2007

A Jurisprudence of Ideology

Robert L. Glicksman
George Washington University Law School, rglicksman@law.gwu.edu

James May

A Jurisprudence of Ideology

Chief Justice Rehnquist was not the simple anti-environmental jurist of his caricature. But his adherence to several tenets of Movement Conservative ideology often produced the same results — unless he was defending state resource protection from federal encroachment or out-of-state waste

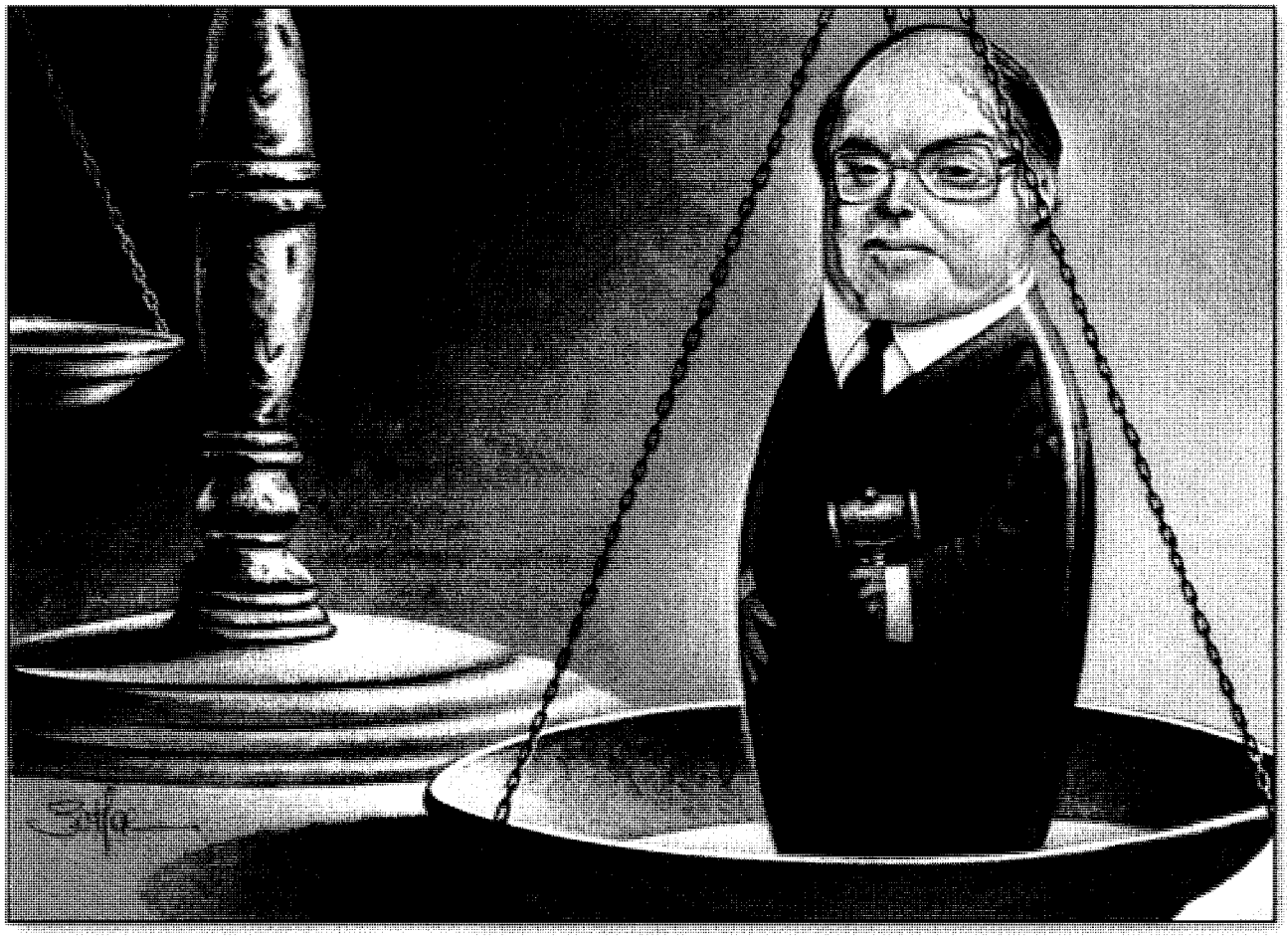
ROBERT L. GLICKSMAN and JAMES R. MAY

Chief Justice William Rehnquist is a towering figure in environmental law, for more than three decades uniquely situated on the Supreme Court to guide the law's development. Coming to the Court two years after Earth Day and serving as chief from 1986 until his death in 2005, he wrote more opinions in environmental cases, as well as in cases on federal lands and waters, than any other justice. He also participated in an unprecedented number of cases challenging state and local land use laws designed to protect the environment. Surveying this vast body of jurisprudence produces an apparent contradiction. Rehnquist adhered to an ideological legal philosophy aligned with Movement Conservatism — the belief, which came into its ascendancy during the Reagan administration, that government's role is protecting property rights and unfettered free markets rather than intervening in economic affairs to achieve social policy goals — that has significantly undermined federal and state environmental policies and will hamper future environmental protection efforts. While his jurisprudential ideology served to undermine environmental law, however, this outcome was most likely not his purpose.

Robert L. Glicksman *is Robert W. Wagstaff Professor of Law at the University of Kansas.* **James R. May** *is Professor of Law at Widener University. This article is based on research that will produce an extensive study of Justice Rehnquist's environmental law jurisprudence.*

What Rehnquist wrote — and not just how he voted — reveals that he used three ideological guideposts as the basis for his reasoning on environmental cases, all of which became the basis of significant challenges to environmental regulation: limiting the scope of federal power, protecting state sovereignty from encroachment by the federal government, and protecting the rights of private property owners against intrusions resulting from regulation by all levels of government. Though each component had the effect of undermining modern environmental law, Rehnquist was not ideologically hostile to environmental initiatives per se. His southwestern roots exposed him to the wisdom of protecting natural resources. He believed that environmental protection fell within the sphere of the states' traditional power, and assiduously supported — most often alone and in dissent — state environmental laws designed to protect natural resources from degradation by out-of-state sources. Moreover, he was reluctant to find state environmental laws preempted by federal law lacking convincing evidence of preemptive intent by Congress.

At the same time, Rehnquist was deeply critical of the federal legislative and regulatory underpinnings of modern environmental law. And despite his general support of state efforts to protect natural resources, he almost always concluded that states should compensate landowners whenever their environmental laws restricted the use of private property, a stance that severely restricted the vestigial environmental import of his pro-states-rights ideology.



Limiting Federal Power

Rehnquist's ideological aversion to expansive federal authority led him to use a number of tools to restrict Congress's power to protect the environment. In particular, he supported the recognition of limits on Congress's authority to legislate under the Commerce Clause. Because the clause provides the constitutional underpinning of most federal environmental legislation, those limits would impair the Legislative Branch's ability to enact strong environmental protection measures and the Executive Branch's ability to implement them.

In *Hodel v. Virginia Surface Mining & Reclamation Association* (1981), Rehnquist concurred in a decision upholding Congress's authority to require mining companies operating on private intrastate land to clean up and restore sites under the Surface Mining Control and Reclamation Act. But he sounded an ominous note of caution, famously observing that although "one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress . . . there are constitutional limits." *In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001), he rejected the federal government's position that the Clean Water Act authorizes federal regulation of intrastate, isolated waters on the ground that they provide habitat for migratory birds. Although he based that conclusion on statutory interpretation, Rehnquist supported his narrow reading of the act based on his conviction that any effort by Congress to rely on the Commerce Clause to regulate intrastate waters would raise "significant constitutional questions."

He was not skeptical of all sources of legislative power to protect the environment. Perhaps feeling that the federal government has the same property rights as a private owner, he never raised an eyebrow when assessing the breadth of Congress's authority under the Constitution's Property Clause "to make all needful rules and regulations" to govern property belonging to the United States. Congress uses this authority to manage federally owned lands such as national parks and forests.

Rehnquist also urged the expansion of the nondelegation doctrine, an outgrowth of the constitutional provision vesting "all legislative powers" in Congress. Restrictions on legislative ability to delegate power to expert executive agencies such as EPA would impair the federal government's capacity to implement environmental legislation properly grounded in the Commerce Clause. Rehnquist

generally took the position that congressional delegation of tough decisions about environmental and other social matters to unelected, mission-oriented agencies like EPA amounts to an improper abdication of Congress's core power to legislate. He strove mightily, at least for a time, to reinvigorate the doctrine. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (1980; also known as the *Benzene* case), for example, a plurality of the Court invalidated a standard designed to protect workers from the health risks of exposure to benzene that had been adopted by the Occupational Safety and Health Administration, concluding that OSHA misinterpreted the scope of its statutory authority. Rehnquist concurred with the plurality, though he would have found that an aspect of the Occupational Safety and Health Act itself was invalid because of the unbounded discretion afforded the agency in the statutory decree that it set workplace safety standards "to the extent feasible." He believed that it is the job of Congress, not the Executive, to weigh the divergent social values necessary to determine the feasible level of exposure to dangerous chemicals in the workplace.

But he seemed to abandon his quest to reinvigorate the doctrine toward the end of his tenure. In *Whitman v. American Trucking Associations* (2001), the Court unanimously rejected a non-delegation challenge to Congress's charge to the agency under the Clean Air Act to set ambient air quality standards that are "requisite" to protect the public health. Despite the similarity between the words "feasible" in the OSH Act and "requisite" in the CAA, Rehnquist joined Justice Antonin Scalia's majority opinion, which held that the CAA delegation falls "comfortably within" the range of permissible delegation established by the Court's past non-delegation precedents.

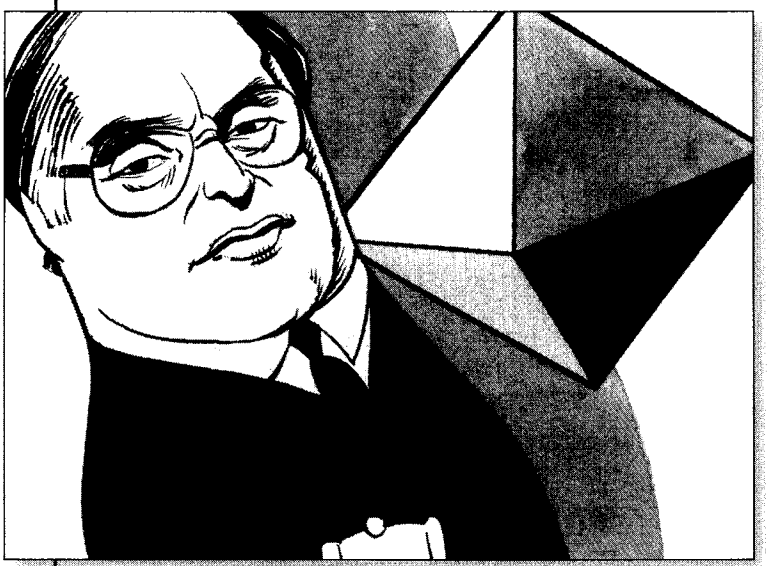
Finally, Rehnquist regularly interpreted the scope of environmental statutes narrowly, especially those administered by EPA, lowering their degree of protection. Indeed, he generally declined to defer to EPA's statutory interpretations, even though the Court during his tenure often emphasized the obligation of judges to defer to administrative interpretations and the impropriety of judicial usurpation of the authority of the elected branches of government. Rehnquist was clearly frustrated with how Congress composed environmental laws. For example, he complained in *United States Steel Corp. v. EPA* (1980) that the CAA's requirements "virtually swim before one's eyes." In *Harrison v. PPG Industries* (1980), he felt obliged to resort to canons of statutory construction, congressional purposes, and legislative history to interpret the same act, bemoaning that "the effort to determine congressional intent here might better be entrusted to a detective than to a judge." In *Adamo Wrecking Co. v. United States* (1978), he aimed his ire not at Congress, but at EPA due to its effort to expand its own regulatory authority. In adopting a narrow construction of the CAA, Rehnquist maintained that the act's criminal liability provisions "did not empower [EPA], after the manner of Humpty Dumpty in *Through the Looking-Glass,* to make a regulation an 'emission standard' by . . . mere designation."

Rehnquist's near universal tendency to interpret statutes narrowly led him to reject implied private rights of action and to deny litigants' entitlement to attorneys fees in environmental cases. The result was a weakening of environmental enforcement. An example is *California v. Sierra Club* (1981), in which the Court held that the Rivers and Harbors Act does not provide an implied private right of action to enforce the statute. Rehnquist concurred, emphasizing the lack of any statutory language or legislative history evidencing that Congress intended to endorse such an action. The court could not recognize implied rights of action absent "clear and manifest" congressional intent to allow them. Yet Rehnquist was willing to ignore what appears to be "clear and manifest" legislative intent in *Ruckelshaus v. Sierra Club* (1983). Writing for a 5-4 majority, he swept aside the plain meaning of the CAA allowing the federal courts in citizen suits to award attorneys fees "as appropriate." Instead, he invoked the so-

called "American rule," which requires parties to bear their own costs in all cases. He reached this conclusion barring the exercise of judicial discretion in assessing whether fee-shifting is "appropriate," despite key passages in the act's legislative history that show that Congress envisioned a regime different from the one governed by the American Rule.

Rehnquist's proclivity for narrow interpretations of the environmental statutes was so strong that he adhered to it in the face of agency interpretations that conflicted with those he adopted. In *SWANCC*, he rejected EPA's (and the Corps of Engineers') expansive interpretation of the CWA's dredge and fill permit program. In several cases arising under the CAA, he also made short shrift of EPA's construction of the statute.

This inclination is perhaps best illustrated in his interpretations of the National Environmental Policy Act. NEPA is procedural — it requires agencies to consider environmental impacts in advance of taking action and to disclose the results. But ever since President Nixon signed NEPA in 1970, many had hoped it would be interpreted to create an additional substantive mandate that agencies make decisions that promote environmental protection. At every opportunity presented to him, however, Rehnquist adopted the most restrictive reading of the law. In *Strycker's Bay* (1980), he definitively denied that NEPA has substantive force. In the seminal *Vermont Yankee* case (1978), Rehnquist put an abrupt halt to the efforts of the lower federal courts to impose on agencies procedural obligations more rigorous than those derived from the Administrative Procedure Act and stressed the "limited" nature of judicial review of alleged noncompliance with NEPA.



To be sure, Rehnquist purported in each of his NEPA opinions to simply be adhering to congressional intent. His uniformly parsimonious interpretations of the statute's scope, however, coupled with his narrow constructions of other federal environmental laws, at least raise the suspicion that Rehnquist relished the opportunity to relegate NEPA to the role of a grandiloquent-sounding but ultimately meaningless paper pushing exercise.

Promoting Federalism

The second component of Rehnquist's jurisprudential ideology was his dedication to the preservation of state sovereignty. Rehnquist pursued this goal in cases involving applications of the dormant Commerce Clause, the Eleventh Amendment, and, less uniformly, the Supremacy Clause. He also sought to protect state sovereignty through the mechanism of statutory interpretation of federal environmental laws and through interpretations of the appropriate scope of federal common law and the equal footing doctrine.

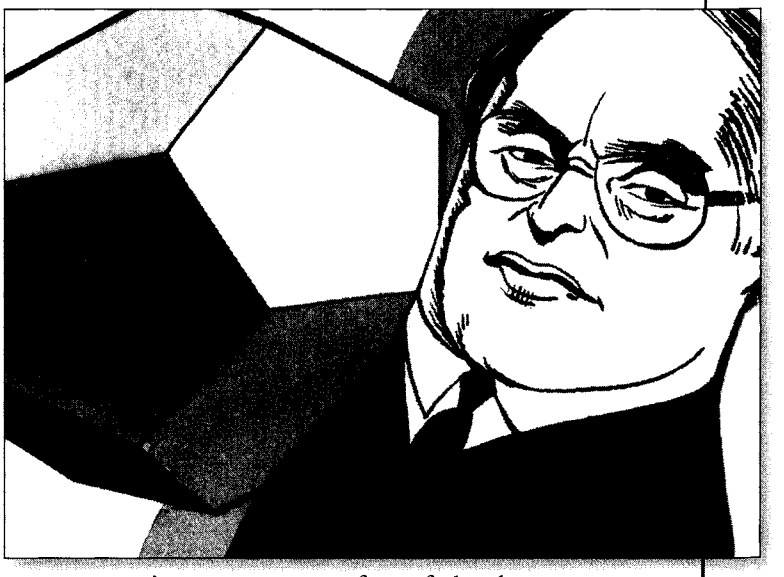
Rehnquist's commitment to state sovereignty is less one-sided in its impact on the fate of environmental protection measures than his pursuit of a federal government of limited powers. His jurisprudence under the dormant Commerce Clause, for example, is apt to protect state initiatives to prevent degradation of state resources by external threats. Yet Rehnquist's ideological commitment to the protection of inviolate state sovereignty had the capacity in other contexts to diminish modern environmental law by tipping the scales in favor of differentiated state solutions to what appear to be problems that demand a national solution.

The Court has interpreted the Commerce Clause not just to delegate to Congress the power to regulate activities in interstate commerce, but also to prevent states from enacting laws that discriminate against out-of-state economic interests — the dormant Commerce Clause. Rehnquist categorically rejected using this "negative implication" of the Commerce Clause to thwart state environmental laws, and categorically dissented from the Court's repeated invalidation of state efforts to protect land and resources from environmental degradation due to external threats. For example, in *City of Phila-*

delphia v. New Jersey (1976), he dissented when the Court struck a state natural resource protection law that banned imports of out-of-state solid waste. In *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources* (1992), Rehnquist dissented from the majority's holding that a state law requiring source separation and shipment to county transfer stations constituted illegitimate economic protectionism. In his dissent in *Chemical Waste Management v. Hunt* (1992), Rehnquist chided his brethren for failing to "acknowledge that a safe and attractive environment is the commodity really at issue in cases such as this, [and that] states may take actions legitimately directed at the preservation of the state's natural resources."

Some of Rehnquist's preemption decisions also rebut the thesis that his opinions were inevitably anti-environmental in character; instead, his concern may have been protecting state sovereignty, regardless of the consequences for environmental protection initiatives. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission* (1983), Rehnquist voted with a unanimous Court to uphold California's moratorium on the construction of new nuclear power plants due to the state's concerns about the economic impact of long-term storage of radioactive wastes. Other preemption opinions, however, have an anti-environmental slant. In *Midlantic National Bank v. New Jersey Department of Environmental Protection* (1986), the majority upheld a state environmental law that forbade parties who file for bankruptcy protection from abandoning hazardous properties. Rehnquist, in dissent, concluded that Congress intended for the "abandonment" provisions of the U.S. Bankruptcy Code to preempt state law.

The most consistently anti-environmental tool in Rehnquist's arsenal of constitutional mechanisms to protect state sovereignty was his use of the 11th Amendment, which he interpreted as prohibiting Congress from abrogating state sovereign immunity by permitting private parties to sue states. In *Pennsylvania v. Union Gas Co.* (1989), Rehnquist dissented from a majority opinion upholding the constitutionality of the Comprehensive Environmental Response, Compensation, and Liability Act insofar as it permitted suits against the states for monetary damages in federal court. Seven years later, he wrote the majority opinion in *Seminole Tribe of Florida v. Florida* (1996), which overruled *Union Gas* and held that Congress may not abrogate sovereign immunity without the consent of the state being sued. This result has created obstacles to the pursuit of citizen suits to redress violations of the federal environmental laws by states and state agencies. It has also hampered implementation of federal whistleblower laws designed to protect state employees who report a



state agency's transgressions from federal environmental law.

Rehnquist relied heavily on statutory construction to protect state sovereignty as well as to limit federal power, most often engendering results not favorable to environmental protection goals. In *SWANCC,* he found that the Corps's attempt to regulate waters frequented by migratory birds under the CWA's dredge and fill permit program exceeded the bounds of the agency's statutory authority. Rehnquist rejected all contrary evidence, including the Conference Report's statement of Congress's "inten[t] that the term 'navigable waters' be given the broadest possible constitutional interpretation." Accepting the Corps's interpretation, he asserted, "would result in a significant impingement of the states' traditional and primary power over land and water use."

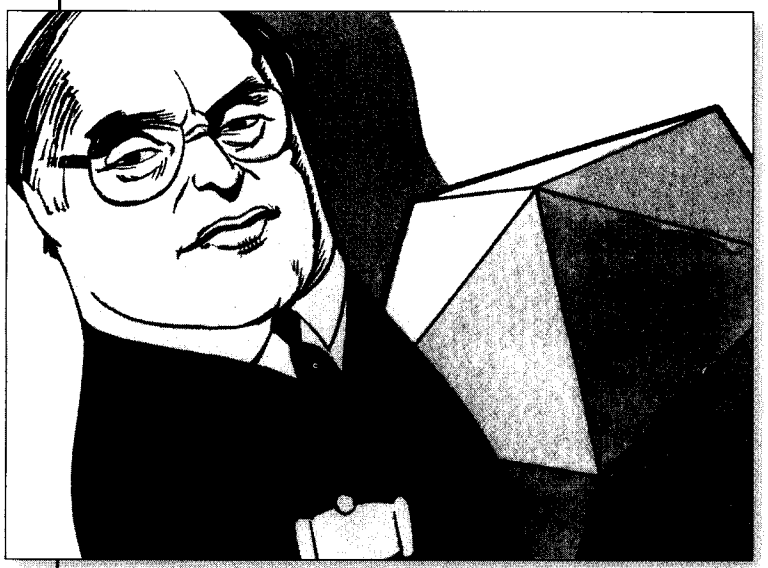
In the natural resources law context, Rehnquist generally supported a narrow application of the equal footing doctrine, which provides that when states are admitted to the Union they acquire the same jurisdiction over lands within their borders underlying navigable waters as the original 13 states. Rehnquist's narrow application of the doctrine expanded the range of circumstances in which state rather than federal law controls the development of submerged lands, often facilitating development

of the resources in question. In *Minnesota v. Mille Lac Band of Chippewa Indians* (1999), he dissented from the majority's holding that tribal usufructuary rights to hunt and fish survived Minnesota's admission. According to Rehnquist, those rights conflicted with state sovereignty and, pursuant to the equal footing doctrine, did not survive statehood.

Protecting Private Property

The final prong of Rehnquist's jurisprudential ideology was protecting private property rights. His sympathy for the plight of property owners adversely affected by regulation was evident in his opinions on both constitutional and statutory issues. He was among the justices most amenable to claims that government regulation required the payment of just compensation under the Takings Clause of the Fifth Amendment. He also interpreted federal legislation to maximize protection of private property.

Rehnquist's opinions uniformly found that state efforts to protect land and resources constituted a regulatory taking. He wrote the majority opinion in *Dolan v. City of Tigard* (1994), holding that an exaction requiring a landowner to dedicate property for use as a drainage easement and a pedestrian and bicycle pathway, was a taking. He wrote dissenting opinions in three other cases, *Penn Central*



(1978), *Keystone* (1987), and *Tahoe-Sierra* (2002), concluding that the Court erred in refusing to characterize as regulatory takings the applications of a local landmarks preservation law, a state statute restricting coal mining that causes subsidence, and a regional effort to halt land development temporarily pending the adoption of a comprehensive land use plan. He argued that the Court should define the property interest adversely affected by regulation more narrowly than the majority was willing to do when it assessed the degree of the adverse economic impact caused by regulation. He also took a narrow view of the Court's exception to the rule that a regulation whose effect is a complete deprivation of all economically viable use is a per se taking. He argued that the exception should be limited to those property uses that traditionally qualify as nuisances under state common law, and does not include more modern forms of disfavored uses recognized by judges or enacted by state or local legislatures.

Rehnquist resolved clashes between protection of state sovereignty and private property in favor of the latter, and, in doing so, made it more difficult for state and local governments to control land use with potentially damaging environmental consequences without compensating affected property owners. He took the position in *Keystone*, for example, that the scope of the nuisance exception is governed by federal rather than state law, subject to independent scrutiny by the federal courts. A lack of deference to state legislative findings on the harmful character of the regulated use can enhance the protection of private property rights. Similarly, in his later years on the Court, Rehnquist seemed more willing to allow federal courts to assume jurisdiction over cases in which landowners asserted takings claims, even before the state courts had definitively ruled that compensation was not allowed under state law.

The ideological positions William Rehnquist took in his opinions addressing environmental issues have left a lasting legacy. They will likely influence the way current and future justices, judges, scholars, and policymakers construe environmental law for decades. Was limiting the scope of federal power, protecting state sovereignty from the encroachment of the federal government, and protecting the rights of private property owners evidence of an anti-environmental agenda? The record offers no firm conclusion. But William Rehnquist's jurisprudence of ideology will remain a force in restricting the ability of all levels of government to protect the environment for many years to come.