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Constitutional Bounds on Congress' Ability to Protect the Environment

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Summary

Federal protection of the environment must hew to the same constitutional bounds as any other federal activity. In the past decade, the Supreme Court has invigorated several of these bounds in ways that present new challenges to congressional drafters of environmental statutes. This report reviews five of these newly emergent constitutional areas. For each area, the focus is its significance for current and future federal environmental legislation.

First, the Commerce Clause, requiring that activities regulated by federal laws enacted under the Clause have a sufficient nexus with interstate commerce. In 1995, the Supreme Court sustained a Commerce Clause challenge to a federal law for the first time in 60 years, and did so again in 2000. Thus far, lower courts have rejected such challenges to federal environmental laws, but in 2001 the Supreme Court opted for a narrow reading of federal Clean Water Act jurisdiction over “isolated waters,” in part to avoid Commerce Clause issues.

Second, standing to sue in the federal courts. Article III restricts standing (who is a proper party to bring suit) to those who can demonstrate injury in fact, causation, and redressability. In a series of decisions during the 1990s, the Supreme Court interpreted these requirements with increasing stringency, making standing more difficult to establish and lessening the viability of many potential environmental citizen suits. In a sharp turnabout, however, the Court in 2000 eased the injury-in-fact and redressability components.

Third, the Takings Clause of the Fifth Amendment, declaring that when the federal government “takes” property, just compensation is owed. The federal environmental program most commonly attacked in takings suits is the Clean Water Act section 404 wetlands program. Other federal programs occasionally challenged as effecting takings include the Endangered Species Act, Surface Mining Control and Reclamation Act, Rails to Trails Act, and Superfund Act.

Fourth, the Tenth Amendment, stating that powers not granted to the Federal Government are reserved to the states. Invoking this Amendment, Supreme Court decisions during the 1990s held that Congress cannot compel the participation of state legislatures or state executive-branch officials in federal programs. But conditions on the grant of federal funds to the states and other noncoercive approaches to enlisting state cooperation with federal environmental initiatives have been judicially approved.

Fifth, the Eleventh Amendment, which together with general principles of state sovereign immunity bars Congress from authorizing private lawsuits against unconsenting states. Because the Amendment applies only to private suits against states and does not prohibit suits against state officials for injunctive relief, it has thus far not been a major constraint on congressional environmental efforts. Noncoercive approaches (preceding paragraph) are also available.

Finally, the report briefly sketches two constitutional doctrines that, while recently active, have not received Supreme Court resuscitation. One, the Article I nondelegation doctrine, was used by a lower court to void Clean Air Act regulations before being returned to its former quiescent status by the Supreme Court in 2001. The other, Article II's vesting of enforcement authority in the executive branch, is today argued by some citizen-suit defendants as being inconsistent with *citizen* enforcement of federal environmental laws. The Supreme Court has yet to resolve the issue.

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Constitutional Bounds on Congress' Ability to Protect the Environment

Congress' efforts to protect the environment have always been required to respect the same constitutional bounds as any other federal actions. Today, however, this fact is newly important. In the past decade or so, the Supreme Court has invigorated five of these constitutional bounds in ways that present fresh challenges to congressional drafters of environmental statutes.

These five constitutional strictures are (1) the Commerce Clause,¹ demanding that congressional enactments based on the Clause address activities having a sufficient link to interstate commerce, (2) Article III standing doctrine, limiting who is a proper party to invoke the jurisdiction of Article III federal courts, (3) the Fifth Amendment Takings Clause, requiring that certain government interferences with private property be accompanied by compensation of the owner, (4) the Tenth Amendment, barring direct federal regulation of state legislatures and state executive-branch officials, and (5) the Eleventh Amendment, limiting federal authorization of private suits against unconsenting states.

What these five constitutional areas share is that in each instance the Court – often, though not always, through the five conservative justices² – has redrawn or at least underscored a fundamental limit on federal power. In the Court's Commerce Clause, Tenth Amendment, and Eleventh Amendment decisions, that line is the one between the proper domains of federal and state power. These are known as the “federalism” cases.³ In the Court's standing-to-sue decisions, it is the line between the judiciary and the political branches of the federal government. And in its Takings Clause decisions, it is the line between the rights of the community, as effectuated by government, and those of individual property owners. A goodly number of these Supreme Court decisions arise out of suits directly involving federal environmental statutes, but even where they do not, their relevance to such statutes is clear.

Until the 1990s, Congress legislated in the environmental area with relatively few constitutional concerns. Thus, the Supreme Court's renewed attention to the five areas mentioned has hardly escaped notice, particularly because the new focus comes chiefly from one side of the political spectrum: the conservative majority on the Court. Some commentators have seen in the Court's new direction a severe threat to the future of federal environmental law --

¹U.S. CONST. art. I, § 8, cl. 3.

²Chief Justice William Rehnquist, and Justices Antonin Scalia, Clarence Thomas, Sandra Day O'Connor, and Anthony Kennedy.

³See also (name redacted), *Federalism and the Constitution: Limits on Congressional Power*, CRS Rept. No. RL30315 (updated March 21, 2001).

In the last decade, judges have imposed a gauntlet of new hurdles in the path of environmental regulators, slammed the courthouse doors in the face of citizens seeking to protect the environment, and sketched the outline of a jurisprudence of “economic liberties” under the Takings Clause and the U.S. Commerce Clause of the U.S. Constitution that would frustrate or repeal most federal environmental statutes.⁴

Others find the threat overstated, at least in regard to the federalism cases --

Collectively, these rulings proscribe federal power, but this does not mean that environmental protection is threatened. Thus far, the Court’s federalist decisions have been exceedingly modest, trimming federal power only on the margins. Congress retains substantial authority to adopt environmental measures, especially in those areas of particular federal concern. [In any event,] Federal regulation is not the only means to advance environmental values⁵

Herein we offer a survey of these newly rehabilitated constitutional bounds.⁶ For each, the report presents a hornbook review of the jurisprudence, then moves on to its key focus: how the jurisprudence has been, or may be, applied to federal environmental programs. The reader should have little difficulty seeing the significance of the discussion for many *non*-environmental federal programs as well.

Following discussion of the five constitutional areas above, the report gives a cursory nod to two constitutional doctrines that, while recently active, have not been the beneficiaries of Supreme Court promotion. One, the Article I nondelegation doctrine, was briefly resurrected by a lower court in a challenge to Clean Air Act regulations before being reigned in by the Supreme Court in 2001. The other, Article II’s vesting of enforcement authority in the executive branch, is today argued by some citizen-suit defendants as inconsistent with *citizen* enforcement of federal environmental laws. The Supreme Court has yet to resolve this issue.

⁴Douglas T. Kendall et al., *Conservative Judicial Activism and the Environment: An Assessment of the Threat*, 32 ENVTL. L. RPTR. 10835 (July 2002) (citations omitted).

⁵Jonathan H. Adler, *Judicial Federalism Not Anti-Environment*, in *Who’s in Charge?*, ENVTL. FORUM, July/Aug. 2002, p. 50.

⁶Constitutional areas that are not “newly” important for federal environmental lawmaking, and accordingly are not discussed in this report, include the Property Power in Article IV (authorizing congressional regulation of the public lands), preemption doctrine under the Article VI Supremacy Clause (defining when a federal statute will be held to have displaced state regulation), and the Fourth Amendment (limiting the use of administrative searches).

Article I: Commerce Clause

Background

The Commerce Clause of Article I bestows upon Congress the power "[t]o regulate Commerce ... among the several States"⁷ As the basis for much of the environmental, social, and economic legislation enacted by Congress, the scope of this power is of more than passing interest. The Supreme Court has often been treated to cases where the validity of a federal statute hinged on whether the activity sought to be regulated, alone or aggregated with similar activity of others, had a sufficient effect on interstate commerce to fall within the Commerce Power. Fortunately from Congress' point of view, the Supreme Court beginning in the 1930s adopted an expansive interpretation of the Clause's reach.⁸ Indeed, from 1937 until 1995, the Court rebuffed every Commerce Clause challenge to federal law.

In 1995, Congress' winning streak came to a halt. In *United States v. Lopez*,⁹ the Supreme Court by 5-4 voided a criminal conviction under the Gun-Free School Zones Act of 1990 as beyond Congress' authority under the Commerce Clause.¹⁰ The majority explained that the Court's decisions had identified three categories of activity reached by the Clause – the now-canonical test.¹¹ First, Congress may regulate use of the channels of interstate commerce. Second, Congress may regulate and protect the instrumentalities of, or persons or things in, interstate commerce, even though the threat may come only from intrastate activities. And third, the Commerce Clause includes the power to regulate intrastate activities that alone or in the aggregate “substantially affect” interstate commerce. As to the last category, the Court strongly suggested that only *economic* activity may be aggregated to establish substantial effect. Finding that possession of a gun in a schoolyard lay outside the last category (the only one that potentially applied), the conviction was reversed.

In 2000 and 2001, the Court showed that *Lopez* was no anomaly. In *United States v. Morrison*,¹² it again held (and again by 5-4) that Congress exceeded its commerce power – this time in creating a federal civil remedy for victims of gender-

⁷U.S. Const. art. I, § 8, cl. 3.

⁸The key decision ushering in the modern period of expansive interpretation was *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). There, the Court rejected its previous distinction between “direct” and “indirect” effects on interstate commerce, recasting the Commerce Clause inquiry as whether the intrastate activities “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce” *Id.* at 36-38.

⁹514 U.S. 549 (1995).

¹⁰See generally (name redacted), *United States v. Lopez: The Limits of Federal Power Under the Commerce Clause*, CRS Rept. No. 95-1047 (1995) (archived).

¹¹514 U.S. at 558-559.

¹²529 U.S. 598 (2000).

motivated violence, as part of the Violence Against Women Act.¹³ As in *Lopez*, the Court focused on the noneconomic, violent nature of the federally proscribed activity in refusing to aggregate impacts on interstate commerce under the “substantially affects” category.¹⁴ Further (and raising eyebrows among the commentators), the Court refused to be bound by congressional findings in the Act asserting such impacts on interstate commerce. These findings, it said, relied on a line of reasoning – “but for” causation – that the Court had previously rejected in the Commerce Clause context. After *Morrison*, the Court twice construed federal statutes narrowly at least in part to avoid questions as to their possible invasion of intrastate realms beyond Congress’ commerce power.¹⁵ While purely statutory rulings, these two decisions show the continuing importance of the constitutional issue to the Court, and its determination that the line between the proper realms of federal and state power not be obliterated.

At the same time, nothing in *Lopez* or *Morrison* overruled any of the Court’s prior Commerce Clause decisions. The Court even cited with approval *Wickard v. Filburn*,¹⁶ widely seen as the pinnacle of its expansive Commerce Clause jurisprudence. *Lopez* and *Morrison* are thus best regarded not as a retrenchment, but rather as a clarification of where the line has long been, and a warning that the line will not be shifted further toward federal power to accommodate Congress.

Are Federal Environmental Statutes Vulnerable?

No sooner had the ink dried on the *Lopez* decision than concerns were raised that some federal environmental statutes might be on shaky Commerce Clause footing.¹⁷ Vulnerabilities were suggested in the Superfund Act (cleanup sites where the contamination remains within one state), Clean Water Act (“isolated waters”), Safe Drinking Water Act (publicly owned drinking water systems providing service within one state), and Endangered Species Act (species located entirely within one state, affected by noneconomic activity).

The bulk of federal environmental provisions seems to be on constitutional terra firma. Either the activity regulated is an economic one that, alone or in the aggregate,

¹³See (name redacted), *United States v. Morrison*, *the Supreme Court Declares 42 U.S.C. 13981 Unconstitutional*, CRS Rept. No. RS20584 (May 22, 2000).

¹⁴“While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity ... , thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” 529 U.S. at 613.

¹⁵*Jones v. United States*, 529 U.S. 848 (2000) (federal arson statute); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (federal statute creating permit program for discharges into “isolated waters”).

¹⁶317 U.S. 111 (1942), cited in *Lopez*, 514 U.S. at 560-561.

¹⁷See generally John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 ENVTL. L. RPTR. 10421 (1995); J. Blanding Holman, Note, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L. J. 139 (1995).

has substantial effect on interstate commerce (e.g., industrial activity causing air pollution), or the statute is explicit that it reaches only activities in or affecting interstate commerce,¹⁸ or there are congressional findings that the regulated activity affects interstate commerce.¹⁹ Moreover, case law indicates that the concept of economic activity, the prerequisite for aggregating the interstate impacts of intrastate activity, may be broadly construed²⁰ – though undeniably amorphous and manipulable.²¹ Finally, the Court has cautioned that congressional enactments should be judicially invalidated only upon “a plain showing” that Congress exceeded its constitutional bounds.²²

Some further words are in order about congressional findings in the wake of *Lopez* and *Morrison*. In both decisions, the Court cautioned that “[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”²³ Particularly is this true, said *Morrison*, when a “but for” causal chain is asserted by Congress as providing the nexus between the regulated act and interstate commerce. Such a chain of inference piled on inference knows no bounds, said the Court, allowing Congress to regulate almost any area of “traditional state regulation.” Thus, concluded the Court, this method of reasoning must be rejected “if we are to maintain the Constitution’s enumeration of powers.”²⁴ The pertinence for this report is that few federal environmental statutes use a “but for” rationale to support Commerce Clause jurisdiction – recall the preceding paragraph. Probably the chief exception is the Endangered Species Act,

¹⁸*See, e.g.*, Federal Hazardous Substances Act, 15 U.S.C. § 1263; Toxic Substances Control Act, 15 U.S.C. § 2602(3)-(4); Migratory Bird Treaty Act, 16 U.S.C. § 705; Clean Air Act, 42 U.S.C. § 7511b(e)(1)(C); Clean Water Act, 33 U.S.C. § 1342(a); Hazardous Materials Transportation Act, 49 U.S.C. § 5102(1).

In other instances, the statute may not explicitly impose such a constraint, but may limit its application to entities that are presumptively engaged in interstate commerce – for example, manufacturers and distributors.

¹⁹*See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2601(a)(3); Marine Mammal Protection Act, 16 U.S.C. § 1361(5). Such findings are persuasive, even if not controlling. *Lopez*, 514 U.S. at 562-563.

²⁰*See, e.g.*, *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *GDF Realty Investments, Ltd. v. Norton*, 169 F. Supp. 2d 648, 660-661 (W.D. Tex. 2001), *appeal pending*.

²¹In his majority opinion in *Lopez*, Chief Justice Rehnquist noted this problem: “Admittedly, a determination whether intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty.” 514 U.S. at 566. *See, e.g.*, *United States v. Gregg*, 226 F.3d 253 (3d Cir. 2000) (majority and dissenting opinions state opposite conclusions as to whether protesters at abortion clinics are engaged in “economic” activity for purposes of Commerce Clause analysis), *cert. denied*, 532 U.S. 971 (2001).

²²*Morrison*, 529 U.S. at 607.

²³*Id.* at 614, quoting *Lopez*, 514 U.S. at 557 n.2. This absence of judicial deference to Congress’ findings is part of a more general trend, visible in even more pronounced fashion in the area of congressional abrogation of state sovereign immunity through the Fourteenth Amendment. See discussion of *Board of Trustees v. Garrett* in note 178 *infra*.

²⁴529 U.S. at 615.

justified (as to noneconomic activities harming intrastate species) on the grounds of persons travelling interstate to observe or study the species, specimens going to out-of-state museums, or the ultimate effects of diminished biodiversity on interstate commerce. It has also been speculated that Congress' ability to enact certain new environmental laws, perhaps addressing land use sprawl or global warming, may be constrained.²⁵

There are other clouds on the environmental horizon as well. First, *Lopez* and *Morrison* suggest that Commerce Clause scrutiny will be closer when federal regulation intrudes on an area of traditional state control. Of course, environmental law has been a heavily federalized area for several decades now.²⁶ In a post-*Morrison* decision, however, the Court's Commerce Clause discussion refers to the states' "traditional and primary power over land and water use,"²⁷ suggesting that the Court still views the federal government as something of an interloper in such matters. Several federal environmental statutes, such as the Clean Water Act wetlands permitting program and the Endangered Species Act, authorize direct federal regulation of "land and water use." Second, this same post-*Morrison* decision suggests doubt in the Court's mind as to whether intrastate economic activities that are a step or two removed from the statute's environmental concerns may be aggregated to show the requisite substantial effect on interstate commerce.²⁸ If this judicial doubt bears fruit in later Court opinions, we may see some contraction in the constitutionally permissible scope of federal environmental laws.²⁹

More optimistically from Congress' point of view, it may be that the moderate conservatives on the Court – that is, Justices O'Connor and Kennedy – are not yet ready to take on a body of law such as federal environmental statutes that by and large, if not in every instance, has an adequate interstate-commerce nexus. To do so would also open up the federal civil rights laws, many federal criminal statutes, and other federal statutes to Commerce Clause attack.

²⁵Charles Tiefer, *After Morrison, Can Congress Preserve Environmental Laws from Commerce Clause Challenge?*, 30 ENVTL. L. RPTR. 10888 (2000).

²⁶*See, e.g.*, *Gibbs v. Babbitt*, 214 F.3d 483, 499-501 (4th Cir. 2000) (noting long history of federal protection of natural resources, including endangered species), *cert. denied*, 531 U.S. 1135 (2001); *GDF Realty*, 169 F. Supp. 2d at 663 (noting long federal involvement in wildlife conservation). The predecessor of the Clean Air Act was first enacted in 1955; the predecessor of the Clean Water Act in 1948.

²⁷*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001).

²⁸*Id.* at 173 (municipal landfill to be built on filled ponds, though plainly an economic activity, is "a far cry, indeed" from question whether Clean Water Act may reach those ponds under Commerce Clause). *See also id.* at 195 (Stevens, J., dissenting).

²⁹Charles Tiefer, *SWANCC: Constitutional Swan Song for Environmental Laws or No More than a Swipe at Their Sweep*, 31 ENVTL. L. RPTR. 11493 (Dec. 2001); Maya R. Moiseyev, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers: The Clean Water Act Bypasses a Commerce Clause Challenge, But Can the Endangered Species Act?*, 7 HASTINGS WEST-NORTHWEST J. ENVTL. L. & POL'Y 191 (2001).

One thing is clear: federal environmental statutes were not written with the current judicial focus on discerning an economic-activity justification in mind. Unsurprisingly, they were written to protect the *environment*, with regulation of economic activity only as a means to that end. The Court's recently revived interest in the Commerce Clause will likely force those defending such laws, and congressional drafters of new ones, to make explicit for the courts the full economic context of environmental protection.

Post-Lopez Decisions Involving Federal Environmental Statutes

Since *Lopez*, lower-court decisions have continued to discern a Commerce Clause foundation in federal environmental laws, rejecting the idea that *Lopez* and *Morrison* state a broad prescription for narrowing such programs. Lower courts have sided with the federal government in numerous cases involving the Superfund Act,³⁰ Clean Air Act,³¹ Clean Water Act,³² Endangered Species Act,³³ and Migratory Bird Treaty Act.³⁴ The Supreme Court has denied several petitions for certiorari from these decisions, even though some of them arguably push the envelope of the Court's *Lopez/Morrison* jurisprudence. There are as yet no circuit splits to tempt the Court, however.

³⁰USA v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997); Cooper Industries, Inc. v. Agway, 43 Env't Rptr. (Cases) 1933 (N.D.N.Y. 1996); United States v. Alcan Aluminum Corp., 1996 WL 637559 (N.D.N.Y. 1996); United States v. NL Industries, Inc., 936 F. Supp. 545 (S.D. Ill. 1996); Nova Chemicals v. GAF Corp., 945 F. Supp. 1098 (E.D. Tenn. 1996).

³¹Allied Local and Regional Mfrs. Caucus v. U.S. EPA, 215 F.3d 61 (D.C. Cir. 2000) (EPA rule limiting volatile organic compounds in architectural coatings), *cert. denied*, 532 U.S. 1018 (2001).

³²United States v. Hartsell, 127 F.3d 343 (4th Cir. 1997) (Act's coverage of discharges into public sewer systems), *cert. denied*, 523 U.S. 1030 (1998).

³³Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) (2-1) (application of Act's "take" prohibition to red wolves on private land), *cert. denied*, 531 U.S. 1145 (2001); National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (2-1) (application of Act's "take" prohibition to Delhi Sands Flower-Loving Fly, a subspecies located entirely in one state), *cert. denied*, 524 U.S. 937 (1998); GDF Realty Investments, Ltd. v. Norton, 169 F. Supp. 2d 648 (S.D. Tex. 2001) (application of "take" prohibition to six species of "cave bugs" located entirely in one state), *appeal pending*; Building Industry Ass'n of Superior California v. Babbitt, 979 F. Supp. 893 (D.D.C. 1997) (listing as endangered or threatened of four species of fairy shrimp residing in state's vernal pools), 247 F.3d 1241, 1247 n.8 (D.C. Cir. 2001) (Commerce Clause claim conceded by plaintiff association to fail under Nat'l Ass'n of Home Builders v. Babbitt, *supra* this note, but asserted to preserve possibility of en banc review), *cert. denied*, 122 S. Ct. 913 (2002).

In addition to *GDF Realty*, *supra* this note, the Fifth Circuit recently had before it the Commerce Clause compatibility of the Endangered Species Act "take" prohibition as applied to several listed species living on the Edwards Aquifer in Texas. The court held the suit unripe, however, and so did not address the merits. Shields v. Norton, 289 F.3d 832 (5th Cir. 2002), *cert. denied*, 71 U.S.L.W. 3283 (Dec. 9, 2002).

³⁴United States v. Bramble, 103 F.3d 1475 (9th Cir. 1997).

Worthy of special note are the following decisions handed down after *Morrison*, the latest Supreme Court holding directly on the Commerce Clause. All of these decisions reject the Commerce Clause challenge, and all do so on the same ground -- that the “substantially affects” factor of *Lopez* was satisfied.

In *Gibbs v. Babbitt*,³⁵ the Fourth Circuit – the same court that struck down the Violence Against Women Act provision on its way to the Supreme Court³⁶ (and a circuit generally seen as quite conservative) – held 2-1 that an aspect of the Endangered Species Act (ESA) was *within* Congress’ commerce power. The issue was whether the United States, under the ESA, could limit the “taking” of reintroduced red wolves on private land. The Fourth Circuit invoked the “substantially affects” criterion on which *Lopez* and *Morrison* hinged, this time finding the criterion satisfied. Unlike gender-based violence and guns near schools, it said, the taking of red wolves *is* connected with economic enterprise. For one thing, “the protection of ... economic assets is a primary reason for taking the wolves.”³⁷ For another, without the wolves, there would be no wolf-related tourism or scientific research, and no commercial trade in pelts. Because of this economic nexus, the effects of individual wolf takings may be aggregated. And when so aggregated, they sufficiently affect interstate commerce to satisfy the “substantially affects” prong of *Lopez*. The absence of congressional findings to that effect, said the Circuit, did not preclude this conclusion.

Also involving the ESA was *GDF Realty Investments, Inc. v. Norton*,³⁸ addressing a use of the Act to block construction of a shopping center that would “take” endangered “cave bugs” by destroying their cave habitat. Outside of museum collections, the cave bugs were known to exist only in one county in Texas. Notwithstanding, the court found the “substantially affects” criterion satisfied – both because the development of the shopping center, standing alone, satisfied the “substantially affects” test, and because, as clearly economic activity, it could be aggregated with other such development to “substantially affect.” Important, however, the court cautioned that on different facts, it might have ruled otherwise. The “broad terms” of the ESA, it said, “certainly cover[] purely local, intrastate activities having no connection whatsoever with interstate commerce.”³⁹ This raises the possibility that use of the ESA to thwart a *non-economic* activity harming an endangered species existing within one state would run into constitutional difficulty.

Finally, in *Allied Local and Regional Mfrs. Caucus v. U.S. EPA*,⁴⁰ the D.C. Circuit held that Clean Air Act section 183(e), instructing EPA to limit volatile organic compounds (VOCs) in architectural coatings as part of the Act’s goal of

³⁵214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

³⁶*Brzoncala v. Virginia Polytechnic Inst.*, 169 F.3d 820 (4th Cir. 1999), *aff’d sub nom. United States v. Morrison*, 529 U.S. 598 (2000).

³⁷214 F.3d at 492.

³⁸169 F. Supp. 2d 648 (W.D. Tex. 2001), *appeal pending*.

³⁹*Id.* at 664.

⁴⁰215 F.3d 61 (D. C. Cir. 2000), *cert. denied*, 532 U.S. 1018 (2001).

minimizing ground-level ozone, was within Congress' commerce power. Industry plaintiffs argued that there was an insufficient nexus under the "substantially affects" *Lopez* factor between coatings manufacture, which they described as an intrastate event, and the interstate phenomenon of ozone formation. "[N]one of the considerations that led the [Supreme] Court to find Congress' authority wanting in *Lopez* and *Morrison*," said the Circuit, "has any application to section 183(e)"⁴¹ For example, the VOC provision regulated only manufacturers, processors, distributors, or importers of products "for sale or distribution in interstate commerce," or their suppliers.

A Special Case: "Isolated Waters"

One of the most high-profile *Lopez* challenges in the environmental realm involves the EPA/Corps of Engineers' assertion of Clean Water Act authority over "isolated waters" under the "migratory bird rule."⁴² Federal regulation of isolated waters – nonnavigable, intrastate waters lacking surface hydrological connections to navigable waters – plainly raises the issue of whether an adequate nexus with interstate commerce is present. Indeed, even before *Lopez*, the Seventh Circuit had gone both ways on the issue -- ruling first against, then for, the Commerce Clause compatibility of Corps jurisdiction over isolated waters.⁴³ Following *Lopez*, the Fourth Circuit in *United States v. Wilson*⁴⁴ invalidated Corps regulations asserting jurisdiction over wetlands the use of which merely "could," as opposed to "did," affect interstate commerce.

The isolated-waters/migratory-bird rule question leaped to the fore when the Supreme Court in 2000 agreed to hear *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*. This case arose when SWANCC, wishing to use a tract of land for a trash disposal facility, asked the Corps of Engineers whether the ponds on the site were jurisdictional – that is, waters requiring a "dredge and fill" permit from the Corps under Clean Water Act section 404. The Corps answered yes, citing the presence of migratory birds on the ponds and invoking its "migratory bird rule." It then denied the permit.

This requires some background. The Clean Water Act of 1972 makes its regulatory programs, such as section 404, applicable to "navigable waters," an ancient phrase given a new and expansive definition in the Act as "waters of the United States."⁴⁵ The Act does not define "waters of the United States," but legislative history says that Congress intended the phrase to apply broadly to the

⁴¹215 F.3d at 83.

⁴²33 U.S.C. § 1344.

⁴³*Hoffman Homes, Inc. v. U.S. EPA*, 999 F.2d 256 (7th Cir. 1993) (reversing earlier decision of circuit).

⁴⁴133 F.3d 251 (4th Cir. 1997).

⁴⁵CWA § 502(7); 33 U.S.C. § 1362(7).

outer limits of Congress' commerce power.⁴⁶ Taking their cue from this legislative history (not to mention a court order demanding expanded jurisdiction), the Corps of Engineers and EPA defined "waters of the United States" in the mid-1970s to include a whole new component: non-navigable "intrastate lakes, rivers, streams ... , or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce."⁴⁷ Now comes the key part. The Corps and EPA interpreted this component of "waters of the United States" to include all waters "which are or would be used as habitat by birds protected by Migratory Bird Treaties" or by "other migratory birds that cross state lines."⁴⁸ This is the controversial "migratory bird rule"—more accurately, not a rule but an interpretive guideline.

In the decision below, the Seventh Circuit found that the migratory bird rule satisfies the "substantially affects" prong of *Lopez*. Pointing out that "3.1 million Americans spent \$1.3 billion to hunt migratory birds in 1996, and that about 11% of them traveled across state lines to do so," the court found the aggregate impact of the destruction of migratory bird habitats to substantially affect interstate commerce.⁴⁹

The Supreme Court decision⁵⁰ never reached the constitutional question, at least not directly. Rather, the majority opinion (the Court split yet again 5-4) confined itself to the *statutory* issue as to the scope of section 404. It held, depending on which part of the opinion one looks at, either that Congress never intended section 404 to extend to isolated waters at all, or that Congress never intended section 404 to extend to isolated waters solely on the basis of the migratory bird rule. The effect of this ruling, however interpreted, is to narrow the reach of not only the section 404 program, but also other components of the Clean Water Act, such as point-source permitting,⁵¹ whose reach likewise is defined by the term "navigable waters."

More important for present purposes, the Court, in arriving at its reading of section 404, drew support from the Commerce Clause and considerations of federalism. (Chief Justice Rehnquist, who authored the majority opinion, also wrote the majority opinions in *Lopez* and *Morrison*.) Because the migratory bird rule "invokes the outer limits of congressional power," said the Court, "we expect a clear indication that Congress intended that result"⁵² — an indication the Court did not find. As noted earlier, the Court also injected two hints of serious import for the scope of federal environmental law generally — one suggesting closer Commerce Clause

⁴⁶See, e.g., Sen. Conf. Rept. No. 92-1236 at 144 (1972).

⁴⁷Now codified at 33 C.F.R. § 328.3(a)(3).

⁴⁸51 Fed. Reg. 41,206, 41,217 (1986) (in preamble).

⁴⁹191 F.3d at 850.

⁵⁰531 U.S. 159 (2001). See generally (name redacted) and (name redacted) *The Supreme Court Addresses Corps of Engineers Jurisdiction Over "Isolated Waters": The SWANCC Decision*, CRS Rept. No. RL30849 (Feb. 16, 2001); Robin K. Craig, *Navigating Federalism: The Missing Statutory Analysis in Solid Waste Agency*, 31 ENVTL. L. RPTR. 10508 (2001).

⁵¹Point-source permitting is more formally called the National Pollutant Discharge Elimination System. CWA § 402; 33 U.S.C. § 1342.

⁵²531 U.S. at 172.

scrutiny when the federal enactment regulates the use of non-federal land and water, and the other casting doubt on whether the economic activity relied on by some of the earlier-discussed decisions is sufficiently closely linked to the goals of those statutes to qualify for aggregation under the “substantially affects” *Lopez* factor.

Article III: Standing to Sue in Federal Court

Background

Standing doctrine is concerned with who is a proper party to raise a particular issue in the federal courts. Some precepts of standing are merely “prudential” – that is, developed by the courts as part of their inherent power of judicial self-management. Our concern, rather, is with those aspects of standing mandated by Article III of the Constitution – in particular, by that Article’s confinement of the jurisdiction of federal courts created under it (such as district courts) to “Cases” and “Controversies.” The case-or-controversy requirement has long been construed to restrict Article III courts to the adjudication of real, live disputes; they are not empowered to decide academic matters. As famously put, standing doctrine demands a plaintiff who has “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends”⁵³

In the Supreme Court’s current thinking, this case-or-controversy prerequisite imposes as a constitutional minimum for standing in an Article III court that the plaintiff show three things: (1) he/she has suffered an “injury in fact” that is concrete and particularized (not common to the entire public), and actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant;⁵⁴ and (3) it is likely that the injury will be redressed by a favorable decision.⁵⁵

Environmental Standing Before *Laidlaw*

Once upon a time, environmental plaintiffs had a relatively easy time establishing standing. In *Sierra Club v. Morton*,⁵⁶ the Supreme Court in 1972 held that injury to aesthetic and environmental well-being may constitute “injury in fact” for purposes of establishing standing to seek judicial review under the Administrative Procedure Act (APA).⁵⁷ Moreover, the fact that the injury was “shared by the many”

⁵³*Baker v. Carr*, 369 U.S. 186, 204 (1962).

⁵⁴Within limits, “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring). *Accord*, *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 773 (2000).

⁵⁵*See, e.g., Vermont Agency*, 529 U.S. at 771.

⁵⁶405 U.S. 727 (1972).

⁵⁷The APA requires that those seeking review under that statute have “suffer[ed] legal (continued...)”

did not make it less deserving.⁵⁸ The following year, in what is regarded as the apogee of relaxed standing law, the Court in *United States v. SCRAP*⁵⁹ found APA standing based on an attenuated argument by a student group seeking to compel the ICC to suspend a proposed freight rate increase. The group argued that the rate increase would raise the price of recyclable materials, which would discourage their use, which would result in increased use of nonrecyclable materials, which would lead to adverse environmental impacts (e.g., increased litter) on the forests and streams in the D.C. area that group members used for recreation.

Following *Sierra Club* and *SCRAP*, the standing hurdle remained easily surmounted in environmental cases for almost two decades. In 1983, however, then-Judge Antonin Scalia argued in a law review article that federal courts were conferring standing too liberally,⁶⁰ complaining in particular of their “love affair with environmental litigation.”⁶¹ For one thing, he said, courts need to accord greater weight to the traditional requirement that plaintiff’s alleged injury be a particularized one, which sets him or her apart from the public at large. For another, he asserted that courts should be less intrusive into executive branch affairs, particularly when the plaintiff seeks to vindicate majoritarian interests. The law of standing, in Judge Scalia’s view, should restrict courts to protecting the minority against the majority. Important here, he seemed to place many environmental suits in the undesirable vindication-of-the-majority category.⁶²

When Judge Scalia ascended to the Supreme Court in 1986, this article assumed some significance. And indeed, now-Justice Scalia authored the majority opinions in each of the Supreme Court’s environmental standing decisions in the 1990s. Not surprisingly, these opinions reflect his law review article, and define a new phase of the Court’s environmental standing jurisprudence.

All the decisions in this new phase that involved environmental plaintiffs found them to lack standing. In *Lujan v. National Wildlife Federation*,⁶³ the Court held 5-4 that where individual plaintiffs averred only that they recreated on unspecified

⁵⁷(...continued)

wrong,” or be “adversely affected” or “aggrieved,” by the challenged agency action. 5 U.S.C. § 702. Courts typically assume congruence between the APA test and the “injury in fact” test for Article III standing.

⁵⁸ To be sure, the Court denied the Sierra Club standing, because the Club had failed to allege that it or its members were among the injured. This deficiency was easily remedied on remand by the Club’s amending its complaint to allege recreational harm to those of its members who visited the affected area.

⁵⁹412 U.S. 669 (1973).

⁶⁰Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881 (1983).

⁶¹*Id.* at 884.

⁶²Also underlying Justice Scalia’s narrow view of standing is his dissent in *Morrison v. Olson*, 487 U.S. 654, 697 (1988). There, he opined that the Constitution permits only the executive branch to enforce a public law.

⁶³497 U.S. 871 (1990).

portions of public land, there was insufficient *geographic* specificity to say they were “adversely affected” under the APA by a Bureau of Land Management action affecting particular tracts. Similarly, in *Lujan v. Defenders of Wildlife*,⁶⁴ the Court held 7-2 that allegations by the environmental group’s members that they intended “some day” to visit an area where endangered species might be harmed by the challenged federal action, lacked the *temporal* specificity needed to meet the “injury in fact” prong of Article III standing. Finally, in *Steel Co. v. Citizens for a Better Environment*,⁶⁵ the Court ruled 6-3 that where the defendant came into compliance during the 60-day notice period before the citizen suit could be filed, the plaintiffs failed the “redressability” component of Article III standing. For example, the civil penalties sought by the suit were payable to the U.S. Treasury, not the plaintiffs, and so could not redress any lingering injury plaintiffs may suffer from the former violation.⁶⁶

Because environmental groups usually seek to establish standing by asserting the standing of their individual members – known as “associational standing”⁶⁷ – the foregoing cases made it more difficult for such organizations as well to sue.

The 1990s drift of the Supreme Court toward an increasingly narrow concept of environmental standing was abruptly reversed in 2000, through the Court’s decision in *Friends of the Earth v. Laidlaw*.⁶⁸

Friends of the Earth v. Laidlaw

Laidlaw operated a hazardous waste incinerator that discharged wastewater into a river. Friends of the Earth (FOE) brought a Clean Water Act (CWA) citizen suit against Laidlaw,⁶⁹ alleging that the incinerator had committed hundreds of violations of its effluent permit. FOE submitted the affidavits of several of its members alleging that they were injured by the violations in that they used the river downstream of Laidlaw’s point of discharge and had curtailed their use because of concerns about the effect of the violations on human health and fish.

⁶⁴504 U.S. 555 (1992).

⁶⁵523 U.S. 83 (1998).

⁶⁶Conversely, a unanimous Supreme Court opinion authored by Justice Scalia granted standing under the Endangered Species Act’s citizen suit provision to ranchers and irrigation districts *opposing* restrictions under the Act. *Bennett v. Spear*, 520 U.S. 154 (1997).

⁶⁷In *Hunt v. Washington State Advertising Comm’n*, 432 U.S. 333 (1977), the Supreme Court articulated the test for determining whether an organization can assert associational standing on behalf of its members: (1) its members would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

⁶⁸528 U.S. 167 (2000).

⁶⁹CWA § 505(a); 33 U.S.C. § 1365(a).

The district court denied injunctive relief since Laidlaw was in substantial compliance by the time the court issued its order.⁷⁰ However, it ordered Laidlaw to pay civil penalties. The Fourth Circuit vacated.⁷¹ In its view, the case became moot once Laidlaw fully complied with its permit and FOE declined to appeal the district court's denial of injunctive relief. FOE's appeal only sought a higher civil penalty than the district court imposed, and under *Steel Co.*, civil penalties do not meet redressability requirements since they are not payable to the plaintiff (they go to the U.S. Treasury).

In 2000, the Supreme Court reversed. Writing for a 7-justice majority,⁷² Justice Ginsburg held that the Fourth Circuit erred in concluding that a citizen suit claim for civil penalties must be dismissed as moot when the defendant, after filing of the suit, comes into compliance.

The majority first resolved the Article III standing question. As for injury in fact, it ruled that the relevant showing is injury to the *plaintiff*, not injury to the *environment*. Thus, it was sufficient that FOE members lived downstream from the point of discharge and were concerned enough by the defendant's discharges that they curtailed their use of the river. Plaintiffs did not have to demonstrate harm to the environment. As for redressability, the Court declared that all civil penalties have some deterrent effect. Indeed, Congress had said so in the specific context of CWA enactment and "[t]his congressional determination warrants judicial attention and respect."⁷³ *Steel Co.* does not dictate otherwise, said the Court, since that decision denied standing for citizen suitors seeking civil penalties for violations *that had abated by the time of suit*. *Steel Co.* did not reach the issue here: standing to seek penalties for violations ongoing at such time. Thus, plaintiffs had standing.

Turning to the mootness issue (again, raised by the defendant's coming into compliance during the district court's deliberations), the Court charged the Fourth Circuit with confusing standing and mootness. The confusion was understandable, the Court conceded, given its past characterization of mootness as "standing set in a time frame." In *Laidlaw*, the Court backed away from that description. It noted, for example, that the prospect of future noncompliance may be too speculative to support standing, but not too speculative to overcome mootness. Then, too, the underlying purpose of the two doctrines counsels greater hesitancy in dismissing a case on mootness, as opposed to absence of standing, grounds. Standing doctrine acts to ensure that the scarce resources of the federal courts are devoted to disputes in which the parties have a concrete interest. In contrast, by the time mootness is an issue, the case may have been in the courts for years, making abandonment without compelling reason a wasteful practice.

⁷⁰956 F. Supp. 588 (D.S.C. 1997).

⁷¹149 F.3d 303 (4th Cir. 1998). An earlier CRS report addresses this Fourth Circuit ruling: (name redacted) *The Future of the Citizen Suit After Steel Co. and Laidlaw*, CRS Report No. RS20012 (Jan. 5, 1999).

⁷²The dissenters were Justices Scalia and Thomas.

⁷³528 U.S. at 185.

That the facility in question had since been closed, however, gave the majority pause. The closure might indeed moot the case if this event, or Laidlaw's earlier achievement of substantial compliance with its permit requirements, made it "absolutely clear" that Laidlaw's permit violations could not reasonably be expected to recur. These factual issues, not explored by the district court, were found to be open for consideration on remand.⁷⁴

Implications of *Laidlaw* for Environmental Citizen Suits

The *Laidlaw* decision is a significant win for the plaintiff side of the environmental citizen suit, likely to make such suits much easier to bring.⁷⁵ Two commentators clarify that notwithstanding the increasingly restrictive standing rules, the number of environmental citizen suits may have doubled from the 1980s to the 1990s.⁷⁶ They then speculate that while *Laidlaw* likely will make such suits less expensive to bring, it may not cause them to be filed in greater number.

Some implications of *Laidlaw* –

1. It will be easier for plaintiffs to show "injury in fact." The *Laidlaw* majority asserted that where the injury to plaintiff results from a reasonable concern, there is little need for plaintiff to demonstrate injury to the environment as a predicate. This altered the prior situation, where plaintiffs' attorneys were expending substantial effort (lab analysis of water samples, ecological testing, witness depositions, etc.) just to get past this threshold issue in the case.

Laidlaw has already borne fruit. One month later, the en banc Fourth Circuit reversed the panel decision in *Friends of the Earth v. Gaston Copper Recycling Corp.*, which had denied standing to bring a CWA citizen suit.⁷⁷ The en banc court noted that on the facts presented, denying standing "encroaches on congressional authority by erecting barriers to standing so high as to frustrate citizen enforcement of the Clean Water Act." The citizen suit provision at issue, it observed, uses language that cannot be reconciled with the strict standard of injury employed in the decisions below. To Gaston Copper's defense that plaintiff had not adequately proved environmental degradation to show injury in fact for Article III purposes, the court held up *Laidlaw*'s focus on injury to the plaintiff. "[Plaintiff's] reasonable fear

⁷⁴The Supreme Court therefore remanded the case to the Fourth Circuit, which, in turn, remanded to the district court. 208 F.3d 209 (4th Cir. 2000) (table entry). Since then, Laidlaw has gone bankrupt.

⁷⁵See, e.g., Symposium, *Citizen Suits and the Future of Standing in the 21st Century: From Lujan to Laidlaw and Beyond*, DUKE ENV'L L. & POL'Y FORUM (Spring, 2001 and Fall, 2001); Michael P. Healy, *Standing in Environmental Citizen Suits: Laidlaw's Clarification of the Injury-in-Fact and Redressability Requirements*, 30 ENVTL. L. RPT. 10455 (2000).

Our discussion of *Laidlaw* omits the attorneys' fee issue in the case, an important one for cash-strapped public interest groups considering whether to file citizen suits, but outside the constitutional focus of this report.

⁷⁶Robert V. Percival and Joanna Groger, *Escaping the Common Law's Shadow: Standing in the Light of Laidlaw*, 12 DUKE ENV'L L. & POL'Y FORUM 147 (2001).

⁷⁷204 F.3d 149 (4th Cir. 2000) (en banc).

and concern about the effects of Gaston Copper’s discharge, supported by objective evidence ... constitutes injury in fact.”

Laidlaw also calls into question the no-standing holding in *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*,⁷⁸ yet another CWA citizen-suit decision. There, the Third Circuit correctly said that the mere knowledge that a company has polluted is insufficient to confer standing, since this is a generalized grievance shared by the public at large. In conflict with the future *Laidlaw* decision, however, the court went on to conclude that standing requires a showing of actual, tangible injury to the environment. This aspect of *Magnesium Elektron* no longer appears to be good law.

2. It will be easier for plaintiffs seeking civil penalties to satisfy the “redressability” component of standing, even though the penalties are not payable to the plaintiff. The Court’s statement that “all civil penalties have some deterrent effect” is a powerful one for citizen suitors. There are currently several citizen-suit provisions that allow claims for money penalties payable to the U.S. Treasury. Note also: because the Court seems inclined to defer to congressional findings in this area, it may be useful in the future for proponents of new citizen-suit provisions authorizing civil penalties to accompany them with assertions of deterrent effect.

3. The majority retained the traditional view that makes it hard for a defendant to obtain a dismissal based on mootness once a plaintiff has established standing.

4. Two facts suggest that *Laidlaw*’s reversal of the 1990s trend toward higher standing hurdles may be more than temporary. First, the Court did not have to decide the standing question at all in the case; mootness was the principal issue presented, and the petitioner’s briefs were focused there. That Justice Ginsburg reached out to resolve the standing issue when it was unnecessary to do so points to a desire on the part of at least some justices to move the pendulum back to some extent. Second, it may be significant that the majority opinion commanded fully 7 votes, including some justices normally on the no-standing side of the Court’s decisions.

5. It now appears that only a minority of the justices are sympathetic to Justice Scalia’s view that the Constitution prohibits a private party from enforcing a public law.

Following *Laidlaw*, the Court again found standing in *Vermont Agency of Natural Resources v. United States*.⁷⁹ This case involved the specialized context of *qui tam* suits, but has some relevance to environmental citizen suits. Under the False Claims Act, a private person may bring suit against an entity that submits a false money claim to the federal government. Such suit, says the Act, is brought “for the person *and for the United States Government*”⁸⁰ and, if successful, entitles the plaintiff (called the “relator”) to a portion of any proceeds from the action. These are the defining characteristics of a *qui tam* action. But since the relator himself suffers

⁷⁸123 F.3d 111 (3rd Cir. 1997).

⁷⁹529 U.S. 765 (2000).

⁸⁰31 U.S.C. § 3730(b)(1) (emphasis added).

no injury supporting a finding of injury in fact (unlike the citizen-suit plaintiff), the issue arose whether a *qui tam* relator has standing.

The *Vermont Agency* Court found an adequate basis for the relator's standing by viewing the relator as a partial assignee of the United States' claim against the alleged false claimant. Citing the doctrine that the assignee of a claim may assert the injury in fact suffered by the assignor, the holding of relator standing directly followed. The interesting question is whether this rationale opens the door for congressional redefinition of citizen-suit plaintiffs as assignees of federal law-enforcement interests. However, the liberalization of standing rules by *Laidlaw* undercuts the need for such an effort.

Fifth Amendment: The Takings Issue

Background

The Takings Clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." But when, precisely, does a government action sufficiently interfere with private property as to effectively "take" it – outside of the obvious circumstance when the government formally condemns or confiscates property? Answering this question has involved the courts in a delicate and usually ad hoc balancing act between the needs of society at large and the rights of the individual property owner.

The rise of the takings issue coincides with the growth during the twentieth century of government regulation of land use – from the advent of comprehensive municipal zoning in the early part of the century, to the widespread use of environmental, historic preservation, growth control, open space preservation, and other government interventions by the 1960s and 1970s. In 1978, a takings challenge to a historic preservation ordinance yielded a Supreme Court decision clearly signaling the Court's interest in developing a coherent theoretical framework in the takings area.⁸¹ Since then, the advent of a conservative majority on the Supreme Court interested in expanding Takings Clause protections has ensured that every Court term includes at least one takings decision. (In the Congress and many state legislatures, property rights partisans, particularly during the 1990s, gave the issue a legislative face as well as a judicial one, by introducing "property rights bills." Some of these bills would have given the property owner aggrieved by regulation a right of action against the government considerably more favorable than that under the Takings Clause. None were enacted by Congress.)

When a landowner brings a "taking action" against the United States (or state or local government for that matter), there are myriad threshold issues that must be surmounted before the merits of the case are even reached. Is the government action at issue more appropriately viewed as something other than a taking – perhaps a

⁸¹Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

breach of contract or a tort?⁸² Is plaintiff in the right court?⁸³ Is the interest plaintiff claims to have been taken one that the Takings Clause recognizes as “property”? (If not, there can be no taking.) Did plaintiff own the property as of the date of the alleged taking? (If not, any physical taking claim, and some regulatory takings claims, will be precluded.) Has the statute of limitations expired?⁸⁴ Is the case ripe – that is, has there been a “final” government decision?⁸⁵ (Except when challenging a government delay, a “final decision” is a prerequisite for a taking claim.) Was the federal agency action in question authorized?⁸⁶ (If not, it cannot be the basis for a taking claim.) Did the federal agency assert merely private (non-sovereign) property rights – i.e., the same as any property owner might assert?⁸⁷ (If so, the Takings Clause is inapplicable.) Many takings cases founder at the outset on these shoals.

If the substantive takings issue is reached, one confronts a body of law often described as muddled and vague. This is doubtless true to a degree, though today’s takings jurisprudence plainly has come a long way from the almost completely ad hoc situation before 1978. In any event, the initial question in the merits phase is which of the three basic categories of takings, and which subcategory, best describes the property owner’s claim. The court’s answer significantly affects the owner’s chances of success.

1. Regulatory takings. In a regulatory taking claim, the property owner asserts that despite the absence of any *physical* intrusion by government or its instrumentalities onto the private property or any government *appropriation* of that property, a taking has been effected by government regulation of the property’s *use*.

There are two subcategories of regulatory takings. If the regulation deprives the property of *all* economic use and/or value, a taking automatically will be found – provided the regulation could not have been imposed under “background principles of the State’s law of property and nuisance” existing when the property was

⁸²See note 83 *infra*.

⁸³Under the Tucker Act, 28 U.S.C. § 1491(a), jurisdiction over almost all takings claims against the United States is vested in the U.S. Court of Federal Claims (CFC). This CFC jurisdiction is effectively exclusive as to takings claims for more than \$10,000, since the Little Tucker Act, 28 U.S.C. § 1346(a), grants the district courts jurisdiction over takings claims against the United States only for claims seeking \$10,000 or less. The Tucker Act does not give the CFC jurisdiction over tort claims against the United States, which must be heard in the district courts.

⁸⁴The statute of limitations for takings claims against the United States is six years, whether the claim is one over which the CFC has jurisdiction (28 U.S.C. § 2501) or not (28 U.S.C. § 2401).

⁸⁵The leading authority for the “final decision” ripeness requirement of takings law is *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985).

⁸⁶*See, e.g., Del Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998).

⁸⁷*See, e.g., Janicki Logging Co. v. United States*, 36 Fed. Cl. 338 (1996), *affirmed*, 124 F.3d 226 (1997) (table entry).

acquired.⁸⁸ This is called the “total taking” rule. If, far more commonly, the regulation removes only a portion – even a very substantial portion – of the property’s use or value, then ad hoc balancing is used. to decide whether a taking occurred. Under this “partial regulatory taking” test, a court assesses the government action for its (1) economic impact on the property, (2) degree of interference with the property owner’s “reasonable investment-backed expectations,” and (3) “character.”⁸⁹

While recent Supreme Court rulings strongly suggest that the above multifactor balancing approach governs in the overwhelming majority of regulatory takings cases,⁹⁰ it has done little to explicate the three factors. Based on the case law, however, we can reasonably say the following. As to the economic impact factor, the degree of loss (in use or value) must be very substantial before a taking occurs. Plaintiff’s ability to recoup his/her cost basis is also relevant. And both direct and indirect benefits conferred by the regulatory scheme may offset the immediate economic impact on the property owner. As to interference with investment-backed expectations, the fact that the regulatory scheme in question predates plaintiff’s acquisition of the property does not automatically preclude the taking action (see “notice rule” discussion below). But those who enter a heavily regulated field have limited expectations of being free of any subsequent strengthening of the regulatory strictures. As to the “character” of the government action, the Supreme Court initially explained that this factor chiefly referred to the fact that takings are more readily found in the case of physical invasions, as compared to purely regulatory interferences. Yet other elements are now understood to be within this most elastic of the three factors. For example, it includes a balancing of the public interest advanced by the government measure against the burden imposed on the property owner and a requirement that plaintiff allege the taking of a specific property interest, rather than, say, only a generalized monetary liability.

A cross-cutting issue arising with both total takings claims and partial regulatory takings claims is the question of the “parcel as a whole.” This conundrum stems from the fact that takings law, in assessing the economic impact and interference with investment-backed expectations factors, looks not at the absolute amount of the property owner’s loss, but rather at the loss *relative to what the owner retains*. To assess what the property owner retains, a court is required to look at the parcel as a whole, in any of its three dimensions. The spatial dimension asks which acreage owned by plaintiff should be included in the assessment of the government action’s

⁸⁸Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992). Despite the reference in the text quote to “State’s,” references elsewhere in *Lucas* and in subsequent case law make clear that federal law as well can be the source of “background principles.”

⁸⁹*Penn Central*, 438 at 124.

⁹⁰An independent test for regulatory takings created by the Supreme Court finds a taking when the government action fails to substantially advance a legitimate government interest. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). This means-end test is a very different animal than the prevailing multifactor balancing method just described in the text, which primarily looks at the *economic effects* of government action. Perhaps reflecting judicial awareness of this uncomfortable fit, the “substantially advance” test has been infrequently used by courts. In any event, there can be little argument that federal environmental statutes do substantially advance a legitimate government purpose.

impact. At a minimum, we know that acreage cannot be excluded from the parcel as a whole merely because it is in a different regulatory status than the restricted acreage claimed to have been taken. The functional dimension of parcel as a whole focuses on the rights plaintiff still has in the property – one must examine, in the common metaphor, the entire “bundle of rights” possessed by plaintiff. And the temporal dimension asks whether, notwithstanding plaintiff’s inability to make economic use of the property during one period in the life span of the property interest, there is another period when the property *can* be so used.

Two specialized issues in regulatory takings law have occupied the Supreme Court recently. *First, the notice rule.* In the 1990s, many courts held that a taking action was barred absolutely whenever a land-use restriction was imposed under a regulatory scheme predating plaintiff’s acquisition of the property. This is known as the “notice rule.” It was justified on the grounds that a land buyer assumes the risk that development will be thwarted under the pre-existing regime and presumably bought at a discounted price reflecting that risk. The notice rule’s importance can hardly be overstated; after another decade or two, few landowners will be left who purchased prior to the advent of many federal environmental programs, and thus can bypass the rule.⁹¹ In 2001, however, the Supreme Court emphatically rejected the absolute version of the notice rule, holding that the pre-acquisition existence of a regulatory program was not a per se bar to later takings actions.⁹² A year later, the Court clarified, albeit in dicta, that a pre-acquisition regime still retains some persuasive role in the regulatory takings equation, even if not a dispositive one.⁹³

Second, the expressly temporary restriction. Typically, the regulation challenged as a regulatory taking is of indefinite duration. In the most recent Supreme Court taking decision,⁹⁴ however, the Court dealt with a very different entity: the regulation declared at the outset to be temporary. Such expressly temporary land-use restrictions commonly take the form of development moratoria imposed by local governments to maintain the status quo until a study of the impacts of future development can be completed. Congress as well has used temporary moratoria, as in connection with Outer Continental Shelf oil and gas production.

The Court declared that for such expressly temporary development bans, the per se “total taking” analysis used for initially indefinite bans is inappropriate. Notwithstanding the owner’s inability to make of his/her property for a time, the former ban is generally to be analyzed under the multifactor balancing test for partial regulatory takings. Under this test, the economic impact and duration of the ban are merely two of many factors, and the ban, if of reasonable duration and for a legitimate public purpose, is likely not to be a taking.

⁹¹For example, the statutory authority for the federal wetlands permitting program, in Clean Water Act section 404, was enacted in 1972.

⁹²Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

⁹³Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002).

⁹⁴*Id.*

Overall, a wide spectrum of federal activities has sparked regulatory takings claims, including bankruptcy laws, controls on health care costs, required funding of pension plans and other employee benefits, settlement of private international claims and freezing of aliens' assets, and, our interest here, environmental regulation.

2. Physical takings. A physical taking claim asserts that the government, directly or through third parties, has effected a physical invasion of private property. As with regulatory takings, there are two subtypes. If the invasion is deemed "permanent," it will be held a taking in almost all instances.⁹⁵ If the invasion is only temporary, the three-factor regulatory taking test above is invoked, under which the invasion may or may not be a taking (but generally not).

Federal actions that often bring on physical takings claims include flooding from federal dams and other water projects, overflights of federal aircraft, and, in the environmental arena, the rails-to-trails and Superfund cleanup programs.

3. Exaction conditions on development permits. Here, the government doesn't forbid the land use, but rather demands a concession ("exaction") from the landowner in return for approving the use. To survive takings challenge, such an exaction condition must satisfy two criteria. It must substantially advance the same government purpose as justified the permit program in question.⁹⁶ And the burden imposed on the property owner by the exaction must be no greater than "roughly proportional" to the burden that the property owner's proposed project would have on the community.⁹⁷ Exactions-based takings claims are myriad at the local level. Curiously, however, the exactions test has never been invoked by a court deciding a taking claim against the United States, though some federal activity, such as the mitigation conditions imposed on wetlands permits and "incidental take permits" under the Endangered Species Act, arguably falls within the test's reach.⁹⁸

So much for how courts determine whether a taking has occurred. We come finally to the question of the constitutionally mandated remedy once a taking is found, a long unresolved matter. The government, says the Supreme Court, generally must pay compensation. In the usual case, it does not satisfy the Constitution for the court to invalidate the act found to have caused a taking, or for the government agency to rescind it.⁹⁹

⁹⁵Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982).

⁹⁶Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

⁹⁷Dolan v. City of Tigard, 512 U.S. 374 (1994).

⁹⁸See (name redacted) *Wetlands Regulation and the Law of Property Rights "Takings"* at 24-25, CRS Report No. RL30423 (Feb. 17, 2000) (hereinafter *Wetlands Regulation*).

⁹⁹First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). In a few exotic circumstances, the remedy of judicial invalidation for a taking remains. See, e.g., Eastern Enterprises v. Apfel, 524 U.S. 498, 521-522 (1998) (statute requiring direct transfer of funds); Babbitt v. Youpee, 519 U.S. 234 (1997) (statute substantially interfering with rights of descent and devise).

Cases Involving Federal Environmental Statutes

Though the takings issue most often arises in disputes over *local* land-use regulation, several federal environmental programs have been implicated, as noted.

In the *regulatory takings* realm, the federal environmental program most commonly attacked is the Corps of Engineers/EPA wetlands permitting scheme under the Clean Water Act – known as the “404 program.”¹⁰⁰ Almost the entire spectrum of regulatory takings issues has arisen at some point in these wetlands cases.¹⁰¹

Two fact scenarios are common in the wetlands/takings cases. In the first, the wetland owner is denied a 404 permit. As a result, he/she argues that the property of which the wetland is a part has severely declined in economic use or value – that is, has been effectively taken.¹⁰² Establishing ripeness here has proved much easier than for landowners dealing with local land-use agencies. The latter must deal with frequent judicial demands that following denial of the owner’s initial proposal, he/she must return to the land-use agency with scaled-down or reconfigured proposals, so the court can ascertain the degree of development that will be accepted. By contrast, the Court of Federal Claims (CFC, where most takings claims against the United States must be brought) has thus far always accepted the first permit denial – if on the merits – as indicating the Corps’ disinclination to permit any development whatsoever, making subsequent applications by the landowner futile.¹⁰³

Once past the ripeness hurdle, permit-denied plaintiffs have enjoyed some success in convincing the CFC and its appellate court, the Federal Circuit, that a taking occurred – under either the “total taking” rule or the three-factor balancing test. Five section 404 permit-denial cases to date have found takings,¹⁰⁴ while a somewhat greater number have been unsuccessful. Prominent issues in these wetlands/takings cases include how to define the “parcel as a whole” to be used in the takings analysis – e.g., whether to include acreage sold off prior to the permit denial (depends on the facts), or contiguous subdivision lots owned by the plaintiff (generally yes). Another recurring issue is how great the drop in market value must

¹⁰⁰CWA § 404; 33 U.S.C. § 1344.

¹⁰¹For more detailed treatment, see *Wetlands Regulation*, *supra* note 98.

¹⁰²The Corps’ mere designation of a parcel as within its wetlands permit jurisdiction cannot by itself be a taking, since it leaves open the possibility that the permit, if applied for, will be granted. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The same holds true when the Corps orders construction on a wetland to cease and desist until the owner secures a permit. *Tabb Lakes, Inc. v. United States*, 10 F.3d 796 (Fed. Cir. 1993).

¹⁰³*See, e.g.*, *Cooley v. United States*, 46 Fed. Cl. 538 (2000), *appeal pending*; *Cristina Inv. Corp. v. United States*, 40 Fed. Cl. 571 (1998); *City Nat’l Bank v. United States*, 30 Fed. Cl. 715 (1994); *Formanek v. United States*, 18 Cl. Ct. 785 (1989); *Beure-Co. v. United States*, 16 Cl. Ct. 42 (1988); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988).

¹⁰⁴In reverse chronological order: *Cooley v. United States*, 46 Fed. Cl. 538 (2000), *appeal pending*; *Florida Rock Industries, Inc. v. United States*, 45 Fed. Cl. 21 (1999); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Bowles v. United States*, 31 Fed. Cl. 37 (1994); *Formanek v. United States*, 26 Cl. Ct. 332 (1992).

be as a result of the permit denial to support a finding of a taking (recent decisions say that a 60-70% value loss is sufficient, a lowering of the threshold suggested in earlier takings cases¹⁰⁵).

The second common scenario in the wetlands/takings cases arises when actions of the Corps cause delay in developing a parcel, though eventually the project proceeds. Such delays are addressed through claims of temporary, rather than permanent, takings. Most of the delay cases involve property owner objection to the time taken by the Corps to process permit applications. Courts hold that the key factor in the takings analysis is whether the wait was, under the circumstances, unreasonable or extraordinary.¹⁰⁶ The extraordinariness inquiry entails a look at whether the delay was unduly protracted in light of the complexity of the regulatory scheme, whether the owner failed to take actions that might have shortened the processing time, and other circumstances. To date, federal courts have held that waiting periods for section 404 permits up to two years did not, under the circumstances presented, work a taking.¹⁰⁷ Another delay scenario is when a Corps action is withdrawn because of agency error. Viewing such delays as part of government decisionmaking, the courts have again applied the extraordinary delay standard and rejected all takings claims so far.¹⁰⁸

Many federal environmental programs outside the wetlands realm also have generated regulatory takings decisions – but far fewer per program. The Endangered Species Act,¹⁰⁹ despite its high profile in the property rights debate, has produced only a few reported takings decisions, and only one in which the property owner succeeded.¹¹⁰ Surface mining restrictions under the Surface Mining Control and Reclamation Act¹¹¹ have prompted a few claims – with some being successful.¹¹² Regulatory takings claims against the Superfund Act, largely targeting its retroactive liability scheme, have all failed.¹¹³

¹⁰⁵Florida Rock Industries, Inc. v. United States, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (62-1/2% value loss might be sufficient to take), *on remand*, 45 Fed. Cl. 21 (1999) (73.1% value loss found to be taking).

¹⁰⁶*See, e.g.*, Walcek v. United States, 44 Fed. Cl. 462, 467 (1999); Norman v. United States, 38 Fed. Cl. 417, 427 (1997) (collecting cases).

¹⁰⁷*See, e.g.*, 1902 Atlantic, Ltd. v. United States, 26 Fed. Cl. 575 (1992); Dufau v. United States, 22 Cl. Ct. 156 (1990).

¹⁰⁸*See, e.g.*, Tabb Lakes, Inc. v. United States, 10 F.3d 796 (Fed. Cir. 1993).

¹⁰⁹16 U.S.C. §§ 1531-1544.

¹¹⁰The one successful claim is Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001), which is still subject to appeal.

¹¹¹30 U.S.C. §§ 1201-1328.

¹¹²One successful claim is Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1995), in which the parties settled for \$200 million – the largest regulatory takings payment by the United States revealed by our research.

¹¹³*See, e.g.*, Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc. 240 F.3d 534, 552-553 (6th Cir. 2001).

Federal environmental laws that have produced *physical takings* rulings include, first, the rails-to-trails program.¹¹⁴ Here, the holder of the fee title underlying the railroad right of way asserts a permanent physical occupation of his/her land when the right of way is taken over by recreational trail users. If the railroad holds only an easement for railroad use, the fee title holder wins.¹¹⁵ Second, the Superfund program has been found to cause a physical taking where monitoring equipment and government inspections are imposed on an unwilling owner of contaminated (or possibly contaminated) property.¹¹⁶ The benefits accruing to the plaintiff from the government-funded action, however, may be viewed by the court as offsetting the compensation otherwise owed, producing an award of zero dollars – taking notwithstanding.¹¹⁷

Tenth Amendment: Federal Intrusions on State Sovereignty

Background

The Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Once dismissed by the Supreme Court as “but a truism,”¹¹⁸ the Court today discerns in these words a bulwark of states’ rights in our federal-state system of government. On other occasions, the Court has derived the same protection for states’ rights by inquiring whether an act of Congress is authorized by one of the powers delegated to Congress in Article I, such as the commerce power. “[T]he two inquiries,” says the Court, “are mirror images of each other.”¹¹⁹

The invigoration of the Tenth Amendment has played out in cases dealing with Congress’ ability to regulate the states *directly* – instances where a federal mandate tells a state or state official what that entity must do. Initially, the context was whether Congress could subject states to the same restrictions it applies to private parties. In a series of decisions beginning in the 1960s, the Court agonized over this issue, eventually concluding in 1985 that its earlier effort to immunize the “traditional governmental functions” of the states from federal mandates was “both impractical and doctrinally barren.”¹²⁰ For the most part, it indicated, states must seek protection from the impact of federal regulation in the political process, not in

¹¹⁴16 U.S.C. §1247(d).

¹¹⁵*See, e.g.,* Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996).

¹¹⁶Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991).

¹¹⁷*Hendler*, 38 Fed. Cl. 611 (1997).

¹¹⁸United States v. Darby, 312 U.S. 100, 124 (1941).

¹¹⁹New York v. United States, 505 U.S. 144, 156 (1992).

¹²⁰*Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 557 (1985), *overruling* *National League of Cities v. Usery*, 426 U.S. 833 (1976) .

any limitations imposed by the Tenth Amendment or the Commerce Clause. Prophetically, a dissent by then-Justice Rehnquist predicted a future time when the Court would restore those abandoned limitations on federal power.¹²¹

In the 1990s, that time came. With a conservative majority now solidified on the Court, the pendulum swung back toward state immunity – in a related, but different, context. The new cases asked whether Congress can compel state legislative branch and executive branch participation in the implementation of Commerce Clause-based federal programs.¹²² The Court's answer was no, if the state is being made to act in its sovereign capacity.

The first decision was *New York v. United States*,¹²³ invalidating a federal law requiring that any state failing to provide for permanent disposal of low-level radioactive waste generated within its borders must take title to the waste. The Court held that Congress may not "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."¹²⁴ At the same time, it hastened to add, Congress may "encourage" states to regulate in a particular way. For example, Congress may, under its Spending Power,¹²⁵ attach conditions to the receipt of federal funds (at least where they bear some relationship to the purpose of the federal spending). Or Congress may offer states the choice between regulating an activity according to federal standards or having state law preempted by federal regulation. The Court specifically noted the Clean Water Act, Resource Conservation and Recovery Act, and Alaska National Interest Lands Conservation Act as examples of the preemption route.¹²⁶

In the second decision, *Printz v. United States*,¹²⁷ the Supreme Court voided a provision of the Brady Handgun Violence Protection Act requiring the chief law enforcement officer of a local jurisdiction to do a background check on would-be purchasers of handguns. The Brady Act thus commanded such officers to participate in administering a federal regulatory scheme. The Court concluded, this time in the *executive* branch context, that the United States may not compel state involvement in a federal program. "Congress," said the Court, "cannot circumvent [*New York's* prohibition on compelling sovereign acts] by conscripting the State's officers directly."¹²⁸

¹²¹469 U.S. at 580.

¹²²The Court had flirted with the question of compelled state participation earlier, in 1981, and hinted in dictum at its unconstitutionality. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981).

¹²³505 U.S. 144 (1992).

¹²⁴*Id.* at 161.

¹²⁵U.S. Const. art. I, § 8, cl. 1.

¹²⁶505 U.S. at 167-168.

¹²⁷521 U.S. 898 (1997).

¹²⁸*Id.* at 935. In contrast with the state's legislative and executive branches, *Printz* made clear that it *is* permissible for Congress to impose an obligation on state judges to enforce
(continued...)

Environmental Cases in the Wake of *New York* and *Printz*

Since *New York*, research reveals only one successful Tenth Amendment challenge to a federal environmental statute. *ACORN v. Edwards*¹²⁹ addressed a Safe Drinking Water Act (SDWA) provision that required each state to establish a program, meeting federal standards, to assist schools in remedying potential lead contamination in their drinking water systems. Failure to do so subjected the states to federal civil enforcement. Such "[c]ongressional conscription of state legislative functions," said the Fifth Circuit, "is clearly prohibited under [*New York*]"¹³⁰ Congress is free to regulate drinking water coolers in interstate commerce directly, but not through the states as conduits to the people. The SDWA provision, it concluded, deprives the state of the option of declining to regulate drinking water systems, and is therefore unconstitutional.

ACORN, it need hardly be said, was an easy case for the challenger. In another post-*New York* decision, the Fourth Circuit in *Virginia v. Browner*¹³¹ failed to find the direct compulsion of state action that the Supreme Court prohibited. *Virginia* was a state challenge to EPA's use of sanctions against the state, required under the Clean Air Act when a state submits an inadequate stationary source permitting scheme. In sustaining EPA's cut-off of certain federal highway funds to the state, the decision echoes the settled view that reasonable conditions on the grant of federal funds are not legally equivalent to compulsion, even when they have significant consequences for a state.¹³² Arguing unconstitutionality here is particularly difficult now that *New York* has specifically endorsed reasonable funding conditions as a means of encouraging state participation in federal programs.¹³³

A second federal-environmental-statute technique blessed by *Virginia* is sanctions triggered by state inaction, but applying solely to private activity. EPA had imposed on the state the Clean Air Act's "offset sanction," under which the quantity of existing emissions that has to be eliminated for every ton of new emissions (from a new factory or modified existing one) was set at 2:1 – greater than the ratio that otherwise would apply. While this sanction may burden the state's citizens

¹²⁸(...continued)
federal prescriptions. *Id.* at 905-907.

¹²⁹81 F.3d 1387 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997).

¹³⁰81 F.3d at 1394.

¹³¹80 F.3d 869 (4th Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997).

¹³²80 F.3d at 881-882 (Clean Air Act highway funds sanction is reasonably limited, hence is not outright coercion). Earlier decisions in accord are *Pacific Legal Found. v. Costle*, 14 ENV. T. RPT. (CASES) 2121, 2128 (E.D. Cal.), *affirmed*, 627 F.2d 917 (9th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) (also sustaining the Clean Air Act highway funds sanction), and *Texas Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025 (D.D.C. 1978), *affirmed without op.*, 598 F.2d 311 (D.C. Cir. 1979) (National Flood Insurance Program).

¹³³505 U.S. at 167.

(individuals proposing to build or modify a factory), the court held that it did not burden the state *as a government*, and thus did not offend the Tenth Amendment.¹³⁴

Third and finally, federal implementation of a federally desired program within a state when the state fails to act, another common approach, is constitutional.¹³⁵ As above, the state is not compelled to regulate. For the same reason, the mirror image of this arrangement -- ending the federal program within the state if the state adopts its own program meeting federal criteria -- is also constitutional.¹³⁶

When the State Itself Engages in the Regulated Activity

There appears to be one circumstance when the United States may regulate the state or political subdivision directly: when the state or local authority *itself* engages in an activity that Congress legitimately may regulate under the commerce power. This may occur, for example, when a county operates a fleet of waste-collection trucks, with their attendant emissions, or a solid waste landfill.¹³⁷ Here, federal regulation burdens the state not as sovereign government, but solely in its "enterprise" capacity. Such burdens do not implicate the federalism concerns raised by federal encroachments on state sovereignty.¹³⁸

A recent and unanimous Supreme Court opinion affirms this sovereign/enterprise distinction. In *Reno v. Condon*,¹³⁹ the Court was faced with the federal Driver's Privacy Protection Act, a statute that regulates the disclosure of personal information contained in the records of state motor vehicle departments. Many states sell such information, generating significant revenues. The statute was inoffensive to Tenth Amendment federalism principles, held the Court; it regulates states as owners of databases, rather than requiring states in their sovereign capacity to regulate their own citizens. It does not compel states to enact any laws, unconstitutional under *New York v. United States*, or require state officials to assist in administering a federal program, unconstitutional under *Printz v. United States*.

¹³⁴80 F.3d at 882 (Clean Air Act emissions offset sanction).

¹³⁵*Id.* at 882-883 (Clean Air Act federal permit program implementation). Another example is Clean Air Act section 110(c)(1), 42 U.S.C. § 7410(c)(1), authorizing U.S. EPA to promulgate a federal implementation plan for a state when it fails to submit an adequate plan.

¹³⁶80 F.3d at 882-883, noting approval of this technique in the Surface Mining Control and Reclamation Act by *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Another example is Clean Water Act section 402(b), 33 U.S.C. § 1342(b), authorizing the substitution of federally approved state discharge permitting programs for the existing federal program.

¹³⁷Whether current Tenth Amendment jurisprudence applies to *political subdivisions* of states, as well as to the states themselves, appears not to have been directly addressed by the Supreme Court. However, the plaintiffs in *Printz* were *county* sheriffs.

¹³⁸This state-as-polluter exemption raises serious constitutional questions, however, if broadly construed to embrace state actions or inactions that cause pollution only indirectly, such as building highways. *Brown v. EPA*, 566 F.2d 665, 672 (9th Cir. 1977).

¹³⁹528 U.S. 141 (2000).

Things blur a bit when the act which constitutes the regulated activity is an act of the state government in its sovereign capacity. In *Strahan v. Coxe*,¹⁴⁰ a state's regulation of commercial fishing was held likely to be a "taking" of Northern Right Whales prohibited under the Endangered Species Act. Here, said the court, it is proper to conclude that the state's scheme cannot continue insofar as it is inconsistent with the preemptive federal act. As long as the court's order does not command specific regulatory action by the state, it will be held not to have "commandeered" the state government – as forbidden by *New York*. Thus, the court could order the state to consider means by which fishing practices might be modified to avoid authorizing takings in state waters, but could not order the state to adopt specific modifications.

Eleventh Amendment and State Sovereign Immunity: Federal Authorization of Private Suits Against States

Background

The Eleventh Amendment is another constitutional provision being used by the conservative majority on the Supreme Court to effect a more states-rights-oriented concept of federalism. It states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State" In simpler terms, a federal court may not hear suits against a state brought by citizens of other states. The Amendment stands for the proposition that the Supremacy Clause¹⁴¹ of the U.S. Constitution notwithstanding, not all exercises of congressional power override state sovereign immunity. The Court's Eleventh Amendment jurisprudence seeks to reconcile these two competing principles.

More accurately, it is not the Eleventh Amendment itself, but rather *broader principles of state sovereign immunity*, upon which the Supreme Court has increasingly relied. In the view of the Court's conservative majority, the Eleventh Amendment merely exemplifies the principles of state sovereign immunity otherwise implicit in the Constitution; it emphatically does not exhaust them.¹⁴² The Court makes a three-step argument. *One*: "Dual sovereignty is a defining feature of our

¹⁴⁰127 F.3d 155 (1st Cir. 1997), *cert. denied*, 528 U.S. 830, 978 (1998).

¹⁴¹The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... , shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI.

¹⁴²As stated in *Alden v. Maine*, 527 U.S. 706, 728-729 (1999):

The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates inherent in the constitutional design.

Nation’s constitutional blueprint.”¹⁴³ *Two*: Thus “[s]tates, upon ratification of the Constitution ... entered the Union with their sovereignty intact.”¹⁴⁴ *Three*: inherent in that state sovereignty is immunity from unconsented-to suit.

This view of the Eleventh Amendment as merely illustrative of broader immunity principles has an important consequence: it largely frees the Court of the Amendment’s textual constraints. Thus, while the Amendment speaks only to suits against states by citizens “of another state,” the Supreme Court has disallowed federally authorized suits against unconsenting states even when brought by citizens of the *same* state.¹⁴⁵ While the Amendment speaks only to suit in federal court, the Court has barred suits in *state* court as well.¹⁴⁶ While the text deals solely with the “judicial power” of the United States and “suit[s] in law or equity,” the Court has barred proceedings against unconsenting states before federal-agency adjudicative bodies, too.¹⁴⁷ And while the Amendment speaks only to suits by “Citizens,” the Court has prohibited suits by recognized Indian tribes,¹⁴⁸ federal corporations,¹⁴⁹ and foreign countries.¹⁵⁰

Pivotal to the applicability of the Eleventh Amendment and principles of state sovereign immunity is the identity of the plaintiff and defendant. As to the plaintiff, no immunity from suit exists for suits against states by the United States¹⁵¹ or by another state.¹⁵² The states, in ratifying the Constitution, are deemed to have surrendered at least that portion of their inherent immunity.¹⁵³ Thus the Amendment and related immunity principles are limited to *private* actions against unconsenting states. As for defendants, the Amendment and related immunity principles extend to alter egos of the state – state agencies, departments, and officers (when sued in their official capacity)¹⁵⁴ – but not to municipal corporations or other governmental

¹⁴³Federal Maritime Comm’n v. South Carolina State Ports Auth., 122 S. Ct. 1864, 1870 (2002) (citations omitted).

¹⁴⁴*Id.* “States entering the Union after 1789 did so on an ‘equal footing’ with the original states.” Idaho v. Coeur d’Alene Tribe of Idaho, 521 U.S. 261, 283 (1997).

¹⁴⁵Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 363 (2001) (collecting cases). The original decision establishing the text proposition is Hans v. Louisiana, 134 U.S. 1 (1890).

¹⁴⁶Alden v. Maine, 527 U.S. 706 (1999).

¹⁴⁷*Federal Maritime Comm’n*, 122 S. Ct. 1864.

¹⁴⁸Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

¹⁴⁹Smith v. Reeves, 178 U.S. 436 (1900).

¹⁵⁰Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

¹⁵¹Alden v. Maine, 527 U.S. 706, 755 (1999), *citing* Principality of Monaco v. Mississippi, 292 U.S. 313, 328-329 (1934) (collecting cases).

¹⁵²Kansas v. Colorado, 206 U.S. 46, 83 (1907).

¹⁵³*Federal Maritime Comm’n*, 122 S. Ct. at 1870.

¹⁵⁴Edelman v. Jordan, 415 U.S. 651 (1974); MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491, 503 (3d Cir. 2001). A plaintiff can state a claim against a state (continued...)

entities that are not an arm of the state.¹⁵⁵ In contrast with the identity of plaintiff and defendant, the nature of the relief sought – damages, injunction, or other – is *not* relevant to whether suit is barred.¹⁵⁶

The Amendment and the constitutional principle of state sovereign immunity have three exceptions.¹⁵⁷

1. Ex parte Young suits. While state immunity extends to state agencies and state officials who act on behalf of the state, *Ex parte Young* allows a federal court to prospectively enjoin a state official from violating federal law.¹⁵⁸ The legal fiction behind this exception is that a suit against a state officer is not a suit against the state when an injunction is sought against an illegal action, since an officer is seen as not acting on behalf of the state when he or she acts illegally. Conversely, *Ex parte Young* doctrine does not cover retroactive relief that requires the payment of funds from the state treasury – e.g., imposing civil money penalties for past noncompliance.¹⁵⁹

The Supreme Court recently has narrowed the *Ex parte Young* doctrine, but only minimally – as yet. The more important of its narrowing decisions, at least for environmental purposes, came in *Seminole Tribe of Florida v. Florida*.¹⁶⁰ There, the Court held that petitioner’s claim against the state, which was barred by the Eleventh Amendment, also could not be brought as an *Ex parte Young* suit against the state governor. The Court reasoned that “where Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right, the court should hesitate before casting aside those limitations and permitting an action against a state officer under *Ex parte Young*.”¹⁶¹ Particularly is this so where the “detailed regulatory scheme” involves only “quite modest” sanctions against the state or state official. Not that Congress cannot, if it chooses, authorize *Ex parte Young* suits against state officials even in this circumstance, the Court hastened to add.

¹⁵⁴(...continued)

officer in his individual capacity, as long as payment is not required from the state treasury.

¹⁵⁵*Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274, 280 (1977).

¹⁵⁶*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996).

¹⁵⁷These are also summarized in *Alden v. Maine*, 527 U.S. 706, 754-757 (1999).

¹⁵⁸209 U.S. 123 (1908). The restriction of *Ex parte Young* suits to state officials accused of violating *federal* law derives from *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). In support, *Pennhurst* explains that if the violation is of state law, the intrusion on state sovereignty is great in that a federal court is being asked to instruct state officials on their own law, while there is no offsetting Supremacy Clause interest.

¹⁵⁹*Pennhurst*, 465 U.S. at 102-103. To be sure, a purely *prospective* injunction against a state official may have financial consequences for the state as well. But such consequences, when the ancillary result of state compliance with decrees that are prospective in nature, “is a permissible and often an inevitable consequence of the principle announced in *Ex Parte Young*” *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

¹⁶⁰517 U.S. 44, 73-76 (1996). The other narrowing opinion is *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 287 (1997).

¹⁶¹517 U.S. at 74.

Indeed, Congress had done precisely that, in the Court’s view, in the Clean Water Act citizen-suit provision (by authorizing suit against “any person”) and the Emergency Planning and Community Right-to-Know Act (holding “the Governor” responsible for nonperformance).¹⁶²

As an addendum to our *Ex parte Young* discussion, passing mention may be made of the continuing possibility, Eleventh Amendment notwithstanding, of suits against state officials in their *individual* capacities for money damages.¹⁶³ In the environmental context, however, such suits pale in importance next to the aforementioned suits for prospective injunctive relief.

2. State consent (waiver). It is well-settled that a state may waive its sovereign immunity – as, for example, that embodied in the Eleventh Amendment – by consenting to be sued.¹⁶⁴ The more difficult question is what constitutes consent. In general, the Court insists that waivers of sovereign immunity be “unequivocal.”¹⁶⁵ Thus, enactment of a state statute or constitutional provision explicitly consenting to suit in federal court generally passes muster.¹⁶⁶ The same goes for a clear statement of a state’s agreement to administer a federal-state program that imposes federal standards on the state. Consent may also take the form of the state’s voluntarily invoking federal jurisdiction,¹⁶⁷ as by its voluntary appearance in federal court as an intervenor and defense of the case on the merits¹⁶⁸ or its removal of a lawsuit from state court to federal court.¹⁶⁹ But in general, the Court has become increasingly stingy in finding that states waive their immunity by exercising the rights given them by federal law. Important to environmental regulation, consent will not be presumed based on the state’s mere presence in a field that is federally regulated – even if the state activity is one it could realistically choose to abandon, is undertaken for profit, or is traditionally performed by the private sector.¹⁷⁰

¹⁶²517 U.S. at 75 n.17.

¹⁶³*Hafer v. Melo*, 502 U.S. 21, 29-31 (1991).

¹⁶⁴*College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Bd.*, 527 U.S. 666, 675 (1999). Consenting to be sued raises a significant issue when the federal court is blocked from hearing an action because of the Eleventh Amendment proper, rather than broader notions of sovereign immunity. The Amendment is phrased in terms of federal court *jurisdiction*, yet jurisdictional barriers to the courthouse door generally are held not to be waivable by litigants.

¹⁶⁵*Id.* at 680.

¹⁶⁶To underscore the text point, the waiver must specify the state’s intention to subject itself to suit in *federal court*. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

¹⁶⁷*Id.* at 675.

¹⁶⁸*Clark v. Barnard*, 108 U.S. 435 (1883).

¹⁶⁹*Lapides v. Board of Regents of the University System of Georgia*, 122 S. Ct. 1640 (2002). The waiver principle in the text does not turn on the nature of the relief sought. *Id.* at 1644.

¹⁷⁰*College Savings Bank*, 527 U.S. at 684.

Mere receipt of federal funds cannot establish consent, though Congress has broad authority to condition financial grants on state waiver.¹⁷¹ Of course, the voluntariness of the consent, hence its effectiveness, is destroyed when that which is attached to refusal to waive immunity is the exclusion of the state from otherwise lawful activity.¹⁷²

3. Congressional abrogation of state sovereign immunity. Congress, says the Supreme Court, may abrogate state immunity pursuant to section 5 of the Fourteenth Amendment.¹⁷³ That Amendment, adopted after the Civil War, bars states from depriving persons of life, liberty, or property without due process of law, or denying to any person equal protection of the laws. Section 5 authorizes Congress “to enforce, by appropriate legislation” the amendment. By contrast, Congress may *not* abrogate state immunity under its Article I authorities, which include the commerce power.¹⁷⁴

When acting under proper constitutional authority, Congress, if it intends to abrogate state sovereign immunity, must make its intention “unmistakably clear in the language of the statute.”¹⁷⁵ The mere fact that a statute was passed under the Fourteenth Amendment is not enough to show that Congress intended to circumvent state sovereign immunity.¹⁷⁶ Also, for legislation to be an “appropriate” remedy under section 5 of the Fourteenth Amendment, it must be plausibly cast as responsive to, or designed to prevent, unconstitutional behavior – and not be simply an effort to define the substance of the Amendment. To that end, there must be a “congruence

¹⁷¹*South Dakota v. Dole*, 483 U.S. 203 (1987). However, a leading text asks: “Given [the conservative majority on the Court’s] apparent willingness to chip away at other established constitutional doctrines in order to protect its vision of untrammelled state sovereign immunity, ... is the broad authority recognized in *Dole* ... a technique that may be narrowed or eliminated?” Richard H. Fallon et al., *Hart and Wechsler’s The Federal Courts and the Federal System* (4th ed.) 111 (1999 Supp.).

Depending on the wording of the federal statute authorizing the federal financial assistance, the waiver may apply only to the state agency that receives the money. *See, e.g., Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161 (3d Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3400 (Nov. 19, 2002) (No. 02-801).

¹⁷²*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 687 (1999).

¹⁷³*Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 364 (2001), *citing Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

¹⁷⁴*Board of Trustees*, 531 U.S. at 364; *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The type of relief sought against the state (e.g., prospective injunctive relief rather than retroactive monetary relief) is irrelevant to whether Congress has power to abrogate the state’s immunity. So is the fact that a congressional enactment extends to the states a power withheld from them by the Constitution. *Id.* at 58.

¹⁷⁵*Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000), *quoting Dellmuth v. Muth*, 491 U.S. 223, 227-228 (1989). The “unmistakably clear” standard is met by statutory authorization of suits against the states; it is unnecessary for the statute to state in so many words that waiver of state sovereign immunity is intended. *See, e.g., Seminole Tribe*, 517 U.S. at 56-57; *Kimel*, 528 U.S. at 73-74.

¹⁷⁶*Seminole Tribe*, 517 U.S. 44.

and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁷⁷ To establish such congruence and proportionality, a court must ensure that (1) the legislation reaches primarily conduct likely to be unconstitutional under some Fourteenth Amendment guarantee, and (2) Congress has made well-supported findings that there exists a widespread pattern of abuse by the states (not local governments) as to that guarantee.¹⁷⁸

Observations as to Federal Environmental Statutes

Since the Eleventh Amendment and the broader constitutional embodiment of state sovereign immunity assure that nonconsenting states cannot be privately sued through the Commerce Clause, such suits under most federal environmental statutes cannot proceed. Most such statutes – the Clean Air Act, Clean Water Act, Superfund Act, Resource Conservation and Recovery Act, etc. – were enacted pursuant to that very Clause, not section 5 of the Fourteenth Amendment. Indeed, in the leading decision rejecting use of the Commerce Clause for such abrogations, the Supreme Court had to overrule its earlier decision allowing private suits against the states under the Commerce Clause-based Superfund Act.¹⁷⁹

Notwithstanding, these immunity-based constraints are of limited scope.¹⁸⁰ Recall that we are talking only about suits against *states*, not against political

¹⁷⁷*Boerne, Texas v. Flores*, 521 U.S. 507 (1997); *Kimel*, 528 U.S. 62.

¹⁷⁸As to item (2), the Supreme Court’s recent decisions have set a demanding standard for Congress as to what constitutes “well-supported” findings of state abuse. Most notably, in *Board of Trustees*, a dozen examples in the Americans with Disabilities Act’s legislative history of adverse state actions against the disabled were still deemed by the Court to “fall far short of even suggesting” the required pattern of unconstitutional discrimination. 531 U.S. at 369-374. (Justice Breyer in dissent countered that Congress had compiled a “vast” record documenting massive state discrimination. *Id.* at 377.) Moreover, the Act’s remedies against the states were seen to raise congruence and proportionality concerns. In *Kimel*, the Court held the Age Discrimination in Employment Act not to satisfy the test because it prohibited substantially more state employment practices than would be unconstitutional under the Fourteenth Amendment, and its legislative history failed to identify any pattern of unconstitutional age discrimination by the states. As to the latter item, “isolated statements clipped from floor debates and legislative reports” are insufficient. 528 U.S. at 89. In *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999), a sparser legislative history led the Court to the same holding with regard to federally authorized patent-infringement suits against the states.

The Fourteenth Amendment violations must be by the states, not their political subdivisions. *Board of Trustees*, 531 U.S. 356, 368-369 (2001).

¹⁷⁹*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996), *overruling Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality opinion).

¹⁸⁰*See generally* Stephen R. McAllister and Robert L. Glicksman, *State Liability for Environmental Violations: The U.S. Supreme Court’s “New” Federalism*, 29 ENVTL. L. RPTR. 10665 (1999) (concluding that Supreme Court’s Eleventh Amendment decisions “do not ultimately appear to preclude Congress from regulating environmental matters in any significant measure”).

subdivisions of states or nongovernmental actors.¹⁸¹ And we are not talking about suits that seek to coerce states to participate in their sovereign capacity in federal programs. *That* option was already lost to Congress through the Tenth Amendment cases. As the cases discussed below indicate, the Eleventh Amendment and related immunity have been a stumbling block for federal environmental programs in principally two narrow situations. The first is *non*-sovereign state activity. As noted earlier, this might include a state's use of vehicles (e.g., police cars) and state ownership or operation of landfills. The second situation occurs when a state chooses to participate in a federal regulatory effort by developing its own program meeting federal standards and submitting it for federal approval, but – the key part – the approved state program retains a purely state-law status. Thus far, this second scenario has arisen solely under the Surface Mining Control and Reclamation Act. A third realm where the Amendment has insulated states is whistleblower actions brought under federal environmental statutes by state employees alleging retaliatory treatment by their state employers.¹⁸² Due to the marginal relevance of such litigation to our topic here, we do not discuss it further.

Even in those limited situations where the Amendment has been held to apply, it can hardly be said that states are free to violate standards imposed under federal environmental laws. As an initial matter, most states presumably would comply as a matter of good faith.¹⁸³ More to the legal point, and as noted above, state officials still could be constrained by injunctions in private suits demanding compliance with federal laws. And, states could still be sued by the Federal Government (or, as presumably would occur only rarely, by other states). The second category above may present higher barriers to enforcement against the states, though even here the United States can bypass the states and enforce directly against the regulatee. And, of course, the state may consent to be sued in its own courts.

An interesting question is whether Congress could authorize private suits against state activity, Eleventh Amendment notwithstanding, by statutorily characterizing such suits as being on behalf of the United States. A similar question recently was presented to the Supreme Court involving a private *qui tam* suit against a state under the federal False Claims Act, but was sidestepped by the Court when it construed the Act as not extending to states.¹⁸⁴

¹⁸¹The text point is important in that under the citizen-suit provisions found in most federal environmental statutes, suits against localities have been numerous. *See, e.g.,* *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994).

¹⁸²*See, e.g.,* *Rhode Island Dep't of Environmental Management v. United States*, 304 F.3d 31 (1st Cir. 2002) (involving whistleblower provision in Solid Waste Disposal Act).

¹⁸³To be sure, there are recurring reasons why states, on occasion, do not comply: (1) the federal obligation imposes onerous financial burdens on the state; (2) the federal obligation trenches on an area traditionally considered a matter of state prerogative; and (3) there is public opposition to the consequences of compliance. *See* Stephen R. McAllister and Robert L. Glicksman, note 180 *supra* (giving examples of state noncompliance).

¹⁸⁴*Vermont Agency of Natural Resources v. United States ex rel Stevens*, 529 U.S. 765 (2000).

To the extent that private suits against states are desired by Congress, consideration also might be given to encouraging state waiver of sovereign immunity by making waiver a condition to receiving delegation of the federal program, or to receiving federal money. As to the latter, we mentioned earlier that the Court has upheld (for now) the power of Congress, in the exercise of its spending power, to condition its grant of funds to the states upon their taking specified actions that Congress could not mandate them to take.¹⁸⁵

The citizen suit provisions found in most federal environmental statutes make the Eleventh Amendment limit on suits against the states explicit. Typical language is that of the Clean Air Act:

[A]ny person may commence a civil action on his own behalf ... against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency *to the extent permitted by the Eleventh Amendment to the Constitution*) who is alleged to have violated ... or to be in violation of (A) an emission standard or limitation under this [Clean Air Act], or (B) an order issued by the [EPA] Administrator or a State with respect to such a standard or limitation.¹⁸⁶

Of course, the Eleventh Amendment would have constrained suits under this and similar citizen-suit provisions even without the explicit mention. Yet mentioning the Amendment has not been for naught; several court decisions have used it to support an inference that Congress intended to authorize suits against state officials.¹⁸⁷

Finally, congressional abrogation of state immunity pursuant to section 5 of the Fourteenth Amendment may be viable in rare instances. Probably the most compelling example would be federal laws to prevent the discriminatory application of environmental laws by the states – such as the disproportionate permitting of toxic hazards or other environmental threats in minority neighborhoods. As noted, Supreme Court decisions make amply clear that the legislative history for such enactments would have to contain substantial evidence of a pattern, or future likelihood, of unconstitutional activity by the states.¹⁸⁸

Case Law Involving Federal Environmental Statutes

Clean Water Act/Clean Air Act. Several Eleventh Amendment decisions stem from Clean Water Act (CWA) and Clean Air Act (CAA) citizen suits against states or state officials. These rulings have all permitted suits against state officials for prospective injunctive relief, citing *Ex parte Young*. For example, an early CWA decision held that the Amendment does not bar suit against members of the

¹⁸⁵See note 171 *supra* and accompanying text.

¹⁸⁶Clean Air Act § 304(a)(1); 42 U.S.C. § 7604(a)(1). Emphasis added.

¹⁸⁷See, e.g., *Strahan v. Coxe*, 127 F.3d 155, 166 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998).

¹⁸⁸See note 178 *supra* and accompanying text.

California Regional Water Quality Control Board seeking an injunction ordering that discharges from an acid-mine-drainage collection facility operated by the Board be terminated until a NPDES permit was obtained.¹⁸⁹

Subsequent to *Seminole Tribe*'s narrowing of *Ex parte Young* in 1996,¹⁹⁰ a Ninth Circuit decision continued to look kindly on CWA citizen suits seeking prospective relief against state officers. The court noted *Seminole Tribe*'s view of the CWA citizen-suit provision as implicitly authorizing citizens to bring *Ex parte Young* suits against state officials.¹⁹¹ But as Eleventh Amendment jurisprudence plainly requires, the court found barred the claim in the citizen suit against the state itself, and the claim against a state official for civil penalties based on past violations of the CWA.¹⁹²

Clean Air Act (CAA) citizen suits against state officials, all decided since *Seminole Tribe*, also have been able to bypass the Eleventh Amendment through *Ex parte Young*. Court decisions cite *Seminole Tribe*'s apparent view that Congress intended to allow CWA citizen suits under *Ex parte Young*, then point to the near-identical wording of the CAA citizen-suit provision.¹⁹³

In another CWA citizen suit, Eleventh Amendment immunity was denied to the New York State Thruway Authority on the ground that it was not an "arm of the state."¹⁹⁴

Surface Mining Control and Reclamation Act. A less hospitable reception has been extended to citizen suits against state officials under the Surface Mining Control and Reclamation Act (SMCRA). In *Bragg v. West Virginia Coal Ass'n*,¹⁹⁵ plaintiffs argued that by issuing permits for mountaintop-removal coal mining, a state official violated state regulations adopted under SMCRA. The Fourth Circuit asserted that in contrast with many federal environmental laws, under which a federally approved

¹⁸⁹*Committee to Save Mokelumne River v. East Bay Utilities District*, 13 F.3d 305, 309-310 (9th Cir. 1993), *cert. denied*, 513 U.S. 873 (1994). To similar effect is *Pennsylvania Env'tl. Defense Found. v. Mazurkiewicz*, 712 F. Supp. 1184 (M.D. Pa. 1989) (suit for injunction against future discharges by state prison exceeding NPDES permit limits authorized by *Ex Parte Young*).

¹⁹⁰*See* text accompanying notes 160-162 *supra*.

¹⁹¹*NRDC v. California Dep't of Transp.*, 96 F.3d 420, 424 (9th Cir. 1996). Said the court: "When Congress enacted the Clean Water Act citizen suit provision, it specified that it was legislating to the extent permitted by the Eleventh Amendment. Congress enacted the citizen suit provision so that 'a citizen enforcement action might be brought against an individual or a government agency.' It would seem reasonable then, that Congress implicitly intended to authorize citizens to bring *Ex Parte Young* suits against state officials with the responsibility to comply with clean water standards and permits." *Id.* (citation omitted).

¹⁹²*NRDC*, 96 F.3d at 423.

¹⁹³*Clean Air Council v. Mallory*, 2002 Westlaw 31323360 (E.D. Pa. Oct.18, 2002); *Sweat v. Hull*, 200 F. Supp. 2d 1162, 1168 n.8 (D. Ariz. 2001).

¹⁹⁴*Mancuso v. New York State Thruway Authority*, 86 F.3d 289 (2d Cir.), *cert. denied*, 519 U.S. 992 (1996).

¹⁹⁵248 F.3d 275 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

state program has a dual federal-state status, such a state program under SMCRA is exclusively state law. It applies as state law to the exclusion of *any* federal law or federal jurisdiction.¹⁹⁶ By asking the district court to order conformance with this purely state law, the citizen suit, in the court’s view, asked for too great an intrusion on state sovereignty. Hence, *Ex parte Young* was unavailable, and the Eleventh Amendment/sovereign immunity bar applied. Nor did the state waive its sovereign immunity by submitting its program to the Secretary of Interior for approval.

Partly for the same reason – the purely state-law status of federally approved state SMCRA programs – the Third Circuit also rejected *Ex parte Young* application and barred most counts of a SMCRA citizen suit against a state environmental official.¹⁹⁷ This time plaintiffs alleged that the state official had failed to perform nondiscretionary duties in the state’s reclamation bonding program.¹⁹⁸ “The appropriate inquiry for *Ex parte Young* purposes,” said the court, “is whether a court is being asked to enforce state law or federal law as against an individual state officer.”¹⁹⁹ As to other counts of the citizen suit that did allege violations of federal law, *Ex parte Young* was available to permit suit. And as with CAA and CWA citizen suits, the *Seminole Tribe* exception to *Ex parte Young* availability was found inapplicable.

Superfund Act/ Resource Conservation and Recovery Act. In the wake of *Seminole Tribe*’s announcement that Congress cannot abrogate state sovereign immunity through a Commerce Clause-based statute, states have successfully asserted the Eleventh Amendment as a shield to Superfund Act and Resource Conservation and Recovery Act monetary liability. For example, *Prisco v. State of New York*²⁰⁰ dismissed on Eleventh Amendment grounds a landfill owner’s Superfund Act claims against a state alleged to have run the landfill as a sting operation to uncover organized crime in the waste industry. The court also dismissed plaintiff’s Superfund claims against state *officials* because they sought monetary relief, not covered by *Ex parte Young*. By contrast, plaintiff’s RCRA

¹⁹⁶Under SMCRA, once a state’s program for regulating surface mining within its borders has been federally approved, the state is accorded “exclusive jurisdiction over the regulation of surface coal mining and reclamation operations” on non-federal lands within its borders. 30 U.S.C. § 1253(a).

¹⁹⁷*Pennsylvania Federation of Sportsmen’s Clubs v. Hess* 297 F.3d 310 (3d Cir. 2002).

¹⁹⁸One presumes that this suit did not bump into Tenth Amendment problems because the state *voluntarily* submitted its program for federal approval. The Tenth Amendment cases, principally *New York* and *Printz*, focus on federal initiatives that “commandeer” state functions.

¹⁹⁹*Id.* at 325. In addition, the court rejected plaintiff’s argument that the state program had been “codified” into federal law by federal regulations stating that each state program is to be “codified in the part [of the Code of Federal Regulations] reserved” for that state.” Nor, in the court’s view, could the regulations have done so constitutionally: “[I]f Congress could empower the [federal Office of Surface Mining] to incorporate state law into federal law ... such that states could be sued by citizens in federal court, the limitations on Congress’ authority to override the Eleventh Amendment by means of legislation would be rendered a virtual nullity.” *Id.* at 327.

²⁰⁰1996 Westlaw 596546 (S.D.N.Y. Oct. 16, 1996) (not published in official reporters).

citizen suit seeking prospective injunctive relief against state officials was held constitutional. As with the CWA, CAA, and SMCRA, RCRA was deemed not to be the sort of “detailed remedial scheme for the enforcement against a state of a statutorily created right” found by *Seminole Tribe* to bar *Ex parte Young* suits.²⁰¹

Endangered Species Act. Finally, an Endangered Species Act (ESA) decision by the First Circuit holds that the *Ex parte Young* exception does not limit courts to simply ordering a cessation of the state official’s unlawful activity.²⁰² Other equitable relief appropriate to achieving that end is also proper. The unlawful activity in question was the state’s regulatory scheme for commercial fishing, under which the state was issuing permits for use of gear harmful to an endangered whale. This activity, declared the lower court, constituted a “take” of the whale by the state, unlawful under the ESA.²⁰³ The circuit’s scope-of-relief ruling allowed it to affirm the lower court’s injunction requiring state officials to apply for an incidental-take permit under the ESA for the endangered whale, and to prepare a proposal for restricting use of fixed-fishing gear in state waters to minimize harm to such whales.²⁰⁴

Addendum 1: Article I’s Nondelegation Doctrine

This doctrine is relegated to an addendum because unlike the constitutional principles in the preceding chapters, the Supreme Court has not been the instrument of its recent resuscitation, but rather of its recent confinement.

The nondelegation doctrine blocks Congress from surrendering too much legislative-type discretion to another branch of government.²⁰⁵ The doctrine flows from the separation of powers in the constitutional structure, and in particular from Article I’s vesting of “[a]ll legislative Powers” in the Congress.²⁰⁶ While the Court gives lip service to an absolute reading of this constitutional grant – insisting that *no* legislative power may be delegated – it has adopted a corollary that largely

²⁰¹The RCRA citizen suit against state officials was dismissed, however, on the ground that they could not be held liable for actions of subordinates acting outside the scope of their employment.

²⁰²*Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997), *cert. denied*, 528 U.S. 830, 978 (1998).

²⁰³ESA § 9(a)(1)(B); 16 U.S.C. § 1538(a)(1)(B).

²⁰⁴Ordering state officials to perform affirmative acts under a federal scheme raises Tenth Amendment issues as well, of course. The particular order in this case was found inoffensive to the Tenth Amendment, on the ground that it did not order the state to take specific regulatory actions. See discussion in Tenth Amendment section.

²⁰⁵The nondelegation doctrine is not the only constitutional constraint upon Congress’ ability to delegate its powers. The principle of unconstitutional vagueness, and due process, also have been invoked. *See, e.g.*, *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92 (1921). The Line Item Veto Act case, *Clinton v. City of New York*, 524 U.S. 417 (1998), found that abdications of legislative authority to the executive branch could also be barred by the Presentment Clause in Article I, section 7.

²⁰⁶U.S. Const. art. I, § 1 (emphasis added).

circumvents that reading. The Court has long held that legislative-like powers may be delegated to agencies if Congress gives the agency an *intelligible principle* to guide its exercise of that authority. This is merely a recognition that Congress routinely and necessarily delegates legislative-type powers to noncongressional bodies. In particular, Congress frequently commits to the specialized expertise of executive-branch agencies the task of rulemaking and standard setting in technical areas — such as environmental control.

Except for two decisions in 1935, the Supreme Court has never agreed with a nondelegation-doctrine challenge,²⁰⁷ and the doctrine “has often been declared deceased.”²⁰⁸ Delegations sustained by the Court sometimes have been extremely broad, including statutes instructing the FCC to regulate broadcast licensing “in the public interest,”²⁰⁹ and authorizing the Price Administrator during World War II to set “fair and equitable” prices.²¹⁰ All that the Court seems to insist on (sometimes) is that Congress employ a delegation which “sufficiently marks the field within which the [Price] Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.”²¹¹ Where the congressional standard is combined with requirements of notice and hearing and agency statements of findings and considerations, so that judicial review under due process standards is possible, the constitutional requirements of delegation have been fulfilled.²¹²

In 1999, the D.C. Circuit breathed new life into the nondelegation doctrine, becoming apparently the first court to bless a nondelegation attack on a federal statute since 1935. At issue in *American Trucking Associations v. EPA*²¹³ was EPA’s promulgation in 1997 of revised primary national ambient air quality standards (NAAQSs) for ozone and particulate matter. The 2-judge majority found that EPA had construed Clean Air Act (CAA) section 109(b)(1)²¹⁴ – requiring that primary NAAQSs be set at a level “requisite to protect the public health” with an additional “adequate margin of safety” – so loosely as to render it an unconstitutional delegation of legislative power.

The D.C. Circuit majority had no quarrel with the *factors* used by EPA to assess the public health threat posed by air pollutants. Rather, it said, EPA had articulated no “intelligible principle” for translating the factors into a particular NAAQS. Nor, it said, is one apparent from the statute. Going from the impact factors to a numerical NAAQS requires more, insisted the court, than asserting that a higher NAAQS would allow greater public health harm, and a lower NAAQS less harm. This is *always* true

²⁰⁷See *Mistretta v. United States*, 488 U.S. 361, 371-379 (1989) (reviewing case law).

²⁰⁸*Consumer Energy Council of America v. FERC*, 673 F.2d 425, 448 n.82 (D.C. Cir. 1982).

²⁰⁹*National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). See also *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24-25 (1932).

²¹⁰*Yakus v. United States*, 321 U.S. 414, 426-427 (1944).

²¹¹*Id.* at 425.

²¹²*Id.* at 426.

²¹³175 F.3d 1027 (D.C. Cir. 1999), *modified*, 195 F.3d 4 (D.C. Cir. 1999).

²¹⁴42 U.S.C. § 7409(b)(1).

for a nonthreshold pollutant,²¹⁵ but does not fix the *maximum acceptable* degree of harm. EPA also argued that at pollution levels below the promulgated standard, health effects are less certain. The court rejected this argument as well. “[T]he increasing uncertainty argument,” it said, “is helpful only if some principle reveals how much uncertainty is too much.”

In *Whitman v. American Trucking Associations*,²¹⁶ the Supreme Court unanimously rejected any nondelegation-doctrine infirmity in CAA section 109, reversing the court of appeals. The Court read the term “requisite” in the section 109 NAAQS standard to mean no higher and no lower than necessary to protect the public health, with an adequate margin of safety. With EPA’s discretion so constrained, the justices found section 109 to be “well within the outer limits of our nondelegation precedents.”²¹⁷ The majority of the justices voiced no disapproval of those precedents.

The Court further opined that “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”²¹⁸ Thus, while Congress need not provide any direction to EPA on the meaning of a narrowly applicable statutory term, it must give “substantial guidance” on setting air standards that affect the entire national economy.²¹⁹ Even in the latter instance, however, the Court asserted that Congress need not provide a “‘determinate criterion’ for saying ‘how much [of the regulated harm] is too much.’”²²⁰

Finally, the Supreme Court rejected the D.C. Circuit’s approach of allowing the agency, rather than Congress, an opportunity to supply the missing intelligible principle.²²¹

With its decision in *Whitman*, the Supreme Court appears to have discouraged judicial invocation of the nondelegation doctrine, restoring the legal situation prior to the D.C. Circuit decision. According to one academic, the doctrine “is going back to sleep and hibernating for a long, long time.”²²² It is possible, however, that the

²¹⁵According to the court, “EPA regards ozone definitely, and [particulate matter] likely, as nonthreshold pollutants, i.e., ones that have a possibility of adverse health impact (however slight) at any exposure level above zero.” 175 F.3d at 1034.

²¹⁶531 U.S. 457 (2001).

²¹⁷*Id.* at 474.

²¹⁸*Id.* at 475.

²¹⁹*Id.*

²²⁰*Id.*

²²¹ In separate concurrences, Justice Thomas questioned whether the Court’s delegation jurisprudence had strayed too far from the Founder’s understanding of separation of powers, while Justice Stevens argued for a candid recognition that agencies routinely exercise legislative power, and that nothing in Article I, section 1, precludes congressional delegation of legislative power.

²²²Remarks of Prof. David Hodas, Widener Univ. School of Law, quoted in “High Court (continued...)”

pendulum has not swung all the way back to somnolence. To be sure, the Court in *Whitman* cited with approval many of its laxest nondelegation precedents. Still, the Court's insistence that regulations of national application be predicated on "substantial guidance" from Congress appears to be a new component of the doctrine, or at least one that has not been made explicit before now. If "substantial guidance" is to have any meaning at all, rumors of the demise of the nondelegation doctrine may, in the familiar expression, be premature. It is difficult, for example, to discern even an amorphous statutory standard for the granting of individual permits under the Clean Water Act wetlands permitting program.²²³

Perhaps the most important statement in *Whitman*, for environmental law purposes, is that the "substantial guidance" required for national regulations does not require Congress to specify how much of the regulated harm is too much. Thus, the typical standards for how protective a federal regulation must be – for example, "necessary to protect human health and the environment" under the Resource Conservation and Recovery Act,²²⁴ or when needed to address emissions that "may reasonably be anticipated to endanger public health or welfare" under the Clean Air Act's mobile sources title²²⁵ – should pass muster readily. Regulations of less-than-national scope would seem to be virtually unassailable.²²⁶

Addendum 2: Article II's Vesting of Law-Enforcement Authority in the Executive Branch

This constitutional issue, frequently raised during the 1980s, seems to have a new generation of supporters today. We treat it in an addendum because it has not

²²²(...continued)

Upholds Revised Clean Air Standards in Landmark Case," vol. 29, no. 9 Haz. Waste Lit. Rptr. 3 (Mar. 16, 2001).

²²³CWA § 404; 33 U.S.C. § 1344

²²⁴RCRA § 3002(a); 42 U.S.C. § 6922(a).

²²⁵CAA § 202(a)(1); 42 U.S.C. § 7521(a)(1).

²²⁶*See Michigan v. U.S. EPA*, 213 F.3d 663, 680-681 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 904 (2001), which, soon after the D.C. Circuit decision in *American Trucking Ass'ns*, refused to find an impermissible delegation in another CAA provision. This provision allowed EPA to require states to revise their implementation plans whenever it finds they are inadequate to prevent emissions within the state that "contribute significantly" to ambient standard nonattainment in another state. Invoking this authority, EPA in 1998 required 22 states to revise their plans to reduce nitrogen oxides (NOx, an ozone precursor) by the amount accomplishable through controls that remove NOx at a cost of \$2000/ton or less. Though EPA viewed its latitude in choosing the dollars per ton cut-off as "essentially unbounded," the court found the delegation lawful. Unlike cases where the agency's claimed power encompassed "all American enterprise," here EPA must make a number of fact findings (e.g., emissions migrating into another state) that "confined the statute to a modest role." Delegations of narrow scope, the court said based on its reading of precedent, can be "effectively standardless."

been authoritatively addressed by the Supreme Court (nor accepted by any lower court). However, some justices of the Court recently have signalled interest.

The locus of concern is the citizen-suit device in many federal environmental statutes – especially its use to seek civil penalties (versus injunctive relief) against polluters. The question is whether the exaction of public fines by a private litigant is a constitutionally offensive delegation of law enforcement power to an entity outside the federal government’s executive branch. More specifically, do private suits for public fines offend various clauses of Article II of the Constitution (the Vesting Clause,²²⁷ Take Care Clause²²⁸ and Appointments Clause²²⁹) that vest federal law-enforcement authority in the executive branch? The resurrected interest in the issue likely derives from remarks of the justices in the Supreme Court’s 2000 decision in *Friends of the Earth v. Laidlaw*.²³⁰

The Supreme Court has never resolved whether citizen suits offend Article II, nor have any reported decisions of the federal appellate courts. However, an ample body of district-court decisions beginning in the 1980s unanimously reject the Article II argument in connection with citizen suits under the Clean Water Act²³¹ and Emergency Planning and Community Right-to-Know Act.²³² These courts endorsed four key arguments. First, they say, the separation-of-powers decisions relied on by citizen-suit defendants are inapposite. Those cases implicate the Constitution’s concern that one *branch of government* not expand its powers at the expense of another branch of government – e.g., Congress expanding its powers into the law-enforcing domain of the executive branch. They do not stand for the proposition that *private persons*, who are not controlled by Congress, may not enforce federal laws. Second, the Appointments Clause does not preclude private enforcement. It simply means that when federal laws are enforced by a person within the executive branch,

²²⁷The Vesting Clause states: “The executive power shall be vested in a President of the United States.” U.S. Const. art. II, § 1.

²²⁸The Take Care Clause states: “[The President] shall take Care that the Laws be faithfully executed” U.S. Const. art. II, § 3.

²²⁹The Appointments Clause states: “[The President] ... by and with the Advice and Consent of the Senate, shall appoint ... Officers of the United States.” U.S. Const. art. II, § 2.

²³⁰In a one-justice concurrence in *Laidlaw*, Justice Kennedy wrote: “Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II” 528 U.S. 167, 197 (2000). He declined to answer these questions because Article II was not invoked by the petition for certiorari. Writing for himself and Justice Thomas, Justice Scalia also expressly declined to reach the issue, but did offer related remarks suggesting that he saw Article II as being transgressed. *Id.* at 209-210.

See also Vermont Agency of Natural Resources v. United States, 529 U.S. 765, 778 n.8, 801 (2000) (noting Article II issue as to *qui tam* actions, where the private “relator” gets to keep a portion of any money penalties imposed).

²³¹*See, e.g.,* Atlantic States Legal Fdn. v. Universal Tool & Stamping Co., 735 F. Supp. 1404 (N.D. Ind. 1990) (collecting cases).

²³²*See, e.g.,* Atlantic States Legal Fdn. v. Buffalo Envelope, 823 F. Supp. 1065 (W.D.N.Y. 1993).

that person must have been appointed in accordance with the Clause. Citizen suitors, plainly, are not within the executive branch. Third, subject to the above limitations Congress has the power to determine who will enforce the statutory rights and obligations it creates. And fourth, citizen suit provisions contain safeguards to limit their intrusion on the enforcement authority of the executive branch – e.g., allowing the United States to intervene in the suit.²³³

To amplify on the fourth point, the initiation of a citizen suit most definitely *can* affect how an agency allocates its enforcement resources. If, for example, EPA became concerned that arguments raised by a citizen-suit defendant were not being adequately addressed by the plaintiff, the agency might fear that the court’s decision would make bad law from its point of view. That fear might effectively compel the agency to intervene in the suit, shifting its attorneys from other enforcement efforts. The skewing of agency resource allocation involved in such citizen-suit scenarios has not been seen by courts as infringing on executive branch law-enforcement responsibilities to a constitutionally suspect degree.

Thus far, the new crop of Article II/citizen-suit decisions has fallen in line with the first generation, rejecting the constitutional challenge.²³⁴ It is tempting, therefore, to dismiss the current cases as posing little threat to this private-enforcement mechanism. Unlike the first generation of cases, however, defense counsel in the current litigation have clear suggestion from the Supreme Court that it might be interested in hearing an Article II challenge. One can expect, therefore, that counsel will press these cases to the petition for certiorari stage. But though Justices Scalia and Thomas likely would respond sympathetically to an Article II attack on citizen suits,²³⁵ it is doubtful that the remainder of the Court, as presently constituted, could supply the three additional votes for a majority.

Summary and Comments

To recap: (1) the Commerce Clause is now a concern for congressional drafters, given that the large majority of federal pollution-control laws, and some federal wildlife-protection laws, rest on this Clause and the Court appears determined to scrutinize federal regulation of noneconomic activity in areas of traditional state regulation. Certain applications of the Endangered Species Act, in seeking to regulate noneconomic land uses harming intrastate species, may be too much for the Supreme Court to resist. (2) Standing doctrine is much less of a barrier to environmental plaintiffs since *Laidlaw*, though certainly not something any such plaintiff can safely ignore. Congress, for its part, can dispense with standing’s prudential aspects, but not those elements (injury in fact, causation, redressability)

²³³See, e.g., Clean Water Act § 505(c)(2), 33 U.S.C. § 1365(c)(2).

²³⁴See, e.g., *United States v. American Elec. Power Service Corp.*, 137 F. Supp. 2d 1060 (S.D. Ohio 2001) (Clean Air Act citizen suit provision); *North Carolina Shellfish Growers Ass’n v. Holly Ridge Assocs.*, No. 7:01-CV-36 (E.D.N.C. Nov. 8, 2001) (Clean Water Act citizen suit provision). See also *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749,752 (5th Cir. 2001) (en banc) (holding *qui tam* provision inoffensive to Article II).

²³⁵See note 230 *supra*.

derived from Article III. (3) The takings issue remains a spectre for federal environmental laws implemented through substantial land use controls, such as wetlands, endangered species, and surface mining statutes.

(4) The Tenth Amendment blocks Congress from compelling the participation of state legislatures and state executive-branch officials in federal programs. However, an ample number of “carrot” approaches (such as conditions on federal funds) remains to encourage state participation should Congress desire a surrogate for direct federal regulation. (5) Finally, the Eleventh Amendment applies broadly to block Congress from authorizing private suits against states. Even so, the Amendment is likely to be a modest constraint on congressional environmental efforts, since it admits of several exemptions (some of which the Supreme Court seems disposed to narrow, however) and does not apply to suits against political subdivisions of states.

Another constitutional bound, the nondelegation doctrine, appears to no longer be a serious impediment to congressional drafters of environmental laws, after the *American Trucking Associations* decision. Yet another constitutional issue, whether Article II bars the private enforcement of federal laws through citizen suits, has thus far been universally rejected by the courts.

As the above indicates, the most significant of these constitutional bounds for Congress’ environmental initiatives are the Commerce Clause and the Takings Clause.

Where is the Supreme Court headed in the application of our five constitutional constraints? Most obviously, the 5-justice conservative majority seems intent on nudging the jurisprudence toward greater protection of states rights and private property. It has been suggested as well that their interest lies in, as much as the balance between federal and state power, that between the judicial and legislative branches. Recall the distinctly undeferential responses of the Supreme Court to the congressional findings in the Violence Against Women Act,²³⁶ and to Congress’ recent efforts to invoke section 5 of the Fourteenth Amendment.²³⁷ At a minimum, congressional drafters should be aware that the days of reflexive judicial acceptance of statutory findings may, in select constitutional areas, be over.

When the Court’s constitutional analysis occurs in an environmental case, there seems to be an additional consideration. Commentators have observed that the Supreme Court’s warm endorsement of national environmental goals in its 1970s decisions seems to have progressively withered in each decade since.²³⁸ Indeed, one commentator asserts that environmental protection seems “increasingly ... to be

²³⁶See text following note 14 *supra*.

²³⁷See note 178 *supra*.

²³⁸Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 U.C.L.A. L. REV. 703, 735-736 (2000); J. William Futtrell, *The Ungreening of the Court*, ENVTL. FORUM, Jan.-Feb. 1992, at 12, 16.

...serving a *disfavored* role in influencing the Court’s outcome.”²³⁹ Still, the moderate conservatives on the Court – Justices O’Connor and Kennedy – do not yet appear ready to carry the Court’s new federalism and takings jurisprudence to any extreme conclusions. As the Court is presently constituted, this means there appear to be at most three votes (Chief Justice Rehnquist, and Justices Scalia and Thomas) out of the required five for any significant constitutional voiding of federal environmental law.²⁴⁰ Of course, new appointments to the Court may alter these numbers.

Moreover, if in fact there is a decreased friendliness on the Court towards federal environmental statutes, it probably should be understood not as an antipathy towards the broad goals of such laws. Rather, the unease of the Court’s conservative majority likely stems from some of the recurring features of federal environmental statutes: increased regulation and federal bureaucracy, expansive construction of the Commerce Clause, broadened standing rules, contraction of permissible property uses, and insertion of federal standards into realms of historic state and local control. Each of these features has been asserted by some commentators to be necessitated by current environmental problems, while opposed by others (such as free market environmentalists). Either way, Congress, in its future environmental efforts, may wish to be mindful of these Supreme Court concerns.

²³⁹Lazarus, *supra* note 238, at 737.

²⁴⁰In the lower courts, a similar schism between conservative judges was evident in *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001). There, the court rejected 2-1 a Commerce Clause challenge to an Endangered Species Act regulation limiting the taking of reintroduced red wolves on private land. *See* text accompanying notes 35-37 *supra*. Writing for the 2-judge majority, Chief Judge J. Harvie Wilkinson III, a noted conservative jurist, set the tone of his opinion in the first sentence: “In this case we ask whether the national government can act to conserve scarce national resources of value to our entire country.” A few sentences further he called for “[j]udicial deference to the judgment of the democratic branches” In sharp contrast, Judge J. Michael Luttig, a conservative generally viewed as “to the right” of Chief Judge Wilkinson, argued matter of factly that the killing of red wolves is not an economic activity, as is required for aggregating effects on interstate commerce. For this and other reasons, he would have “faithfully” applied *Lopez* and *Morrison* to invalidate the challenged regulation. The limits of the Commerce Clause, he said, “do not wax and wane depending on the subject matter”

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