judicial process in which courts attempt to determine whether or not an “issue” or conflict is in fact a legal “case.” So, to give one example, an issue is not justiciable if a judicial decision cannot affect the outcome; the case is “moot.” Similarly, under the rules of justiciability, courts have typically demanded that the parties to case have a genuine conflict of interest—this is referred to as the doctrine of adverseness. “Standing” refers to the question of whether or not an individual, group, or organization has a right to assert specific legal claims.

Historically, this has meant that, in order to have “standing” to raise a legal claim, an individual must have suffered (or be about to suffer) a concrete and particularized injury to their own rights. The doctrine of standing, in Anglo-American jurisprudence, was meant to limit or prevent abstract or hypothetical claims from overwhelming the legal system. As Maxwell Stearns has observed, the requirements of standing are rooted in the pragmatic recognition of the costs of litigation; given the real costs of litigating, it makes sense that individuals should only be able to invoke the judicial system to protect their own rights, to and prevent or redress real, concrete injuries.²¹⁵

In practice this means, or rather has meant, that no individual has an abstract right to the enforcement of law, if the enforcement or non-enforcement of law does not affect them. So, for instance, in the early 20th century case of *Frothingham v. Mellon*,²¹⁶ the Supreme Court ruled that an individual did not have the power to challenge a federal spending program merely because they objected to it on constitutional grounds. Only if the law affected them directly would they have a “case or controversy” in law, and the indirect effect upon their tax bill occasioned by an

²¹⁵ Maxwell L. Stearns, “Standing Back from the Forest: Justiciability and Social Choice.” *California Law Review*. Vol. 83, No. 6 (Dec., 1995) pp 1309-1413.

²¹⁶ *Frothingham v. Mellon*, SUPREME COURT OF THE UNITED STATES 262 U.S. 447; 43 S. Ct. 597; 67 L. Ed. 1078; 1923.

individual spending program was not sufficient to establish a case or controversy in law. The change in the courts approach to standing is best evident in the case of *Flast v. Cohen*,²¹⁷ in which Earl Warren granted standing to party to challenge state spending that was supposedly in violation of the First Amendment. Since that time, Congress has taken upon itself the duty of altering the laws of standing, particularly in relationship to environmental laws and regulations, where it was thought that the participation of citizen groups as “private attorneys general” would be useful in supporting environmental regulation against potentially recalcitrant bureaucrats and executive officials.²¹⁸ However, under the Rehnquist court, the rules of standing have once again become a source of considerable controversy and conflict in American law. Many of those controversies have dealt with standing in the context of environmental law.

The development of the law of standing in the American Supreme Court parallels the development of commerce clause jurisprudence. Just as conflicts over the scope of Congressional power under the commerce clause have emerged in the Rehnquist Court, so too have conflicts emerged over the “liberalized Conservative justices on the Rehnquist court attempted to return to the pre-Warren Era of standing in cases such as *Lujan v. Defenders of Wildlife*,²¹⁹ a case in which Scalia re-asserted the idea that, in order to challenge government actions, individuals had to suffer concrete and particularized harms, that harm had to be traceable to government action, and the harm that was suffered had to be amenable to a judicial remedy. Not surprisingly, this new precedent did not settle the issue.

²¹⁷ *Flast v. Cohen*, SUPREME COURT OF THE UNITED STATES 392 U.S. 83; 88 S. Ct. 1942; 20 L. Ed. 2d 947; 1968.

²¹⁸ For a discussion of the rise of “private attorneys general,” see Jeremy Rabkin, “The Secret Life of the Private Attorney General.” *Law and Contemporary Problems* Vol. 61, No. 1 (Winter, 1998) pp 179-203.

²¹⁹ *Lujan v. Defenders of Wildlife*, SUPREME COURT OF THE UNITED STATES 504 U.S. 555; 112 S. Ct. 2130; 119 L. Ed. 2d 351; 1992.

Some commentators suggested that the *Lujan* decision had the potential to undermine all of the various “citizen suit” provisions that are part of most major national environmental statutes.²²⁰ This has not yet come to pass, though the issue of standing continues to be a source of conflict in federal courts. It is not necessarily the case that this is only a consequence of differing political preferences of federal judges. Since the *Lujan* decision, there has been no case in which the Supreme Court has struck down citizen suit provisions of environmental law, which indicates that while *Lujan* might potentially limit Congressional control over the law of standing, the “zone of interests” test is not particularly restrictive. The U.S. Supreme Court has decided three environmental law cases in which standing was the central issue since 1992, and in each case the outcome was very different. In *Bennet v. Spears*,²²¹ the court ruled unanimously that a group of land-owners had standing under the Endangered Species Act to challenge lake-level regulations that were intended to protect two varieties of endangered fish. In *Chicago Steel and Pickling Co. v. Citizens for a Better Environment*,²²² another unanimous decision, the court ruled that an environmental group could not be granted standing, where the relief they sought was unrelated to any alleged injury. Environmentalists might point out that the clearest pattern in these few cases is the fact that environmentalist interest lost on the question of standing, while private land owners and state agencies were granted standing. Yet the *Lujan* decision has not led to complete administrative autonomy for national environmental policy-makers, though this may well be because those who might apply

²²⁰ E.g. “Read for all it is worth, the decision (*Lujan*) invalidates the large number of statutes in which Congress has attempted to use the ‘citizen-suit’ device as a mechanism for controlling unlawfully inadequate enforcement of law.” Cass R. Sunstein “What’s Standing after *Lujan*? Of Citizen Suits, ‘Injuries,’ and Article III.” *Michigan Law Review*. Vol. 91, No. 2 (Nov. 1992) pp 163-236 (p. 165).

²²¹ *Bennett v. Spear*, SUPREME COURT OF THE UNITED STATES 520 U.S. 154; 117 S. Ct. 1154; 137 L. Ed. 2d 281; 1997.

²²² *Chicago Steel and Pickling Co. v. Citizens for a Better Environment* SUPREME COURT OF THE UNITED STATES 523 U.S. 83; 118 S. Ct. 1003; 140 L. Ed. 2d 210; 1998.

the decision with a ruthless consistency do not yet hold a majority on the court.²²³ The expansion of standing continues to influence American environmental law and environmental policy, though the scope of standing is still contested.

Within the American political system, the transformation of standing has greater ramifications than in the parliamentary systems of government, because the tensions between the separation of the executive and legislative branches invariably produces more occasions to claim that “the rule of law” has been violated by executive discretion. Insofar as American courts adopt an illegitimate role in environmental policy, it is because they attempt to uphold a rigid conception of the rule of law. Particularly within the American system of separated powers, the post-1960 conception of standing allows legalism to trump political prudence. The traditional rules of standing, in contrast, allowed courts to accept the limits of abstract legalism without endorsing executive lawlessness. If the rules of standing are abandoned, then this creates the space for courts to substitute their own discretion for that of the executive branch, all in the name of Congressional supremacy or the “rule of law.”

A key example of this is the case of *Massachusetts v. EPA*,²²⁴ heard by the DC Circuit court of appeals in 2005 and by the United States Supreme Court in the spring of 2007. In this case, an assortment of states and environmental interest groups petitioned the court in the hopes of forcing the EPA to adopt more stringent regulations of CO₂ emissions from new motor vehicles. The EPA argued that it lacked statutory authority to regulate CO₂ emissions from motor vehicles. Secondly, even if it

²²³ For a thorough-going critique of “citizen suit” provisions on the grounds of their incompatibility with the Constitutional separation of powers, see Charles S. Abell, “Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act violates the Constitution’s Separation of Powers Principle.” *Virginia Law Review*, Vol. 81, No. 7 (Oct., 1995) pp 1957-1987.

²²⁴ *Massachusetts v. EPA*, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 367 U.S. App. D.C. 282; 415 F.3d 50; 2005; *Massachusetts v. EPA*, SUPREME COURT OF THE UNITED STATES 127 S. Ct. 1438; 167 L. Ed. 2d 248; 2007.

possessed this authority, it retained the discretion to not promulgate regulations in this specific instance, due to the uncertainties regarding the environmental effects of carbon dioxide and other green house gases. From the perspective of the environmental interest groups and state attorneys general bringing this petition, the EPA decision not to promulgate regulations was not only a disastrous policy choice: it was an illegal violation of Congressional intention as expressed in the Clear Air Act and its subsequent amendments. Yet before the court could consider the merits of EPA's decision not address CO₂ emissions, the court had to determine whether the objections of the petitioners constituted a "case" at all.

The EPA's primary defense against the challengers was that none of them satisfied the requirements of Article III standing: they had not suffered injuries in fact that could be traced to the challenged actions, injuries that were likely to be redressed by a favorable decision in the court.²²⁵ In anticipation of this challenge, the petitioners produced two volumes of various statements regarding the potential impact of the EPA's failure to regulate. These volumes described the catastrophes that would occur from global warming, catastrophes that the EPA could help the world to avoid by regulating CO₂ emissions. Given the particularized nature of the claim in this case—it dealt with CO₂ standards for new motor vehicles in the USA, not global environmental policy—it was still unclear how a judicial decision could ameliorate these conditions. One climatologist answered this objection by suggesting that EPA regulations would set in motion a series of desirable events. The EPA regulations would provide an example for other countries, as the new regulations would spur the development of more effective CO₂ control technologies, which would then be mandated around the

²²⁵ Standards that were articulated by Justice Scalia in *Lujan v. Defenders of Wildlife*. For an analysis of standing that explores the scope for environmental litigation within the parameters established by Lujan, see Daniel A. Farber, "Stretching the Margins: The Geographic Nexus in Environmental Law." *Stanford Law Review*. Vol. 48, No. 5 (May, 1996) pp 1247-1278.

world. If the climatologist's prognostications were correct, it was only several steps from granting the petitioners request to saving the world from impending doom.

The court was faced with a difficult problem, and three different opinions emerged in the case. According to Judge Randolph, evaluating the case for standing could not easily be separated from the merits of the case. Standing could only be established (or rejected) through an evaluation of the science of global warming.²²⁶ In other words, the issues have become so complex that the Court must assume that the petitioners have a "case" in law. Proceeding to the merits, Randolph argued that the National Research Council's report on climate change had acknowledged that the link between CO₂ and other green house gases was not yet firmly established. In addition, the EPA had not determined what, if any, forms of regulation would be best able to address the problem of emissions. Unable to find a clear error in the EPA's record, Randolph was unwilling to substitute his own assessment of global climatology and the frontiers of pollution control technology for the experts in the executive branch. He solved the problem of standing, in this case, by essentially stating that it no longer exists as a hurdle in the legal process. The petitioners' standing was essentially incontestable, as it was based on theories of causation that were difficult if not impossible to evaluate. While Randolph's inability and unwillingness to challenge their theory of causality allowed the petitioners to get their day in court, his recognition of the complexity of climate change and pollution control led him to defer to the EPA's decision not to regulate CO₂ emissions. Randolph deferred to the EPA for the same reason that led him to accept the petitioner's claim to have standing.

²²⁶ This is a common source of disagreement over the meaning of standing. The question is whether, at the "threshold" stage, plaintiffs must establish the existence of particularized injuries, or simply aver a relationship between action and injury which, if true, would establish standing. See the dissent of Justice Blackmun, *Lujan v. Defenders of Wildlife* (1990).

Randolph's decision combined an extremely broad conception of standing (which can be had for the asking) with deference to policy decisions made by the executive branch. The problem is that, if one was willing to overlook the fact that the petitioners were not actually affected by the law and thus did not have a case under the traditional Article III "case and controversy" standard, their interpretation of the law had considerably more validity than the EPA's. This is not to say that the petitioners advanced a more plausible interpretation of the state of scientific knowledge of climate change, or a more rational balancing of the competing costs and benefits involved in pollution control. However, the petitioners could easily make the case that the Clean Air Act required the EPA to produce CO₂ regulations. If one ignored the fact that they did not have a "case," the law did indeed appear to be on the petitioner's side.

It might seem odd that courts, at the instigation of interest groups, could force the EPA—against its own judgment—to create national regulations of a natural occurring gas that human beings produce every second of their existence. Presumably, such a massive extension of regulatory power should at least be authorized by clear Congressional directives. When the FDA attempted to extend its regulatory arm over a substance—tobacco—that had traditionally fallen outside of its ambit, the Supreme Court rebuffed the attempt.²²⁷ In this case, however, the dissenting judge David Tatel made a convincing case that, given the statutory language of the Clean Air Act, and given the willingness of many federal courts to allow interest groups to operate as private wings of the executive branch, the EPA was required to promulgate national CO₂ emission standards for new automobiles.

²²⁷ *FDA v. Brown & Williamson Tobacco Corp.* (2000); for a highly-strung discussion of the policy issues surrounding this case, see David Kessler, *A Question of Intent: A Great American Battle with a Deadly Industry*. New York: Public Affairs, 2001.

In his dissenting opinion, Judge Tatel suggested that, however reasonable the EPA's decision might appear from a policy perspective, their judgment was not related to the standards outlined in the CAA itself. Congress, for better or worse, had not given the EPA license to protect the environment as EPA official saw fit, using their discretion to balance the benefits of clean air against the cost of pollution abatement.²²⁸ There is not much doubt that Tatel's position was heavily influenced by his differing appraisal of the state of climatology and environmental science. While Judge Randolph was unwilling to challenge the EPA's claim that uncertainty regarding the causes of climate change and the lack of available control technologies made national regulations unwise at the current time, Judge Tatel argued that the EPA had in fact misinterpreted the evidence submitted to it by the National Research Council's 2001 report on climate change. The EPA's mistake lay in the fact that while the report acknowledged uncertainty regarding the extent to which CO₂ emissions would affect global temperatures, there did not appear to be any doubt as to whether CO₂ would induce global temperature changes of some kind. Even if the most optimistic predictions were in fact correct, the report still suggested that greenhouse-gas induced climate change would result in drought, heat stress, rising sea levels, and the disruption of eco-systems. Given these claims, Judge Tatel had no trouble asserting that the state of Massachusetts, at least, had standing. If the reports analysis was correct, the failure of the EPA to regulate had the potential to disrupt the climate of New England and all coastal states, if not to submerge Boston beneath the Atlantic.

Could the EPA, based upon this evidence, nevertheless conclude that the costs of CO₂ regulation of motor vehicles still outweighed the evidence? Catastrophic

²²⁸ In other words, the CAA was based upon a repudiation of the New Deal model of legislation and administrative discretion. For a defense of the New Deal model in the context of environmental policy, and an explanation of how the New Deal model contrasted with the new social regulation of the 1970s, see Bruce Ackerman and William Hassler, *Clean Air/Dirty Coal*. New Haven: Yale University Press, 1981.

environmental forecasts had been wrong—completely wrong—in the past, even when there had been substantial consensus amongst the community of experts.²²⁹ According to Tatel, the answer was clearly no, as all of the reasons provided by the EPA were insufficient in light of the standards provided by the Clean Air Act:

The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicle engines which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

The EPA gave four reasons for their decisions not to regulate CO₂ emissions. First, they argued that when the relevant laws and amendments were passed in the 1960s and 1970s, Congress had not anticipated the regulation of gases such as CO₂, or indeed greenhouse gases as a whole, because Congress was concerned with pollutants that caused direct injury to human beings, not with substances that might contribute to global warming. Global warming was not on Congress' radar screen when the laws were passed, and thus the EPA would not be justified in enacting broad national regulations to address the problem now.

This led directly to the EPA's second major argument. Given that the problem of global warming seemed substantially different from the original problems addressed by the Clean Air Act, it was necessary for Congress to address the new problem through the creation of a new statutory scheme. If a qualitative leap in regulation was required to protect the environment, then it should be a decision that can be directly traced to elected law-makers. In addition, EPA suggested that the fact that Congress had passed legislation to study the global warming indicated that Congress did not think that the problem had already been outsourced to the executive

²²⁹ For an analysis of some of the mistakes on pessimistic environmental prognostication, see Bjorn Lomborg, *The Skeptical Environmentalist: Measuring the Real State of the World*. Cambridge: Cambridge University Press, 2001.

branch. Additional legislation was needed to properly deal with global warming, as the existing framework of environmental regulation made it difficult for the EPA to address greenhouse gases from automobiles. There were at least two major problems with the existing framework. The regulation of automobile emissions created a potential jurisdictional conflict between the EPA and the Department of Transportation. More significantly, the EPA enforced the Clean Air Act through National Ambient Air Quality Standards (NAAQS), which were based upon establishing regional goals that significantly departed from the national norms.²³⁰ The typical enforcement action taken by the EPA under the Clean Air Act was the targeting of industrial and urban regions that had unusually high levels of pollutants. The problem of CO₂ emissions was very different, as CO₂ concentration (as opposed to say, pollution from small particulate matter) is even throughout the entire nation. Regulating carbon dioxide simply raised issues that were too unusual to address under a statutory scheme that, according to the EPA, was meant to address very different problems.

Judge Tatel argued that EPA's interpretation of their responsibilities and powers was far too modest given the language of the Clean Air Act itself. We might say that the EPA interpreted the Clean Air Act as if it were modest, well-specified, and constitutional, when in fact it was extraordinarily ambitious, ambiguous, and based on an extremely broad delegation of Congressional responsibilities to the executive branch. While the assertion of EPA responsibility over green house gases was novel, it was not analogous to the attempt made by the FDA in the late 1990s to assert power over tobacco products.²³¹ The FDA would have been required to immediately ban

²³⁰ Marc Eisner, *Governing the Environment: The Transformation of Environmental Regulation*. Bolder, CO.: Lynne Rienner Publishers, 2007. pp 18-19.

²³¹ Martha Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Policy*. Washington, D.C.: CQ Press, 2005.

tobacco products if they were to regulate it at all, while the EPA had considerable more leeway in dealing with CO₂ and its ilk. But the leeway accorded to the EPA was not unlimited. The EPA had been granted discretion by Congress to determine what kinds of pollutants contributed to environmental harms, but they did not have the discretion to determine that regulation was not necessary or bad policy. Congress did not give the EPA the power to regulate the environment as it saw fit, but had instead mandated a specific “precautionary” approach to environmental harms that gave greater weight to potential harms (however remote) than to short term costs (however severe) According to Judge Tatel, the EPA had not explained its decision not to regulate in light of the explicit precautionary principles outlined in the Clean Air Act and its various amendments.

Justice Randolph’s decision to accept the EPA’s determination regarding CO₂ emissions was perfectly reasonable. Yet as Judge Tatel ably demonstrated, it was not strictly speaking a legal decision, because it required adopting a reasonable but implausible interpretation of a Congressional law. Judge Tatel’s opinion represents a reasonable legal interpretation of a poorly drafted law. One might argue, in defense of Judge Randolph, that the open-ended, aspirational character of environmental laws, combined with the complexity of the issues raised by environmental regulation, requires judges to basically defer to the technical decisions made by the executive branch and leave it up to Congress to exercise control over executives that depart radically from the evolving legislative will. The *Chevron* decision of the Supreme Court mandates this deferential approach to judicial review of administrative rule-making.²³² Yet even *Chevron* required the judges to respect, first and foremost, the

²³² The *Chevron USA Inc. v. NRDC* (SUPREME COURT OF THE UNITED STATES 467 U.S. 837; 104 S. Ct. 2778; 81 L. Ed. 2d 694; 1984) decision is usually taken to stand for the proposition that courts should defer to reasonable interpretations of statutory mandates made by administrative agencies. The alternative is for courts to demand that agencies adhere to a “correct” interpretation of law as determined by the courts. Unsurprisingly, there is considerable disagreement amongst judges over what constitutes a reasonable and therefore permissible interpretation of law. See Peter H. Schuck

express intention of Congress, and Randolph's deference rested on a willful blindness to the ambitious regulatory agenda that was clearly mandated, however unwisely, by the Clean Air Act.

While Tatel's interpretation of the Clean Air Act was superior to Randolph's, his decision was nevertheless wrong. Randolph's asserted that the executive should not be hampered by the courts in exercising its discretion to determine how to enforce or not enforce Congressional laws. But his opinion was misguided, because it forced him to openly acknowledge that the executive power is necessary not only to enforce Congressional law, but also to not enforce them when they are unwise or when they conflict with competing legislative goals. Because Randolph dismissed the issue of standing, he was forced to openly defend the proposition that the executive need not be bound by Congressional statutes (notwithstanding his lame attempt to explain away key provisions of the Clean Air Act.) Judge Tatel's interpretation of the Clean Air Act is superior to Judge Randolph's, but it is undercut by the mistaken view that he was dealing with a legal case, as opposed to an airing of political grievances—however serious those grievances might be.

Judge Sentelle, who concurred with Randolph in regards to the outcome of the case, was able to defer to the EPA—or rather, to kick this political football back into the political arena where it properly belongs—without having to ignore or distort the language of the EPA in order to reach the pragmatic conclusion. His position was simple: the problem of global warming is global in scope, and the petitioners are arguing this case on behalf of humanity as a whole. Broad claims of this kind simply are not amenable to resolution by the courts; the claims they raise to do not constitute legal cases or controversies.

and E. Donald Elliott, "To the Chevron Station: An Empirical Study of Federal Administrative Law." *Duke Law Journal*. Vol. 1990, No. 5 (Nov., 1990) pp 984-1077.

Many political scientists would argue that there really is no substantial difference between the opinions of Judge Randolph and Judge Sentelle in this case. The only serious divisions are between the “anti-environment” bloc and the dissenting “pro-environmental” Justice Tatal. My suggestion is that the pattern of judicial decisions at the appellate level regarding environmental policy do not support the conclusion that partisanship and policy-preferences are determine the rulings of judges. There is simply too much agreement amongst judges over a broad range of complex statutory questions, judges appointed by differing Presidents and with presumably different political orientations. The problem with opinions such as Tatal’s dissent in *Massachusetts v. EPA* is not that they are excessively political. The problem is that, by abandoning the standards of standing, they allow strict legality to take an unwarranted prominence in the policy-making process.

The case of *Massachusetts v. EPA* illustrates how, once the rules of standing have been revised, it is very difficult for courts to avoid intervening into complex policy questions, thereby wresting control of policy from elected officials. Of course, from a different perspective, the liberalization of the rules of standing allow for the rule of law to triumph, at least potentially, in contrast to executive tyranny. The liberalization of the law of standing has been one of the major goals of the Canadian environment movement, who have long envied the ability of American environmentalists to play a role in the enforcement of environmental law.²³³ Americans have had long experience with “private attorneys general,” and advocates of increased environmental regulation in Canada have, unsurprisingly, regarded this policy device as key to environmental protection in Canada.²³⁴ For some

²³³ S. Elgie “Environmental Groups and the Courts: 1970-1992.” in G. Thompson, M. McConnell, and L. Huestis, editors. *Environmental Law and Business in Canada*. (Toronto: Canada Law Books, 1993.); Hessing and Howlett, *Canadian Natural Resource and Environmental Policy*, pp 203-204.

²³⁴ Boyd, *Unnatural Law*, pp 232-233.

commentators, as long as only the government is responsible for enforcing environmental law, environmental law will never be enforced responsibly. Thus it is not merely an academic exercise to consider whether the Canadian polity is showing a tendency to emulate the American system of private attorneys general.

In his 1994 article on environmental litigation in Canada, Michael Howlett argued that Canadian courts have not, for the most part, followed the lead of their American counterparts in regards to questions of legal standing.²³⁵ Howlett reasoned that the constitutional transformations of the 1980s had simply not given the court any mandate to rearrange to processes of Canadian environmental law and policy. The Constitution Act and the Charter itself did not address the law of standing in regards to environmental matters. Furthermore, Canadian courts have been unwilling to read Section 7 of the Charter as if it contained an implied right to a clean environment. The courts have also ruled that the Charter only applies to relations between citizens and government (i.e. it does not apply to the relations between citizens and, say, a polluting company).²³⁶ Despite the negligible impact of the Charter, over the past three decades Canadian citizens have expanded their ability to raise public or quasi-public claims through the courts. The general rule for civil cases involving the public interest was that individuals could only pursue a case relating to a public grievance if they were “exceptionally prejudiced by the wrongful act.” In 1986, the Supreme Court of Canada offered further clarification regarding the prerequisites for private individuals to raise public interest claims in the courts: the issue must be “justiciable” (that is, it must be amenable to a court’s decision), it must not be “trivial” or “speculative,” the

²³⁵ Howlett, “The Judicialization of Canadian Environmental Policy 1980-1990A Test of the Canada-United States Convergence Thesis.” *Canadian Journal of Political Science*. Vol. 27, No. 1 (March, 1994) pp 99-127.

²³⁶ Thomas M.J. Bateman, “Rights Application Doctrine and the Clash of Constitutionalisms in Canada.” *Canadian Journal of Political Science*. Vol. 31, No. 1, (March, 1998) pp 3-29.

individual must have either a strong personal interest in the case or a strong interest based on involvement in the policy process, and there must be no other reasonable means by which the action could be brought before the courts.²³⁷ As Howlett observes, these rules leave judges a great deal of discretion as to whether they will grant standing or withhold it. However, he interprets the discretionary aspects of the Canadian law of standing as an indication that environmental policy is less judicialized in Canada than in America, where litigants are often empowered by broad statutory provisions for standing.²³⁸ The real question, however, is whether Canadian judges have used their discretion so as to emulate the American law of standing. And here, Howlett's conclusion does not seem accurate, especially if we consider Canadian judicial practice over the course of the 1990s.

In environmental law decisions during the 1990s, Canadian courts enacted a veritable revolution in the law of standing. Despite the fact that the Canadian parliament has not attached specific "citizen suit" provisions to environmental legislation, in contrast to the practice of the American Congress, Canadian courts have been quite willing to allow private groups to contest government action. Out of the 71 reported environmental policy cases decided by federal trial and appeal courts between 1990 and 1999, there is not a single instance in which judges denied standing to a public interest group.²³⁹ The Supreme Court of Canada has consistently adhered to

²³⁷ *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 See also W.A. Bogart, "Understanding Standing, Chapter IV: *Minister of Finance v. Finlay*," *Supreme Court Law Review*, Volume 10, 1988. pp 377-97.

²³⁸ E.g. Joseph L. Smith, "Congress Opens the Courthouse Door: Statutory Changes to Judicial Review Under the Clean Air Act." *Political Research Quarterly*. Volume 58, Number 1, 2005. pp 139-149.

²³⁹ See Appendix C for a full list of cases.

broad understanding of the scope of standing in the post-Charter era.²⁴⁰ Thus while Howlett argued that the existence of judicial discretion regarding legal standing illustrates that Canadian environmental policy is less judicialized than its American counter-part, Canadian courts have liberalized standing laws to such an extent that there are essentially no substantive barriers to standing for Canadian environmental interest groups. Instead of being forced to stake claims on the basis of concrete violations of rights, Canadian environmental groups are more or less free to contest the legal interpretations and policy decisions of bureaucrats and cabinet ministers. Liberalized standing cannot simply be attributed to executive-legislative conflict within the American presidential system of government. Canadian courts have knocked down the barriers of standing without any direct pressure from parliament, and without any clear statutory directives to proceed in this manner. In regards to environmental policy, Canadian judges have decided, more or less on their own, that private attorneys general are a good thing. This is not to say that they are any more likely to endorse the ultimate goals of environmentalist litigants, however.

One might object that the fact that federal courts tend overwhelmingly to grant standing to public interest groups in environmental policy does not necessarily mean that the rules of standing have been liberalized in Canada. Perhaps dozens of potential public litigants are dissuaded from even attempting to have their day in court by rigid rules of standing, rules which insure that only those with a concrete right at stake will be able to challenge the decisions of elected officials and expert bureaucrats. According to some researchers, for instance, Canadian environmental groups devote most of their resources towards non-litigation based political strategies, such as public

²⁴⁰ Rainer Knopff and J.E. Glen, "Courts, Tribunals, and the Environment in Canada. In Kenneth Holland et al, editors, *Federalism and the Environment: Environmental Policymaking in Australia, Canada, and the United States*. Greenwood Press: Westport, Conn., 1996.

education.²⁴¹ Perhaps this indicates that the law of standing is less lax than it first appears.

A few examples will illustrate that this is probably not the case. The bar for standing in Canadian environmental law has been set very low. Even the most abstract claims made against administrative agencies have an excellent chance of being heard by the Canadian courts. A litigant need not face the threat of having her farmland covered by an artificial lake in order to contest dam-building permits; she need only show an authentic sense of aesthetic disapproval for dams; it might help if she can show that there was a minor procedural error in the permit-granting process. The crucial point is that Canadian courts are willing to hear cases on the basis of policy objections. These policy objections need to be cloaked in the rhetoric of “rights talk,” or based on semi-plausible readings of obscure statutory passages; but these are of course simple operations for any moderately skilled practitioner of the legal arts.

The case of *Canadian Environmental Law Association v. Canada-Minister of Environment*,²⁴² is probably the most interesting example of the complete erosion of the rules of standing, at least insofar as those rules relate to environmental policy. In this case, CELA raised a challenge to a half-dozen federal-provincial environmental policy agreements. CELA wanted the courts to declare these agreements invalid, due to the fact that they seemed to place restrictions on the discretionary power of federal ministers in several areas related to environmental policy. It is important to note that CELA was challenging *agreements* in this case. No actual actions had been taken on the basis of those agreements. CELA’s case for the illegality of the agreements was

²⁴¹ Jeremy Wilson, “Continuity and Change in the Canadian Environmental Movement: Assessing the Effects of Institutionalization.” in Debora L. VanNijnatten and Robert Boardman, editors, *Canadian Environmental Policy: Context and Cases*. (Oxford: Oxford University Press, 2002) pp 46-65.

²⁴² *Canadian Environmental Law Association v. Canada (Minister of the Environment)*, 1999 CanLII 7906 (F.C.).

based on an assortment of hypothetical scenarios. It is also crucial to remember that the Canadian Constitution makes federal-provincial agreements of this kind a practical necessity, due to that document's imprecise delimitation of environmental jurisdiction.²⁴³

In essence, CELA's case was based on nothing more than its distaste for the particular *modus vivendi* that had emerged from the process of federal-provincial diplomacy. Given the absence of any clearly relevant constitutional right, and given the absence of any actual government actions, why should CELA have been allowed to voice its objections in a federal court? The federal-provincial agreements seemed to be no business of CELA. Were its members apprehensive about the possible consequences of such agreements, they could of course vote against federal politicians who foolishly deign to compromise and cooperate with their provincial counterparts.

The trial judge in this case was unmoved, if not unaware, of any possible objections of this sort. Judge Reed simply assumed that the business of Canada is CELA's business as well, and proceeded to address the substantive issues of the case (e.g. did the federal minister of the environment fetter her own discretion and the discretion of other ministers in an unconstitutional manner?) The fact that the issue of standing was studiously ignored does not mean that everything would go CELA's way. In fact, CELA was not able convince the judge to overturn the agreements or declare sections of them unconstitutional. As is often the case in Canadian environmental law, litigants with no concrete stake in a case are granted standing only to have their application dismissed.

²⁴³ Thus Canadian political scientists commonly refer to "federal-provincial" diplomacy (e.g. Richard Simeon. *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada*. Toronto: University of Toronto Press, 1972) as the process of hammering out agreements over jurisdiction, resources, transfer payments, national policy, etc.

I will use one more example—*Friends of the Island (FOTI) v. Canada*²⁴⁴ in order to illustrate my point that the total absence of denials of standing in Canadian environmental law cases is because the rules of standing have been gutted. *FOTI v. Canada* is an amusing example, as it contains a peculiar application of “strict textual interpretation.” The Canadian government, in conjunction with the government of Prince Edward Island, intended to construct a bridge connecting PEI with mainland Canada. According to the then-existing rule dealing with environmental issues related to federally approved projects—the Environmental Assessment and Review Process Guidelines Order (EARPGO)—the Minister of Public Works had to assess environmental impact when approving a bridge of this kind.²⁴⁵ Due to the high level of public concern, the Minister of Public Works asked the Minister of the Environment to refer the details of the project to an environmental assessment panel. The panel concluded that the possible environmental damage caused by the bridge was too great to allow for construction to continue, though it was willing to consider the development of an underground tunnel. The Minister of the Environment, presumably after considering the relative costs of tunnels and bridges, felt that it would be possible for the final bridge plan to mitigate the environmental problems addressed by the panel. By January of 1993, eight years after the initial plan for the bridge had begun, Strait Crossing Incorporated was given the construction contract.

FOTI challenged the decision to move forward on bridge construction on two grounds: first, that the EARPGO had not been fully complied with in the project review and assessment stage, and secondly, that the decision to replace the PEI ferry

²⁴⁴ *Friends of the Island v. Canada (Minister of Public Works)* 1993 CanLII 2942 (F.C.).

²⁴⁵ For a discussion of the Canadian environmental assessment process, see Marcia Valiant, “The Legal Foundations of Canadian Environmental Policy.” Debra L. VanNijnatten and Robert Boardman, editors. *Canadian Environmental Policy: Context and Cases*. Oxford: Oxford University Press, 2002. pp 17-19.

with a bridge constituted a violation of the Prince Edward Island terms of Union. The PEI Terms of Union state that the Dominion Government (Canada) is required to maintain an “an efficient steam service” between PEI and mainland Canada. And as the Canadian Federal Court reporter helpfully points out, “A bridge is not an efficient steam service.” Clearly, a legal violation of considerable magnitude was at stake.

One might well wonder whether a right to ferry service is so fundamental as to deserve judicial protection, especially in an era of “progressive” constitutionalism. The government’s lawyers certainly did their best to argue for a flexible interpretation of the terms of union. Yet even if the Judge Reed felt compelled to adopt Protestant interpretative principles in this case,²⁴⁶ he was still faced with a problem: the right to ferry service had not yet been abridged. True, the government had shown a clear intention to neglect its traditional responsibility for efficient steam service. The people of PEI (or at least their self-chosen spokespersons), ever jealous of incursions on their sacred liberties, were not about to ignore the federal government’s “settled design” on their constitutionally protected three-hour boat rides. Yet as the government lawyers also observed, there was no way to show how FOTI had an interest in the case, an interest that might distinguish them from the general public. The PEI terms of agreement actually specified that it was the right of the provincial *government* to challenge violations of the agreement in court.

The trial court judge was not impressed by these considerations. FOTI were granted standing, despite the fact that no right had been violated, and despite the fact that they were not the most likely possessor of the relevant rights. Unlike the case of *CELA v. Canada*, FOTI was granted more than standing; the judge granted them a stay against the permit for bridge construction, thereby insuring that FOTI’s private

²⁴⁶ Sanford Levinson’s pejorative tag for “strict constructionism,” “originalism,” or “textualism.” Sanford Levinson, *Constitutional Faith*. Princeton: Princeton University Press, 1988.

preference for ferry trips would be respected for just a little while longer. But once again, though the Friends of the Island were allowed their day in court, the Confederation Bridge project was not ultimately derailed.

Canadian courts have adopted a liberalized interpretation of the rules of standing. Unlike the case in the United States, there are no judges in Canadian courts who have articulated the rationale behind the traditional understanding of standing. As in the case with questions of federal jurisdiction over the environment, Canadian courts have adopted a “progressive” position when evaluating issues of standing. The limits of environmentalism in Canadian law only become apparent through an examination of how Canadian courts deal with disputes over the interpretation of environmental law.

4.5 Divergent Paths: Statutory Interpretation and Administrative Discretion in Canadian and American Environmental Law

The “rights revolutions” in Canada and the United States have followed similar trajectories, at least in regards to the novel rights to challenge government that have emerged through the revolutionary re-thinking of the concept of legal standing.²⁴⁷ The expansion of standing, therefore, does not appear dependent upon any factors or motives that emerge from the specific political arrangements in the United States or in Canada. We would nevertheless expect that the judicialization of American environmental policy, or at least the scope of political-legal conflict over environmental policy, to be far more prominent, for two central reasons: the separation of powers, and the greater degree of ideological diversity in the American political system. There are two features of the separation of powers which would seem to make

²⁴⁷ Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*. Cambridge: Harvard University Press, 1990.

the judicialization of public policy more likely, or more extensive, in the American system than in a parliamentary system:

1) The legislature is more likely to either be opposed to an executive from an opposing party, or to anticipate being in such a situation. This kind of tension and distrust between the executive and the legislature typically does not exist in parliamentary systems. As a consequence, members of Congress have an incentive to expand the scope for judicial oversight of the executive branch, as well as an incentive to increase the capacity of interest groups to use the courts to challenge executive decision-making.²⁴⁸ In contrast, there has been an ever increasing tendency within Parliamentary governments, especially Canadian governments, to vest increasing powers in the cabinet, the federal civil service, and the Prime Minister's office.²⁴⁹

2) The fact that the government does not depend upon the support of the legislature in American politics has reduced the need for party discipline, and the policy-making process is affected by this comparative weakness of American parties.²⁵⁰ In some circumstances, weak parties produce legislators who are more prone to create ambiguous laws.²⁵¹ This is because ambiguous policy proposals are more likely to survive the legislative process in Congress than laws which set clear policy goals. This feature of American law-making is not omnipresent. Particularly after the sub-committee revolution of the 1970s, and perhaps in response to criticisms of Congressional delegation of law-making power, American legislators increased

²⁴⁸ Dodd, Lawrence C. and Richard Schott, *Congress and the Administrative State* (New York: John Wiley and Sons, 1979).

²⁴⁹ Donald Savoie *Governing From the Center: The Concentration of Power in Canadian Politics*. Toronto: University of Toronto Press, 1999.

²⁵⁰ Sidney Milkis, *Political Parties and Constitutional Government* (Baltimore: Johns Hopkins University Press, 1999).

²⁵¹ R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights*. Washington, D.C.: Brookings Institution, 1994.

their capacity to insert detailed regulatory provisions into law.²⁵² Yet nevertheless, American laws in the modern administrative state have exacerbated problems that are inherent in the attempt to rule through law: the failure to anticipate all of the circumstances in which the law has to be applied, and the failure to reconcile conflicting legal requirements or policy programs. Modern law has the additional problem of often stating aspirations instead of establishing principles. This is a problem for law-makers in parliamentary systems of government as well. But in parliamentary systems there is no separation between the legislature and the executive, no formal separation between those who make and those who enforce it. When Parliamentary governments offer interpretations of ambitious or poorly specified laws, it is difficult for courts to argue that the government is departing from the will of the legislature; the government serves at the will of the legislature. In the United States, the situation is very different. While the President has always played a role in the legislative process, whether through the exercise of traditional powers or through the expanded institutions and practices of the modern “legislative” or “plebiscitary” Presidency,²⁵³ the specific enforcement actions of the Presidency and the executive branch cannot necessarily claim to have the support of the legislature in the same way that Prime Ministerial actions can claim support from the Commons.

The American system is thus ripe for conflict between the legislature and the executive in the arena of environmental policy. The key difference between the Congressional and Parliamentary system lies in the fact that the executive in the Parliamentary system exists by virtue of legislative support. A Canadian court that challenges a government decision does not merely challenge an executive (who may

²⁵² R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act*. Washington, D.C.: Brookings Institution, 1983 pp 5-9.

²⁵³ E.g Theodore Lowi, *The “Personal” President: Power Invested, Promise Unfulfilled*. Ithaca: Cornell University Press, 1985.

or may not have Congressional support regarding the interpretation of law) but the majority of representatives of the national government. The President's institutional independence from Congress is, in contrast, a source of weakness when confronting the courts. A cabinet minister in Canada, when interpreting ambiguous provisions in law, can claim that their interpretations are implicitly supported by the very people who are responsible for either making or maintaining the laws. The President, lacking that institutional connection to the legislature, is a more fitting target for judicial suspicion. Given all of these factors, we would expect environmental policy to be more "judicialized" in the United States than in Canada.²⁵⁴

While conflict over environmental jurisdiction created by the Canadian Constitution provides opportunities to adjudicate disputes between the federal and provincial governments, federal environmental statutes are often strewn with the kind of ambitious yet ambiguous statements which practically beg for judicial resolution. Consider the following statement from the preamble to the 1999 *Canadian Environmental Protection Act*:

Whereas the Government of Canada is committed to implementing the precautionary principle that, where 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.

Statutory language of this kind has the potential to be a valuable resource for public-interest litigants. The precautionary principle is an environmentalist version of Pascal's wager, in which "complete ecological catastrophe" is equivalent to the existence of God and "economic development" equivalent to the delights of free-wheeling atheism. However, arguments supporting the impending possibility of ecological catastrophe are at least as uncertain as those in favor of the existence of

²⁵⁴ Martin Shapiro, "Juridicalization of Politics in the United States." *International Political Science Review*. Vol. 15, No. 2 (April, 1994) pp 101-112.

God. Perhaps this is why the impending ecological damage must be “serious” or “irreversible,” and why the preventive measures must be “cost-effective.” Yet all of these terms depend upon scientific assessments of environmental impact, as well as economic calculations of the relative benefits of regulation versus development. This clause, like many others that proliferate in Canadian environmental statutes, seem to incorporate both a desire to privilege the post-materialist claims of environmental movements and a desire not to overly restrict the discretion of federal administrators. In practice, the courts are forced to determine whether post-material aspirations or governmental flexibility will predominate.²⁵⁵

The vague language used by lawmakers in this instance causes statutory interpretation to be a potential vehicle for the judicialization of environmental policy. Thus, just as Kelly may underestimate the centralization of policy by focusing on disallowance as opposed to jurisdictional issues, one can easily underestimate the extent of judicial power if one neglects to consider that judges have the potential to exercise power through the mundane task of statutory interpretation.

Yet despite the ambiguities in law that seem to provide opportunities for the exercise of judicial power, Parliamentary governments constrain the opportunities for the “judicialization” of environmental policies in at least two general ways. First, parliamentary governments are usually well-positioned to reverse judicial decisions that hamper executive discretion,²⁵⁶ and secondly, parliamentary governments are less likely to constrain executive discretion through detailed statutes that impose non-discretionary duties on administrators. Perhaps paradoxically, American courts have

²⁵⁵ For a discussion of the precautionary principle and its relationship to Canadian environmental policy, see David Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy*. Vancouver: UBC Press, 2003 pp 234-236.

²⁵⁶ Except, of course, when they are not: see Thomas Flanagan, “The Staying Power of the Legislative Status Quo: Collective Choice in Canada’s Parliament after *Morgentaler*.” *Canadian Journal of Political Science*. Vol. 30, No. 1, (March, 1997) pp 31-53.

the potential to intervene into environmental policy whether Congress writes laws that are broad and vague, or detailed and wonkish. In Canada, courts are constrained because Lilliputian legislators have fewer incentives to constrain executive Gullivers; and if the courts act to restrain executive discretion, legislators have the incentive and the capacity to challenge and reverse those judicial decisions.

In order to assess the ways in which differing institutional environments place limits on judicial policy-making, it is useful to consider one of the major aspects of environmental policy in Canada and the United States: environmental impact assessment. Environmental assessment refers to the process through which governments evaluate the impact that development projects have upon various aspects of the environment, such as the effect of development upon human health, the potential for pollution, the disruption of eco-systems, the threat to endangered species, and so on. By looking at the statutes that govern environmental assessment in the United States and Canada, we can see how American political institutions create a far greater scope for judicial intervention into environmental policy.

The principal environmental assessment law in the United States is the National Environmental Policy Act, or NEPA. The key element of NEPA reads as follows:

The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the federal government shall include, in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action.

As other scholars have noted, there are no provisions for enforcement of this law other than through recourse to litigation—no special boards or tribunals were

established to oversee the environmental assessment process. Thus, the courts have played a key role in implementing NEPA from the very beginning.²⁵⁷

In Canada, similarly, environmental assessment involves identifying and reviewing federal projects that are likely to have an environmental impact. “Federal projects” are those projects initiated by federal departments and agencies, using federal funds, or involving federal funds or federal jurisdiction. What is most interesting about the judicial role in environmental assessment policy is the way in which Parliament has circumscribed the role played by judges. Canadian judges have shown some inclination to “judicialize” environmental policy, but here, limits on political jurisprudence have been successfully imposed by political actors. Even while Canadian courts were clearly moved by environmental values in their attempt to insert non-discretionary duties into the Canadian environmental assessment process, the capacity of the courts to do this was limited by their institutional environment. All of this is fully consistent with a purely political interpretation of judicial decision-making. What is not consistent is the way in which the generally progressive Canadian judiciary comes to accept that “environmental values”—if accompanied by American-style environmental litigation—cannot be imposed through judicial decisions. After being rebuked by elected legislators, the Canadian judiciary does not carry on institutional warfare with Parliament. In contrast to what we might expect based upon the general trends of Canadian jurisprudence in other areas, Canadian judges come to accept that, for the most part, Canadian courts should not attempt to emulate the role played by American courts in environmental policy.

²⁵⁷ Kenneth Holland, “The Role of the Courts in the Making and Administration of Environmental Policy in the United States.” in Holland et al, editors. *Federalism and the Environment: Environmental Policy-Making in Australia, Canada, and the United States*. Greenwood Press: Westport, Conn. 1996.

The Canadian version of environmental assessment began to take shape in the early 1970s, as the desire for development in Canada's resource-dependent economy began to be qualified by concerns with environmental degradation. Environmental assessment of federal projects, as in the U.S.A., was meant to help the national government take into account the "externalities" created by economic development. Yet the concern with environmentalism in Canada took place in the shadow of NEPA, which had already been revealed as heavily dependent upon litigation, with its attendant costs and lack of predictability.²⁵⁸ As a result, Canadian policy-makers approached environmental assessment in a cautious, Canadian fashion. In contrast to the USA, where environmental assessment laws were created without an accompanying bureaucratic apparatus, the Trudeau government in Canada created a bureaucracy without an accompanying law to enforce. The Canadian Federal Environmental Assessment Review Office was established by cabinet decision in 1973. From this beginning point, the Canadian analogue to NEPA—the Environmental Assessment and Review Process, or EARP—would evolve over the next several decades. But the role of the courts in this process would not be analogous to the American case.

In order to compare the role played by Canadian and American courts in the environmental assessment process, I have assembled a sample of 50 American and 35 Canadian environmental cases. The American cases are drawn from Federal Appeals Court cases decided in 2006-2007; the Canadian cases are composed of all environmental assessment cases decided by the Canadian Federal Court of Appeals between 1990 and 2007, as well as all environmental assessment cases decided by the British Columbia, Alberta, and Ontario courts of appeal between 2000 and 2007.²⁵⁹

²⁵⁸ Hessing and Howlett, *Canadian Natural Resource and Environmental Policy*, p. 202.

²⁵⁹ See Appendices D and E.

The decisions of executive branch officials were overturned, in whole or in part, in 21 out of 51 cases in the American federal appellate courts. In the Canadian federal appellate courts and the courts of appeal in Alberta, British Columbia, and Ontario, decisions by government officials were overturned in whole or in part in 7 out of 35 cases. It is interesting to note that in 3 of the 7 cases where Canadian appellate courts overturned government decisions, the courts acted in favor of business or development interests. Judging by these environmental assessment cases, the Canadian appellate courts are no haven for environmentalist interest groups. The revolution in the law of standing has done little to give environmentalist litigants any purchase over environmental policy through the Canadian court system.

Another way to consider the scope of politicization in American and Canadian environmental assessment jurisprudence is to consider the level of unanimity in appellate court decisions. In the 50 NEPA cases decided by American appellate courts which I examined, there were dissenting votes in 10 of the cases; there were only 2 dissenting votes in the 35 environmental assessment cases decided by Canadian appellate courts. This indicates that the moderate, deferential approach to government decision-makers in environmental policy is not a particular matter of controversy at the appellate court level. There is no struggle in Canadian jurisprudence between those who wish to incorporate “green” values into their decision-making, and those who wish to respect the generally pro-development inclinations of government and business. The unwillingness of Canadian appellate courts to intervene into environmental policy, and the low levels of dissent in environmental assessment cases, is a good indicator of the ways in which the parliamentary system places political restraints on even the most progressive judiciaries.

Does this mean that the American environmental law decisions are simply political, not different in kind from the struggles over environmental policy that occur

in other forums? The answer, I believe, is that there is less contention and less politicization in American environmental law than we might expect, even if American courts are more interventionist and more divided than their Canadian counterparts. In order to examine the scope of politicization in American environmental law, I conducted a Lexis Nexis search of federal appellate court cases, using the following environmental policy-related statutes as keywords: Clean Water Act (CWA), National Environmental Protection Act (NEPA), National Forest Management Act (NFMA), the Endangered Species Act (ESA), the Clean Air Act (CAA). I selected over 100 cases, based upon whether or not at least one environmental interest group was opposing a position taken by the national government, or by state governments who were participating in a nationally mandated policy.

In analyzing the cases, I divided the cases into the following categories:

1) Cases in which environmentalist petitioners succeeded on at least one of their claims

2) Cases in which environmentalist petitioners were completely rebuffed by the courts

3) Cases in which “anti-environmentalist” (typically, businesses or business associations) petitioners succeeded on at least one of their claims

4) Cases in which “anti-environmentalist” groups lost on all of their claims

Table 8 summarizes the outcomes in these cases.

Table 8: Environmental Law Cases in U.S. Courts of Appeal.*

	N = 100	Cases with Dissenting Votes	Court Maj. Dem.	Court Maj. GOP
1. Environmentalist Petitioner Wins	39	4	19	20
2. Environmentalist Petitioner Loses	43	3	17	26
3. Anti-Environmentalist Petitioner Wins	5	2	3	2
4. Anti-Environmentalist Petitioner Loses	13	0	4	9

* See Appendix F for a full list of cases.

What is of most interest in the outcomes of these cases is the absence of any clear partisan divisions on the court. 93 out of 100 of these cases were decided unanimously, despite the fact that most of the cases (86) featured appeals court panels with judges appointed by both parties. Success for environmental interest groups does not seem to depend on facing Democratic appointees on the bench. These decisions show that the appeals courts are not overly hesitant to take the side of environmentalist interest groups, but the courts are not especially fractured by deep partisan divisions. Without detailed knowledge of the specific political preferences of the 126 judges who participated in these cases, it is impossible to reject with certainty that the judges are not simply voting their policy preferences. Still, when one considers the increased attention that both parties have paid to the appointment process in recent decades,²⁶⁰ the increase of partisan differences amongst political elites,²⁶¹ and the intensity of

²⁶⁰ E.g. Thomas Keck, *The Most Activist Supreme Court in History? The Road to Modern Constitutional Conservatism*. Chicago: University of Chicago Press, 2004.

²⁶¹ E.g. Marc Hetherington “Resurgent Mass Partisanship: The Role of Elite Polarization.” *American Political Science Review*. Vol. 95, No. 3 (Sept. 2001) pp 619-631.

public conflict over environmental issues,²⁶² it is interesting that the battles over environmental policy that occupy the public, the pundits, and the politicians have not, for the most part, spilled over into the judicial branch. The question of whether judges are “really” on the basis of their policy preferences in these cases is in some ways *politically* irrelevant, if the policy preferences of Democratic and Republican appointees converge (for the most part) when dealing with highly contentious issues such as environmental regulation.

At the Supreme Court level, comparisons are more difficult to make due to the paucity of environmental law decisions in the Canadian Supreme Court, and the even greater paucity of cases dealing with highly significant environmental issues. The Canadian Supreme Court has, in the post-charter era, decided only 18 cases dealing with environmental law and regulation.²⁶³ Evidence of statutory activism is slim to non-existent. In the case of *The Friends of the Oldman River Society v. Canada*,²⁶⁴ the court ruled that the federal EARPGO process was mandatory, and had to be applied to an Alberta dam that had undergone construction. The federal government underwent the review process, but this had no impact upon the construction of the dam. The court did play a role in halting the James Bay Hydro Electric Project by enjoining the federal government to conduct an environmental review. Yet, while the case certainly pitted the court against the Quebec provincial government, it is far from clear whether the federal government was averse to conducting a federal environmental assessment over the project.²⁶⁵ So, while the court did force the federal to act in this case, judicial

²⁶² E.g. Aaron M. McCright and Riley E. Dunlap, “Challenging Global Warming as a Social Problem: An Analysis of the Conservative Movement’s Counter-Claims.” *Social Problems*. Vol. 47, No. 4 (Nov. 2000).

²⁶³ See Appendix G.

²⁶⁴ *The Friends of the Oldman River Society v. Canada* 1992 CanLII 110 (S.C.C.).

²⁶⁵ The federal government had attempted to initiate jurisdiction over the process, but backed down in response to the intransigence of decision-makers in Quebec. The court’s decision to make the

intervention did not really supplant the preferred political options of national decision makers. As in the case of *R. v. Crown Zellerbach*, the court has intervened into environmental policy as a supporter of national jurisdiction and national policymaking. This is judicial activism of a sort, but it difficult to construe it as anti-democratic or counter-majoritarian judicial activism.²⁶⁶

The American Supreme Court has been more willing, in general, to rule against national, state, and local governments based upon statutory interpretation. This can be seen by looking at decisions addressing one of the central national environmental regulatory statutes, the Clean Air Act. The Court ruled on 8 cases dealing interpretation of the Clean Air Act; it directly overturned or challenged the statutory interpretations of national policy-makers in two of those cases. One of those defeats for the national government, the case of *Massachusetts v. EPA* discussed above, saw a clear division of the court into “liberal” and “conservative” wings; in the other case, discussed below, the Court ruled unanimously in favor of the trucking industry’s challenge to the regulatory power of the EPA. The court has also made several rulings against state governments, though here the issues were not as momentous; rather than dealing with the implementation of nation-wide rules, the only loss for state governments in the Clean Air Act cases dealt with awards for attorney’s fees. The key thing to note is that the political divisions on display in *Massachusetts v. EPA* are not necessarily reflected in all of the cases dealing with the Clean Air Act; if the judges are voting simply on the basis of policy preferences in these cases, or at least, their preferences cannot be determined by their general ideological orientations.

federal review process mandatory in some ways provided “cover” for a government, a way for it to avoid the political fallout of hampering a multi-billion dollar project that was central to the economic interests of Quebec. See Oliver A. Houck, “O Canada! The Story of Rafferty, Oldman, and the Great Whale.” *Boston College International and Comparative Law Review*. Vol. 29 (Spring, 2006).

²⁶⁶ Barry Friedman, “The Birth of An Academic Obsession: The History of the Counter-Majoritarian Difficulty, Part V.” *The Yale Law Journal*. Vol. 112, No. 2 (Nov. 2002) pp 153-259.

The court ruled in favor of the national government in 6 cases. In these cases, there is little indication that the willingness of individual judges to defer to the government shifts depending upon whether they prefer a more or less active approach to government regulation. In one instance, liberal judges argued in dissent that the power of the national government to enforce environmental policy had to be restrained by the criminal law provisions of the Bill of Rights—a clear case of legal commitments trumping presumed policy preferences.²⁶⁷ One unanimous decision upheld government regulatory power over the legalistic objections of General Motors,²⁶⁸ another more recent case (with Souter in lone dissent) held that federal law pre-empted some of California’s more rigorous clean air regulations.²⁶⁹ Similarly, in 2004, the Court ruled unanimously against the claim that the EPA must be required to exercise its authority over cross-border transportation operations between Mexico and the United States.²⁷⁰ These unanimous (or near unanimous) decisions indicate that, while the American political system provides considerable opportunity for judicial intervention into environmental policy, the ways in which judges choose to challenge (or not challenge) government decisions is not determined by their individual assessment of environmental regulation alone. A closer look at several examples of American appeals court decisions that address the Clean Air Act will help to illustrate how the division of powers in American politics and the nature of statutory law-making affect the role of courts in the environmental policy process.

²⁶⁷ *Dow Chemical v. USA*, SUPREME COURT OF THE UNITED STATES 476 U.S. 227; 106 S. Ct. 1819; 90 L. Ed. 2d 226; 1986.

²⁶⁸ *General Motors Corporation v. United States*, SUPREME COURT OF THE UNITED STATES 496 U.S. 530; 110 S. Ct. 2528; 110 L. Ed. 2d 480; 1990.

²⁶⁹ *Engine Manufacturers Association/ Western States Petroleum Association v. South Coast Air Quality Management District*, SUPREME COURT OF THE UNITED STATES 541 U.S. 246; 124 S. Ct. 1756; 158 L. Ed. 2d 529; 2004.

²⁷⁰ *Department of Transportation v. Public Citizen et al.*, SUPREME COURT OF THE UNITED STATES 541 U.S. 752; 124 S. Ct. 2204; 159 L. Ed. 2d 60; 2004.

4.5.i Statutory Interpretation and the Clean Air Act: *Whitman v. American Trucking Association* (United States Supreme Court, 2001), *New York et al v. EPA* (D.C. Circuit),

The Clean Air Act and its various amendments has been one of the most highly litigated aspects of American Environmental policy, and courts have played a major role in shaping the implementation of the act since its inception.²⁷¹ Table 9 summarizes the cases decided by the United States Supreme Court between 1985 and 2007 which addressed various aspects of the Clean Air Act.

What is interesting about the patterns of decisions regarding the Clean Air Act is the general absence of the kinds of clear political divisions that are apparent in other controversial areas of law, such as the Supreme Court’s abortion decision. This is not to say that political divisions are absent. The case of *Massachusetts v. EPA*, discussed earlier in regards to the question of standing, is one example of a clear “liberal vs. conservative” split over the scope of the EPA’s duties under the Clean Air Act. A similar division is apparent in *Alaska Department of Environmental Conservation v. EPA*, in which a majority on the court endorsed the EPA’s determination to enforce a more rigorous air protection policy on the government of Alaska.²⁷² But liberal justices have not maintained anything like a general endorsement of environmentalist claims in regards to this law. This can be seen by looking at one of the court’s unanimous Clean Air Act decisions from the past decade: *Whitman v. American Trucking Association*.²⁷³ The case reveals some of the distinctly legal factors that shape how American courts resolve environmental policy questions.

²⁷¹ R. Shep Melnick, *Regulation and the Courts*. Washington, D.C.: Brookings Institution, 1983. pp 343-394.

²⁷² *Alaska Department of Environmental Conservation v. EPA*, SUPREME COURT OF THE UNITED STATES 540 U.S. 461; 124 S. Ct. 983; 157 L. Ed. 2d 967; 2004.

²⁷³ *Whitman v. American Trucking Association*, SUPREME COURT OF THE UNITED STATES 531 U.S. 457; 121 S. Ct. 903; 149 L. Ed. 2d 1; 2001.

Table 9: Clean Air Act Decisions of the Supreme Court of the United States, 1985-2007.

Case and Year	Description	Outcome	Majority	Dissent
<i>Pennsylvania v. Delaware Valley Citizens Council for Clean Air et al</i> , 1986	Government Actor: Penn. Law: Clean Air Act Issue: attorney's fees Ruling: Award of attorneys' fees for 1) work in administrative proceedings held authorized by Clean Air Act (42 USCS 7604(d)), but held to have been 2) improperly increased for superior quality of work.	1) Pro-env, Anti-state gov 2) Anti-env, Pro-state	1) Unanimous 2) White, Burger, Powell, Rehnquist, Stevens, O'Connor	2) Blackmun, Marshall, Brennan
<i>Pennsylvania v. Delaware Valley Citizens Council for Clean Air et al</i> , 1987	Government Actor: Pennsylvania, USA Law: Clean Air Act Issue: dispute over attorney's fees for consent decree Ruling: Enhancement of reasonable lodestar amount for risk of loss when awarding attorneys' fees to prevailing party pursuant to fee-shifting provision of Clean Air Act (42 USCS 7604(d)) held improper.	Pro-state gov Anti-env	White, Rehnquist, Powell, Scalia, O'Connor	Blackmun, Brennan, Marshall, Stevens
<i>General Motors Corporation v. United States</i> , 1990	Government Actor: EPA Law: Clean Air Act Issue: review of State implementation plan (SIP) Ruling: Clean Air Act held not to (1) require review of state implementation plan (SIP) revision within 4 months, or (2) prevent enforcement of existing SIP, where SIP revision is not timely reviewed.	Pro-env Pro-federal gov	Unanimous	

Table 9 (Continued).

Case and Year	Description	Outcome	Majority	Dissent
<i>Whitman v. American Trucking Association</i> , 2001	Government Actor: EPA Law: Clean Air Act Issues: 1) Did the Clean Air Act delegate legislative power to the administrator of the EPA? 2) Can the administrator consider the costs of implementation? 3) Do courts have jurisdiction with respect to revising ozone NAAQS? 4) If so, was the EPA's interpretation permissible? Ruling: CAA provisions do not unconstitutionally delegate legislative power; they do not permit consideration costs of implementation	Anti-gov Anti-env	Unanimous re. result	
<i>Engine Manufacturers Association/Western States Petroleum Association v. South Coast Air Quality Management District</i> , 2004	Government Actor: SCAQMD (California) Laws: Clean Air Act, state regulation Issue: Is the state regulation pre-empted by CAA? Ruling: Yes. California subdivision's rules, imposing emission requirements on motor vehicles purchased or leased by public and private fleet operators, held not to escape pre-emption under § 209(a) of Clean Air Act (42 USCS § 7543(a)).	Pro-fed Anti-env	Scalia, J., Rehnquist, Ch. J., and Stevens, O'Connor, Kennedy, Thomas, Ginsburg, and Breyer,	Souter
<i>Alaska Department of Environmental Conservation v. EPA</i> , 2004	Government Actor: EPA, Alaska Department of Environmental conservation Law: CAA Issue: Can EPA rule on reasonableness of best available control technology decisions by state permitting agencies re. polluting facilities? Did EPA properly block construction? Ruling: EPA can make the ruling, and properly blocked construction	Pro-fed Pro-env	Ginsburg, Stevens, O'Connor, Souter, and Breyer	Kennedy, Rehnquist, Scalia, Thomas

Table 9 (Continued).

Case and Year	Description	Outcome	Majority	Dissent
DEPARTMENT OF TRANSPORTATION, et al., Petitioners v. PUBLIC CITIZEN et al, 2004	Government Actor: DOT, EPA Law: NEPA and CAA Issue: Does National Environmental Policy Act of 1969 (42 USCS §§ 4321 et seq.) and Clean Air Act (42 USCS §§ 7401 et seq.) require Federal Motor Carrier Safety Administration to evaluate environmental effects of some cross-border operations by Mexican-domiciled carriers? Ruling: Government decision upheld	Pro-gov Anti-env	unanimous	
Massachusetts v. EPA, 2007	Government Actor: EPA Laws: CAA, APA Issue: Does the CAA has the authority to regulate green house gases such as carbon dioxide? Ruling: Case remanded to EPA, which must provide reasons for decision not to regulate green house gases that do not run afoul of APA arbitrary and capricious standards	Anti-fed gov Pro-env	Stevens, Kennedy, Souter, Ginsburg, Breyer	Roberts, Thomas, Alito, Scalia
Environmental Defense, et al., Petitioners v. Duke Energy Corporation, et al.	Government Actor: Federal government joined by environmental petitioners Laws: CAA Issue: Are re-designed coal fired electric generating units “major modifications” under CAA? Must “modification” be interpreted identically under all CAA implementing regulations? Ruling: lower court overturned; no need for identical interpretation of terms	Pro-gov Pro-env	Souter Roberts Scalia Breyer Ginsburg Alito Stevens Kennedy Thomas (in part)	Thomas (in part)

Whitman v. American Trucking Association dealt with the Clean Air Act's directive to establish National Ambient Air Quality Standards.²⁷⁴ These standards establish the maximum amount of pollutants allowable in the air, standards that are developed and enforced by the EPA. The interpretation and implementation of NAAQS has been a central problem in environmental law, because a great deal of uncertainty has been built into the relevant statutory framework.²⁷⁵ As a consequence, this aspect of American environmental policy has been subjected to considerable judicial scrutiny.

In the case of *Whitman v. American Trucking Association*, the Supreme Court faced a direct challenge to the statutory framework of the EPA. Specifically, the American Trucking Association and the other parties to the case claimed that the Clean Air Act unconstitutionally delegated legislative power to the EPA administrator. To challenge the delegation of legislative power to the executive is in many ways to challenge the basis of the post-New Deal administrative state.²⁷⁶ According to some liberal commentators, the attempt to resuscitate the non-delegation doctrine is part of the larger project that aims to return the "Constitution in Exile," the jurisprudential regime that once placed significant limits not only on the ability of Congress to blur the lines between creating law and enforcing it, but also limited the scope and ambitions of the national government as a whole.²⁷⁷ Thus, the various industries

²⁷⁴ For a succinct discussion of the development of the Clean Air Act, see Marc Allen Eisner, *Governing the Environment: The Transformation of Environmental Regulation*. Boulder: Lynne Rienner Publishers, 2007. pp 18-23.

²⁷⁵ Daniel J. Fiorino, *The New Environmental Regulation*. MIT Press: Cambridge, 2006. pp 208-209.

²⁷⁶ For a succinct summary of the issue, see David H. Rosenbloom, "Retrofitting the Administrative State to the Constitution: Congress and the Judiciary's Twentieth Century Progress." *Public Administration Review*. Vol. 60, No. 1 (Jan. 2000) pp 39-46.

²⁷⁷ For an overview of the debate over the New Deal's relationship to the Constitutional order, see William Forbath, "The New Deal Constitution in Exile." *Duke Law Journal*. Vol. 51, No.1 (Oct., 2001) pp 165-222.

involved in this case were not merely challenging the EPA, but were raising some basic constitutional challenges to the political status quo, which in many ways is based upon the demise of the non-delegation doctrine.²⁷⁸

The non-delegation doctrine, in its traditional form, was based on the premise that the powers given to branches of government could not be given to other individuals, groups, organizations, or (most relevant here) other branches of government. The rule made a good deal of sense—after all, legislators are elected to create laws, not to create new legislatures, however much this might help them focus on more pleasing tasks such as campaign fund raising and interest-group funded junkets. In eras where the responsibilities of government were rather limited, as in the 19th century United States, the non-delegation was rarely employed by courts because legislators rarely attempted to delegate power. When the problem of delegation of power was raised, (for instance, in relation to tariff setting decisions that could not be easily made on a case-by-case basis by Congress as a whole), courts usually required that Congress had only to determine a practical principle that could guide executive decision making. Under this standard, the court upheld some fairly amorphous laws. Over the course of the late 19th and early 20th century, the modern administrative state (whether executive branch agencies or independent regulatory commissions) would raise questions not only about whether the substantive goals but also whether the means employed by progressive reformers were compatible with traditional standards of legality and American constitutionalism. Yet by the end of the 1930s, the court had shown that it was willing to be more deferential when reviewing Congressional delegations of power to the executive branch.²⁷⁹

²⁷⁸ David Schoenbrod, *Power without Responsibility: How Congress abuses the people through delegation*. New Haven: Yale University Press, 1993.

²⁷⁹ See David Schoenbrod, “The Delegation Doctrine: Could the Court Give it Substance?” *Michigan Law Review*. Vol. 98, No. 2 (April, 1985) pp 1223-1290.

The non-delegation doctrine has re-emerged in recent years, after an almost century-long hiatus. In the case of *Whitman v. American Trucking Association*, the circuit court for the District of Columbia used the non-delegation doctrine, or at least a version of it, to challenge the ways in which the EPA had interpreted its responsibility to establish air quality standards. Under the Clean Air Act, Congress gave the EPA the responsibility to set standards for ozone and particulate matter “requisite to protect the public health” and with an “adequate margin of safety.” In its 1997 revisions of the “national ambient air quality standards” (NAAQS) for ozone, the EPA decided to reduce the allowable “parts per million” (ppm) from 0.08 to 0.07. In American law, litigation has sprung from things even smaller than one-one hundredth of a part per million of ozone.

In an opinion by Judge Williams, joined by Judge Ginsburg and in part by Judge David Tatel, the D.C. Circuit Court of Appeals ruled that the EPA had not provided an intelligible principle for reducing the allowable ppm’s.²⁸⁰ Section 109 of the Clean Air Act states that the standards must be set at a level “requisite to protect the public health” with an “adequate margin of safety.” The EPA had determined that ozone was definitely a “non-threshold” pollutant—that is, a pollutant that has adverse health impacts at any level. Given this fact, it was necessary for the EPA to provide an explanation of their decision to reduce the ppm level. As Judge Williams put it, “here it is as though Congress commanded the EPA to select ‘big guys,’ and the EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The reasonable person responds ‘how tall? how heavy?’” Yet a reasonable person might also question whether Williams’ critique falls under the category of the non-delegation doctrine.

²⁸⁰ *American Trucking Association v. EPA*, 175 F.3d 1027, 1053-55 (D.C. Cir. 1999).

What was unusual about the use of the “non-delegation doctrine” in this case was that it was used to question an administrative agency’s interpretation of a statute, not to challenge the way Congress had delimited the responsibilities of the agency. Under this new guise, the non-delegation doctrine was used not to constrain or prevent delegations of power by Congress, but rather to prevent “unprincipled” or arbitrary decisions made by administrative agencies. In effect, the court was telling the agency that the violation of the non-delegation doctrine could be avoided if the agency adopted the principles that Congress had failed to provide it. In order to be “principled,” however, the agency would have to explain to the court why it had adopted the 0.07ppm standard as opposed to 0.08, or 0.09, or “0,” or “killer fog” levels of pollution. As reasonable as this demand for reasons might seem, it appeared to be the rejected “hard-look” doctrine in “non-delegation” clothing.

The decision of the D.C. Circuit court was in many ways typical of a certain strain of modern judicial conservatism that aims to restrict aspects of the modern state without returning to the standards of pre-New Deal jurisprudence. The non-delegation doctrine was not resurrected in its pre-New Deal form in this case. Instead the courts adopted a somewhat curious approach: the law was not an unconstitutional delegation of legislative power in itself, but was only un-Constitutional as interpreted by the EPA. Of course, had the court adopted a more strict approach²⁸¹ to the non-delegation doctrine, the implications would have been far more severe. If courts were to require Congress to do all of the rule-making currently undertaken by federal agencies, then the entire structure of the modern administrative state would (potentially) be thrown

²⁸¹ Admittedly, it is not entirely clear that there was a consensus approach to the non-delegation doctrine even prior to the new deal. Nevertheless, some of the earliest decisions by the Supreme Court that struck down aspects of the New Deal (such as *ALA Schechter Poultry Corp. v. United States*, SUPREME COURT OF THE UNITED STATES, 295 U.S. 495; (1935) were unanimous, and not merely a consequence of Four Horsemen of Laissez-Faire standing in the path of progress. The *Schechter* case involved the delegation of legislative power to private groups, however, not the executive branch, which might have explained the outcome in this case.

into disarray.²⁸² By interpreting the non-delegation doctrine as simply a demand for “principles” in the rule-making process, the circuit court must have hoped to place restrictions on the scope of administrative discretion and arbitrariness without initiating a Constitutional counter-revolution.²⁸³

The appeals court concluded that the EPA had to assume the responsibilities of a legislature; that is, the court required that the executive establish its own principles for action that Congress had neglected to provide. Some would conclude that this decision can easily be explained under “attitudinalist” model of judicial making. This may be the case, but the most relevant attitude or preference in this case is not the judge’s views of environmental policy, but rather his view on the form that law and policy should take: the law should be principled, and if the legislature will not make laws that reveal principles, then executive agencies must take this burden upon themselves.

Upon appeal, the Supreme Court issued a ruling that reveals the “Congress-centered” character of American jurisprudence. The Court upheld Congress’ delegation of legislative power to the EPA, while at the same time challenging the discretion of the EPA to consider the costs of environmental regulation; essentially, the Court held that Congress can absolve itself from the responsibility of considering the costs of environmental legislation, and in doing so it can ALSO prevent the executive branch from assuming that responsibility. The opinion upholding this peculiar policy arrangement, in which it is made certain that neither the legislature nor

²⁸² See John F. Manning, “The Non-Delegation Doctrine as a Canon of Avoidance.” *The Supreme Court Review*, Vol. 2000, (2000) pp 223-277.

²⁸³ The decision is therefore similar to the Supreme Court’s recent federalism decisions, which place some restraints on national power (particularly in regards to Congressional power over state government) without returning to the pre-New Deal understanding of the commerce clause. *United States v. Lopez* SUPREME COURT OF THE UNITED STATES 514 U.S. 549; 115 S. Ct. 1624; 131 L. Ed. 2d 626; 1995), *United States v. Morrison* SUPREME COURT OF THE UNITED STATES 529 U.S. 598; 120 S. Ct. 1740; 146 L. Ed. 2d 658; 2000.

the executive should consider the costs of a national policy, was penned by Antonin Scalia. Scalia's opinion (joined by Rehnquist and Thomas, in addition to Ginsburg, Kennedy, O'Connor, and Breyer) is best interpreted not as a consequence of his support for the particular policy, but rather as a result of his attempt to determine Congressional intent.²⁸⁴ Whether or not the policy arrangement is constitutional is a question that perhaps should have detained Justice Scalia longer. Whether the arrangement was politically wise is an easier to question to answer, at least for a conservative.

Is it possible for Congress to make a law that prevents the executive from making a decisions based on the costs of policy, while at the same time declining to make that calculation itself? The Court's opinion in *Whitman* suggests that this somewhat irrational outcome is constitutionally legitimate. In order to meet the Constitutional requirements of Article I, which vests the legislative power in Congress, Scalia suggests that Congress must carefully circumscribe executive discretion—in this case, by eliminating the discretion of the EPA to consider the costs of national regulation. The problem with this view is that placing restraints on the executive branch is not equivalent to making a decision about the substance of policy.

The majority's opinion is based on the fiction that Congress has not delegated legislative power in establishing the National Ambient Air Quality Standards policy. It is not surprising that the court was unwilling in this case to apply an expansive understanding of the non-delegation doctrine—though it is a sign that the prophecies about the return of the Constitution in Exile are surely exaggerated.²⁸⁵ Yet it might be

²⁸⁴ Scalia's best argument against the administration's "spirited" attempt to rationalized environmental decision-making was that Congress, in other pieces of environmental regulation, had left no doubt when it wanted to grant executive agencies the power to take costs into account.

²⁸⁵ Thomas Keck, *The Most Activist Supreme Court in History? The Road to Modern Constitutional Conservatism*. Chicago: University of Chicago Press, 2004.

surprising to some that the “conservative wing” of the 2001 court showed no inclination to revisit the specter of *Schechter*. Or rather, the conservative wing of the court signed onto the fiction that *Schechter* had never been abandoned, that there was no delegation of legislative power in this case, because the Court had rubber-stamped much vaguer laws in other circumstances. Justices Stevens and Souter, in a concurring opinion, argued that the Court should stop pretending that agencies like the EPA have not been delegated “legislative power”:

The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is “legislative” but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not “legislative power.” Despite the fact that there is language in our opinions that supports the Court’s articulation of our holding, I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is “legislative power.”²⁸⁶

It is true that theoretical differences lie beneath the surface of the concurring opinions in this case. Stevens and Souter, for instance, argue that even though the Constitution lodges the “legislative power” in Congress, there is no explicit prohibition on the delegation of that power. Therefore, Congress can delegate that power to the executive branch (or, presumably, to private business associations, management consulting firms, etc.) as long as it provides “intelligible principles.” Justice Thomas, while apparently accepting the fiction that no delegation of power has occurred in the case, was clearly uncomfortable with the courts broad deference to Congressional delegations of power. But despite their clear theoretical differences, Stevens, Souter and Thomas ultimately agreed to support a policy whose “rationale” is

²⁸⁶ Justice Stevens, concurring opinion, *Whitman v. United States Trucking Association*, SUPREME COURT OF THE UNITED STATES 531 U.S. 457.

that policy is best made with only minimal attention to cost and context. It is not even clear that non-conservatives could support such a policy. Yet in the context of legal decision-making—or rather, within the context of a legal tradition that combines deference to Congressional regulatory decisions, suspicion of executive discretion, and general indifference to the logic of the non-delegation doctrine—the decision was entirely predictable.

Ultimately, this kind of decision reflects a distrust of executive power that is produced by the structure of American institutions—the decision cannot be understood if looked at simply as a dispute over “preferences” in environmental policy. Distrust of executive discretion is much less evident in Canadian courts, because the government is always the head of the legislature, the source of law. Paradoxically, the American President, directly elected by the people, is subjected to more scrutiny because he is not directly connected to law-makers. The form of judicial politics revealed in this case is a product not simply of the politics of the judges involved, but is instead a consequence of the institutional setting in which they operate. The preferences of the court are best characterized as a desire for “lawfulness” combined with deference to Congress’ determination not to provide the principles necessary for the rule of law.

The complicated case of *New York et al v. EPA*,²⁸⁷ decided by the D.C. circuit in 2005, provides a further example of how judicial decisions are hampered by an excess of legality—as opposed to an excess of partisan politics. In this case, the EPA’s 2002 interpretation of “new source review” (NSR) provisions in the Clean Air Act and its amendments was challenged by a variety of state governments, environmental interest groups, and industry representatives.²⁸⁸ The NSR provisions in the CAA are

²⁸⁷ *New York et al v. EPA*, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 367 U.S. App. D.C. 3; 413 F.3d.

²⁸⁸ For a discussion of the NSR provisions of the Clean Air Act, see Todd B. Adams, “New Source Review Under the Clean Air Act: Time for More Market-Based Incentives?” *Buffalo Environmental Law Review*. Vol. 8, No. 1, (Fall, 2000).

meant to address the problems that emerge from the attempt to balance environmental improvements and economic efficiency. Under the CAA, the EPA can impose environmental standards on the construction of new plants, but it does not necessarily require existing plants to be retrofitted or scrapped if they fail to meet those standards. However, in order to limit the capacity of older sources of pollution to be maintained for extensive periods of time, the NSR provisions require that modifications to existing plants have to be subjected to review by the EPA if those modifications lead to an increase in pollution. Interpreting and implementing these provisions is complicated, for the simple reason that Congress never defined “modification” or “increase in pollution.” Congress has used these terms in different and even contradictory ways. As a consequence, the EPA has been forced to defend its interpretation of NSR against challenges from industries, states, and environmental groups.

In *New York v. EPA*, there were several sources of controversy over the EPA’s 2002 interpretations of NSR. First, the EPA introduced new standards for interpreting both the “baseline” of emissions from a source. In order to determine whether or not modifications of existing plants leads to increased pollution, the EPA must evaluate the amount of pollution that the source or plant currently emits. The CAA assumes that this is a relatively straightforward process, but in practice it is extremely complicated to find a useful standard for evaluating the pollution emitted during the production process.

On the one hand, it is possible to determine how much pollution is emitted during the production of any given unit of widget X. But the production of an individual unit cannot be the starting point for measuring increases in pollution, as differing plants will have differing levels of overall production—some will operate around the clock, some will sit dormant for long periods of time, etc. A temporal

element has to be introduced to accurately measure the amount of overall pollution produced by the source. It isn't clear, however, what temporal frame should be used to evaluate the amount of pollution released by a production process, as patterns of production will vary from day to day, week to week, and year to year. In order to establish baseline standards for evaluating increases in pollution, in 2002 the EPA promulgated a rule which allowed firms to select any continuous 24 month period from the previous ten year period.

The EPA also changed the ways in which it measured increases in emissions. Once a baseline of emissions has been established, it is necessary to determine the amount by which proposed changes will increase emissions (if at all) in the production process. Based upon 1980 rule, the EPA had come to the conclusion that increases should be measured by the potential annual emission rate of the source, compared against the "baseline" period discussed above. In response, industry petitioners argued that this "actual to potential" test was invalid, as the 1980 regulation provided that an "increase" in emissions occurs only if the maximum hourly emissions rate goes up as a result of the physical or operational change. The practical difference between the two interpretations was that, if the industry position was adopted, a plant might adopt technology that could produce the same amount of widgets while reducing emissions, but the overall emission rate might nevertheless increase (due to increased overall production).

The EPA rule was upheld in court. But by 1992, the EPA wanted to introduce more flexibility into the regulatory process by abandoning the "actual to potential." Instead, increases would be measured on the basis of projected emissions. More importantly, changes in emissions that resulted from demand-related increases in production would not be counted as "increases" in terms of NSR requirements. At first, the actual to projected test and the "demand growth exclusion" were applied only

to utilities. By 2002, the “actual to projected test” and “demand growth exclusion” was adopted for all sources. Obviously, the expansion of these rules was very much in line with long-term commitment of the GOP to regulatory flexibility. From the perspective of many states and environmental groups it represented yet another example of the Bush Administration’s indifference to the “rule of law.”²⁸⁹

In addition to changing the standards for measuring past emissions and universalizing the actual to projected test and demand growth exclusion, the EPA also adopted several new exemptions to the NSR policy. In situations where changes were not anticipated to have any real possibility of increasing emissions, firms were exempted from certain onerous record keeping requirements. In addition, the EPA adopted several programs that, if followed, would exempt firms from NSR: the Plantwide Applicability Limitations (“PAL”) program, the Clean Unit option, and the Pollution Control Project (“PCP”) exemption.

As is usual in American politics, the new rules provoked lamentations and gnashing of teeth from all sides of the political spectrum. The outcome in the case does not reveal any obvious partisan or political influence, however. What the case does reveal is that the structure of American law-making creates a situation in which judges are more likely to challenge executive discretion, not on the basis of their own policy preferences, but on the basis of their understanding of Congressional law. This is, in its own way, just as troubling as an overtly “politicized” court. The court denied all of the petitions made by the industry, state government, and environmentalist petitioners, vacating only those provisions adopted by EPA in relation to the “Clean Unit Rule,” “Pollution Control Projects,” and record-keeping requirements. A closer look at the judges’ reasoning in relation to these specific provisions reveal how

²⁸⁹ E.g Patrick Parenteau, “Anything Industry Wants: Environmental Policy Under Bush II.” *Vermont Journal of Environmental Law*. Vol. 6, No. 1 (2004/2005).

legalism, not politicization, becomes a problem once judges have adopted a flexible conception of standing to sue.

The Clean Unit Rule was adopted by the EPA in order to prevent NSR from creating disincentives against the adoption of the “best available control technology.” The rule stated that, if a firm has adopted BACT as part of plant modifications, then additional collateral emissions will not necessarily trigger NSR. Pollution Control Projects would be treated in a similar manner. The problem with these policies was that exemptions of this kind were not authorized by the Clean Air Act itself. As a consequence, the court ruled that even if it seemed irrational to conclude that the CAA mandated perverse incentives with anti-environmental consequences, the precise words of the statute were controlling. If those words mandated a policy approach that was manifestly irrational in the context of the broader goal of environmental protection, then the EPA was forced to accept an irrational policy.

In regards to other aspects of the law where the political stakes were much more apparent, such as the EPA’s new interpretation of baseline emissions or the expansion of the “demand growth exclusion,” the court found statutory justification for deference to the EPA’s policy judgments. But the statute could not be stretched so as to endorse the new exemptions proposed by the EPA, for the very simple reason that there were no discussions of exemptions in the CAA and its amendments. The court even seemed to endorse the policy-judgments made by the EPA regarding the perverse incentives of the CAA, in the very act of striking down those policies. While this is very much an example of “judicial activism,” in the sense that the court invalidated the decisions of another branch of government, it is very difficult to say that this decision was motivated by the policy preferences of the judges. The most pressing policy issues were left untouched by the court. The outcome of the decision is better explained as an attempt by the court to enforce a strict conception of legality.

And therein lies the problem. What we see here is not a politicized court, but a court that is committed to an abstract conception of the “rule of law,” a strictness that does not take into account the limits of legality.

The kind of legality defended by the court is curiously one-sided. Judges approach the terms of Congressional law with an almost Talmudic reverence, and are eager to constrain executive discretion within the terms of statutory language. In terms of evaluating environmental statutes, judges (regardless of their political affiliations) overwhelmingly appear to be committed textualists; there is no evidence of either environmentalist ideology or libertarian economics leading judges to ignore the explicit language of law. But just as judges have, for the most part, been unwilling to adhere to the formal limits on judicial power contained in the Article III “case and controversy” requirements, courts have been unwilling to place formal limits on the scope of congressional power. Thus while environmental law decisions show that judges have not been co-opted by either environmentalism or free-market anti-environmentalism, they have been swept into the legislative vortex.

The cases I have discussed in this section—*Whitman v. American Truckers Association* and *New York v. EPA*—reveal federal courts caught in a struggle not over policy, but a struggle over the role of the courts in the modern political state. While clearly political in some sense, it is also distinctively judicial politics, not simply partisan politics in robes. The key problem for the courts is determining the scope of judicial power. In cases such as *New York v. EPA*, Democratic and Republican appointees reached agreement over a broad range of complicated statutory issues. A similar dynamic is apparent in the unanimous Supreme Court decision in *Whitman*. What these cases illustrate is that the greater judicialization of American environmental law is more than a product of the greater ideological tensions in the

American political system. The American political system itself—rooted in the separation of powers—has come to be a major source of judicialization.

4.5.ii The Judicialization of Environmental Policy in Canada: A Delayed Revolution?

There are many reasons to think that the role played by American courts in overseeing the details of environmental policy will not be replicated in Canada. Yet as we have also seen, Michael Howlett’s prediction that Canadian courts would be unlikely to endorse American-style “private attorneys general” has proven to be incorrect. With little or no help from parliamentary enabling legislation, Canadian courts have created a broad potential for citizens groups to challenge the details of environmental policy. But the opportunity to challenge policy should obviously not be equated with success in the courtroom. Howlett argued that even if the rules of standing were to be liberalized in Canada, it would not necessarily lead to the complete “judicialization” of environmental policy; that is, he suggested that environmentalists might not get the desired results from judges, even if they were granted their day in court.

His reasoning was based primarily on the institutional differences between the Canadian and American regimes. In the United States, a combination of fragmented parties and separation of the legislative and executive branches creates a number of conditions which can promote judicial power. Legislators often have an incentive to enlist courts in their struggles with the executive branch, and it is often extremely difficult for legislators to respond to judicial statutory interpretations which they find uncongenial.²⁹⁰ In Canada, there is no institutional separation between the executive and legislative branches; furthermore, the disciplined nature of the Canadian party

²⁹⁰ Melnick, *Between the Lines*, pp. 8-13.

system often makes it easier for legislators to respond to the statutory interpretations of judges. These institutional differences could probably be supplemented by cultural and historical factors, such as the United States' longer experience with judicial activism, the prevalence of "rights consciousness" and anti-statist libertarianism in America, etc. Yet if the rules of standing have proven so malleable, it is worthwhile to question whether institutional and cultural differences will be able to support the traditional deference of Canadian courts.

Judging by the cases which I have examined for this chapter, it seems clear that Canadian judges are still far less active challengers of administrative discretion than are their American counterparts. There are perhaps some reasons to suspect that judicialization in Canada is in fact beginning to follow the American model, albeit at a slow pace, and despite the remaining institutional and cultural differences between the two countries. Ted Morton, who has studied the development of judicial activism in Canada across a broad range of issues, argued that there was likely to be a spillover effect into environmental policy as well; judicial "values," not constitutional structure or constitutional language, would determine the role played by Canadian courts in governing the environment.²⁹¹ But, as we have seen by looking at the Supreme Court decisions dealing with environmental issues and lower appeals court cases dealing with environmental assessment, there are few signs that Canadian courts are playing, or are likely to play, a key role in the development of environmental policy. The courts

²⁹¹ E.g. "While the Charter has had little direct impact on environmental policy, there is a consensus that Charter-inspired activism in other policy fields has spilled over into the Court's environmental docket, making the court more 'receptive' to legal challenges to government decisions...The new constitutional culture that has taken root around the Charter not only has legitimized judicial intervention in policy matters but also has devalued the principle of respect for provincial autonomy, heretofore the two most important restraints on judicial activism in the area of environmental jurisdiction." F.L. Morton, "The Constitutional Division of Powers with Respect to the Environment in Canada." in Kenneth Holland, et al., editors *Federalism and the Environment: Environmental Policymaking in Australia, Canada, and the United States*. Greenwood Press: Westport, Conn., 1996. pp 37-55 (p. 50).

have pursued a revolution in the ability of groups to participate in Canadian environmental policy, but judicialization has not led to many substantive challenges to the discretionary power of government in environmental policy.²⁹²

If we consider the actual successes of environmental interest groups, it is clear that the judicialization of Canadian environmental policy is proceeding at a glacial pace, if at all. We should not be surprised by the slow progression. In the United States, the judicialization of public policy through administrative law did not emerge all at once, fully formed like Athena from the head of Zeus. The starting point was the advent of the New Deal, which from a Constitutional perspective introduced the following changes: courts appeared to abandon their traditional solicitude for “economic rights,”²⁹³ they endorsed a “looser” understanding of the scope of national regulatory power under the commerce clause,²⁹⁴ and they endorsed a broader role for the executive branch in policy-making, based upon the delegation of Congress’ legislative powers.²⁹⁵

Courts did not simply wash their hands of administrative law and regulatory policy, however. Starting sometime in the 1960s—perhaps in response to the specter of “iron triangles” and “private governments” and their influence upon federal policy making²⁹⁶—judges began to open up access to the courts (i.e. they liberalized the rules of standing.) Shapiro refers to this as a shift from a “deferential” to a “pluralist” or

²⁹² Boyd, *Unnatural Law*, pp 237-248.

²⁹³ Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights*. Princeton: Princeton University Press, 1994.

²⁹⁴ Randy Barnett, “The Original Meaning of the Commerce Clause.” *The University of Chicago Law Review*, Volume 68, Number 1, pp 101-147.

²⁹⁵ David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* New Haven: Yale University Press, 1993.

²⁹⁶ Theodore Lowi, *The End of Liberalism: The Second Republic of the United States*. New York: W.W. Norton Press, 1979.

“polyarchical” model of judicial decision-making.²⁹⁷ Gaining access to the courts meant little if the applicants were unable to raise meaningful challenges to administrative decisions. For the process of administrative rule-making to be truly polyarchical, all power and information could not reside with the administrators. So judges started to spread power and information around.

In order to facilitate the polyarchical litigation process, courts began to expand upon the simple procedural rules found in the Administrative Procedure Act of 1946. Federal agencies were forced to not only notify the public of their intention to promulgate a new rule of regulation, but also to provide increased information regarding the need for the rule, and the grounds upon which they based their decision regarding the rule’s content. Similarly, courts gradually became more willing to demand that agencies not merely receive comments from interested parties, but also provide responses to those comments. These judicially invented rules—what Shapiro refers to as “dialogue requirements”—still fit within a polyarchical model. The next stage of judicial decision-making emerged when courts began agencies to not simply provide responses, but to provide fully adequate, rationally justified responses. The next two steps moved beyond polyarchalism. First, courts began to demand that agencies respond not to all significant issues that were raised, but to all significant issues. Secondly, courts began to demand that the agencies prove that they reached the correct or most rational regulatory decision. Shapiro refers to this final stage as “synoptic rationalism.”

There are some sign that Canadian federal courts are starting to march down the path towards “synoptic rationalism” in regards to environmental policy. Two sorts of evidence support this claim. First, Canadian judges appear increasingly willing to

²⁹⁷ Shapiro, *Who Guards the Guardians? Judicial Control of Administration*. Athens, Ga.: University of Georgia Press, 1988.

challenge the statutory interpretations of administrative decision makers. Secondly, there are indications that Canadian judges are becoming more willing to challenge the scientific or factual bases of administrative decision makers as well, in emulation of the “hard look” doctrine propagated by American courts. Examples of these two modes of judicialization are relatively sparse. There is some reason to suspect, however, that Canadian courts have begun to follow the American path in the development of administrative law. The groundwork has been laid for Canadian courts to move from a “polyarchical” to a “synoptic-rationalist” model of decision-making. It is true that the Canadian Parliament will usually have more capacity to respond to judicial statutory constructions that finds uncongenial, especially in comparison with its American counterparts. This is true as well in regards to Constitutional law, where the “notwithstanding clause” gives national and provincials governments to insulate laws from many Charter provisions. However, the use of the notwithstanding clause has become a sort of political taboo in Canadian politics.²⁹⁸ Judicial decrees on Constitutional controversies are, for practical purposes, the final word on those controversies.

Some Canadian judges are developing the legal tools necessary to expand the power of courts to intervene into environmental policy. One crucial theme in the federal court’s environmental law cases from the 1990s is the absence of any clear distinction between “judicial review based upon statutory interpretation” and “judicial review based upon ‘hard looks’ at facts/scientific evidence.” Canadian judges almost never directly challenge the scientific bases of administrative decisions. Though courts immerse themselves in the minutiae of environmental assessments, such open

²⁹⁸ This has led many commentators to suggest that the notwithstanding clause has been essentially been repealed by the Canadian public. The closest analogy in American politics would be the theoretical independence of “electors” in the electoral college; what is true in Constitutional theory has been superseded by Constitutional practice. Admittedly, the notwithstanding clause has far more champions than does the “original understanding” of the electoral college. However, there are some.

exercises in policy analysis are usually resolved in favor of the government. However, it is often quite easy for judges to re-interpret factual disputes as disagreements over the meaning of statutes. While judges seem to doubt their capacity to examine scientific findings, they are more confident in their ability to interpret the law.

A good example of how factual disputes are transformed into statutory disputes can be seen in the Federal Trial Court decision in *Friends of the Oldman River Society v. Canada*.²⁹⁹ Even more importantly, this case illustrates that judicialization does not occur simply when judges challenge scientific evidence. The collapse of the rules of standing permit judges to exercise an illegitimate control over the discretion of administrative officials, despite the fact that judges need not go far beyond the letter of the law to do this.

Friends of the Oldman River Society v. Canada dealt with final federal authorization of a dam construction project in Alberta, the planning for which had begun in the 1950s. By May of 1987, the federal government had reached an agreement with the province not to make any claims of jurisdiction over the dam project, thereby avoiding federal duplication of the already extensive environmental review process. By March of 1989, the dam was 40% complete. In April of that year, the Friends of the Oldman River Society filed a motion for certiorari quashing the Minister of Transportation's approval of the project, on the grounds that the minister had failed to comply with the environmental assessment and review process guidelines order (EARPGO). The Friends of the Oldman River were basically claiming that the federal decision to abstain from conducting further environmental assessments was illegal.

This case illustrates that the problem of judicialization is often not the result of judges moving beyond the letter of the law, but is instead the result of strict adherence

²⁹⁹ *Friends of the Oldman River Society v. Canada* 2 F.C. 18 • (1990), 68 D.L.R. (4th) 375.

to statutory constraints in regards to policy decisions that do not affect private rights, what I will call “legalism.” Before judges can use legalism to hamper executive discretion, they need to allow the rules to standing to erode so that they no longer pose a significant barrier to access. Once this has occurred, judges are well-positioned to impose strict legality upon government actions. In enforcing legalism, judges are supported several crucial myths. The first is the myth that all executive action must be in strict accordance with the letter of “the law,” regardless of whether or not the departure from law affects individual rights. The second myth is that “the law” provides clear indications of the scope of executive discretion. The third myth is that public-interest groups are entitled to enjoin enforcement of the law, even when there are no private rights at stake.

In *Friends of the Oldman River Society v. Canada*, the trial judge could have dismissed the application on the grounds that the applicant was simply moving a policy dispute into a legal arena. No individual or property rights were at stake; the Friends of the Oldman River were simply perturbed that the government of Canada was not exercising the full scope of its own powers. Instead, the trial judge simply assumed that the applicants had standing; there is literally no discussion of the issue at all in the decision. In the end, the judge dismissed the application of Friends of the Oldman River society, yet his reasoning was far from water-tight. Indeed, if one accepts that public-interest groups have the right to enforce strict legalism upon government decision-makers, one would probably have to accept that the trial judge erred in this case.

Simplifying for the sake of brevity, the trial judge concluded that the EARPGO was not applicable to the decision to approve the dam. Alberta’s application for approval was made under section 5(1) of the NWPA, an act which made no reference to environmental assessments; the judge concluded that the minister of transportation

was therefore only required to take navigation issues into account when assessing the dam project. A further legal issue was whether or not the Department of Fisheries and Oceans had to undertake an environmental assessment in relation to this project, given the fact that it was not an “initiating department” faced with a “project” (i.e. the project was being undertaken by the Alberta government, not the government of Canada.) Essentially, the trial judge gave an extremely narrow reading of the EARPGO, a reading which caused this statute to be subordinated to other statutes such as the Navigable Waters Protection Act, a reading which implied that only a fairly narrow range of ministerial decisions should be subject to the environmental assessment process.

This narrow reading of the EARPGO was frankly implausible. The statute clearly is meant to be of broad application: all decisions and authorizations made by federal ministers should be able to trigger the environmental assessment process, not merely a decision to directly engage in the construction of dams. Secondly, the EARPGO would have been meaningless if it could only come into effect when directly incorporated in other statutes. The appeals court—which upheld the application of the Friends of the Oldman River Society—gave a much more plausible reading of the scope and intention of the EARPGO. Their reasoning was fairly straightforward. EARPGO is triggered whenever a federal minister makes a decision which is likely to have a significant impact upon an area of federal jurisdiction; the dam is likely to affect fisheries, Indians, and Indian lands; thus, the Ministry of Fisheries and Oceans and the Minister of Transportation must conduct a federal environmental assessment.

This plausible statutory reading hides the fact that the court’s decision still rested on contestable interpretations of the facts. The appeals court had many opportunities to defer to the federal authorities. The simplest way would have been to

accept the federal government's contention that the dam posed no significant threat to an area of federal jurisdiction. This decision of the federal ministers to accept the validity of the provincial environmental assessment process, a process that had been going on for years if not decades, was certainly not beyond the bounds of rationality. Once the court had asserted its own version of the facts—i.e. the potential impact upon fisheries, Indians, and Indian lands—it was quite easy for the appeals court to maintain that they were simply enforcing the letter of the law when they demanded the federal government to conduct another environmental assessment.

There were several other opportunities that the court could have taken in order to rule in the government's favor. The application of the 1984 EARPGO legislation to a dam project initiated decades earlier was a retroactive application of the law. The extremely late filing date of the motion (recall that the dam was almost half completed) would under most circumstances have been regarded as a reasonable grounds for dismissal. What cases of this kind illustrate is that the image of a deferential Canadian federal court is radically incomplete, not least due to the fact that judges can judicialize public policy without appearing to move beyond their traditional focus upon statutory interpretation into the realm of "hard looks" at scientific evidence. The appeals court did not have to engage in a wild deconstructive reading of federal statutes in order to rule in favour of the Friends of the Oldman River. In this case, the judges had in some ways a plausible legal basis for intervening into a highly complex area of federal-provincial negotiations. But such intervention is only legitimate if we assume that old rules of standing are no longer legitimate, an assumption that is dubious despite being widely accepted.

The rules of standing were meant to prevent abstract legal claims from trumping political prudence; they gave frank acknowledgment to the fact that "the rule of law" does not require us to ignore the theoretical and practical difficulties of

legalism. Though it may seem that the courts are simply following the law in this case, we should consider whether attention to legalism is of any value when it is divorced from any concern with concrete private rights. The rules of standing were meant to insure (amongst other things) that the discretion of government officials would be restrained only when its actions affect individuals, their rights, and their property. The reason that the ultimate responsibility for the execution of laws is entrusted to elected officials is that the execution of public policy cannot and should not be a mechanical process. General laws can never anticipate the multiplicity of particular situations in which they must be applied, and cabinet officials are entrusted to adjust the laws to those circumstances, provided that they do not infringe upon individual rights. The practical judgment of elected officials is needlessly hampered, however, once groups are able to dispute those judgments not because their rights have been violated, but because they hold a different (and often idiosyncratic) vision of the public good. Thus Michael Howlett was wrong when he asserted that liberalized rules of standing would be unlikely to judicialize Canadian environmental policy. Liberalized rules of standing allow judges to illegitimately wrest control of public policy from responsible officials, despite the fact that judges claim they are only following the law when doing so. Judicialization can occur even when judges refrain from imposing “new rights,” even when judges refrain from conducting “hard looks” at scientific evidence that they are typically not qualified to evaluate. Once the rules of standing have been liberalized, judges can judicialize public policy simply by applying the black letter of the law. This will seem desirable only to those who regard legalism as the supreme political value.

In addition to using statutory interpretation as a vehicle for asserting control over public policy, Canadian federal courts have shown that they are prepared to adopt some version of the American “hard look” doctrine. As mentioned in the previously

discussed case, disputes over facts can sometimes be disguised as disputes over the meaning of statutes. Federal judges also indulge in direct, ad-hoc analyses of scientific evidence on some occasions. Such analyses do not often lead judges to overturn administrative decisions, but we can presume that a familiarity with factual analysis will eventually yield more confident judicial edicts on the meaning of those facts. At any rate, it is no longer true that Canadian judges restrict themselves to questions of law in cases that deal with environmental policy.

A few examples will suffice to illustrate how Canadian courts are moving beyond legal interpretation into the realm of factual analysis. *The Friends of the West Country Association v. Canada*³⁰⁰ dealt with an authorization, granted by the Minister of Transportation, for the Sunpine Logging Company to construct bridges over two waterways in rural Alberta. After an initial screening process, ministry officials concluded that there was no risk of environmental harm from the project. FOWC disagreed. In their application, they contended that the initial screening process was conducted in an unlawful manner. The government argued, as we might expect, that the group was simply contesting the factual evidence and professional judgments of ministry of transport officials, and really had no legal right to contest the authorization.

The trial court judge, in ruling for the FOWC, argued that the Ministry of Transportation had failed to take into account the full range of possible environmental effects that might result from bridge construction. The idea that the effects of this proposal should be assessed in a broad manner was extracted by the trial judge from something called the “independent utility principle.” According to this principle, if a given project (e.g. a bridge) has no worth (“independent utility”) in itself, except as a means for accomplishing another project (e.g. logging) then the effects of the latter

³⁰⁰ *The Friends of the West Country Association v. Canada*; 1997 CanLII 5107 (F.C.).

project should be considered in the assessment process. Of course, this principle was never actually enshrined in any parliamentary legislation. Guided by an esoteric reading of a single paragraph from a Supreme Court decision, as well as a pamphlet from the Canadian Environmental Assessment Administration, Judge Gibson felt confident in asserting that the independent utility principle was applicable in this case. It would be difficult to imagine a more explicit example of judicial law-making, or a more worrying sign of the decline of deference amongst Canadian judges.

Though I have focused on some of the most prominent examples of judicial activism in Canadian environmental policy, I should stress once more that the conclusions of this chapter are meant to be very modest. “Post-materialist” environmentalism has not supplanted the Canadian judiciary’s traditional patterns of deference towards the federal government. Michael Howlett’s thesis—that environmental policy is unlikely to be judicialized in Canada due to institutional constraints—and the Shapiro-Bzdera thesis—that federal courts tend to partisans of centralized government—find considerable support from the pattern of environmental law decisions in the Canadian federal courts between 1990 and 1999, and the environmental law decisions decided by the Canadian Supreme Court between 1985 and 2007. The activism that the Court has shown in other areas of law has not been apparent in environmental policy.

Yet those same cases also show that there is a certain amount of flux in the Canadian court. Rules of standing have collapsed, which has allowed courts to exercise control over the execution of environmental policy without having to move beyond statutory interpretation. These cases also reveal that the primary battle lines in environmental policy are not between federal and provincial governments, but are instead between governments and interest groups, such as “green” lobbyists and Indian bands. Courts are rarely given the opportunity to favor the federal government

over the provincial government, and when such conflicts arise, the federal government is not the invariable winner. The willingness of federal courts to respect federal-provincial bargaining in regards to environmental policy may be wavering, however. The collapse of the rules of standing, and the combination of ambiguous legislative standards and utopian legislative aspirations, provides fertile ground for the further cultivation of judicialization.

The transformation of the laws of standing in relation to Canadian environmental policy reveals that institutions do not fully determine the nature of judicial power. It is also interesting to consider why the Canadian Government itself continues to accept the judicially-created policy of private attorneys general. What does not the government gain from not only accepting liberalized rules of standing, but also from funding the very groups who use those rules to pester the government with lawsuits? Perhaps the government accepts a mild level of judicialization in order to create a façade of participation in governmental decision making. No elected official would echo my argument against the legitimacy of “public interest” litigation; it would seem authoritarian, despite the fact that it is implicit in the very structure of responsible government. Yet in the long run it is a dangerous for governments to rely on the public’s firm belief in the mystique of law and courts. If Canadian courts increase their interference with the details of environmental policy, the federal government will find it very difficult to challenge the legitimacy of judicial decision making, even if those decisions have moved beyond the law. But thus far, the influence of the Supreme Court, so prominent in Canadian aboriginal policy, has not been extended to environmental policy. Canadian judges have given environmentalists their day in court, but in terms of ultimate outcomes in environmental policy, Canadian courts have not directly challenged the authority of elected governments.

In contrast with the United States, the Canadian judiciary has had little influence over the development of environmental policy. The absence of environmentalism activism in Canada—in particular, the absence of detailed judicial oversight over the interpretation of environmental laws—is one of the clearest signs of the ways in which institutions shape the limits of political jurisprudence. In the United States, the tensions between Congress and the Presidency have produced a system of environmental policy that, due to a combination of statutory inflexibility and distrust of executive power, remains a paradigmatic case of “judicialization.” Despite the recognition of the problems of “judicialized” environmental policy, it has proven very difficult for American political leaders to craft an alternative. While the Canadian political system is unlikely to create a judicialized form of environmental policy, the American political system often seems unable to escape it.³⁰¹ This has little to do with the political proclivities of judges. The opportunities available to judges to influence environmental policy is shaped much more decisively by the constitutional architecture of the two nations.

³⁰¹ Daniel J. Fiorino, *The New Environmental Regulation*. Cambridge, Mass.: MIT Press, 2006. pp 27-59.

CHAPTER FIVE: CONCLUSION

This study has attempted to assess the constraints imposed on judicial power by constitutional language and institutional differences—what I have called “constitutional architecture.” The central conclusion is that the constitutional and institutional differences between Canada and the United States, not merely the political differences between the Canadian and American judiciary, continue to impose limits on “political jurisprudence.” This is not to revert to a purely legalistic interpretation of judicial decision-making; rather, my argument is that differences in constitutional architecture create differing opportunities for political jurisprudence.

In Canada, the adoption of the Constitution Act of 1982 paved the way for a court-led revolution in aboriginal rights, as the document included new and expansive protections for aboriginal rights without clarifying the content of those rights. The specific intentions of the framers were unclear, but the desire to “judicialize” this area of public policy was not. The United States has not experienced any similar constitutional modifications in the area of aboriginal rights, and as a consequence, judicial decisions in aboriginal law move within a nineteenth century framework that accords fewer possibilities for aboriginal rights activists. Within this framework, there are some clear differences between conservative and liberal justices on the American Supreme Court. But on the whole, both liberal and conservative justices on the American Supreme Court have adopted a more constrained conception on the scope of aboriginal rights and aboriginal sovereignty.

This is not to say that the development of Canadian aboriginal law in the post-Charter era was *determined* by the Constitution Act, or that the courts have been following the “framer’s intentions” in any direct sense. It is be difficult to determine if

the framers of the Constitution Act even had a specific understanding of exactly how Section 35 of the Constitution Act would affect the relationship between aboriginals and the provincial and federal governments of Canada. The intentions of constitutional framers can be obscure, even when the framing has occurred in living memory. It is undeniable, however, that the language of Section 35 limits the power of the national and provincial governments to alter and abridge aboriginal rights and treaty rights, and in their aboriginal law jurisprudence, the justices of the Supreme Court of Canada have made the plausible claim that they fulfill a role that has been assigned to them by the Constitution. This is not to say that the decisions of the court have been wise, necessarily. But the Court's activism in this area is a product of constitutional, not judicial, supremacy.

The activism of the Canadian court in aboriginal law does not necessarily support the "Court party" thesis, advanced by Canadian critics of judicial power which suggests that the jurisprudence of the court has been shaped largely by interest-group pressure, and the influence of the left-leaning Canadian legal academy. The court has used Section 35 to advance the interests of aboriginal litigants in many important cases, but it has not endorsed the visions of aboriginal sovereignty that command near unanimous support amongst academics, aboriginal leaders, and even government experts who deal most closely with aboriginal affairs.³⁰² This suggests that connection between the Court and the national government—the "centralization thesis"—plays a considerable role in limiting judicial activism. Or, alternatively, it may provide further evidence in support of Hirschl's "juristocracy" thesis: courts are willing to transform policy in regards to many social issues, but they are unlikely promote those aspects of

³⁰² For discussion of the near unanimity of the aboriginal rights establishment, manifested most prominently in the Canadian government's 1996 Royal Commission on Aboriginal People, see Thomas Flanagan *First Nations? Second Thoughts*. pp 5-10.

the progressive agenda that threaten the interest of economic and political elites.³⁰³ It is important not to miss the forest for the trees, however. The Canadian Supreme Court has not re-defined the relationship between aboriginal tribes and the Canadian polity as a relationship between separate sovereigns. But it *has* transformed the meaning and scope of aboriginal and treaty rights, by adopting both an “evolutionary” understanding of treaty agreements, and through novel approaches to the use of evidence that expand the opportunities for aboriginal litigants. This judicially managed transformation of aboriginal law was not dictated by the Constitution Act of 1982, but for, better or worse, Section 35 of the Constitution Act authorized this transformation by judicializing this area of public policy. The more limited success of aboriginal litigants in the American Supreme Court is a consequence of the more limited protections for aboriginal rights in the Constitution of 1787—not simply a result of the more conservative character of American justices.

In contrast, the differences between parliamentary and Presidential-Congressional government help to explain the contrasting approach to environmental law adopted by Canadian and American courts. Canadian courts have transformed many of the *procedural* aspects of environmental decision-making, particularly in regards to the law of standing. But Canadian courts have typically refrained from challenging the statutory interpretations and scientific conclusions of environmental policy makers. Thus, while the values of what might be called legal pluralism or even participatory democracy have opened Canadian courts to environmentalist claimants, Canadian courts have rejected substantive environmentalist claims. In the United States, the transformation of procedure in environmental law has more often lead to a transformation in the substance of environmental policy. This is because the differing institutions of the American political system, particularly the separation of powers,

³⁰³ Hirschl, *Towards Juristocracy* pp 213-214.

create greater space for judicial intervention into environmental policy. When American courts adjudicate environmental policy, they typically encounter not “the government” but rather a conflict within government, conflicts between the often vaguely-expressed intentions of Congress and the decisions of the executive branch. Despite the impact of the *Chevron* decision, American courts are still more likely than Canadian courts to justify intervention into environmental policy-making based upon the tension between legislative intent and executive decision-making.

The absence of environmental activism by the Canadian court is an anomaly for those scholars who view judicial decision-making through a political lens. Judged by its decisions in aboriginal law but also in areas related to gay right, women’s rights, and criminal rights, the Canadian court has been liberal or left-leaning in the post-Charter era.³⁰⁴ Why has this liberal trend not been extended to environmental law decisions? It is difficult to believe that this is simply because of the idiosyncratic policy preferences of the judges—particularly when a broad number of Canadian trial and appellate courts judges have all rejected the substantive claims of environmentalist litigants. The simplest explanation is that the legal and institutional conditions for judicial activism in environmental law do not exist in the Canadian political system; in particular, the institutional dependence of “the government” on “the legislature” in a parliamentary system makes it difficult for courts to claim that executive branch decisions have departed from “legislative intent.” Canada’s constitutional transformations have increased the power of the courts to protect certain spheres of individual rights, but judging by the case of environmental policy, the capacity and willingness of courts to make policy through statutory activism remains largely unchanged. I have also suggested that a purely political perspective cannot fully

³⁰⁴ Though, of course, never “leftist” enough for those still waiting for the revolution. E.g. Joel Bakan *Just Words: Constitutional Rights and Social Wrongs*. Toronto: University of Toronto Press, 1997.

account for the pattern of environmental law decisions in American appellate courts, though this claim is not central to my overall argument. What is central is the fact that American judges, in contrast with their Canadian counter-parts, are more likely to intervene into the details and substance of environmental policy-making.

The conclusions of this study have important implications for those scholars who are primarily interested in what courts do and how they make their decisions, and for those citizens and scholars who are primarily interested in what courts should (or should not) be doing. The contrasting roles of Canadian and American courts in aboriginal and environmental law challenges the views of those who regard the court decisions as being largely a consequence of the ideological preferences of justices. Environmentalist litigation has limited success in Canada, and aboriginal litigation has had considerable success, not simply because of the values and preferences of Canadian judges, but because of the constitutional and institutional features of the Canadian regime. The contrasting experience of environmentalist and aboriginal litigants in the United States provides support for this claim. For the remainder of this conclusion, I will assess how these findings relate to other comparisons of judicial power in Canada and the United, and consider some possible implications and areas for future research. I will also explain how attention to the constitutional and institutional limits on judicial power might help to shape political debate over the legitimacy of political jurisprudence and judicial activism.

The case of gay rights appears to provide support for those who regard judicial ideology and cultural differences as the primary causes of disparate outcomes in Canadian and American jurisprudence; this contrasts with this study of aboriginal and environmental law, which has stressed the importance of legal and institutional differences. Over the last decade, Canada has experienced a judicial transformation in gay rights related to matters such as employment and marriage. Gay rights decisions in

American courts have not gone as far in endorsing gay rights, and they have elicited far more political and legal opposition. James Pierceson explains the contrasting development of gay rights in Canada and the United States as a consequence of cultural differences between the two nations, emphasizing in particular the “richer” liberalism that has come to dominate Canadian political culture, a liberalism that endorses a broader notion of equality than the negative liberalism that predominates in the United States.³⁰⁵ Despite these differences, Pierceson suggests that the case of gay rights illustrates a new dynamic in North American constitutional law. While influence in constitutional doctrine has traditionally flown south to north, Pierceson argues that American courts and American legal culture is likely to follow Canadian developments in areas such as same-sex marriage, spousal benefits, adoption rights, and so forth.

Pierceson’s analysis contrasts with the analysis of environmental and aboriginal law presented here because it explains different legal outcomes as a consequence of cultural differences. Furthermore, he argues that those legal differences are likely to decline as a consequence of cultural convergence. According to his argument, the “Canadianization” of gay rights litigation in the United States is driven by broader cultural changes, and depends primarily on the changing ideology of judges. Pierceson does not extend his analysis beyond the issue of gay rights, and does not consider whether or in what way the “convergence” of Canadian and American jurisprudence in gay rights is a sign of a broader trend. If, as I have argued, Canadian and American jurisprudence is not converging in environmental and aboriginal law, and if this is not likely to be affected by the general ideological predispositions of judges, what accounts for the case of gay rights jurisprudence?

³⁰⁵ Jason Pierceson, *Courts, Liberalism, and Rights: Gay Law and Politics in the United States and Canada*. Philadelphia: Temple University Press, 2006.

One hypothesis is that the convergence of Canadian and American jurisprudence is most likely to occur in areas of law and policy that are most readily cognizable under the rubric of individual rights. In many instances, the kinds of questions that must be addressed by Canadian and American courts when dealing with individual rights (e.g. whether a given act is “speech,” whether a classification is a violation of equality rights) are identical.³⁰⁶ Environmental law cases in Canada differ from those in the United States because of tensions between executive action and legislative intent that emerge in the American context. Section 25 of the Charter and Section 35 of the Constitution Act cast a shadow over aboriginal law in Canada, one that is not present in American law. In the case of issues related to gay rights, the institutional or legal environment is essentially the same—both nations have provisions that guarantee equal protection of the law, and courts in both countries must consider in what instances legislatively-drawn categories violate equal protection. In regards to some equal protection issues, the debate in Canadian courts has been less contentious, not only because of the greater ideological unity of Canadian judges but also because the framers of the Constitution insulated affirmative action programs from “equal protection” challenges. But in both Canada and the United States, the meaning of equal protection of the law raises identical issues; the uncertainty over the meaning of equal protection creates the space for ideological divisions amongst judges.³⁰⁷ The ultimate outcome of these judicial conflicts depends very much on the political forces which influence the court, whether in terms of public opinion, the “evolution” or development of individual justices, or—most

³⁰⁶ Ronald J. Krotzyski, Jr. *The First Amendment in Cross-Cultural Perspective*. New York: New York University Press, 2006 p. 4.

³⁰⁷ The uncertainty over the meaning of equal protection of the law may arise as much from the limitations of the judges, as from the complexity of the questions they address. For a critique of the premises of gay marriage litigation, see Robert P. George, *In Defense of Natural Law*. Oxford: Oxford University Press, 1999.

importantly—the appointment process. Aboriginal law in the United States is not susceptible to political forces and ideology in the same way or to the same degree, and this is also true regarding environmental law in Canada.

The Supreme Court of Canada's gay rights jurisprudence raises questions about the legitimacy of judicial power. This contrasts with the role of Canadian courts in aboriginal and environmental law. The Constitution Act empowers the Courts to intervene into aboriginal issues, and the court has done so; the Constitution Act changes nothing in regards to Canadian environmental policy, and Canadian courts have remained deferential to the environmental policy decisions of governments (especially the national government). Environmentalist litigants have achieved some successes regarding the procedures involved in environmental policy, but courts in Canada have not gone as far as have American courts in challenging the substance and details of environmental policy. In endorsing the idea that gays and lesbians form a "suspect class," the Court cannot rely on the specific intentions of the framers or the specific words of the Constitution Act and the Charter of Rights and Freedoms. Instead, they act as Philosopher-Kings, constitutional prophets, and comparative anthropologists, assaying the development of the world-spirit in order to push the Canadian polity along the path to enlightenment and true freedom; or at least, that is how conservative critics of the court would view it. And here they would be correct—to some extent. The court has certainly acted as the "vanguard of the intelligentsia" in endorsing gay rights, as have their liberal counterparts in certain American states. The intelligentsia, however, may well be leading the Canadian people. The gay rights decisions of the Court have not sparked public outcry, and the Court remains the political institution with the highest degree of public approval. The gay rights decisions of the Canadian Supreme Court rest on thin legal justifications, but it is difficult to say that the cases raise a "counter-majoritarian" problem.

Canadian gay rights jurisprudence nevertheless illustrates well the “Court Party” thesis of Morton and Knopfy, the idea that the judicial power is directed by judges and interest groups, not by the text of the Charter or the intentions of its framers. In the case of gay rights, the similarities between Canadian judges and their liberal counterparts in the American judiciary also suggests that a political interpretation, rooted in individual policy preferences of judges, is more useful in explaining this aspect of law than in the case of aboriginal and environmental jurisprudence. Is this a sign that there is an emerging liberal, North American jurisprudence of *individual* rights? This is a possibility. Though gay rights decisions, and even to some extent decisions dealing with women’s rights, raise acute cultural and religious controversies, they are in some ways *less* controversial from a legal perspective than many aboriginal and environmental rights claims, in which private groups attempt to direct public policy, place limits on the sovereignty of the state, assign access to natural resources based upon ethnicity, etc. Gay rights decisions deal with momentous moral questions, but from a legal perspective the claims are not so strange: they deal with *individuals* and their relationship to the state, in particular, the claims of individuals to have been denied a benefit, due to an arbitrary classification by the state. In dealing with controversies of this kind, differing judicial decisions are based upon differing assessments of what classifications are arbitrary. Those differences will not be affected by the institutional differences between Canada and the United States, but will instead be shaped by judicial ideology.

However, the evidence for the convergence of Canadian and (liberal) American jurisprudence in other aspects of individual rights is incomplete. Part of the problem is that the rights provisions of the Canadian and American constitutions do differ in some significant ways. Ronald Krotoszynski, in his comparative study of free speech jurisprudence, argues that the Canadian Supreme Court has occupied a middle

ground between the libertarian “market place of ideas” model that dominates in American law, and post-war German jurisprudence in which freedom of speech has been subordinated to other values such as human dignity.³⁰⁸ In his attempt to explain the Canadian Court’s willingness to accept government limitation on free speech, Krotoszynski emphasizes the limits that have been built into the Charter of Rights and Freedoms itself—not so much the dead letter Section 33 “notwithstanding clause,” but rather the Section 1 “reasonable limitations” clause, which allows the court to uphold limits on the rights of free speech, as long as those limits are “reasonable” in a “free and democratic society.”³⁰⁹ Through Section 1, the Canadian Constitution endorses Felix Frankfurter’s approach to freedom of speech, not the First Amendment absolutism of Hugo Black. As a consequence, the Canadian Court has given government considerable leeway to enact restrictions on speech such as hate crime and anti-obscenity laws.

The issue which Krotoszynski does not fully address is whether the “reasonable limits” clause leads to outcomes in Canadian jurisprudence that cannot be explained on the basis of ideology alone. Is the Canadian Supreme Court’s perception of what constitutes a “reasonable limit” on free speech determined by party affiliation and ideological predispositions? Based on the limited range of cases addressed in *The First Amendment in Cross-Cultural Perspective*, the answer would seem to be no. However, one problem with evaluating the ideological aspects of free speech cases is that they raise issues that are not easily mapped onto a liberal-conservative continuum. For instance, in endorsing government prosecution of a prominent Native Canadian leader for anti-semitic ravings that violated hate crime laws, was the Court adopting a

³⁰⁸ Krotoszynski, *The First Amendment in Cross-Cultural Perspective*. New York: New York University Press, 2006.

³⁰⁹ Janet Hiebert, *Limiting Rights: The Dilemma of Judicial Review*. Montreal-Buffalo: McGill-Queen’s University Press, 1996.

progressive or conservative agenda? What about the willingness of Canadian Courts to uphold anti-obscenity laws? Krotoszynski makes the case that the court's free speech jurisprudence tends to have conservative consequences. In accepting hate crime laws, the Court has also accepted the government's highly selective approach to hate crime enforcement: expressions of racial hatred made by marginal groups leads to prosecution, while equally inflammatory statements from government officials (particularly in Quebec) are left un-prosecuted. In accepting anti-obscenity laws, the Court has also accepted the disparate treatment that gay and lesbian publications receive from Canadian customs officials. We might be inclined to interpret the Canadian Supreme Court's willingness to uphold hate-crime and anti-pornography laws as part of a general "progressive project," one that is fully consistent with the Court's gay rights jurisprudence. But the ideological issues are blurred. As is well known, conservative legal scholars have long argued against the expansive interpretations of First Amendment rights—perhaps less well known is the fact that conservative legal scholars are not only concerned with the ways in which First Amendment jurisprudence has been used as a shield for pornography and obscenity. Hadley Arkes, for instance, has argued that freedom of speech should not be extended to include group defamation, including the defamation of racial groups.³¹⁰ Krotoszynski has raised some interesting hypotheses about the consequences of Canadian free-speech cases, but further investigation—and a broader range of cases—is necessary to evaluate the ideological and political dimensions of free speech jurisprudence in Canada.

Such an investigation would have to focus on whether the "judicial balancing" promoted by Section One of the Canadian Charter has led Canadian courts to defer to

³¹⁰ Hadley Arkes, *The Philosopher in the City: The Moral Dimensions of Urban Politics* (Princeton: Princeton University Press, 1980) pp 23-56.

government in a consistent and deferential way, or whether the deference shown by the court varies depending upon the political goals of speech regulations, or the characteristics of those whose speech is being regulated. Further comparative analysis of Canadian and American free speech jurisprudence is still necessary as well, as Krotozynski is too quick to accept the claim that American courts have accepted the Holmesian “marketplace of ideas” metaphor as their guide to free speech. American judges—at least, many of them—accept restrictions on freedom of speech in relation to political expression that are every bit as draconian as those imposed by the Canadian state. Furthermore, it may be the case that the “attitudinal model” may be particularly apt in explaining the hypocrisy of American free speech jurisprudence, in which liberal judges have endorsed restrictions on peaceful abortion protesters and conservatives endorse restrictions on political pamphleteering in supposedly private spaces such as shopping malls and housing developments.³¹¹ It is still an open question whether Section One of the Charter, in allowing for “reasonable limits” on free speech rights, encourages a consistently deferential approach by Canadian Courts or whether it allows them to favor some groups over others.

Other studies have attempted to show how, much like in the case of freedom of speech, the specific features of the Canadian Charter of Rights and Freedoms have shaped post-Charter jurisprudence, thereby undermining the claims of those who argue that Canadian Courts have asserted “judicial supremacy” in the post-Charter era. James Kelly has argued that the Canadian Supreme Court, in supervising police conduct and the criminal process, has not simply aped the “due process” model of American jurisprudence developed during the Warren Era, but has instead maintained

³¹¹ Margaret Kohn, *Brave New Neighborhoods: The Privatization of Public Space*. New York: Routledge, 2004.

many aspects of the “crime control” model of criminal rights.³¹² So, for instance, the court has adopted a version of the exclusionary rule that, in contrast with the general approach of American courts, is less likely to lead to the exclusion of evidence as a remedy for procedural errors committed by police officers.

Canadian jurisprudence in the area of criminal rights is best characterized, according to Kelly, as being moderately activist, in that it recognizes, perhaps more adequately than American criminal rights jurisprudence, the need to balance the imperatives of crime control and due process when overseeing the actions of police and prosecutors. The liberalism on display in the Canadian Supreme Court’s gay rights jurisprudence has been more qualified in the area of criminal rights. Similarly, and perhaps most surprisingly, the Canadian court has engaged in what might be called conservative or even libertarian activism in cases dealing with Canadian health policy. The differences between Canada’s state-monopolized health care regime and America’s mixed government-private system are great enough that a comparison of health care litigation is very difficult. The significance of the Court’s conservative activism in health care policy is worth considering, however, because it seems to contrast with the findings of this study in the area of environmental policy. The health care decisions of the court are an anomaly, because health care law seems to be more similar to environmental law than issues in gay law, aboriginal law, and criminal law, in that the Constitution Act and Charter did not create any specific rights related to health care. More specifically, and unlike the case of criminal rights discussed by Kelly, there are no indications that the framers of the Charter and Constitution Act thought that their constitutional innovations would affect the health care policy status quo. Why have Canadian courts challenged the statism of Canadian health care, in a

³¹² James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent*. (Vancouver: UBC Press, 2005) pp 107-110.

way that promotes greater individual freedom and even threatens to undermine the state monopoly on health care, when it has refrained from endorsing the substantive goals of environmental litigants?

The answer may lie in the fact that, while the framers of the Constitution Act and Charter did not specifically consider the question of how these documents would affect health care policy, courts found it reasonable to extend enumerated rights to cover health policy related claims. That Canadian courts have not, for the most part, found the Constitution Act and Charter sufficiently flexible so as to encompass environmental rights is a good sign that the judiciary has not been captured by liberal litigants. In the case of *Waldman v. Medical Services of British Columbia*³¹³ the Supreme Court of British Columbia found that the province's attempt to control the geographic dispersion of physicians in the province violated the equality and mobility rights protected by the Charter.³¹⁴ Similarly, in the case of *Chaolli v. Quebec*³¹⁵ the Supreme Court of Canada struck down two provincial statutes in Quebec that limited access to private health care, on the grounds that long waiting lists for medical treatment violated Quebec's Charter of Human Rights and Freedoms. The latter case is particularly interesting, in terms of the ideological dimensions of the case, because it is one of the few examples of judicial elaboration of the Charter in a way that protects economic rights from arbitrary government action. According to one of the Quebec Appeal's court judges who rejected Chaolli's claims, the Charter was not intended to protect "economic rights" of any kind—an interpretation that is probably correct, though one that also reveals the severe limits of the Charter as a statement of human

³¹³ *Waldman v. Medical Services of British Columbia*, 1997 CanLII 3113 (BC S.C.).

³¹⁴ Christopher Manfredi and Antonia Maioni, "Courts and Health Policy: Judicial Policy-Making and Publicly Funded Health Care in Canada." *Journal of Health Politics, Policy and Law*. Volume 27, Number 2 (April, 2002) pp 223-240.

³¹⁵ *Chaolli v. Quebec (Attorney General)* 1 S.C.R. 791, 2005 SCC 35 (CanLII).

rights. *Chaolli*'s challenge to the government health care monopoly may indicate an unexpected potential of Canadian jurisprudence to serve as a limit on Canadian statism. That this decision was reached by many of the same justices who endorsed expansive readings of aboriginal, criminal, and gay rights is yet another indication that, even if the court is driven by policy preferences, those preferences are not narrowly partisan or merely "post-materialist."

A closer reading of the *Chaolli* decision reveals that libertarians should not hold their breath in anticipation of a Canadian economic rights revolution, however. The Court did not provide a principled justification for overturning the state health care monopoly—the kind of consideration that, in reflecting on the problem of state monopolies and restrictions on economic freedom in general, would have had implications for many other areas of public policy. Instead of reasoning on the basis of principles and rights, the Court engaged in a sort of ad hoc comparative policy analysis: because most other countries with public health care do not forbid private insurance and private provision of health care, and because this does not appear to have a deleterious effect on public health systems, the Quebec government is not justified in maintaining a health care monopoly which imposes long waiting times on patients. The "arbitrariness" of law is measured by the state of international public opinion and international public policy, not by the logic of individual rights. The three dissenting justices argued, hysterically, that the *Chaolli* decision was a northern version of the discredited, even demonic *Lochner v. New York*, a decision that would threaten "Canadian values" (presumably, envy, resentment, and lousy health care for the very ill). But the decision was hermetically sealed off from principled reasoning, and thus its effects are likely to be felt only in the area of health care access. Those effects have already started to be felt, however: regardless of the decision's

philosophical merits, it shows that the court is willing to challenge and even re-structure the most significant area of public policy in Canadian politics.

The pattern of Canadian jurisprudence in gay rights, criminal law, and health care litigation does not reveal a consistent ideological pattern—just as the court’s activist aboriginal rights jurisprudence contrasts with its reticence in environmental law. The recent health care decisions undermine the “centralization thesis,” the idea that courts tend to reflect the political interests of the established regime. In addition, those decisions challenge the idea that Canadian jurisprudence is shaped solely by the supposedly collectivist and statist values of Canadian society. It is possible, of course, that the patterns of judicial decision making—bracketed by the liberal activism of the gay rights decisions, and the conservative activism of the health care decisions—reflect the idiosyncratic policy preferences of the Supreme Court, even if they do not reflect (at least not entirely) a partisan agenda. Is there any unifying theme to the activism of Canadian courts, if partisan ideology and “capture” by “the court party” fail to account for the various forms of activism and deference in Canadian jurisprudence? This is a possible area for future exploration, and one possible answer may lie in the way the views of judges are shaped, not by partisanship, but by their professional experiences as lawyers, and as member of international legal elites.

My central claim, however, is that whatever the role or sources of ideology and “political preferences,” the policy-making of courts is limited by constitutional language and institutional arrangements. Institutional differences explain why Canada has not had the experience of the judicialization of public policy through “statutory activism.” The convergence of judicial power in Canada and the United States has occurred in areas of law that deal with constitutionally protected individual rights, and this convergence requires both similarity between legal elites, and similarities in constitutional language. The differences that remain are most likely explained as

consequence of the array of political forces in Canadian and American society that shape the ideological predispositions of Canadian and American Courts.

The debate over the legitimacy of judicial activism is enhanced by paying attention to the limits placed upon judicial power by legal and political institutions. Proponents of judicial power have come perilously close to suggesting that judges should not hesitate to impose their own conceptions of public policy, notwithstanding the evidence of the limits of judicial effectiveness in shaping significant social change. Critics of judicial power, particularly in Canada, have emphasized that the courts are already politicized, and are dominated by ideologies that are systematically biased in a liberal or left-leaning direction. The response of judges, for the most part, is that their decisions are guided by the law, not by their personal politics, and that those who object to judicial-policymaking actually object to constitutionalism. This is only a half-truth, but it is still a *half-truth*. The deference of Canadian courts in environmental policy illustrates that the courts do not simply march lock-step with the “post-materialist” intelligentsia. Environmental law decisions in the United States are more political in character (though, as I suggest, they are less political or at least less partisan than one might expect). But the more activist character of American environmental law jurisprudence is a consequence of the institutional features of the American regime, most prominently, the endless tension between executive discretion and congressional intent. In aboriginal law, the claim that Canadian judges are guided by constitutional imperatives is not simply boilerplate. The Framers of the Constitution Act did not specify what policies they wanted to inaugurate in the area of aboriginal rights, but they clearly wanted—or at least agreed—to judicialize aboriginal rights and aboriginal treaties. In the absence of a similar constitutional imperative, American courts—and to a great extent, liberal American judges—have adopted a deferential approach to government decisions regarding aboriginal policy. Political

jurisprudence will always exist, and the dream of a completely impartial judiciary will always be a dream. But political jurisprudence exists within legal and institutional limits, limits that are created by constitutional architecture, limits that have not been erased by judicial ideology.

APPENDIX A:
ABORIGINAL LAW CASES IN THE SUPREME COURT OF CANADA,
1985-2007

Case/Year	Law-Subject	Position of Aboriginal Tribe/Organization/Individual	Outcome for Aboriginal Tribe/Organization/Individual
1. Simon v. The Queen, 1985	Are Indian hunting rights in Nova Scotia protected by 1752 treaty?	No	Win
2. Dick v. the Queen, 1985	Are hunting regulations applicable to Indians?	No	Loss
3. R. v. Horse, 1988	Do Indians have hunting rights on private lands, whether under the i) Wildlife Act, or by virtue of ii) treaty or iii) aboriginal rights? (Custom/usage)	Yes	i-iii Loss
4. R. v. Sparrow, 1990	Did the Fisheries Act extinguish aboriginal rights prior to the adoption of Section 35 of the Constitution Act?	No	Win (but aboriginal fishing rights still subject to reasonable limits)
5. R. v. Sioui, 1990	Do provincial logging regulations violate treaty rights protected by Section 35?	Yes	Win
6. Mitchell v. Peguis Indian Band, 1990	Is personal property of Indians on reservation subject to garnishment for non-payment of fees?	No	Win
7. R v. Horseman, 1990	Are Indians subject to Alberta Wildlife Act regs re. sale of animal skins?	No	Loss
8. Ontario v. Bear Island Foundation, 1991	Do the Temagami Indians have aboriginal title to various tracts of land in Ontario?	Yes	Loss
9. Williams v. Canada, 1992	Are unemployment benefits exempt from taxation?	Yes	Partial win Benefits are exempt, but there must be a tie to a reserve

Case/Year	Law-Subject	Position of Aboriginal Tribe/Organization/Individual	Outcome for Aboriginal Tribe/Organization/Individual
10. R. v. Howard, 1994	Were fishing rights extinguished by 1923 treaty?	No	Loss
11. Native Women's Association v. Canada, 1994	Is the government under any obligation to provide equal funding for aboriginal women's groups?	Yes (petitioner)	Loss
12. Blueberry River Indian Band v. Canada (DIAND), 1995	Did the government owe fiduciary duty to the Blueberry River Indian Band regarding the transfer of reserves and mineral rights that occurred in the 1940s?	Yes	Win
13. Canadian Pacific Ltd. v. Matsqui Indian Band, 1995	Do Indian tribunals have jurisdiction to determine if rail lines are on reserves, for purposes of tax assessment?	Yes	Loss
14. R. v. Vanderpeet, 1996	Do fisheries regulations infringe upon aboriginal right to sell fish?	No	Loss
15. R. v. Cote, 1996	Are Indian fishing rights dependent upon aboriginal title, or can they be free standing rights	No	Win
16. R. v. Pamajewon, 1996	Can an Indian tribe refuse to submit to casino licensing regulation, based upon right to self-government	Yes	Loss
17. R. v. Gladstone, 1996	Challenge to BC fishing regulations; have commercial fishing rights been extinguished?	No	Win
18. R. v. NTC Smokehouse, 1996	Is there an aboriginal right to commercial fishing?	Yes	Loss

Case/Year	Law-Subject	Position of Aboriginal Tribe/Organization/Individual	Outcome for Aboriginal Tribe/Organization/Individual
19. R. v. Lewis, 1996	Can fishing regulations be extended to reserves?	No	Loss (Fishing area not part of the reserve)
20. Nikal v. the Queen, 1996	Can an Indian fish on a reserve without a license?	No	Win/Loss The province can impose regulations, but there are several particular regulations which are not justified
21. R. v. Badger, 1996	Can Indians hunt on privately owned property within land that was ceded by treaty?	Yes	Loss
22. Delgamuukw v. British Columbia, 1997	Do the Indian bands have aboriginal title over thousands of square miles of British Columbia?	Yes	Win (on evidentiary issues; ultimate issue not decided)
23. St. Mary's Indian Band v. Cranbrook, 1997	Does the inclusion of rider mean that surrender of land (for airport) not absolute, therefore designated land, therefore subject to tribal taxation?	Yes	Loss
24. Opetchesaht Indian Band v. Canada, 1997	Can BC maintain an easement on tribal land that does not appear to have any termination date?	No.	Loss
25. Union of New Brunswick Indians v. New Brunswick (Minister of Finance), 1998	Can provincial government tax consumption items purchased off reserve?	No	Loss

Case/Year	Law-Subject	Position of Aboriginal Tribe/Organization/Individual	Outcome for Aboriginal Tribe/Organization/Individual
26. R. v. Sundown, 1999	Can Indian cut down trees, in violation of provincial regulations, when the trees are used for shelter during hunting (a protected aboriginal right in this instance)?	Yes	Win
27. R. v. Marshall I, 1999	Do treaty rights (1770s) confer exemptions from fishing regulations for Indians, based on “oral terms” of the treaty?	Yes	Win
28. R. v. Marshall II, 1999	Scope of government power to regulate treaty right—Whether judgment should be stayed pending disposition of rehearing if so ordered?	No	Win
29. R. v. Gladue, 1999	In a trial for manslaughter, did the sentencing judge take proper account of the aboriginal background of the defendant, in regards to sentencing	No	Loss
30. R. v. Wells, 2000	Criminal rights case; did sentencing judge fail to consider aboriginal background when applying custodial sentence?	No	Loss
31. Osoyoos Indian Band v. Oliver, 2001	Are land taken by province still “within the reserve” for purposes of taxation by the Indian tribe?	Yes	Win
32. Mitchell v. M.N.R., 2001	Do the Mohawks of Akwesane have the right to trade cross-border without paying customs duties?	Yes	Loss
33. Wewaykum Indian Band v. Canada, [2002]	2 bands claim each other’s reserves as their own; has this been precluded by the statute of limitations?	--	The claims have been precluded by the relevant statute of limitations

Case/Year	Law-Subject	Position of Aboriginal Tribe/Organization/Individual	Outcome for Aboriginal Tribe/Organization/Individual
34. Ross River Dena Council Band v. Canada, 2002	Do lands which had been “set aside” in the 1950s have reserve status?	Yes	Loss
35. Kitkatla Band v. British Columbia (Minister of Small Business, Tourism), 2002	Is the power to make exceptions to heritage preservation laws <i>intra vires</i> , in regards to the alteration and destruction of native cultural objects?	Yes	Loss
36. Paul v. British Columbia (Forest Appeals Commission), [2003]	Can Province constitutionally confer on an administrative tribunal the power to determine questions of aboriginal rights and title as they arise in course of tribunal’s duties	No	Loss
37. R. v. Powley, 2003	i) Do Metis have aboriginal right to hunt in Sault Ste. Marie environs?	i) Yes	i) Win
	ii) If so, are licensing limitations justified?	ii) No	ii) Win
38. Haida Nation v. BC Minister of Forests, 2004	i) Does the Crown have a duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims?	Yes	i) Win ii) Loss
	ii) Does this duty extend to third parties?		
39. R. v. Marshall; R. v. Bernard, 2005	Can Indians harvest logs for commercial purposes, without provincial licenses, as a result of treaty rights or aboriginal title?	Yes	Loss

Case/Year	Law-Subject	Position of Aboriginal Tribe/Organization/Individual	Outcome for Aboriginal Tribe/Organization/Individual
40. Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005	Does the Crown have a duty to consult Indian tribes regarding the construction of road on crown land, in which Indians retain aboriginal hunting rights?	Yes	Win
41. R. v. Sappier; R. v. Gray, 2006	Do two Indian tribes have the right to harvest wood on traditional territory? Application of Van der Peet Test: is wood harvesting part of the distinctive culture of the Indian tribes?	Yes	Win
42. R. v. Morris, 2006	Does treaty right to hunt include right to hunt at night with illuminating device?	Yes	Win
43. God's Lake Band v. McDiarmid Lumber, 2006	Indian Act Are band funds exempt from seizure in commercial dispute?	Yes	Loss

APPENDIX B:
ABORIGINAL LAW CASES IN THE SUPREME COURT
OF THE UNITED STATES, 1985-2006

Case	Issue	Position of Aboriginal Tribe/Organization/ Individual	Outcome
1. UNITED STATES v. DANN ET AL., 1985	Has the tribe's aboriginal title to the land been extinguished by an earlier monetary award by the Indian Claims Commission?	No	Loss
2. COUNTY OF ONEIDA, NEW YORK, ET AL. v. ONEIDA INDIAN NATION OF NEW YORK STATE ET AL., 1985	Can the Oneida sue for damages over 18 th century transfer of land that occurred in violation of Non-Intercourse Act of 1793?	Yes	Win
3. KERR-MCGEE CORP. v. NAVAJO TRIBE OF INDIANS ET AL., 1985	Are two tribal ordinances imposing taxes on business activities conducted on the tribe's land invalid because they had not been approved by the Secretary of the Interior?	No	Win
4. NATIONAL FARMERS UNION INSURANCE COS. ET AL. v. CROW TRIBE OF INDIANS ET AL., 1985	Does the a tribal court have jurisdiction over a personal injury suit between tribe member and school district, when school land located on reservation but owned by the state?	Yes	Partial Win: tribal court must be granted the opportunity to determine its own jurisdiction
5. MONTANA ET AL. v. BLACKFEET TRIBE OF INDIANS, 1985	Are state taxes applied to tribal royalty interest in oil and gas production authorized by Indian Mineral Leasing Act?	No	Win
6. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. v. PUEBLO OF SANTA ANA, 1985	Was an easement granted by the Pueblo to a telephone company invalid under the Non-Intercourse Act and the Pueblo land Act?	No	Loss
7. OREGON DEPARTMENT OF FISH AND WILDLIFE ET AL. v. KLAMATH INDIAN TRIBE, 1985	Did later agreements ceding land extinguish hunting and fishing rights of Klamath Indian tribe, thus subjecting them to state regulation?	No	Loss

Case	Issue	Position of Aboriginal Tribe/Organization/ Individual	Outcome
8. SOUTH CAROLINA ET AL. v. CATAWBA INDIAN TRIBE, INC., 1986	Was a tribal claim that 1840 transfer of land to South Carolina invalid under the Non Intercourse itself invalid, due the termination of the tribe's existence in the 1950's?	No	Loss
9. UNITED STATES v. MOTTAZ, 1986	Was a claim for damages regarding an invalid sale of Indian land time barred?	No	Loss
10. UNITED STATES v. DION, 1986	Do tribal members have a treaty right to exemptions from the Endangered Species Act?	Yes	Loss
11. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. v. ROY ET AL., 1986	Is an American Indian entitled to receive AFDC despite refusal to obtain social security number, due to religious beliefs?	Yes	Loss
12. THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION v. WOLD ENGINEERING, P. C., ET AL., 1986	Is a state statute that requires Indian tribes to consent to suit in all civil actions unduly intrusive on the Indian's common law sovereign immunity?	Yes	Win
13. IOWA MUTUAL INSURANCE CO. v. LaPLANTE ET AL., 1987	i) Is a federal court required to exercise diversity jurisdiction, where case with same parties is pending in trial court?	Yes	Win
14. CALIFORNIA ET AL. v. CABAZON BAND OF MISSION INDIANS ET AL., 1987	Must federally approved Indian bingo games comply with state regulations?	No	Win
15. AMOCO PRODUCTION CO. ET AL. v. VILLAGE OF GAMBELL ET AL., 1987	Did sale of leases for oil and gas exploration adversely affect aboriginal hunting and fishing rights? Did the Secretary of the Interior fail to comply with the Alaska National Interest Lands Conservation Act?	I) Yes II) Yes	Loss

Case	Issue	Position of Aboriginal Tribe/Organization/ Individual	Outcome
16. UNITED STATES v. CHEROKEE NATION OF OKLAHOMA, 1987	Did a federal navigation project that affected the riverbed interests of Indian require just compensation to be paid by the federal government, under the fifth amendment?	Yes	Loss
17. HODEL, SECRETARY OF THE INTERIOR v. IRVING ET AL., 1987	Does Indian Land Consolidation Act, which allows individual land allotments to escheat to tribe rather than descend by intestacy or devise, violate the Fifth Amendment by taking private property for public use without just compensation?	No (Native American organizations as amici curiae)	Loss.
18. Richard E. Lyng, Secretary of Agriculture, et al., Petitioners v. Northwest Indian Cemetery Protective Association et al., 1988	Can federal government authorize timber harvest near areas used by Indians for religious ceremonies?	No	Loss
19. EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF OREGON, ET AL. v. SMITH, 1988	Does dismissal for drug use (drugs part of Indian religious ritual) constitute unjustified infringement on free exercise of religion?	Yes	Loss
20. Oklahoma Tax Commission v. Graham, 1989	Has a federal question been properly pleaded in dispute over application of state taxes to Indian gaming venture?	Yes	Loss
21. MISSISSIPPI BAND OF CHOCTAW INDIANS v. HOLYFIELD ET AL., 1989	Are Indian children born outside reservation “domiciled” within the reservation for purposes of adoption proceedings?	Yes	Win
22. COTTON PETROLEUM CORP. ET AL. v. NEW MEXICO ET AL., 1989	Can New Mexico impose a severance tax on non-Indian gas/oil facilities on Indian reservation?	No	Loss

Case	Issue	Position of Aboriginal Tribe/Organization/ Individual	Outcome
23. Brendale v. Yakima Indian Nation, 1989	Do the Yakima have zoning authority over fee lands owned by non-members in i) the reservation's "closed area" and ii) the reservation's "open" area	i) and ii) Yes	i) Win ii) Loss
24. EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON, et al. v. SMITH et al., 1990	Can Oregon prohibit the use of Peyote in Native American religious ceremonies?	No	Loss
25. Duro v. Reina, 1990	Can a non-member Indian be subject to tribal criminal jurisdiction, when a non-Indian would not be subject to tribal jurisdiction?	Yes (Native American amici)	Loss
26. EDGAR BLATCHFORD, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS OF ALASKA, PETITIONER v. NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE, 1991	Does the 11 th Amendment bar suits by Indian Tribes against states without their consent?	No	Loss
27. OKLAHOMA TAX COMMISSION v. CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, 1991	1. May a state that has not asserted jurisdiction over Indian Land under Public Law 280 collect taxes for on-reservation sales of cigarettes to non-members? 2. Did the tribe waive its sovereign immunity by filing an action for injunctive relief?	No and no	1. Loss 2. Win
28. COUNTY OF YAKIMA v. Yakima Indian Nation, 1992	Can the county impose i) excise tax and ii) ad valorem tax on land, sale of land that had been allotted under the 1887 Dawes Act?	No and no	i) Win ii) Loss

Case	Issue	Position of Aboriginal Tribe/Organization/ Individual	Outcome
29. Lincoln v. Vigil, 1993	Did the Indian Health Service violate the Administrative Procedure Act when it discontinued a program for handicapped children?	Yes	Loss
30. South Dakota v. Bourland, 1993	Can tribes regulate hunting and fishing rights over non-members in disputed territory?	Yes	Loss
31. EMERY L. NEGONSOTT, PETITIONER v. HAROLD SAMUELS, WARDEN, ET AL., 1993	Does the Federal government have jurisdiction regarding Indian on Indian, on reservation crime?	Yes	Loss
32. OKLAHOMA TAX COMMISSION, PETITIONER v. SAC AND FOX NATION, 1993	Must an Indian live on reservation for presumption against state tax jurisdiction to be applied, in the context of a challenge to state taxation?	No	Win
33. NEW YORK, ET AL v. MILHELM ATTEA & BROS., INC., ETC., ET AL., 1994	Is a New York regulatory scheme enacted to prevent non-Indians from purchasing untaxed cigarettes an invalid exercise of a federal regulatory power?	Yes	Loss.
34. Hagen v. Utah (1994)	Does crime fall under state jurisdiction, when the crime has taken place in Indian lands that have been opened to settlement by non-Indians?	No	Loss
35. Oklahoma Tax Comm'n v. Chickasaw Nation (1995)	Can the state i) tax fuel sold on reservation and ii) wages paid to Indians who live off of the reservation (claim rooted in 1837 Treaty)?	No	i) Win ii) Loss
36. Seminole Tribe of Florida v. Florida, et al., 1996	Can Seminole Tribe sue the state of Florida for violation of duty to negotiate in good faith regarding gaming industry?	Yes	Loss

Case	Issue	Position of Aboriginal Tribe/Organization/ Individual	Outcome
37. BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS v. MARVIN K. YOUPEE, SR., ET AL., 1997	Does Indian land consolidation act violate property rights?	No (amici)	Loss
38. Strate v. A-1 CONTRACTORS AND LYLE STOCKERT, 1997	Can tribe member (widow of tribe member) sue company that she had an accident with on federal highway on Indian reservation in tribal court?	Yes	Loss
39. IDAHO, ET AL v. COEUR d'ALENE TRIBE OF IDAHO, ETC., ET AL., 1997	Does a tribe have title to banks/beds of a navigable water course, and thus rights to exclusive use and exemption from state regulation, based on 1873 executive order?	Yes	Loss
40. MONTANA, ET AL., PETITIONERS v. CROW TRIBE OF INDIANS ET AL., 1998	Can Crow Tribe get restitution for state taxes imposed upon mining company that had leased land from the tribe?	Yes	Loss
41. CASS COUNTY, MINNESOTA, ET AL. v. LEECH LAKE BAND OF CHIPPEWA INDIANS, 1998	Is the tribe exempt from county taxation on reservation land that had been sold to individuals but was re-purchased by the tribe? 1855 Leech band given reservation	Yes	Loss
42. ALASKA, v. NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT ET AL., 1998	Are the tribe's ANCSA land "Indian country," therefore entitling the tribe to tax business conducted on the land?	Yes	Loss
43. KIOWA TRIBE OF OKLAHOMA v. MANUFACTURING TECHNOLOGIES, INC., 1998	Is the Kiowa tribe subject to a breach of contract suit in Oklahoma courts?	No	Win
44. SOUTH DAKOTA, PETITIONER v. YANKTON SIOUX TRIBE ET AL., 1998	Did the Yankton Sioux cede governing authority over land it sold in the 19 th century?	No	Loss

Case	Issue	Position of Aboriginal Tribe/Organization/ Individual	Outcome
45. ARIZONA DEPARTMENT OF REVENUE, PETITIONER v. BLAZE CONSTRUCTION COMPANY, INC, 1999	Does federal law pre-empt application of state tax to Indian-owned company?	Yes	Loss
46. EL PASO NATURAL GAS COMPANY, ET AL., PETITIONERS v. LAURA NEZTSOSIE ET AL., 1999	Does Price-Anderson Act establish federal court jurisdiction for torts for regarding nuclear waste?	No	Loss
47. MINNESOTA, ET AL., PETITIONERS v. MILLE LACS BAND OF CHIPPEWA INDIANS ET, 1999	Did 1850 executive order extinguish tribes usufructuary rights established in 1837 Treaty?	No	Win
48. AMOCO PRODUCTION COMPANY, v. SOUTHERN UTE INDIAN TRIBE ET AL., 1999	Does a tribe that has been given rights to coal deposits also have rights to coalbed methane gas (alternative energy source)?	Yes	Loss
49. HAROLD F. RICE, v. BENJAMIN J. CAYETANO, GOVERNOR OF HAWAII, 2000	Does a Hawaii statute permitting only “Hawaiians”— that is, descendants of aboriginal peoples inhabiting Hawaiian Islands in 1778—to vote for trustees of state agency violate the Federal Constitution’s Fifteenth Amendment.	No	Loss
50. C & L ENTERPRISES, INC., v. CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, 2001	Has tribe waived sovereign immunity regarding contract dispute?	No	Loss
51. ATKINSON TRADING COMPANY, INC. v. JOE SHIRLEY, JR., ET AL., 2001	Can Indian Tribe impose a hotel tax on nonmember guests in hotel rooms that were located on non-Indian fee land within exterior boundaries of tribe’s reservation?	Yes	Loss
52. Chickasaw Nation v. United States, 2001	Tax question regarding exemptions; do Indian tribes receive identical exemptions as do state governments?	Yes	Loss

Case	Issue	Position of Aboriginal Tribe/Organization/ Individual	Outcome
53 NEVADA, ET AL. v. FLOYD HICKS, ET AL., 2001	Does a tribal court have jurisdiction over civil claims against state official	Yes	Loss
54. STATE OF ARIZONA v. STATE OF CALIFORNIA, ET AL., 2001	Are water rights claims of Indian tribe precluded by claims commission decision?	No	Win
55. United States v. Navajo Nation, 2003	Did payment rate for private company which has licensed to mine coal on federal Indian land violate the federal government's fiduciary duty to the Navajo?	Yes	Loss
56. INYO COUNTY, CALIFORNIA, et v. PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY et al., 2003	Can a state search an Indian casino as part of an investigation of welfare fraud?	No	Loss
57. UNITED STATES, PETITIONER v. WHITE MOUNTAIN APACHE TRIBE, 2003	Does the US gov't have a fiduciary duty regarding military base on Native American land? Must the government pay monetary compensation for decay of fort?	Yes	Win
58. UNITED STATES v. BILLY JO LARA, 2004	Does trial by Indian court and subsequent trial by federal court violate double jeopardy clause?	No (amici)	Win
59. CITY OF SHERRILL, NEW YORK, v. ONEIDA INDIAN NATION OF NEW YORK, et al., 2005	Does open market purchase of land that was previously part of Indian territory restore tax immunity privileges?	Yes	Loss
60. JOAN WAGNON, SECRETARY, KANSAS DEPARTMENT OF REVENUE, PETITIONER v. PRAIRIE BAND POTAWATOMI NATION, 2005	Can Kansas impose a gas tax on suppliers for Indian reservation?	No	Loss

Case	Issue	Position of Aboriginal Tribe/Organization/ Individual	Outcome
61. Cherokee Nation of Oklahoma v. Leavitt, 2005	Under the Indian Self-Determination and Education Assistance Act (ISDEAA) (25 USCS §§ 450 et seq.) which authorized the Federal Government and Indian tribes to enter into contracts in which the tribes promised to supply some federally funded services that a government agency would otherwise provide, there is a provision which) specified that the government had to pay a tribe's "contract support costs," which included some indirect administrative costs; is this a legally enforceable contract?	Yes	Win

APPENDIX C:
ENVIRONMENTAL LAW IN CANADIAN FEDERAL TRIAL AND
APPELLATE COURTS, 1990-1999

Decision: Government loses to pro-environment challenger (n=16)

Case/Year	Court	Issue and Outcome	Vote/Dissent
Canadian Wildlife Federation v. Canada, 1990	Trial	Challenge to environmental assessment process; Federal minister required to comply with EARPGO	
Friends of the Oldman River Society v. Canada, 1990	Appeal	Must federal government assert jurisdiction and complete EARPGO review process; Federal government must apply the process to this project	3-0
Edmonton Friends of the North Society v. Canada, 1991	Appeal	Appeal from order adding appellants as party subject to restrictions; proceedings seek to quash federal decisions regarding the approval of pulp and paper mill; the appeals court ruled that the trial court imposed improper conditions which “reduced appellants role almost to that of an intervenor rather than a full party.”	3-0
Carrer-Sekani Tribal Council v. Canada, 1991	Trial	Application to quash federal-provincial agreement re. ALCAN project; application for mandamus requiring respondents to comply with EARPGO granted	
Cree Regional Authority v. Canada, 1991	Trial	Application for mandamus ordering respondent to conduct environmental assessment of Great Whale River Hydro Electric Project	
Cree Regional Authority v. Canada, 1992	Trial	Application for mandamus to compel federal government to carry out federal environment and social impact assessment; the federal and provincial government cannot simply agree to conduct ONLY a provincial level process	
Eastmain Indian Band v. Canada, 1992	Trial	Application for mandamus ordering federal administrator to carry out federal environmental assessment with public input, as per EARPGO	
Tetzlaff v. Canada , 1992	Trial	Application for a series of order concerning the conduct of environmental assessment process	
Friends of the Island v. Canada, 1992	Trial	Application for EARPGO review of PEI-New Brunswick bridge, also challenge in light of the PEI Terms of Union.	

Case/Year	Court	Issue and Outcome	Vote/Dissent
Union of Nova Scotia Indians v. Canada, 1997	Trial	Application for judicial review of Minister of Fisheries/Oceans and Minister of Environment decision to accept CEEA report	
Friends of the West Country Association v. Canada, 1997	Trial	Motion to compel respondents to produce documents related to Sunshine Village Corp. project	
Alberta Wilderness Association v. Canada, 1998	Trial	Can a newly formed Indian association represent numerous Indian entities under CEEA review process? Yes; they can be added as intervenors	
Friends of the West Country Association v. Canada, 1998	Trial	Application for review of environmental assessment; applicants argued that a proposed bridge was integrally related to forestry operations, and the effects of forestry operations should be taken into account when reviewing the application for the bridge	
Societ Pour Vaincre la Pollution v. Canada, 1998	Trial	Application to stay minister's decision to continue salvage of Irving Whale barge pending final disposition of application for judicial review	
Alberta Wilderness Association v. Canada, 1999	Appeal	Appeal from trial division dismissal of application for review of coal project report; application allowed; CEEA mandates full environmental assessment in this case	3-0
Alberta Wilderness Association v. Cardinal River Coal, 1999	Trial	Application for review of Department of Fisheries and Oceans authorization of coal mines; did the joint federal/provincial review panel comply with CEEA? Did it conduct the hearing in accordance with procedural fairness? Application allowed; the panel failed to properly consider all information that had been submitted to it.	

Decision: Government wins in pro environment challenge (n=40)

Case/Year	Court	Issue and Outcome	Vote/Dissent
Friends of the Oldman River Society v. Canada, 1990	Trial	Challenge to federal decision not to assert jurisdiction over dam approval process	
Walpole Island Indian Band v. Canada, 1990	Trial	Motion for injunction against dredging of St. Clair river due to failure to comply with EARPGO	
Angus v. Canada, 1990	Appeal	Is EARPGO applicable to Order in Council re. VIA rail reduction of passenger rail services? Application dismissed due to delay in filing	
International Wildlife Coalition v. Canada, 1990	Trial	Application to restrain aquarium from capturing and transporting beluga whales; application to require minister to comply with EARPGO; standing granted, application dismissed	
Lifeforce Foundation v. Canada, 1990	Trial	Application to quash beluga whale catching license; application dismissed, no evidence that federal minister failed to take public concerns into account	
Naskapi-Montegnais Innu Association v. Canada, 1990	Trial	Application for order stopping low-flying military air operations; must project be halted during EARPGO assessment? No.	
Canadian Wildlife Federation v. Canada, 1991	Appeal	Minister does not have to withhold license prior to completion of environmental assessment, vis a vis Rafferty-Alameda dam construction project	
Teztlaff v. Canada, 1991	Trial	Application for order to enforce compliance with mandamus requiring appointment of environmental review panel	
Cantwell v. Canada, 1991	Trial	Application to quash minister's proposal to construct coal fired generating station; challenge to validity of environmental assessment	
Cantwell v. Canada, 1991	Appeal		
Carrier-Sekani Tribal Council v. Canada, 1992	Appeal	Does EARPGO apply to federal-provincial authorization of water project? Application dismissed.	3-0
Vancouver Island Peace Society v. Canada, 1992	Trial	Application to quash approval of visit by American nuclear vessels to Canadian port, as approvals were made without EARPGO compliance; application dismissed	

Case/Year	Court	Issue and Outcome	Vote/Dissent
Friends of the Oldman River Society v. Canada, 1993	Trial	Application seeking mandamu requiring Minister of Transportation to implement recommendations of environmental assessment panel; application dismissed	
Friends of the Island Inc. v. Canada, 1993	Trial	Application seeking mandamus regarding decisions to build bridge between PEI and mainland; bridge in violation of terms of Union; improper EARPGO process Application dismissed; no rights violation until ferry service actually discontinued	
Eastmain Band v. Canada, 1993	Appeal	Appeal by Quebec and Canada against order requiring the Eastmain Hydro-electric project to be subject to public environmental review process; application allowed; EARPGO does not apply to this project	
Canadian Parks and Wilderness Society v. Canada, 1994	Trial	Application for interim order setting aside decision to issue timber cutting permit; application dismissed; Parks Canada can assess individual components of long-range planning separately from other components	
Vancouver Island Peace Society v. Canada, 1994	Trial	Applications for mandamus quashing approval of nuclear vessel visits in Canadian ports due to failure to comply with EARPGO; application dismissed	
Friends of the Oak Hammock Marsh v. Canada, 1994	Trial	Application to quash federal approval of "Ducks Unlimited Educational Center" in Oaks Hammock Marsh; application dismissed	
Pulp, Paper, and Woodworkers Local 8 v. Canada, 1995	Appeal	Appeal from trial division decision quashing ministerial decision to register pesticide Busan; application allowed; trial division judge engaged in unwarranted analysis of Agriculture Canada evidence	
Canadian Parks and Wilderness Society v. Canada, 1996	Trial	Application for declaration that Westmin Resources Ltd. is required to obtain land use permit prior to exploratory mining; permit to move bulldozers only took environmental effects of movement into account, not the activities at the company's site; application dismissed; adequacy of review "somewhat moot" as bulldozers had completed work and were removed from the site	
Friends of the Island Incorporated v. Canada, 1996	Appeal	Appeal from trial divisions decision re. fixed link bridge; principal issue= adequacy of EARPGO process; application dismissed	

Case/Year	Court	Issue and Outcome	Vote/Dissent
Alberta Wilderness Association v. Express Pipeline Ltd. 1996	Appeal	Application for leave to appeal NEB approval of pipeline project; application dismissed; applicants fail to raise questions of law, and simply attack the quality of evidence and conclusions of NEB	
Societe Pour Vaincre la Pollution v. Canada, 1996	Trial	Application for declaration that respondents have not complied with environmental assessment law; dispute is over whether PCBs should be pumped before a sunk barge is removed from a river; application removed	
Canadian Parks and Wilderness Society v. Canada, 1997	Appeal	Appeal from trial division dismissal of application for judicial review of construction permit with Sunshine Village Corp.; also appeal of decision to refuse to order Minister of Parks to subject long-range development plan to EARPGO; application dismissed; Ministers retain residual powers to engage in assessments	2-1 Dissent: 1992 approval cannot be subjected to subsequent reviews
Ghali v. Canada, 1997	Trial	Motion for Mandamus ordering Minister of Transport to proceed under CEAA with environmental assessment of newly liberalized international flight schedule; application dismissed	
Innu Nation v. Canada, 1997	Trial	Application to set aside decision authorizing provision of funds for Ptarmigan Trail in Labrador; application dismissed	
Community before Cars Coalition v. National Capital Commission, 1997	Trial	Application for review of decision to widen bridge; issues = jurisdiction of commission, conflict of interest, interpretation of EARPGO; application dismissed	
Nanoose Conversion Campaign v. Canada, 1998	Trial	Application for judicial review of decision not to require ocean dumping permit in relation to naval operations (i.e. torpedoes are being “dumped”) application dismissed; “The Court presumes that the reference to nuclear warheads is not a reference to reality...” The minister is free to determine that torpedoes are not a significant environmental threat	
Alberta Wilderness Association v. Canada, 1998	Trial	Application seeking declaration that environmental assessment of coal project failed to comply with CEAA; application dismissed	

Case/Year	Court	Issue and Outcome	Vote/Dissent
Alberta Wilderness Association v. Canada, 1998	Trial	Application for judicial review of report regarding coal project; application dismissed	
Lake Petticodiac Preservation Association v. Canada, 1998	Trial	Application for interim relief pending disposition of judicial review application; applicants seek declaration that screening report decisions re. Lake management project null and void; application dismissed	
Tsawassen Indian Band v. Canada, 1998	Trial	Application for review of port construction authorization; effects on Indian Band not properly assessed; application dismissed; the port is not a project within the meaning of the CEAA	
Qikiqtami Inuit Association v. Canada, 1999	Trial	Review of Nunavut Water Board decision to renew water license on Nanisivik Mines; challenged due to failure to take all evidence into account; application dismissed	
Lavoie v. Canada, 1999	Trial	Application for interim relief in context of application for judicial review of decision to issue construction permits for hydro facilities; application dismissed	
Citizens' Mining Council of Newfoundland v. Canada, 1999	Trial	Application challenging environmental assessment of nickel mining project, arguing that two projects should be assessed separately; application dismissed	
Lavoie v. Canada, 1999	Trial	Application alleging that Ministry of Fisheries and Oceans authorization is unlawful because not all relevant documents were made public; application dismissed	
Canadian Environmental Law Association v. Canada, 1999	Trial	Application for declaration that Minister of Environment exceeded her jurisdiction in signing four federal-provincial environmental policy agreements; application dismissed	
Animal Alliance of Canada v. Canada	Trial	Application for review of decision to create a special hunting season for over-abundant snow geese; applicants allege violations of 1916 Migratory Birds Act, unlawful sub-delegation, erroneous findings of fact; application dismissed	
Bow Valley Naturalists v. Canada, 1999	Trial	Challenge to decision to allow development of meeting facility at Chateau Lake Louise in Banff National Park; application dismissed	

Case/Year	Court	Issue and Outcome	Vote/Dissent
Manitoba's Future Forest Alliance v. Canada, 1999	Trial	Application to set aside bridge construction permit; challenge to "scoping" of the project; application dismissed; note rejection of broad interpretation of CEAA "independent utility" principle	

Decision: Government loses to anti-environment challenger (n=4)

Case/Year	Court	Issue and Outcome	Vote/Dissent
Quebec v. Canada, 1991	Appeal	National Energy Board does not have authority to impose production conditions (e.g. EARPGO review) on Hydro Quebec as condition for granting of export license	3-0
Sunshine Village Corp. v. Canada, 1995	Trial	Application for review of refusal to grant a previously approved logging permit; EARPGO does not permit reassessment of license in light of new public concerns, once the permit has been granted	
Bowen v. Canada, 1997	Trial	Application for CEAA review of decisions to close airstrips in Banff National Park	
B.C. Hydro and Power Authority v. Canada, 1998	Trial	Application for review of federal water control order under the Fisheries Act Application allowed; Minister did not provide B.C. Hydro with proper notice/opportunity to respond	

Decision: Federal government wins in anti-environment challenge (N=9)

Case and Year	Court	Issue	Vote
Provirotec Inc. v. Canada, 1990	Trial	Application against ministerial decision not to create board of review regarding PCB regulations	
Provirotec v. Canada, 1991	Trial	Application for injunction exempting plaintiffs from PCB export regulations; action for declaration that regulation is ultra vires	
Alberta v. Canada, 1991	Trial	Application by Alberta to halt environmental assessment review; province questioned whether federal government could provide for review of environmental and socio-economic concerns that fall within areas of provincial jurisdiction	
Cominco Ltd. v. North West Territories Water Board, 1991	Appeal	Appeal from NWTWB dismissal of application to increase percentage of zinc and lead in mine effluent; appellant argued that the board lacked jurisdiction to impose conditions on the license	3-0
Curragh Resources v. Canada, 1992	Trial	Application to determine whether the Crown has the authority to impose mitigation measures re. Vanguard mining project	
International Mineral and Chemicals Corp. v. Canada, 1993	Trial	Company applied for declaration that a creek = navigable water, in order to insure that the federal government would be responsible for the conduct of an environmental assessment prior to the grant of mining licenses; application dismissed	
Sunshine Village Corp. v. Canada, 1995	Trial	Motion to strike respondent status for members of environmental assessment panel in judicial review of proceedings regarding review of long-range development plan; motion dismissed	
Sunshine Village Corporation v. Canada, 1996	Trial	Application for review challenging appointment of review panel by minister of Environment under CEAA; Sunshine argued it had received full approval in 1992; application dismissed; approval in 1992 did not preclude future assessments of individual components of the project	
Sunshine Village Corp. v. Canada, 1999	Trial	Application for review of Minister of Canadian Heritage's decision to retain federal environmental assessment panel; application dismissed	

APPENDIX D:
CANADIAN ENVIRONMENTAL ASSESSMENT CASES

Note cases which were excluded: rulings do not involve interpretation of CEAA (e.g. ruling on exclusion of evidence, cases based upon treaties with Indian tribes)

Rulings against Government: 7

Rulings for Government: 28

Number of Cases with Dissenting Votes: 2

Pro-gov/ anti-gov = decision in favor of/ against government

Pro-env/ anti-env = decision in favor of/ against environmentalist group or claimant

Case and Year	Court	Description	Outcome	Majority	Dissent
Eastmain Band v. Canada, 1992	FCA	Government Actor: Attorney General, Hydro Quebec Project: James Bay Hydro Electric Dam Law: EARPGO Issue: Is there a duty for the federal government to conduct an environmental assessment, once irrevocable steps towards the completion of the Project have been taken? Judicial Actions: In regards to EARPGO claims, a "Project" is no longer in the "Project" stage once irrevocable steps have been taken to complete the Project. EARPGO review only applies to "Projects" in the planning stage.	Pro-gov Anti-env	Marceau, Decary and Letourneau J.J.A.	
Curragh Resources Inc. v. Canada, 1993	FCA	Government Actor: Minister of Indian and Northern Affairs, Minister of Fisheries and Oceans Project: water license for mining company Law: EARPGO Issue: Do the ministers have the authority under EARPGO to impose additional conditions for water license? Judicial Actions: Minister of Indian and Northern Affairs had the authority to impose conditions	Partial Pro-gov Pro-env	Isaac, Stone, Craig	

Case and Year	Court	Description	Outcome	Majority	Dissent
Sea to Sea Greenbelt Society v. Greater Victoria Water District, 1996	BCCA	Government Actor: Ministry of the Environment/GVWD Project: expansion of reservoir capacity Law: BC environmental assessment act Issue: does the BC EAA apply to this Project? Judicial Action: appeal dismissed, lower court upheld	Pro-gov Anti-env	Williams, McEachern, Goldie	
Canadian Parks and Wilderness Society v. Superintendent of Banff National Park, 1996	FCA	Government Actor: Parks Canada Project: ski resort Law: EARPGO, CEAA Issue: do developments fall under the EARPGO and CEAA? Had Project received valid final approval, or was it subject to ongoing environmental review? Judicial Action: Project subject to ongoing environmental review	Pro-gov Pro-env	Stone, Desjardins	McDonald
Vuntut Gwitchin First Nation v. Canada (Attorney General) 1998	FCA	Government Actor: DIAND Project: well-testing Law: CEAA Issue: challenge to permit decision Judicial Action: application denied; lower court affirmed	Pro-gov Anti-env	Stone, Denault and Decary	
Alberta Wilderness Association v. Canada, 1998	FCA	Government Actor: Department of Fisheries and Oceans Project: open pit coal mine in Jasper national park Law: CEAA Issue: failure to complete EA prior to issuing authorizations Judicial Action: application allowed; environmental assessment must be conducted; lower court overturned	Anti-gov Pro-env	Strayer, Robertson and Sexton J.J.A.	
Algonquin Wildlands League v. Ontario (Minister of Natural Resources), 1998 CanLII 5756 (ON C.A.)	ONCA	Government Actor: Minister of Natural Resources Project: Forest management plans Law: Crown Forest Sustainability Act Issue: Did the plans comply with the act? Judicial Action: Statutory requirements are mandatory, not directory	Anti-gov Pro-env	CARTHY, MOLDAVE R and FELDMAN	

Case and Year	Court	Description	Outcome	Majority	Dissent
Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans) 1999	FCA	Government Actor: Coast Guard Project: bridge Law: CEAA Issue: Scoping, application of independent utility principle (Projects cannot be separated for purpose of EA if they have no independent utility) Judicial Action: appeal dismissed; Coast Guard decision re. scoping of Project invalid	Pro-env Anti-gov	Linden, Rothstein, McDonald	
Sharp v. Canada (Transportation Agency) 1999	FCA	Government Actor: Transportation Agency Project: railway line construction Law: CEAA, Canadian Transportation Act Issue: Does law require that new the need for new rail line constructions be demonstrated? Judicial Action: application dismissed	Pro-gov Anti-env	Isaac, Decary, Rothstein	
Alberta Cement Corporation v. Alberta Environmental Protection, 1999 ABCA 212 (CanLII)	ABCA	Government Actor: Alberta Environmental Protection Project: quarry Law: Land Surface Conservation and Reclamation Act Issue: Validity of request for environmental impact assessment Judicial Action: appeal dismissed	Pro-gov Pro-env	Cote, McFayden, Hunt	
Taku River Tlingit First Nation v. Tulsequah Chief Mine Project, 2000	BCCA	Government Actor: Minister of Environment, Mines, Northern Development Project: mine Law: BC environmental assessment act Issue: can government decision maker pursue an appeal of a decision by a lower court, when the lower court has remitted the issue to the decision maker? Judicial Action:			

Case and Year	Court	Description	Outcome	Majority	Dissent
Canada (Minister of Environment) v. Hamilton Wentworth (Municipality), 2001 FCA 347 (CanLII)	FCA	Government Actors: Environment Canada vs. municipal government Project: highway construction Law: CEAA Issue: Does the CEAA apply to a Project that had been initially approved in the early 1980s? Judicial Actions: CEAA not applicable to 45 year old highway Project now nearing completion; lower court decision favoring federal position overturned	Anti-fed gov Anti-env	Richard, Linden, Evans	
Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage) (C.A.), 2001	FCA	Government Actor: Parks Canada Project: construction of meeting facility in Banff National Park Law: CEAA Issue: scoping of Project, cumulative environmental effects assessment Court Action: application dismissed	Pro-gov Anti-env	Linden, Isaac, Sharlow	
Inverhuron & District Ratepayers Ass. v. Canada (Minister of The Environment), 2001 FCA 203 (CanLII)	FCA	Government Actor: Environment Canada Project: Nuclear Waste Storage Facility Law: CEAA Issue: adequacy of review Judicial Actions: application denied; lower court decision upheld	Pro-gov Anti-env	Stone, Strayer, Sexton	
Tsawwassen Indian Band v. Canada (Minister of Environment), 2001 FCA 57 (CanLII)	FCA	Government Actor: Ministry of the Environment Project: ocean dumping Law: CEAA, Ocean Dumping Control Act Issue: do the actions constitute a "Project" under CEAA? Judicial Actions: application denied; CEAA only applies to Proposed Projects	Pro-gov Anti-env	Strayer, Linden, Sexton	

Case and Year	Court	Description	Outcome	Majority	Dissent
Cook v. Alberta (Environmental Protection), 2001 ABCA 276 (CanLII)	ABCA	Government Actor: Minister of Environmental Protection Project: wilderness camping facility Law: Public Lands Act Issue: Could the Minister reject lease application Judicial Actions: Minister must reconsider application, Provide reason for decisions	Anti-gov Anti-env	Hunt, McFayden, Berger	
Athabasca Chipewyan First Nation v. British Columbia Hydro and Power Authority (C.A.), 2001 FCA 62 (CanLII)	FCA	Government Actor: National Energy Board Project: export of hydro-electric energy Law: National Energy Board Act Issue: adequacy of review Process Judicial Actions: appeal allowed, Board's decision quashed	Anti-gov Pro-env	Rothstein SharlowMal one	
Lavoie v. Canada (Minister of the Environment), 2002 FCA 268 (CanLII)	FCA	Government Actor: Minister of the Environment, Department of Fisheries and Oceans Project: hydroelectric Project Law: CEAA Issue: Did Project approval comply with environmental assessment Process? Judicial Actions: application dismissed; ministerial decision upheld	Pro-gov Anti-env	Richard Evans Malone	
Fenske v. Alberta (Minister of Environment), 2002 ABCA 135 (CanLII)	ABCA	Government Actor: Minister of the Environment Project: landfill expansion Law: Environmental Protection and Enhancement Act Issue: Ministerial decision to approve expansion of the Project, against recommendations of environmental review board Judicial Actions: lower court decision overturned	Pro-gov Anti-env	Costigan, Beger, Paperny	
Taku River Tlingit First Nation v. Ringstad, 2002	BCCA	Government Actor: Environmental Assessment Office et al Project: mining Project Law: BC EAA Issue: adequacy of environmental review Process Judicial Action: as a matter of administrative law (BC EAA) the certificates authorizing the Project were valid	Pro-gov Anti-env	Rowles, Huddart	Southin

Case and Year	Court	Description	Outcome	Majority	Dissent
Canadian Parks and Wilderness Society v. Minister of Canadian Heritage, 2003	FCA	Government Actor: Minister of Canadian Heritage Project: wilderness road Law: Canadian National Parks Act Issue: Can the Minister approve road construction for non-park related purposes? Did the minister breach her duty to uphold the ecological integrity of the park? Were road permits issued for the purpose of park management? Judicial Action: application dismissed	Pro-gov Anti-env	JA Evans, Rothstein, Malone	
Society Promoting Environmental Conservation v. Canada (Attorney General) (C.A.), 2003	FCA	Government Actor: A.G., Ministry of Defense Project: Expropriation of seabed and foreshore for torpedo testing Law: Expropriation Act Issue: Did the hearings officer Properly notify the public, Properly inform the minister of the nature of the objections Judicial Action: application rejected, lower court overturned	Pro-gov Anti-env	Strayer, Evans, Malone	
Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District), 2003	BCCA	Government Actor: Ministry of Forests Project: four logging cutblocks Law: Forest Practices Code of B.C. Issue: Did the decision to approve a logging Project adequately take into account dangers to the spotted owl? Judicial Action: application dismissed; lower court decision upheld	Pro-gov Anti-env	Prowse Ryan Huddart	
Inter-Church Uranium Committee Educational Co-operative v. Canada (Atomic Energy Control Board) (F.C.A.), 2004 FCA 218 (CanLII)	FCA	Government Actor: Atomic Energy Control Board Project: licensing for component of uranium mine Law: CEAA Issue: retroactive applicability of CEAA Judicial Action: lower court decision overturned, application of ICUCEC rejected	Pro-gov Anti-env	Richard, Rothstein, Sharlow	

Case and Year	Court	Description	Outcome	Majority	Dissent
Lone Pine (Committee) v. Alberta (Natural Resources Conservation Board), 2004 ABCA 404	ABCA	Government Actor: Natural Resources Conservation Board Project: expansion of cattle feedlot Law: Agricultural Operations Practices Act Issue: Did the Board err in application of the transitional Provisions of the act? Judicial Action: decision of the board quashed	Anti-gov Pro-env		
Sutcliffe v. Ontario (Minister of the Environment), 2004 CanLII 31687 (ON C.A.)	ONCA	Government Actor: Ministry of the Environment Project: landfill site Law: Environmental Assessment Act Issue: Can the minister approve an assessment that is tailored for a specific Project? Judicial Action: appeal allowed; ministerial decision re-instated	Pro-gov Anti-env	Charron, Laskin, MacPherson	
Canada (Minister of the Environment) v. Bennett Environmental Inc., 2005 FCA 261 (CanLII)	FCA	Government actor: Environment Canada Project: High Temperature Thermal Oxidizer Law: CEAA Issue: challenge to federal decision to refer facility to a review panel; facility was largely complete at the point when the federal review Process began; was the facility still a “Project” subject to review? Judicial Action: lower court decision that the facility was not a “Project” at this stage was correct	Anti-env Anti-gov	Sharlow Linden, Sexton	
Sumas Energy 2 Inc. v. Canada (National Energy Board), 2005 FCA 377 (CanLII)	FCA	Government actor: National Energy Board Project: international power line Law: National Energy Board Act, Canadian environmental assessment act Issue: can the board consider the environmental impact of an international Project? Judicial Action: application for review of Board’s decision rejected	Pro-gov Pro-env		

Case and Year	Court	Description	Outcome	Majority	Dissent
Castle-Crown Wilderness Coalition v. Alberta (Director of Regulatory Assurance Division, Alberta Environment), 2005 ABCA 283 (CanLII)	ABCA	Government Actor: Director of Regulatory Assurance, Ministry of the Environment Project: ski facility Law: Alberta Environmental Protection and Enhancement Act Issue: Was an EIA (environmental impact assessment) necessary for all aspects of the development? Judicial Action: appeal allowed, lower court overturned	Pro-gov Anti-env	Ritter, McFayden, O'Leary	
South Etobicoke Residents & Ratepayers Association Inc. v. Ontario Realty Corp., 2005 CanLII 19654 (ON C.A.)	ONCA	Government Actor: Ontario Realty Corp, Ministry of the Environment Project: crematorium Law: Ontario Environmental Protection Act Issue: challenge to adequacy of environmental assessment Judicial Action: application denied; lower court upheld	Pro-gov Anti-env	Borins, Blar, LaForme	
Eagleridge Bluffs & Wetlands Preservation Society v. H.M.T.Q., 2006 BCCA 334	BC	Government Actor: Project: highway construction Law: B.C. environmental assessment act Issue: have those responsible for the construction Project complied with environmental assessment certificate? Judicial Action: application dismissed; lower court decision upheld	Pro-gov Anti-env	HallMcKen zie Levine	
Do Rav Right Coalition v. Hagen, 2006 BCCA 571	BCCA	Government Actor: Project: RAV rapid transit line Law: BC environmental assessment act Issue: consultation on Project was inadequate due to recent changes in construction method Judicial Action: application dismissed, lower court decision upheld	Pro-gov Anti-env	Newbury, Hall, Kirkpatrick	
Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans) 2006	FCA	Government Actor: Department of Fisheries and Oceans Project: Oil sands Project Law: CEAA Issue: scoping of oil sands Project, delegation of aspects of environmental assessment to Alberta Court Action: application for review dismissed, lower court upheld	Pro-gov Anti-env	Rothstein, Noel, Malone	

Case and Year	Court	Description	Outcome	Majority	Dissent
R.K. Heli-Ski Panorama Inc. v. Glassman,	BCCA	Government Actor: Environmental Assessment Office, Minister of Sustainable Resource Management, etc Project: ski resort Law: BC environmental assessment act Issue: Procedural unfairness and bias in assessment Process Judicial Action: appeal dismissed	Pro-gov Anti-env	Smith, Saunders, Levine	
Tsawwassen Residents Against Higher Voltage Overhead Lines Society v. British Columbia (Utilities Commission), 2007 BCCA 211 (CanLII)	BCCA	Government Actor: BC Utilities Commission Project: construction of overhead electrical power lines Law: Utilities Commission Act Issue: Must the government rely on the “precautionary principle” when undertaking environmental assessment Judicial Action: appeal dismissed	Pro-gov Anti-env	Thackray, Lowry, Chiasson	

APPENDIX E:
50 NATIONAL ENVIRONMENTAL POLICY (NEPA) CASES
IN THE AMERICAN FEDERAL COURTS, 2006-2007

Rulings for Government: 21
 Rulings against Government: 30
 Cases with Dissenting Votes: 10

Case and Year	Circuit	Issue	Outcome	Majority	Dissent
Lands Council v. McNair, 2007	9th	Government Actor: USFS Project: logging in National Forest Law: NFMA, NEPA Issue: Is project approval invalid because USFS failed to include a full discussion of scientific uncertainty surrounding its strategy for improving wildlife habitat? Judicial Action: Appeal allowed; EIS is insufficient	Pro-env Anti-gov	Warren J. Ferguson, Stephen Reinhardt, and Milan D. Smith, Jr.,	
City of Dania Beach v. FAA, 2007	DC	Government Actor: Federal Aviation Administration Project: Change to runway procedures at Florida airport Law: NEPA Issue: Has the FAA followed the proper NEPA review process? Judicial Action: petition for review granted	Pro-env Anti-gov	Sentelle, Tatel, Brown	
Environmental Protection Info Center v. United States Forest Service	9th	Government Actor: USFS Project: forest thinning project Law: NEPA Issue: Has USFS met NEPA requirements in its EIS Judicial Action: petition for review granted	Anti-gov Pro-env	Nelson, Gould,	Callahan
Citizens for Alternative v. United States DOE	10th	Government Actor: Department of Energy Project: Nuclear Waster Repository Law: NEPA Issue: Did DOE rely on faulty data in its environmental review? Judicial Action: request for injunction denied	Pro-gov Anti-env	MURPHY, BRORBY, and TYMKOVICH,	

Case and Year	Circuit	Issue	Outcome	Majority	Dissent
Utah Environmental Congress v. Richmond, 2007	10th	Government Actor: USFS Project: timber sale Law: NEPA, NFMA Issue: Judicial Action: petition for review granted	Pro-env Anti-gov	KELLY, EBEL, Circuit Judges and, MURGUIA *, District Judge.	
Consejo De Desarrollo Economico De Mexicali, A.C. v. United States, 2007	9th	Government Actor: Bureau of Reclamation Project: Concrete-lined canal Law: NEPA and APA Issue: Failure to prepare supplementary environmental impact statement Judicial Action: environmental and statutory claims are moot	Pro-gov Anti-env	NOONAN, TASHIMA, and THOMAS	
Utah Environmental Congress v. Troyer, 2007	10th	Government Actor: United States Forest Service Project: six separate logging projects Law: NEPA Issue: approval process Judicial Action: 3 project approvals affirmed, 3 reversed	Partial Pro-env Anti-gov	BRISCOE, HOLLOWAY,	McCONNELL
Navajo Nation v. United States Forest Service, 2007		Government Actor: USFS Project: expansion of ski resort Law: Religious Freedom Restoration Act, NEPA Issue: Did FEIS comply with NEPA? Judicial Action: challenge to USFS allowed	Pro-env Anti-gov	William A. Fletcher Rawlinson, Thelton E. Henderson, * District Judge.	
Lands Council v. Martin, 2007	9th	Government Actor: US Forest Service Project: post-fire logging sales Outcome: NEPA claim denied, NFMA claim accepted Court Action: Preliminary injunction halting logging operations to allow for consideration on merits	Pro-env Anti-gov	Graber, Paez, Bea	

Case and Year	Circuit	Issue	Outcome	Majority	Dissent
Forest Guardians v. Forsgren, 2007	10th	Government Actor: US Forest Service Project: Forest Management Plan that may threaten Canadian Lynx Laws: ESA (not NEPA) action more broadly defined Outcome: action dismissed, lower court affirmed Court Action:	Anti-env Pro-gov	MURPHY, BALDOCK, and McCONNELL	
Hale v. Norton, 2007	9th	Government Actor: National Park Service Project: moving large vehicles through park for home construction Laws: NEPA; Hale's claim that moving vehicles does not constitute a federal project; challenge to NPS decision to submit decision to NEPA analysis Court Action: appeal rejected	Pro-env Pro-gov	Goodwin, Melvin Brunetti, and William A. Fletcher, Circuit Judges.	
Karst Environmental Education and Protection v. EPA 2007	D.C.	Government Actor: EPA, TVA, HUD Project: Transit Park development Laws: NEPA Court Action: appeal rejected	Anti-env Pro-gov	ROGERS and TATEL, Circuit Judges, and WILLIAMS	
O'Reilly v. U.S. Army Corps of Engineers, 2007	5th	Government Actor: US Army Corps of Engineers Project: dredging of wetlands for housing project Laws: NEPA Court action: inadequate EA upheld; district courts reversed	Partial Pro-env	Davis, Dennis	
18. Siskiyou Reg'l Educ. Project v. Goodman	9th	Government Actor: United States Forest Service Project: salvage of dead wood from fire Laws: NEPA Court Action: lower court upheld, injunction denied	Anti-env Pro-gov	REAVLEY, **, and CALLAHAN	* PREGERS ON
Mayo Foundation vs. Surface Transportation Board	8th	Government Actor: surface transportation board Project: railway construction Laws: NEPA Court Action: petition denied	Anti-env Pro-gov	Bye, Arnold, Riley	

Case and Year	Circuit	Issue	Outcome	Majority	Dissent
Environmental Law and Policy Center v. NRC, 2006	7th	Government Actor: Nuclear Regulatory Commission Project: permit for nuclear power facility Laws: NEPA Court action: injunction denied	Anti-env Pro-gov	Flaum, Evans, Williams	
Or. Natural Res. Council v. United States BLM,	9th	Government Actor: Bureau of Land Management Project: logging project Laws: NEPA Court action: injunction granted, insufficient environmental analysis	Anti-gov Pro-env	Goodwin, Graber	Tashima
Wildwest Institute v. Bull, 2006	9th	Government Actor: United States Forest Service Project: Forest fuel reduction project Laws: NEPA (service committed resources prior to full EIS) Court action: lower court affirmed, preliminary injunction denied	Anti-env Pro-gov	GOODWIN, O'SCANNLAIN, and FISHER	
Pit River Tribe v. United States Forest Service, 2006		Government Actor: US Forest Service Project: geothermal plant Laws: NEPA Court action: permit overturned	Pro-env Anti-gov	Clifford Wallace, Sidney R. Thomas, and Kim McLane Wardlaw, Circuit Judges.	
Klamath Siskiyou Wildlands Ctr. v. Boody 2006	9th	Government Actor: Bureau of Land Management Project: timber sales Law: Federal Land Policy & Management Act ("FLPMA") and NEPA Court Action: lower court overturned, injunction against timber sales entered	Pro-env Anti-gov	Dorothy W. Nelson, David R. Thompson, and Richard A. Paez, Circuit Judges.	

Case and Year	Circuit	Issue	Outcome	Majority	Dissent
Tri Valley Cares v. DOE, 2006	9th	Government Actor: Department of Energy Project: proposed construction of biological weapons research lab Law: NEPA Court Action: DOE must consider the effects of a terrorist attack on the project vis a vis the environment, and conduct EIS accordingly	Pro-env Anti-gov	SCHROEDER, Chief Judge, GRABER, Circuit Judge, and HOLLAND, ** Senior District Judge.** ** The Honorable H. Russel Holland, United States District Judge for the District of Alaska, sitting by designation.	
Islander East Pipeline Co. V. Conn. Dept. Of Environmental Protection, 2006		Government Actors: FERC, Conn. Dept of Environmental Protection Project: natural gas pipeline between Conn. and NY; Conn. denied approval permits Law: Natural Gas Act, NEPA Court Action: Conn. Dept. Forced to reverse decision The state argued that the Natural Gas Act violated the 11 th Amendment note issues regarding 11 th Amendment, retroactivity	Anti-env Anti-state gov	Raggi, Restani (Restani = court of international trade)	Kearse
Forest Conservation Council v. United States Forest Service	9th	Government Actor: US Forest Service Project: four timber sales from four national forests; failure to “monetize” non-timber resources Law: NEPA Court Action: lower court’s summary judgment in favor of US affirmed	Pro-gov Anti-env	SCHROEDER, Chief Circuit Judge, KLEINFELD and BEA, Circuit Judges.OPINION	
‘Ilio’Ulaokalani Coalition v. Rumsfeld,	9th	Government Actor: US Army Project: Expansion of army base in Hawaii Law: NEPA Court Action: Army has not fully considered alternatives	Anti-gov Pro-env	Fletcher, Thompson,	Bea

Case and Year	Circuit	Issue	Outcome	Majority	Dissent
Utah Shared Access Alliance v. Carpenter,	10th	Government Actor: Bureau of Land Management Project: limitation of off road vehicle use in Utah Law: NEPA, FLPMA Court Action: lower court affirmed BLM's decision upheld	Pro-gov Pro-env	Tacha, McWilliams, O'Brien	
Coliseum Square Ass'n v. Jackson	5th	Government Actor: HUD Project: Federal funding for housing redevelopment project Law: NEPA Court Action: HUD actions upheld	Pro-gov Anti-env		
Ouachita Watch League v. Jacobs,	11th	Government Actor: US Forest Service Project: change to forest management plans in the southern region of USA; standing Law: NEPA Court action: lower court ruling overturned; standing of environmental groups upheld	Pro-env Anti-gov (standing)	ANDERSON, BARKETT and CUDAHY *, Circuit [**2] Judges.* Honorable Richard D. Cudahy, Circuit Court Judge for the Seventh Circuit, sitting by designation.	
La. Crawfish Producers Ass'n v. Rowan	5th	Government Actor: U.S. Army Corps of Engineers Project: restoration of swampland Law: NEPA Court Action: lower court affirmed; government action upheld	Pro-gov Anti-env		
Northwest Env'tl. Advocates v. Nat'l Marine Fisheries Serv., 2006	9th	Government Actor: Fisheries Service, Army Corp of Engineers Project: Deepening of Columbia River navigation channel Law: NEPA Court Action: lower court affirmed; Corp did take hard look at the evidence	Pro-gov Anti-env	Silverman, Gould	Fletcher

Case and Year	Circuit	Issue	Outcome	Majority	Dissent
THE FUND FOR ANIMALS, INC., ET AL., APPELLANTS v. U.S. BUREAU OF LAND MANAGEMENT, ET AL., APPELLEES	D.C.	Government Actor: Bureau of Land Management Project: regulations re. Wild Horse and Burros Law: NEPA, Wild Horses and Burros Act Court Action: The Fund does not challenge any justiciable agency actions	Pro-gov Anti-env	Henderson, Randolph	Griffith
Nevada v. EPA, 2006	D.C.	Government Actor: Department of Energy Project: transportation of nuclear waster to Yucca Law: NEPA Court Action: petition for review denied	Pro-fed gov Anti-env?	Henderson, Randolph, Edwards	
Highway J Citizens Group v. DOT	7th	Government Actor: DOT Project: Highway expansion Law: NEPA, APA, CWA Court Action: lower court affirmed, claims barred	Pro-gov Anti-env	Bauer, Ripple, Williams	
Great Basin Mine Watch v. Hankins, 2006	9th	Government Actor: Department of Interior, Bureau of Land Management Project: gold mining project Law: NEPA, APA, CWA—particularly the “scoping of the project” Court Action: some aspects of EIS insufficient	Partial Pro-env Anti-gov	Wallace, Hawkins	Thomas (pro-env)
Northwoods Wilderness Recovery, Inc. v. USDA Forest Serv.	6th	Government Actor: US Forest Service Project: Timber sales Law: NEPA Court action: lower court upheld, petition of Northwoods denied	Pro-gov Anti-env	RYAN, COOK, GWIN, District Judge. ** The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.	

Case and Year	Circuit	Issue	Outcome	Majority	Dissent
North Alaska Environmental Center v. Kempthorne,	9th	Government Actor: Bureau of Land Management, Fish and Wildlife Service, DOI Project: leasing for oil drilling Law: NEPA Court action: summary judgment for government affirmed	Progov Anti-env	Schroeder, Chief Judge, Arthur L. Alarcon and Andrew J. Kleinfeld	
Nuclear Information and Resource Service v. NRC		Government Actor: Nuclear Regulatory Commission Project: exemption standards for transportation of nuclear material Law: NEPA Court action: petition for review dismissed	Pro-gov Anti-env	Rhymer, Wardlaw, Selna (Central District of California)	
California Sportfishing Protection Alliance v. FERC	9th	Government actor: FERC Project: hydroelectric project Law: NEPA Court action: petition for review dismissed	Pro-gov Anti-env	Schroeder, Trott, Kleinfeld	
Idaho Rivers United v. FERC, 2006	9th	Government Actor: FERC Project: 5 hydro-electric projects Law: NEPA Court Action: petition for review denied	Pro-gov Anti-env	Thompson, Tashima, Callahan	
Ecology Center v. United States Forest Service	10th	Government Actor: US Forest Service Project: Logging Law: NFMA, NEPA Court: affirm in part, reverse in part, remand NEPA claim rejected claim sustained under national forest management act	Partial Pro-env victory	HENRY, EBEL, and TYMKOVICH	
Environmental Protection Info Center v. U.S. Forest Service, 2006	9th	Government Actor: US Forest Service Project: timber sale Law: NEPA, NFMA Court: petition denied, lower court affirmed	Pro-gov Anti-env	Wallace, Hawkins, Thomas	

Case and Year	Circuit	Issue	Outcome	Majority	Dissent
Gulf Restoration Network v. DOT, 2006	5th	Government Actor: DOT Project: license for liquefied natural gas facility Law: NEPA Court Action: Petition for review denied	Pro-gov Anti-env	HIGGINBOTHAM, DAVIS and STEWART	
San Luis Obispo Mothers for Peace v. NRC, 2006	9th	Government Actor: Nuclear Regulatory Commission Project: nuclear facility Law: NEPA; must a terrorist attack be taken into account? Court action: petition of San Luis Obispo granted in part NEPA claim upheld	Partial Pro-env Anti-gov	Stephen Reinhardt and Sidney R. Thomas, Circuit Judges, and Jane A. Restani,* Chief Judge, United States Court of International Trade	
Cherokee Forest Voices v. United States Forest Service	6th	Government Actor: United States Forest Service Project: logging projects Law: NFMA, NEPA Court Action : Cherokee Forest Voices wins on NFMA claim, but lower court upheld on NEPA claim	Partial Pro-env Anti-gov	RYAN and COOK, Circuit Judges; GWIN, District Judge.** The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.	
Utah Environmental Congress v. Bosworth, 2006	10th	Government Actor: United States Forest Service Project: Forest thinning Law: NEPA Court Action: USFS plan upheld	Pro-gov Anti-env	Henry, Ebel, Tymkovich	
Sierra Club v. US Army Corps of Engineers, 2006	8th	Government Actor: US Army Corps of Engineers Project: levee Law: NEPA, FEMA Court Action: lower court reversed; NEPA claims of Sierra Club upheld; environmental assessment insufficient	Pro-env Anti-gov	Loken, Lay, Benton	

Case and Year	Circuit	Issue	Outcome	Majority	Dissent
Wyoming v. United States DOI	10th	Government Actor: Department of the Interior Project: failure to de-list gray wolves from endangered species list Law: ESA, NEPA Court Action: standing denied	Pro-env Pro-gov	Tacha, Ebel, Cassell	
Earth Island Institute v. United States Forest Service, 2006	9th	Government Actor: US Forest Service Project: post-fire restoration projects Law: NEPA Court Action: Preliminary injunctions against Forest Service granted	Pro-env Anti-gov	Noonan, Tashima, Fletcher	
Ripplin Shoals Land Co. v. US Army Corps of Engineers, 2006	8th	Government Actor: US Army Corps of Engineers Project: bridge construction as part of development project Law: NEPA Court Action: US Army Corps of Engineers ordered to reconsider application	Anti-gov Anti-env	Beam, Smith	Bye
Utah Environmental Congress v. Bosworth, 2006	10th	Government Actor: USFS Project: timber harvesting project Law: National Environmental Policy Act, NFMA Issue: Did the USFS properly monitor Management Indicator Species? Did it properly analyze alternatives? Court Action: USFS did not properly monitor Management Indicator Species, but it did properly consider NEPA alternatives; USFS project approval vacated	Anti-gov Anti-env		

Case and Year	Circuit	Issue	Outcome	Majority	Dissent
Turtle Island Restoration Network v. United States DOC, 2006	9th	Government Actor: Department of Commerce, National Marine Fisheries Service Project: re-opening swordfish fisheries Law: NEPA, Migratory Bird Treaty Act, Endangered Species Act, APA, Magnuson-Stevens Fishery Conservation and Management Act Issue: compliance with multiple statutory requirements Court Action: action is time-barred	Pro-gov Anti-env	Hawkins, McKeown, Clifton	
Sierra Nev. Forest Prot. Campaign v. United States Forest Service, 2006	9th	Government Actor: United States Forest Service Project: Meadow Valley Defensible Fuel Profile Zone Law: NEPA Issue: Was an EA/ FONSI appropriate, or was an EIS required to approve this project? Court Action: EA was appropriate; USFS decision upheld	Pro-gov Anti-env	Fletcher, Thompson Bea	
Colorado Wild v. United States Forest Service, 2006	10th	Government Actor: United States Forest Service Project: salvage of dead trees Law: NEPA Issue: Can dead trees be salvaged without EA? Court Action: All claims by conservation groups rejected	Pro-gov Anti-env	Kelly, Porfilio, Tymkovich	
Silverton Snowmobile Club v. United States Forest Serv., 2006	10th	Government Actor: United States Forest Service Project: Changes in access to Molas Pass recreational area Law: NEPA, NFMA Issue: failure to take "hard look" at proposed actions Court Action: USFS decision upheld	Pro-gov Pro-env	Henry, Anderson, O'Brien	

APPENDIX F:
100 ENVIRONMENTAL LAW DECISIONS
OF THE U.S. COURTS OF APPEALS

CAA = Clean Air Act
 CWA = Clean Water Act
 EnPA = Energy Policy Act
 NEPA = National Environmental Policy Act
 NFMA = National Forest Management Act
 ESA = Endangered Species Act
 HMTA = Highways Management and Transportation Act
 Dem = judges appointed by Democratic President
 GOP = judges appointed by Republican President

Decision: Government loses to pro-environmentalist challenger

Case	Year/ Circuit	Law	Dem.	GOP	Vote	Dissent
1. New York v. EPA	2005, DC	CAA	ii	i	3-0	
2. Sierra Club v. EPA	2002, DC	CAA	i	ii	3-0	
3. Friends of the Earth v. EPA	2006, DC	CWA	i	ii	3-0	
4. Sierra Club and Missouri Coalition for the Env. V. EPA	2002, DC	CAA	i	ii	3-0	
5. Nuclear Energy Institute v. EPA	2002 DC	EnPA	i	ii	3-0	
6. Environmental Integrity Project v. EPA	2005, DC	CAA	i	ii	3-0	
7. Mossville Environmental Action Now v. EPA	2004, DC	CAA	i	ii	3-0	
8. Sierra Club/NYPIRG v. EPA	2003, DC	CAA	ii	i	3-0	
9. NRDC v. Musynski	2001, 2nd	CWA	i	ii	3-0	
10. NRDC v. Department of Energy	2004, 2nd	EnPA	i	i	2-0	
11. Catskill Trouts Unlimited v. NYC Dept of Env protection	2006, 2nd	CWA	i	ii	3-0	
12. National Audubon Society v. Dept. of Navy	2005, 4th	NEPA	i	ii	3-0	

Case	Year/ Circuit	Law	Dem.	GOP	Vote	Dissent
13. Sierra Club v. EPA	2002, 5th	CAA	ii	i	3-0	
14. La. Environmental Action Network v. EPA, 2004	2004, 5th	CAA	i	ii	3-0	
15. Cherokee Forest Voices v. US Forest Service, 2006	2006, 6th	NFMA and NEPA	i	ii	3-0	
16. Sierra Club/Missouri Coalition for the Environment vs. EPA	2002, 7th	CAA	iii		3-0	
17. Friends of the Boundary Waters Wilderness/ Sierra Club v. US Forest Service	2006, 8th	CWA	ii	i	3-0	
18. Environmental Defense Center et al. v. EPA, 2003	2003, 9th	CWA	iii		3-0	
19. Earth Island Institute v. US Forest Service , 2006	2006, 9th	NFMA/ NEPA	ii	i	3-0	
20. Ecology Center vs. US Forest Service	2005, 9th	NFMA, NEPA	iii		2-1	Dem
21. Forest Guardians v. U.S. Forest Service	2006, 9th	ESA	iii		3-0	
22. Public Citizen v. Department of Transportation, 2003	2003, 9th	CAA/NEPA	ii	i	3-0	
23. San Luis Obispo v. Nuclear Regulatory Com.	2006, 9th	NEPA, Atomic Energy Act	ii	i	3-0	
24. Sierra Club, Physicians for Social Responsibility, Georgia Forestwatch versus Georgia Power Company, 2006	2006, 11th	CAA	ii	i	3-0	
25. Sierra Club v. Leavitt	2004, 11th	CAA	ii	i	3-0	
26. Sierra Club v. Hankinson	2003, 11th	CWA	ii	i	3-0	
27. Sierra Club v. EPA (Oglethorpe Power case),	2004, 11th	CAA	ii	i	3-0	
28. Ecology Center vs. US Forest Service	2006, 10th	NEPA/ NFMA	i	ii	3-0	

Case	Year/ Circuit	Law	Dem.	GOP	Vote	Dissent
29. Sierra Club v. US Corp of Engineers	2006, 8th	NEPA	i	ii	3-0	
30. SIERRA CLUB , et al, Intervenor, v. EPA	2003, 9th	CAA	ii	i	3-0	
31. SOUTHERN UTAH WILDERNESS ALLIANCE, v. BUREAU OF LAND MANAGEMENT, et al	2005, 10th	FLPMA	i	ii	3-0	
32. Utah Environmental Congress v. US Forest Service	2003, 10th	ESA	i	ii	3-0	
33 Alliance for the Wild Rockies v. United States Forest Service,	2003, 9th	NEPA	i	ii	2-1	GOP
34. Center for Biological Diversity v. US Forest Service	2003, 9th	NEPA	ii	i	3-0	
35. Earth Island Institute v. US Forest Service	2003, 9th	NEPA	i	ii	2-1	DEM
36. Stewart Park and Reserve Coalition v. US Dept. Of transport 2003	2003, 2nd	NEPA	i	ii	2-1	GOP
37. The Wilderness Society v. US Fish and Wildlife	2003, 9th	NEPA	ix	i	10-0	
38. Sierra Club v. US Army Corp of Engineers	2006, 8th	NEPA	i	ii	3-0	
39. Sierra Club and Engine Manufacturers association v. EPA	2002, DC	CAA	ii	i	3-0	

Decision: Government wins against pro-environment petitioner

Case	Year/Circuit	Law	Dem.	GOP	Vote	Dissent
1. Massachusetts v. EPA	2004, DC	CAA	i	ii	1-1-1	1 GOP, 1 DEM
2. Olmstead Falls v. FAA	2002, DC	CAA	i	ii	3-0	
3. National Wildlife Federation v. EPA	2002, DC	CWA	i	ii	3-0	
4. Massachusetts v. EPA	2004, DC	CAA	i	ii	1-1-1	1 GOP, 1 DEM
5. Grassroots Recycling Network v. EPA	2005, DC	NEPA		iii	3-0	
6. Bluewater Network v. EPA	2004, DC	CAA		iii	3-0	
7. NRDC v. EPA	2006, DC	CAA	i	ii	3-0	
8. Mass. v. EPA	2005, DC	CAA	ii	vi	6-2	2 Dem
9. Utility Air Regulatory Group v. EPA	2003, DC	CAA	ii	i	3-0	
10. City of Waukesha v. EPA	2003, DC	CWA	ii	i	3-0	
11. Sierra Club v. EPA	2004, DC	CAA	i	ii	3-0	
12. Lafleur v. Whitman	2002, 2nd	CAA	ii	i	3-0	
13. Environmental Defense v. EPA	2004, 2nd	CAA	ii	i	3-0	
14. BCCA v. EPA	2004, 5th	CAA	i	Ii	3-0	
15. Gulf Restoration Network v. US Dept of Transportation	2006, 5th	NEPA	i	Ii	3-0	
16. Save our Cumberland Forests/Sierra Club v. Dept. of the Interior	2006, 6th	NEPA	I	ii	3-0	
17. Transportation Solutions Defense et al v. EPA	2002, 7th	CAA	i	ii	3-0	
18. Saint Theresa Action Group v. Environmental Appeals Board, EPA	2002, 9th	CAA	ii	i	3-0	

Case	Year/Circuit	Law	Dem.	GOP	Vote	Dissent
19. Sierra Club v. EPA (St. Louis ozone case)	2004, 7th	CAA		iii	3-0	
20. Arkansas Wildlife Federation v. Army Corps of Engineers	2005, 8th	NEPA	i	ii	3-0	
21. Association to Protect Hammersley v. Taylor Resources	2002, 9th	CWA	iii		3-0	
22. Hall v. EPA	2002, 9th	CAA	i	ii	3-0	
23. Association of Irrigated Residents v. EPA	2005, 9th	CAA	ii	i	3-0	
24. Cascadia Wildlands Project v. Conroy	2005, 9th	NFMA/ NEPA	i	ii	3-0	
25. Center for Biological Diversity vs. US Fish and Wildlife, stickleback case	2006, 9th	ESA	i	ii	3-0	
26. Environmental Info Protection Center v. US Forest Service,	2006, 9th	NFMA	ii	i	3-0	
27. IDAHO RIVERS UNITED et al, v. FEDERAL ENERGY REGULATORY COMMISSION	2006, 9th	Federal Power Act	ii	ii	3-0	
28. Native Eco-systems council v. US Forest Service	2005, 9th	NFMA/ NEPA	Iii		3-0	
29. Nuclear Information et al v. US Dept. Of Transportation	2005, 9th	HMTA	i	ii	3-0	
30. Nuclear Information v. Nuclear Regulatory Commission, 2006	2005, 9th	NEPA	i	ii	3-0	
31. TVA v. EPA	2002, 11th	CAA	ii	i	3-0	
32. Center for Biological Diversity v. US F and W	2006, 11th	ESA		iii	3-0	
33. American Canoe Association/Sierra Club v. City of Attalla	2004, 11th	CWA	Ii	I	3-0	
34. La. Crawfish Producers v. US Army Corp of Engineers	2006, 5th	NEPA		iii	3-0	

Case	Year/Circuit	Law	Dem.	GOP	Vote	Dissent
35. Northern Alaska Environmental Center v. US Bureau of Land Management et al	2006, 9th	NEPA	ii	i	3-0	
36. Allegheny Defense Project v. US Forest Service	2005, 3rd	NFMA	i	ii	3-0	
37. Wilderness Society v. Norton	2005, DC	NEPA/ APA	ii	i	3-0	
38. Turtle Island Restoration Network v. US Dept. Com.	2005, 9th	Fishery Conservation and Management Act	ii	i	3-0	
39. Utah Environmental Congress v. US Forest Service	2006, 10th	ESA	i	ii	3-0	
40. Western Watersheds Project v. US Forest Service	2005, 9th	ESA	ii	i	3-0	
41. Spiller v. Mineta	2003, 5th	NEPA		iii	3-0	
42. The Ocean Conservancy v. US Fish and Wildlife	2003, 9th	NEPA	iii		3-0	
43. Highway J Citizens Group v. Mineta	2003, 7th	NEPA	i	ii	3-0	

Decision: Government wins against anti-environment petitioner

Case	Year/Circuit	Law	Dem.	GOP	Vote	Dissent
1. Independent Equipment Dealers Association v. EPA	2004, DC	CAA	ii	i	3-0	
2. American Forest and Paper Association v. EPA	DC	CAA	i	ii	3-0	
3. National Petrochemical Association v. EPA	2002, DC	CAA	i	ii	3-0	
4. National Association of Homebuilders v. Norton,	2005, DC	ESA	i	ii	3-0	
5. Independent Equipment Dealers Association v. EPA	2004, DC	CAA	ii	i	3-0	
6. Pennsylvania v. EPA	2005, DC	CAA	ii	i	3-0	
7. West Virginia v. EPA	2004, DC	CAA	i	ii	3-0	
8. Crete Carrier Corporation v. EPA	2004, DC	CAA		iii	3-0	
9. USA v. Eric Kung-Shou Ho	2002, 5th	CAA		iii	3-0	
10. Acker v. EPA	2002, 7th	CAA	i	ii	3-0	
11. USA v. Price,	2002, 9th	CAA	ii	i	3-0	
12. Engine Manufacturers Assoc. V. S Coast Air Quality Management District	2002, 9th	CAA	i	ii	3-0	
13. State of Alaska v. EPA	2004, 9th	CAA		iii	3-0	

Decision: Government loses to anti-environment petitioner

Case	Year/Circuit	Law	Dem.	GOP	Vote	Dissent
1. Ethyl Corp. v. EPA	2002, DC	CAA	ii	i	3-0	
2. American Corn Growers Association v. EPA	2002, DC	CAA	ii	i	2-1	Dem
3. Center for Energy and Economic Development v. EPA	2005, DC	CAA	i	ii	3-0	
4. HONEYWELL INTERNATIONAL, INC., PETITIONER v. ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT ATOFINA CHEMICALS, INC., INTERVENOR	2004, DC	CAA	i	ii	2-1	Dem. (Note: dissent is over proper remedy, not substance of claim)
5. Arteva Specialties v. EPA	2003, DC	CAA	ii	i	3-0	

Mixed/consolidated cases: Petitioners represent both environmentalist and business groups

Case	Year/Circuit	Law	Dem.	GOP	Outcome	Vote	Dissent
1. American Trucking Association v. EPA	2002, DC	CAA	i	ii	Deference, anti-env, anti-bus	3-0	
2. Sierra Club and Engine Manufacturers association v. EPA	2002, DC	CAA	ii	i	Remand on basis of one env. group petition	3-0	
3. California Sportfishing Alliance v. FEC	2006, 9th	ESA	i	li	All petitions for review of dam permit denied	3-0	

APPENDIX G:
ENVIRONMENTAL LAW CASES IN THE SUPREME COURT OF CANADA,
1985-2006

Case, Year, Law	Issue	Outcome	Majority	Dissent
1. R. v. Crown Zellerbach Canada Ltd., 1988, Ocean Dumping Control Act	Is ocean dumping a matter of national concern falling within Parliament's power to legislate?	Pro-env Pro-federal government	Dickson C.J. and McIntyre, Wilson and Le Dain	Bee Beetz, Lamer and La Forest JJ. dissenting
2. Gauthier v. Quebec (Commission de protection du territoire agricole), 1989 Act to Preserve Agricultural Land	Issue: Does Gauthier have a right to use formerly agricultural land for non-agricultural purposes? Ruling: No such statutory or Charter right exists	Pro-env Pro-gov	Beetz, Lamer, Wilson, Le Dain* and La Forest JJ.	
3. Friends of the Oldman River v. Canada, 1992 EARPGO Navigable Waters Protection Act	Issue: Is the federal government required to conduct an environmental assessment of an almost completed dam project? Ruling: EARPGO is mandatory in this instance	Anti-gov Pro-env	Lamer C.J. La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci JJ.	
4. Quebec (Attorney General) v. Canada (National Energy Board), 1994 National Energy Board Act EARPGO	Issues: Conflict between federal board and provincial government over license to export hydro electric power over scope and fairness of board's cost-benefit review, compliance with EARPGO. Ruling: lower court overruled, ruling of board restored	Pro-fed gov Pro-env	Lamer C.J., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major JJ.	
5. Ontario v. Canadian Pacific Ltd., 1995 Ontario Environmental Protection Act	Issues: Was Ontario Environmental Protection act unconstitutionally vague? Ruling: No	Pro-env Pro-gov	Lamer C.J., La Forest, L'Heureux-Dube, Sopinka, Gonthier, Cory, McLachlin, Iacobucci Major	
6. MacMillan Bloedel Ltd. v. Simpson, [1996] Criminal Code	Issue: Validity of injunction barring protesters from blocking roads used as part of logging operation Ruling: injunction was valid	Anti-env	Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.	

Case, Year, Law	Issue	Outcome	Majority	Dissent
7. R. v. Hydro-Québec, 1997 CEPA	Issue: Are federal regulation of toxic substances ultra vires? Ruling: Federal regulation is not ultra vires	Pro-gov Pro-env	Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.	
8. R. v. Consolidated Maybrun Mines Ltd., 1998 Ontario Environmental Protection Act	Issue: Was order to conduct remedial measures on contaminated site valid? Ruling: orders were valid	Pro-gov Pro-env	Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Bastarache JJ.	
9. CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] Fisheries Act Waste Management Act Criminal Code	Issue: Did the government violate criminal procedure rights during the investigation of an environmental accident? Ruling: Warrants and searches were valid	Pro-gov Pro-env	Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Major and Binnie JJ.	
10. Berendsen v. Ontario, 2001) Public Authorities Protection Act Limitations Act	Issue: Is an environmental pollution related claim precluded by the statute of limitations? Ruling: appeal allowed; longer limitation period applies	Anti-gov Pro-env	L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.	
11. 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001 Quebec Cities and Towns Act Federal Pest Control Products Act	Issue: Is local pesticide by-law ultra vires? Ruling: by-law is valid	Pro-env Pro-gov	McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.	
Ho 12. Hollick v. Toronto (City), 2001 Ontario Class Proceedings Act	Issue: Class certification regarding noise and physical pollution complaints Ruling: Certification upheld	Pro-env Anti-gov	McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.	

Case, Year, Law	Issue	Outcome	Majority	Dissent
Sierra Club of Canada v. Canada (Minister of Finance), 2002 CEAA Federal Court Rules	Issue: validity of federal financial assistance to crown corporation for construction and sale of CANDU reactors to China; does authorization of aid require environmental assessment? Crown corporation seeks confidentiality order regarding certain documents related to the sale Ruling: The appeal should be allowed and the confidentiality order granted on the terms requested by AECL.	Pro-gov Anti-env	McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.	
Harvard College v. Canada, 2002 Patent Act	Issue: can a life form be patented Ruling: Higher life form cannot be patented	Pro-gov Pro-env	Per L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache and LeBel JJ.:	(McLachlin C.J. and Major, Binnie and Arbour JJ. dissenting
Imperial Oil Ltd. v. Quebec (Minister of the Environment), 2003 Environmental Quality Act	Issue: Did Minister fulfill duty of impartiality in issuing "characterization order" against oil company? Ruling: Minister's decision upheld	Pro-gov Pro-env	McLachlin C.J. Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel Deschamps JJ.	
British Columbia v. Canadian Forest Products Ltd., 2004 Canadian Environmental Protection Act BC Forest Act	Issue: Can the Crown make claims for damages against Canfor for burn in timberlands Ruling: The Crown cannot make this claim	Pro-Anti-gov	McLachlin C.J. Iacobucci, Major, Binnie, Arbour Deschamps JJ.	Bastarache, LeBel and Fish JJ.

APPENDIX H:
ENVIRONMENTAL LAW DECISIONS IN THE SUPREME COURT OF THE
UNITED STATES, 1985-2005

CAA= Clean Air Act
 CWA= Clean Water Act
 ESA= Endangered Species Act
 FLPMA= Federal Land Policy Management Act
 RCRA= Resource Conservation and Recovery Act
 CERCLA= Comprehensive Environmental Response, Compensation, and Liability Act
 FIFRA= Federal Insecticide, Fungicide, and Rodenticide Act
 NEPA= National Environmental Policy Act

Case and Year	Description	Ruling	Majority	Dissent
1. MANUFACTURERS ASSOCIATION ET AL. v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., 1985	Government Actor: EPA Law: CWA Issue: Can the EPA issue “fundamentally different factor” variances under the CWA? Ruling: the variances can be issued	Pro-gov Anti-env	White, Burger, Brennan, Powell, Rehnquist	Marshall, Blackmun, Stevens, O’Connor
2. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY v. UNION CARBIDE AGRICULTURAL PRODUCTS CO. ET AL., 1985	Government Actor: EPA Law: FIFRA Issue: Does arbitration scheme of FIFRA violate Art. III of Federal Constitution? Ruling: Arbitration scheme of the Federal Insecticide, Fungicide, and Rodenticide Act (7 USCS 136 et seq.) held not violative of Article III of the Federal Constitution.	Pro-gov Pro-env	O’Connor, Burger, White, Powell, Brennan, Marshall, Blackmun, Stevens, Rehnquist	
3. UNITED STATES v. RIVERSIDE BAYVIEW HOMES, INC., ET AL., 1985	Government Actor: EPA Law: CWA Issue: Is property “wetland” under CWA? Ruling: Property is wetland, subject to CWA permitting process	Pro-fed Pro-env	Unanimous	

Case and Year	Description	Ruling	Majority	Dissent
4. EXXON CORP. ET AL. v. HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, ET AL., 1985	Government Actor: New Jersey Law: CERCLA, state tax Issue: Is the state tax pre-empted by CERCLA? Ruling: State statute imposing tax to fund prevention and cleanup of oil spills and leaks of hazardous chemicals held pre-empted in part by federal Comprehensive Environmental Response, Compensation, and Liability Act.	Mixed victory for state govt’/ Pro-env	Marshall, Berger, Brennan, White, Blackmun, Rehnquist, O’Connor,	Stevens (pro- env = no pre- emption on any grounds.
5. DOW CHEMICAL CO. v. UNITED STATES, BY AND THROUGH ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, 1986	Government Actor: EPA Law: Clean Air Act, Fourth Amendment Issue: use of aerial photography as part of investigation Ruling: Aerial photography of industrial complex by Environmental Protection Agency held not to exceed Agency’s investigative authority under 42 USCS 7414 nor to violate Fourth Amendment.	Pro-gov Pro-env 1. Statutory authority 2. 4th Amendment limits	1. Unanimous 2. Burger, White, Rehnquist, Stevens, O’Connor	2. Brennan, Marshall, Blackmun, Powell
6. PENNSYLVANIA ET AL. v. DELAWARE VALLEY CITIZENS’ COUNCIL FOR CLEAN AIR ET AL., 1986	Government Actor: Penn. Law: Clean Air Act Issue: attorney’s fees Ruling: Award of attorneys’ fees for 1) work in administrative proceedings held authorized by Clean Air Act (42 USCS 7604(d)), but held to have been 2) improperly increased for superior quality of work.	1) Pro-env, Anti-state gov 2) Anti-env, Pro-state	1. Unanimous 2. White, Burger, Powell, Rehnquist, Stevens, O’Connor	2. Blackmun, Marshall, Brennan

Case and Year	Description	Ruling	Majority	Dissent
7. INTERNATIONAL PAPER CO. v. OUELLETTE ET AL., 1987	<p>Government Actor: Law: Clean Water Act Issue: pre-emption of private suits under clean water act Ruling: 1) Clean Water Act held to pre-empt private suit under Vermont common law, but not 2) suit in Vermont Federal District Court under New York law, where New York water pollution allegedly caused Vermont injury.</p> <p>USA supported affirmance . . . strange</p> <p>Application of out of state law to pollution source</p>	<p>1) Pro-fed gov, Anti-env 2) Anti-fed gov, Pro-env</p>	<p>1) Powell, J., Rehnquist, Ch. J., and White, O'Connor, 2) Unanimous</p>	<p>1) Brennan, Marshall, Blackmun</p>
8. Tull v. USA, 1987	<p>Government Actor: US A.G. Law: Clean Water Act, 7th Amendment Issue: jury trial for injunctions and civil penalties under Clean Water Act Ruling: Seventh Amendment held to guarantee jury trial as to determination of liability in Government's action for injunction and civil penalties under Clean Water Act (33 USCS 1319(b), (d)), but not as to assessment of amount of civil penalties.</p>	<p>1. Anti-gov Anti-env 2. Pro-gov +/-</p>	<p>1. Brennan, Rehnquist, White, Marshall, Blackmun, Powell, O'Connor, Scalia, Stevens 2. Brennan Rehnquist, White, Marshall, Blackmun, Powell, O'Connor</p>	<p>2. Scalia, Stevens</p>

Case and Year	Description	Ruling	Majority	Dissent
9. PENNSYLVANIA ET AL. v. DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL., 1987	Government Actor: Pennsylvania, USA Law: Clean Air Act Issue: dispute over attorney's fees for consent decree Ruling: Enhancement of reasonable lodestar amount for risk of loss when awarding attorneys' fees to prevailing party pursuant to fee-shifting provision of Clean Air Act (42 USCS 7604(d)) held improper.	Pro-state gov Anti-env	White, Rehnquist, Powell, Scalia, O'Connor	Blackmun, Brennan, Marshall, Stevens
10. GWALTNEY OF SMITHFIELD, LTD. v. CHESAPEAKE BAY FOUNDATION, INC., ET AL., 1987	Government Actor: -- Law: CLEAN WATER ACT Issue: validity of citizen suits Ruling: Federal jurisdiction over citizen suits for wholly past violations held not to be conferred by 505(a) of Clean Water Act, but good-faith allegations of ongoing violation held to be actionable.	Pro-env	MarshallRehnquist BrennanWhite BlackmunSteven sO'ConnorScalia in part re. Judgment	Scalia, Stevens, O'Connor
11. ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL. v. METHOW VALLEY CITIZENS COUNCIL ET AL., 1988	Government Actor: USFS Law: NEPA Issue: validity of environmental impact statement Ruling: Forest Service's environmental impact statement as to ski resort held not to require fully developed plan to mitigate environmental harm or "worst case analysis" of potential environmental harm.	Pro-gov Anti-env	Unanimous	
12. MARSH, SECRETARY OF THE ARMY, ET AL. v. OREGON NATURAL RESOURCES COUNCIL ET AL., 1988	Government Actor: Army Corps of Engineers Law: NEPA Issue: validity of environmental impact statement Ruling: Army Corps of Engineers' decision that environmental impact statement supplement was not required before construction of Elk Creek Dam proceeded held not "arbitrary and capricious."	Pro-gov Anti-env	Unanimous	

Case and Year	Description	Ruling	Majority	Dissent
13. PENNSYLVANIA v. UNION GAS CO., 1989	Government Actor: state government Law: CERCLA Issue: Is CERCLA suit against state government barred by 11 th Amendment? Ruling: Federal environmental “superfund” statute held (1) to permit suit for money damages against state in federal court, and (2) in so doing, to be within Congress’ authority under commerce clause.	Pro-fed gov	Brennan, Marshall, Stevens, Blackmun	White, Scalia, Rehnquist, O’Connor (Separate dissents)
14. HALLSTROM, ET UX., PETITIONERS v. TILLAMOOK COUNTY, 1989	Government Actor: local government Law: RCRA Issue: Validity of citizen suit under RCRA Ruling: Dismissal of citizen suit under Resource Conservation and Recovery Act provision, 42 USCS 6972, held required where plaintiffs did not meet notice and 60-day-delay requirements of 6972(b)(1).	Pro-gov Anti-env	O’Connor, J., joined by Rehnquist, Ch. J., and White, Blackmun, Stevens, Scalia, and Kennedy	Marshall, Brennan
15. Lujan v. National Wildlife Federation, 1990	Government Actor: DOI Law: FLPMA, NEPA Issue: reclassification of public lands in 17 states Ruling: reclassification upheld	Pro-gov Anti-env	Scalia, Rehnquist, White, O’Connor, Kennedy	Blackmun, Brennan, Marshall, Stevens
16. GENERAL MOTORS CORPORATION, PETITIONER v. UNITED STATES, 1990	Government Actor: EPA Law: Clean Air Act Issue: review of State implementation plan (SIP) Ruling: Clean Air Act held not to (1) require review of state implementation plan (SIP) revision within 4 months, or (2) prevent enforcement of existing SIP, where SIP revision is not timely reviewed.	Pro-env Pro-federal gov	unanimous	

Case and Year	Description	Ruling	Majority	Dissent
17. WISCONSIN PUBLIC INTERVENOR, ET AL., PETITIONERS v. RALPH MORTIER, ET AL., 1991	Government Actor: Wisconsin Public Intervenor (assistant attorney general, Wisconsin) Law: local ordinance, FIFRA Issue: Is local ordinance pre-empted by FIFRA? Ruling: Federal Insecticide, Fungicide, and Rodenticide Act (7 USCS 136-136y) held not to pre-empt regulation of pesticides by local governments.	Pro-local gov Anti-fed Pro-env	White, Rehnquist, Ch. J., and Marshall, Blackmun, Stevens, O'Connor, Kennedy, and Souter, Scalia (concurring in result)	
18. Arkansas, et al., Petitioners v. Oklahoma, et al.; and Environmental Protection Agency, Petitioner v. Oklahoma, et al.	Government Actor: Arkansas, Oklahoma, EPA Law: CLEAN WATER ACT Issue: validity of discharge permit Ruling: EPA's issuance of discharge permit to sewage plant, based on finding that discharges would not cause detectable violation of downstream state's water quality standards, held authorized by Clean Water Act.	Pro-fed Anti-env Pro-gov	Stevens for unanimous court	
19. UNITED STATES DEPARTMENT OF ENERGY, PETITIONER v. OHIO, ET AL.; AND OHIO, ET AL., PETITIONERS v. UNITED STATES DEPARTMENT OF ENERGY	Government Actor: DOE, Ohio Laws: Clean Water Act, Resource Conservation and Recovery Act Issue: Has federal government waived sovereign immunity under RCRA Ruling: Federal sovereign immunity held not waived as to state-imposed punitive fines under Clean Water Act (33 USCS 1251 et seq.) and Resource Conservation and Recovery Act (42 USCS 6901 et seq.).	Anti-state gov Pro-fed gov Anti-env	Souter, Scalia, Kennedy, Thomas, Rehnquist, O'Connor	White, Blackmun, Stevens (in part)
20. New York v. United States, 1992	Government Actor: Law: Low-Level Radioactive Waste Policy Amendments Issue: Do the take-title provisions of the law violate the 10 th Amendment? Ruling: Do take-title provisions violate the 10 th Amendment?	Pro-state Anti-env	Rehnquist, Scalia, Kennedy, Souter, Thomas, O'Connor	White, Blackmun, Stevens

Case and Year	Description	Ruling	Majority	Dissent
21. City of Burlington v. Dague, 1992	Government Actor: city government Laws: CWA Issue: enhancement of attorney's fees Ruling: enhancement of attorney's fees reversed	Pro-gov Anti-env	Scalia, Rehnquist, White, Kennedy, Souter, Thomas	Blackmun, Stevens
22. CHEMICAL WASTE MANAGEMENT, INC., PETITIONER v. GUY HUNT, GOVERNOR OF ALABAMA ET AL., 1992	Government Actor: Alabama Law: State waste disposal law, commerce clause Issue: validity of law under commerce clause Ruling: Disposal fee imposed by Alabama on hazardous waste generated out of state, but not on waste generated in state, held to violate Federal Constitution's commerce clause (Art I, 8, cl 3).	Anti-state Anti-env	White, joined by Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, and Thomas, JJ.	Rehnquist
23. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, ET. AL., Petitioners v. SEATTLE AUDUBON SOCIETY ET AL., 1992	Government Actor: United States Forest Service Law: Department of the Interior and Related Agencies Appropriations Act, 1990 Issue: Did Congressional response to court ruling violate Article III of the Constitution? Ruling: Provision that statute meets requirements of earlier statutes on which specified pending cases involving logging and endangered spotted owl are based, held not to violate Federal Constitution's Article III. (Five different statutes)	Anti-env Pro-gov	Unanimous	
24. MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONER v. DEFENDERS OF WILDLIFE, ET AL., 1992	Government Actor: DOI Law: Endangered Species Act Issue: Standing to challenge actions taken in foreign nations Environmental groups held to lack standing to challenge regulation interpreting 7(a)(2) of Endangered Species Act (16 USCS 1536(a)(2)) not to apply to actions taken in foreign nations.	Anti-env Pro-gov	Scalia, J., joined by Rehnquist, Ch. J., and White, Kennedy, Souter, and Thomas, JJ.	Blackmun, O'Connor

Case and Year	Description	Ruling	Majority	Dissent
25. FORT GRATIOT SANITARY LANDFILL, INC., PETITIONER v. MICHIGAN DEPARTMENT OF NATURAL RESOURCES ET AL.	Government Actor: Michigan Dept. Of Natural Resources Law: state regulation, commerce clause Issue: validity of state regulation under commerce clause Ruling: Michigan statute barring private landfill owner from accepting solid waste originating outside county in which landfill was located held to violate Federal Constitution's commerce clause (Art I, 8, cl 3).	Anti-state govt Anti-env regulation	Stevens, J., joined by White, O'Connor, Scalia, Kennedy, Souter, and Thomas, JJ.,	Rehnquist, Blackmun
26. OREGON WASTE SYSTEMS, INC., ET AL., v. DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON ET AL.	Government Actor: Oregon Dept. Of Environmental Quality Law: state regulation, Commerce clause Issue: validity of state regulation under commerce clause Ruling: Surcharge imposed by Oregon on in-state disposal of solid waste generated in other states held to violate Federal Constitution's commerce clause (Art I, 8, cl 3).	Anti-state govt Anti-env	Thomas, J., joined by Stevens, O'Connor, Scalia, Kennedy, Souter, and Ginsburg, JJ.	Blackmun
27. OF CHICAGO, ET AL., PETITIONERS v. ENVIRONMENTAL DEFENSE FUND ET AL., 1994	Government Actor: EPA, local government Law: Resource Conservation and Recovery Act Issue: exemptions under RCRA Ruling: Ash generated by resource recovery facility's incineration of municipal solid waste held not exempt, pursuant to 42 USCS 6921(i), from regulation as hazardous waste under 42 USCS 6921-6934.	Pro-env Anti-city govt	Scalia, J., joined by Rehnquist, Ch. J., and Blackmun, Kennedy, Souter, Thomas, and Ginsburg	Stevens, O'Connor
28. C& A CARBONE, INC., ET AL., PETITIONERS v. TOWN OF CLARKSTOWN, NEW YORK	Government Actor: local government Law: town ordinance, Commerce Clause Issue: Does ordinance violate commerce clause? Ruling: Town ordinance requiring that all nonrecyclable nonhazardous solid waste within town be deposited at designated transfer station held to violate Federal Constitution's commerce clause	Anti-env Anti-local govt	Kennedy, J., joined by Stevens, Scalia, Thomas, and Ginsburg, JJ.O'Connor	Souter, Rehnquist, Blackmun

Case and Year	Description	Ruling	Majority	Dissent
29. PUD NO. 1 OF JEFFERSON COUNTY AND CITY OF TACOMA, PETITIONERS v. WASHINGTON DEPARTMENT OF ECOLOGY, ET AL., 1994	Government Actors: state and local government Law: Clean Water Act Issue: Permissibility of state requirements under CWA Ruling: State's minimum stream flow requirement held to be permissible condition of certification under 33 USCS 1341 to build hydroelectric project.	Pro state govt Anti-local govt pro-env	O'Connor, J., joined by Rehnquist, Ch. J., and Blackmun, Stevens, Kennedy, Souter, and Ginsburg, JJ.	Thomas, Scalia
30. KEY TRONIC CORPORATION, PETITIONER v. UNITED STATES ET AL.	Government Actor: EPA Law: CERCLA Issue: Ruling: Private litigant's attorneys' fees associated with bringing action under 42 USCS 9607(a)(4)(B) to recover share of landfill cleanup costs held not recoverable.	Partial Anti-gov, Anti-env	by Stevens, J., joined by Rehnquist, Ch. J., and O'Connor, Kennedy, Souter, and Ginsburg, JJ.	Blackmun, Thomas, Scalia
31. ALAN MEGHRIG, ET AL., PETITIONERS v. KFC WESTERN, INC., 1994	Government Actor: Law: RCRA Issue: private cause of action under RCRA Ruling: Resource Conservation and Recovery Act provision (42 USCS 6972) held not to authorize private cause of action to recover prior cost of cleaning up toxic waste that does not endanger health or environment at time of suit.	Anti-env Pro-gov (based upon USA brief)	Unanimous	
32. BENNETT, ET AL., PETITIONERS v. MICHAEL SPEAR, ET AL.	Government Actor: DOI, Fish and Wildlife Service Law: ESA, APA Issue: Standing Ruling: Parties challenging federal agency's lake-level restrictions imposed to protect endangered species held to have standing under Endangered Species Act (16 USCS 1540(g)(1)) and Administrative Procedure Act (5 USCS 701 et seq.)	Anti-gov Anti-env	Unanimous	

Case and Year	Description	Ruling	Majority	Dissent
STEEL COMPANY, AKA CHICAGO STEEL AND PICKLING COMPANY, PETITIONER v. CITIZENS FOR A BETTER ENVIRONMENT	Government Actor: -- Law: EPCRA Issue: Standing, citizen suits for wholly past violations Ruling: Environmental organization held to lack standing to maintain suit under Emergency Planning and Community Right-To-Know Act provision (42 USCS 11046(a)(1)), where no relief sought was likely to remedy organization's alleged injury.	Pro-gov Anti-env	Unanimous in result	
33. UNITED STATES v. BESTFOODS, ET AL.	Government Actor: US A.G. Law: CERCLA Issue: Liability Parent corporation held (1) not subject to derivative liability for environmental cleanup costs as to subsidiary's operations unless corporate veil is pierced, but (2) subject to direct liability for such costs as to parent's own operations.	Anti-gov Anti-env	Unanimous	
34. OHIO FORESTRY ASSOCIATION, INC., PETITIONER v. SIERRA CLUB, ET AL., 1998	Government Actor: USFS Law: National Forest Management Act Issue: validity of logging provisions in land and resource management plan Ruling: Federal suit by environmental organizations who challenged logging provisions of United States Forest Service's land and resource management plan for national forest held not justiciable.	Pro-gov Anti-env	Unanimous	
35. Friends of the Earth Incorporated v. Laidlaw Environmental Services, 2000	Government Actor:-- Law: Clean Water Act Issue: Was claim for civil penalties mooted by compliance? Ruling: Environmental group's claim for civil penalties not necessarily mooted by owner's compliance	Pro-gov Pro-env	Ginsburg, Rehnquist, Stevens, O'Connor, Kennedy, Souter, Breyer	Thomas, Scalia

Case and Year	Description	Ruling	Majority	Dissent
36. SOLID WASTE AGENCY OF NORTHERN COOK COUNTY v. UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.	Government Actor: local government, US Army Corps of Engineers Law: Clean Water Act Issue: Does Clean Water Act extend to intrastate waters (in this case, seasonal ponds in isolated gravel pit that may be used by migrating birds) Ruling: CWA does not extend to this body of water	Anti-gov Anti-env	Rehnquist, O'Connor, Scalia, Kennedy, Thomas	Stevens, Souter, Ginsburg, Breyer
37. Whitman v. American Trucking Association, 2001	Government Actor: EPA Law: Clean Air Act Issues: 1) Did the Clean Air Act delegate legislative power to the administrator of the EPA? 2) Can the administrator consider the costs of implementation? 3) Do courts have jurisdiction with respect to revising ozone NAAQS? 4.) If so, was the EPA's interpretation permissible? Ruling: CAA provisions do not unconstitutionally delegate legislative power; they do not permit consideration costs of implementation	Anti-gov Anti-env	Unanimous re. result	
38. Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency	Government Actor: Tahoe Regional Planning Agency Law: moratoria imposed (as part of land use planning), 5 th Amendment Issues: Do moratoria on developments constitute takings? Ruling: Moratoria do not constitute takings	Pro-gov Pro-env	Stevens, Souter, Ginsburg, O'Connor, Kennedy, Breyer	Rehnquist, Thomas, Scalia
39. SOUTH FLORIDA WATER MANAGEMENT DISTRICT, Petitioner v. MICCOSUKEE TRIBE OF INDIANS et al., 2004	Government Actor: Law: Clean Water Act Issue: Is a permit required to pump already polluted water from a canal to a reservoir? Ruling: For purposes of Clean Water Act requirement of permit for discharge of pollutant into nation's waters, such discharges held to include point sources that did not themselves generate pollutants.	Pro-env Anti-gov	Unanimous	Scalia, II-C

Case and Year	Description	Ruling	Majority	Dissent
40. Engine Manufacturers Association/ Western States Petroleum Association v. South Coast Air Quality Management District, 2004	Government Actor: SCAQMD (California) Laws: Clean Air Act, state regulation Issue: Is the state regulation pre-empted by CAA? Ruling: Yes. California subdivision's rules, imposing emission requirements on motor vehicles purchased or leased by public and private fleet operators, held not to escape pre-emption under § 209(a) of Clean Air Act (42 USCS § 7543(a)).	Pro-fed Anti-env	Scalia, J., Rehnquist, Ch. J., and Stevens, O'Connor, Kennedy, Thomas, Ginsburg, and Breyer	Souter
41. COOPER INDUSTRIES, INC., Petitioner v. AVIALL SERVICES, INC., 2004	Government Actor:-- Law: CERCLA Issue: liability under CERCLA Ruling: Private party, potentially liable for cleaning up property contaminated by hazardous substances, that had not been sued under § 106 or § 107 of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), held unable to obtain contribution under § 113(f)(1) of CERCLA from another allegedly liable party.	Anti-env	Thomas, J., Rehnquist, Ch. J., and O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ.	Ginsburg, Stevens
42. Alaska Department of Environmental Conservation v. EPA, 2004	Government Actor: EPA, Alaska Department of Environmental conservation Law: CAA Issue: Can EPA rule on reasonableness of best available control technology decisions by state permitting agencies re. polluting facilities? Did EPA properly block construction? Ruling: EPA can make the ruling, and properly blocked construction	Pro-feds Pro-env	Ginsburg, Stevens, O'Connor, Souter, and Breyer	Kennedy, Rehnquist, Scalia, Thomas
43. GALE NORTON, SECRETARY OF THE INTERIOR, et al., Petitioners v. SOUTHERN UTAH WILDERNESS ALLIANCE et al.	Government Actor: DOI, Bureau of Land Management Law: FLPMA, NEPA Issue: challenge to BLM decision to allow off-road vehicle use in certain wilderness areas Ruling: challenge dismissed	Pro-fed Anti-env	Unanimous	

Case and Year	Description	Ruling	Majority	Dissent
44. DEPARTMENT OF TRANSPORTATION, et al., Petitioners v. PUBLIC CITIZEN et al., 2004	Government Actor: DOT, EPA Law: NEPA and CAA Issue: Does National Environmental Policy Act of 1969 (42 USCS §§ 4321 et seq.) and Clean Air Act (42 USCS §§ 7401 et seq.) require Federal Motor Carrier Safety Administration to evaluate environmental effects of some cross-border operations by Mexican-domiciled carriers? Ruling: Government decision upheld	Pro-gov Anti-env	Unanimous	
45. DENNIS BATES, et al., Petitioners v. DOW AGROSCIENCES LLC, 2005	Government Actor: EPA Laws: FIFRA Issue: Does FIFRA pre-empt state law claims regarding damages caused by pesticides Ruling: FIFRA does not pre-empt all claims	Pro-env	Stevens, J., Rehnquist, Ch. J., O'Connor, Kennedy, Souter, Ginsburg, Breyer,	Thomas, Scalia
46. UNITED HAULERS ASSOCIATION, INC., ET AL. v. ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY ET AL., 2007	Government Actor: Local government Laws: local waste ordinance, Commerce Clause Issue: Can a municipality enact a flow control ordinance that directs all solid waste generated in its jurisdiction to a public facility without offending the commerce clause? Ruling: Ordinances do not violate commerce clause	Pro-gov Pro-env	Roberts, Thomas, Souter, Ginsburg, Breyer, Scalia (except II-D)	Alito, Stevens, Kennedy
47. S. D. WARREN COMPANY, v. MAINE BOARD OF ENVIRONMENTAL PROTECTION et al., 2006	Government Actor: Maine Board of Environmental Protection, FERC, EPA Law: CWA Issue: Does Federal licensing of hydroelectric dams require state certification? Ruling: state certification is required	Pro-gov Pro-env	Souter, J., Roberts, C. J., Stevens, Kennedy, Thomas, Ginsburg, Breyer, Alito, Scalia, J.,	

Case and Year	Description	Ruling	Majority	Dissent
48. JOHN A. RAPANOS ET UX., v. UNITED STATES. JUNE CARABELL, ET AL., PETITIONERS v. UNITED STATES ARMY CORPS OF ENGINEERS, ET AL., 2007	Government Actor: US Army Corps of Engineers Laws: CWA Issue: Is the CWA applicable to intrastate waters? Ruling: CWA cannot be applied to these waters, either because a) not connected to interstate commerce or b) insufficient nexus between waters and interstate commerce	Anti-gov Anti-env	Scalia, Roberts, Thomas, Kennedy, Alito	STEVENS, SOUTER, GINSBURG, and BREYER
49. NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL., PETITIONERS v. DEFENDERS OF WILDLIFE ET AL.; ENVIRONMENTAL PROTECTION AGENCY, PETITIONER v. DEFENDERS OF WILDLIFE ET AL., 2007	Government Actor: EPA Laws: CWA and ESA Issue: Were proper criteria met for transferring administrative power to Arizona under the ESA? Ruling: EPA decision upheld, 9 th circuit overturned CLEAN WATER ACT and ENDANGERED SPECIES ACT	Pro-gov Anti-env	Alito, Roberts, Scalia, Thomas, Kennedy	Steven, Breyer, Souter, Ginsburg
50. Massachusetts v. EPA, 2007	Government Actor: EPA Laws: CAA, APA Issue: Does the CAA have the authority to regulate green house gases such as carbon dioxide? Ruling: Case remanded to EPA, which must provide reasons for decision not to regulate green house gases that do not run afoul of APA arbitrary and capricious standards	Anti-fed gov Pro env	Stevens, Kennedy, Souter, Ginsburg, Breyer	Roberts, Thomas, Alito, Scalia

Case and Year	Description	Ruling	Majority	Dissent
51. United States v. Atlantic Research Corporation, 2007	Government Actor: USA Laws: CERCLA Issue: suit to recover costs for clean up Ruling: Atlantic Research has a cause of action	Anti-fed gov	Unanimous	
52. Environmental Defense, et al., Petitioners v. Duke Energy Corporation, et al.	Government Actor: Federal government joined by environmental petitioners Laws: CAA Issue: Are re-designed coal fired electric generating units “major modifications” under CAA? Must “modification” be interpreted identically under all CAA implementing regulations? Ruling: lower court overturned; no need for identical interpretation of terms	Pro-gov Pro-env	Souter, Roberts, Scalia, Breyer, Ginsburg, Alito, Stevens, Kennedy, Thomas (in part)	Thomas (in part)

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