“GREENING” THE CONSTITUTION—HARMONIZING ENVIRONMENTAL AND CONSTITUTIONAL VALUES

BY
ROBERT V. PERCIVAL*

The United States Constitution is the oldest written constitution in the world, having recently celebrated its 215th birthday. The Constitution’s durability is a product of its adaptability in the face of vast social and economic changes that have occurred since our republic was founded. Created when the United States was a small, predominantly agrarian nation, the Constitution now has adapted to the needs of a vast, urbanized country with a highly integrated national economy and a strong public commitment to environmental protection. Environmental concerns have spawned significant changes in our legal system, including the rise of administrative agencies and the establishment of comprehensive national regulatory programs to protect the environment.

This article reviews the history of constitutional issues raised by federal environmental regulation. Unlike more recently drafted constitutions, the U.S. Constitution does not mention the word “environment.” But the Supreme Court has long understood the importance of government intervention to protect the environment. For decades the Court played an active role in using federal common law to defend state sovereign interests in avoiding environmental harm. The Court ultimately abandoned this role after Congress created comprehensive federal regulatory programs to protect the environment. These programs spawned a host of legal challenges because of their breadth, novelty, and complexity. However, few questioned their constitutionality. Today an activist Court led by a narrow conservative majority is reshaping constitutional law to limit federal power, bolster state sovereignty, and increase protection for

* ©Robert V. Percival, 2002. Distinguished Visiting Professor of Law, Lewis & Clark Law School, September 2002; Professor of Law, Robert Stanton Scholar and Director, Environmental Law Program, University of Maryland School of Law. The author would like to thank Katherine Baer, Daniel Fruchter, and Sandra Holt for research assistance with this article.
property rights. As a result, efforts to protect the environment now frequently confront constitutional challenges.

This Article explores some of the tensions created by the Court's new constitutional jurisprudence. For example, the Court's efforts to invigorate state rights have generated new constitutional challenges to federal regulatory authority, even as the Court aggressively uses dormant commerce clause analysis to invalidate state laws restricting waste disposal. While the Court has rebuffed some of the most aggressive assaults on federal environmental laws, its newly restrictive view of the scope of the federal commerce power now threatens federal authority to protect some of the nation's most vulnerable resources, such as endangered species. A determined property rights movement has helped elevate regulatory fairness concerns to a constitutional level even as the environmental justice movement has failed to have its fairness concerns afforded constitutional dimensions. The Court's revival of the Eleventh Amendment and state sovereign immunity is on a collision course with its efforts to revive regulatory takings doctrine.

This Article argues that much of the tension between environmental and constitutional values can be traced to the Court's continued reliance on a private law vision that is ill-suited to the modern regulatory state. The genius of the American constitutional system has been its ability to distribute power in a manner that checks abuses of power without depriving government of the authority it needs to function effectively. The Article explores why the Constitution, properly understood, should provide ample federal authority to protect the environment, while preserving state prerogatives and promoting regulatory fairness for all citizens.

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The Commerce Clause empowers Congress "to regulate commerce" not "ecosystems." The Framers of the Constitution extended that power to Congress, concededly without knowing the word "ecosystems," but certainly knowing as much about the dependence of humans on other species and each of them on the land as any ecologist today. An ecosystem is an ecosystem, and commerce is commerce.¹

Judge David Sentelle, dissenting in NAHB v. Babbitt

Ours is the oldest written constitution in the world, but its longevity has everything to do with its flexibility over time. Even on fundamental matters, the meaning of the Constitution's broad guarantees is often quite different, in any given year, from what it was as little as thirty years before. Sometimes the revision occurs through the judiciary; usually it happens elsewhere.²

Professor Cass R. Sunstein, University of Chicago

The United States Constitution is the oldest written constitution in the world today, having recently celebrated its 215th birthday. While its framers could not have envisioned the enormous changes that have occurred in our economy, society, legal, and political systems, the system of government they created has proven remarkably durable. Our Constitution's durability stems in large part from its ability to adapt to vast social and economic changes that reshape the way "We the people" live, work, and recreate. Environmental concerns are among the forces that have spawned significant changes in our legal system, including the growth of administrative agencies, the creation of comprehensive, national regulatory programs, and the use of citizen suits to ensure implementation and enforcement of the law.

While most of the world's more youthful constitutions have provisions that expressly address environmental concerns, ours makes no mention of the environment (or "ecosystems," as Judge Sentelle reminds us).⁴ Yet this did not pose any insurmountable obstacles to the rapid rise of environmental law during the 1970s and 1980s. Virtually every Congress that convened during the 1970s and 1980s enacted major environmental legislation, usually with broad bipartisan support. Congress created breathtakingly ambitious programs to protect the environment, and the courthouse doors swung open to citizen groups seeking to shepherd the fledgling programs through the halls of the federal bureaucracy.

More recently, a sharply divided but highly activist United States Supreme Court has been reshaping the landscape of constitutional law. Under the leadership of Chief Justice William H. Rehnquist and Associate justice Antonin Scalia, a 5-4 majority of the justices has significantly altered

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³ U.S. CONST. pmbl.
⁴ NAHB v. Babbitt, 130 F.3d at 1065 (Sentelle, J., dissenting).
constitutional notions of state sovereignty, federal authority, separation of powers, and regulatory fairness. The current Court has been one of the most activist in history, striking down federal and state legislation on constitutional grounds. In its last eight terms, the Court has invalidated federal statutes in thirty-two cases, a rate more than three times that of the Warren Court.\(^5\)

While Congress used to be the primary arena for those seeking to change the environmental laws, today environmental lawyers increasingly turn to the courts. As a result, efforts to protect the environment now confront constitutional challenges at seemingly every turn. These challenges deserve serious attention because of their constitutional dimensions, even if they have not yet substantially altered the fabric of environmental law.

Too often today the Constitution is viewed only as a product of the latest decisions of the United States Supreme Court. Our understanding of its meaning has become dependent on the complex architecture of case law developing and applying specific doctrines as each new controversy arises. It is useful to step back from this mindset to examine the overall consequences of the Court’s decisions for society’s ability to protect the environment.

This Article assesses the implications for environmental law of this changing constitutional landscape. It begins by reviewing constitutional history through the lens of environmental concerns, highlighting some forgotten episodes that provide valuable insights into current controversies. The Article concludes by discussing how to promote greater harmony between environmental values and the concerns on which our current constitutional architecture is founded.

Harmonization of environmental and constitutional values need not require abrupt change in existing constitutional understandings. The entire enterprise of constitutional interpretation is itself an effort to harmonize tensions between competing, but constitutionally important, interests.

I. THE CONSTITUTION AND THE ENVIRONMENT: AN EARLY HISTORY

A. The Framers and the Environment

While the environment is not mentioned in the Constitution, it seems likely that most of the founding fathers had a more intimate knowledge of nature than current political leaders. At its founding, the United States was an agrarian nation whose leaders appreciated the value of land and its importance to a growing economy. The first federal census in 1790 found that less than four percent of the nation’s population lived in urban areas.\(^6\) Wilderness existed in such abundance that the new nation had little concern for the environmental consequences of development. Our Constitution’s

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\(^5\) Under the leadership of Chief Justice Earl Warren, the Supreme Court struck down federal laws in 20 cases over a 16-year period.

framers never envisioned today's national regulatory programs to protect the environment.

The founding fathers included students of world history concerned about the forces that contributed to the rise and fall of great nations. The availability of virgin land to accommodate population growth was viewed as an important factor, as historians of the founding era have explained:

There was a distinct strand in [enlightened thought], to which the Jeffersonians were highly sensitive, that took for granted a kind of cyclical movement from youth to age, and that all civilizations must eventually reach a stage of decline and decay. The problem for political economy was that of prolonging the stage of youthful vigor and making the onset of decay as remote as possible. A master variable, moreover, was assumed to be the pressure of population growth, well before Thomas Malthus produced his celebrated essay on that subject toward the close of the century. A predominately agricultural society was seen as the kind inherently most virtuous, the freest from corruption, the kind best constituted for resisting decay, and the one most to be desired for the American republic. Its growth and expansion, the Virginians believed, should occur across space rather than through time; its vigor might best be retained, its decline postponed, and time thus be thwarted, as long as its surplus population could keep moving into virgin land and as long as such land remained abundant.\(^7\)

Thomas Jefferson envisioned a nation of citizen farmers whose agrarian prosperity would promote civic engagement to help facilitate a well-functioning democracy.\(^8\)

Environmental concerns surfaced only fleetingly in the early days of the republic. In his *State of the Union Address* of 1797, President John Adams expressed concern about the potential effects a war with France would have on access to the nation’s fisheries.\(^9\) But the fledgling nation faced no realistic possibility of exceeding the carrying capacity of nature's bounty, particularly after the Louisiana Purchase opened up seemingly limitless resources to the west. President Thomas Jefferson was familiar with Thomas Malthus’s warning, published in 1798, that exponential population growth could eventually cause human starvation, but he was confident that the new nation would avoid such a fate through westward expansion.

In contrast to the Jeffersonians, Alexander Hamilton’s vision embraced a national government aggressively promoting commerce and mercantilism. But the economic integration of the United States did not come about until the middle third of the nineteenth century. By this time the republic’s political arrangements were already fixed, including the belated formation of political parties, which had not been a high priority in the immediate aftermath of a successful revolution.\(^10\)


\(^9\) Id. at 18.

\(^10\) ELKINS & MCKITRICK, *supra* note 7, at 21.
B. The Constitutional Convention, the Bill of Rights, and the Eleventh Amendment

Two major themes dominated the debates in the Constitutional Convention in 1787: how to form a national government that would be powerful enough to govern effectively, and how to provide sufficient safeguards to prevent the new government from abusing its power. The interim government produced by the Articles of Confederation was widely conceded to be ineffectual. But as revolutionaries who had just successfully overthrown a despotic government, the framers were keenly aware of the importance of keeping government in check.

The document the framers ultimately produced sought to form a powerful national government constrained from abuses of its powers by a functional separation of responsibilities between three branches of government. Each branch would possess checks and balances over the others. The nation also would be governed by a unique system of dual sovereignties with states sharing power with a national government of enumerated powers. The national government’s laws would be supreme when exercised in areas of concurrent jurisdiction. Among the most important enumerated powers given to Congress by Article I, section 8 were the powers to provide for the “general Welfare of the United States,” to regulate commerce “among the several States,” and “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”

When the Constitution was ratified in 1789, several states premised their ratification on the promise that the Constitution would soon be amended to include a bill of rights. In September of 1789, the First Congress proposed a Bill of Rights as part of twelve proposed constitutional amendments that it forwarded to the states for ratification in October of 1789. Ten of these amendments were ratified by the states and became part of the Constitution in 1791. These included the Fifth Amendment, which prohibited on deprivations of life, liberty, or property without due process of law and which barred takings of private property for public use without payment of just compensation. The Tenth Amendment reserved of powers not delegated to the federal government to the states.

Seven years after ratification of the Bill of Rights, the Eleventh Amendment was added to the Constitution in reaction to the unpopular

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11 The need for “energy” in government is a major theme in the Federalist Papers, which was welcomed because of the weaknesses of the Articles of Confederation, the need to gain respect from foreign powers, and a desire to overcome the “irresponsibility and small-mindedness of the state legislatures in the years immediately following the Revolution.” Id. at 22, 702.
12 U.S. Const. art. I, § 8, cl. 1, 3, 18.
13 The two amendments that were not ratified included a measure on apportionment of congressional representation and an amendment prohibiting changes in congressional pay from becoming effective until after the next general election. The latter was not ratified until 1992, when it became the Twenty-seventh Amendment.
Supreme Court decision *Chisholm v. Georgia*. Alexander Chisholm, a citizen of South Carolina, sought to collect a $70,000 debt owed by the state of Georgia for clothing and uniforms purchased during the Revolutionary War. In light of Article III's extension of the federal judicial power to cases "between a State and Citizens of another State," Chisholm had filed suit against Georgia in the Supreme Court, which had original jurisdiction over suits in which a state was a party. By a 4-1 vote, the Court rejected Georgia's assertion that sovereign immunity barred it from being sued by a citizen of another state. All five justices who participated in the case had been framers of the Constitution. Justice Blair dismissed Georgia's assertion that Article III meant states could be plaintiffs but not defendants, noting that "[a] dispute between A. and B. is surely a dispute between B. and A." A

After *Chisholm* was decided in February 1793, states immediately pressured Congress for a constitutional amendment to reverse the decision. The states feared they would be subjected to a multitude of lawsuits, particularly by British loyalists whose property had been seized during the Revolutionary War. In March 1794, Congress proposed the Eleventh Amendment, which was ratified in January 1798. The Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of Any Foreign State." Faithful to the language and history behind the Amendment, an early Supreme Court decision held that the Amendment did not bar suits by citizens of the defendant state, and that it was inapplicable to suits "arising under the constitution or laws of the United States." As discussed below, contemporary Eleventh Amendment jurisprudence has sharply departed from this understanding of the Amendment's reach, which would have limited its applicability to diversity cases based on state law claims, consistent with the facts of *Chisholm*.

*C. Environmental Concerns in Nineteenth-Century America*

With the addition of the Bill of Rights, the Constitution now included important protections for individual liberty, though it continued to tolerate slavery and suffrage restricted to white males. In an early takings case decided in 1833, the Court made it clear that the protections of the Bill of Rights did not apply against the states. In *Barron v. Mayor and City Council of Baltimore*, the owner of a wharf claimed that he should be compensated for damage to his property caused by silt deposits from municipal street construction. The Court held that the Bill of Rights, including the Fifth

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14 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).
15 *Peter Irons, A People's History of the Supreme Court* 93 (1999).
16 U.S. Const., art. III, § 2, cl. 1.
17 *Chisholm*, 2 U.S. (2 Dall.) at 450.
18 U.S. Const., amend. XI.
21 *Id.* at 249-44.
Amendment and its Takings Clause, limited only the federal government and not the states.\textsuperscript{22} It was not until 1897 that the Court applied the Fifth Amendment’s just compensation clause to the states,\textsuperscript{23} presaging its subsequent twentieth-century decisions selectively incorporating the provisions of the Bill of Rights into the Fourteenth Amendment’s guarantees of due process and equal protection.

Issues of federalism were a significant part of the Supreme Court’s early agenda. Chief Justice John Marshall’s expansive view of the federal commerce power in \textit{Gibbons v. Ogden}\textsuperscript{24} did not preclude a role for states in implementing inspection and quarantine laws and “health laws of every description.”\textsuperscript{25} In Marshall’s view, such laws could be justified as legitimate exercises of state police powers, despite their incidental burden on interstate commerce. While the Court generally invalidated state regulations that disadvantaged interstate commerce, the one case in which Marshall used his police power rationale to uphold a state action interfering with interstate commerce involved the draining of a wetland. In \textit{Willson v. Black Bird Creek Marsh Co.}\textsuperscript{26} the Court held that a Delaware law authorizing a private company to build a dam to help drain a marshy creek was constitutional even though the dam blocked interstate navigation.\textsuperscript{27} Marshall noted that Congress had not specifically prohibited the dam. Reflecting then-prevailing views concerning the undesirability of marshland, the Chief Justice observed that

\textit{[t]he value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states}.\textsuperscript{28}

\textsuperscript{22} \textit{Id} at 250–51.

\textsuperscript{23} Chicago, Burlington and Quincy R.R. v. Chicago, 166 U.S. 226 (1897).

\textsuperscript{24} 22 U.S. (9 Wheat) 1 (1824).

\textsuperscript{25} \textit{Id} at 203.

\textsuperscript{26} 27 U.S. (2 Pet.) 245 (1829).

\textsuperscript{27} \textit{Id} at 252.

\textsuperscript{28} \textit{Id} at 251. The disfavored status of wetlands continued in 1900 when the Court reversed a conviction for obstructing a navigable stream in Louisiana in violation of federal law. The defendants maintained they had blocked the stream in order to drain swamp land to protect their health. Referencing other federal law that encouraged the draining of swamp land, Justice Shiras, speaking for the Court, stated:

\begin{quote}
We think that the trial court might well take judicial notice that the public health is deeply concerned in the reclamation of swamp and overflowed lands. If there is any fact which may be supposed to be known by everybody, and, therefore, by courts, it is that swamps and stagnant waters are the cause of malaria and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances . . . .
\end{quote}

\textit{[I]n the present case the reclamation of swamp and overflowed lands was not only not forbidden, but was recognized as the duty of the state, in consideration of the grant of the public lands . . . . Hence, the state authorities were left free to act in such a manner as they thought fit to promote the health and prosperity of the people concerned. Leovy v. United States, 177 U.S. 621, 636 (1900).}
The population of America's largest cities grew rapidly during the 1790s, with New York increasing by 118 percent and Baltimore by 93.4 percent. But overall urban growth was relatively stagnant until the 1820s, when the urban population of the nation almost doubled. However, even by the end of the 1820s, less than seven percent of the total population of the United States lived in cities or towns. That changed dramatically over the next three decades as the population of cities more than quintupled from 1.1 million to 6.2 million—the fastest rate of urbanization in United States history. While poor sanitation contributed to epidemics of infectious diseases that frequently struck U.S. cities, the causes of illness and disease were poorly understood at the time. "As late as the 1860s, Washingtonians dumped garbage and slop into alleys and street. Pigs roamed freely, slaughterhouses spewed noxious fumes and effluent, and vermin infested dwellings—including the White House." It was not until after 1880 that the germ theory of disease became firmly established. Increased concern for urban sanitation was spawned in large part by the continued explosive growth of cities between 1880 and 1910, when the number of cities with more than 100,000 inhabitants increased from 19 to 50. Nuisance litigation became a tool for moving environmentally undesirable businesses out of urban areas. In 1883 the Supreme Court upheld a lower court judgment finding that noise and smoke pollution from a railroad engine house in the District of Columbia had created a private nuisance by interfering with the activities of a nearby church. The Court rejected a defense claim that congressional authorization to operate the railroad in the District and its compliance with city regulations governing the height of smokestacks should immunize it from nuisance liability. The Court explained that

D. Supreme Court Adjudication of Interstate Pollution Disputes

At the dawn of the twentieth century, several states brought environmental disputes directly to the United States Supreme Court for

29 Melosi, supra note 6, at 18.
30 Id. at 17.
31 Id. at 59.
32 Id. at 19.
33 Id. at 60.
34 Id. at 104.
36 Id. at 330–31.
37 Id. at 334.
resolution, as contemplated by the framers of the Constitution. These states invoked the Court's original jurisdiction under Article III, Section 2 over controversies between two or more states, jurisdiction the Court still uses today to resolve boundary and water rights disputes between states. This feature of the United States constitutional system greatly impressed Alexis de Tocqueville. In his famous chronicle of the new nation's government, Democracy in America, de Tocqueville observed that "[i]n the European nations only private persons come under the jurisdiction of the courts, but the Supreme Court of the United States may be said to summon sovereigns to its bar."40

In a series of cases spanning seven decades, the Supreme Court adjudicated interstate pollution disputes by fashioning a federal common law of interstate nuisance. The Court's long-forgotten decisions in these cases provide important insights into the nature of federalism and its relationship to environmental protection under our constitutional system. Five elements of its jurisprudence are particularly noteworthy.

First, the Supreme Court recognized its unique capability to resolve environmental disputes between states. As Justice Oliver Wendell Holmes explained:

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable

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38 The framers of the Constitution clearly contemplated that the Court would use its original jurisdiction to resolve more than just boundary disputes between states. As Alexander Hamilton explained: "[T]here are other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union .... Whatever practices may have a tendency to disturb the harmony of the States, are proper objects of federal superintendence and control." The Federalist No. 80, at 407-08 (Alexander Hamilton) (Max Beloff ed. 1948). The Articles of Confederation provided for Congress to appoint a thirteen-person tribunal of citizens to resolve disputes between states. The thirteen members of the tribunal were to be selected from a pool of 39 candidates formed by having each state nominate three persons. The parties to the dispute then would take turns striking members of the pool until 13 remained. At the Constitutional Convention early drafts of the Constitution proposed a special court formed by the Senate to resolve disputes between states over property or jurisdiction, while authorizing the Supreme Court to resolve all other disputes between states. The special court provision was dropped in favor of giving the Supreme Court jurisdiction over all disputes between states. See Missouri v. Illinois, 180 U.S. 208, 241 (1901) (discussing the history referenced here).

39 U.S. Const. art. III, § 2. Article III, section 2 of the Constitution extends the judicial power to controversies between two or more states and to controversies between a state and citizens of another state. It specifies that the Supreme Court has original jurisdiction over cases in which a state shall be a party.


demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.  

In 1900, when Missouri sued to prohibit Illinois from opening a canal to transport Chicago's raw sewage to the Mississippi River (St. Louis's source of drinking water) the Court recognized that it was the only body capable of providing an adequate remedy.  

The Court indicated that states, having given up the powers of independent sovereigns to make war and to conduct diplomacy, must be able to turn to the federal government for protection from transboundary pollution, rather than force their citizens to rely on state private nuisance actions.  

Second, the Court recognized that states have a sovereign right to protect their citizens from environmental harm. When it agreed to hear Missouri's complaint, the Court noted that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." Six years later, when Georgia sued to abate pollution from copper smelters in Tennessee, Justice Holmes observed:  

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.  

Third, the Court acknowledged that because it had a responsibility to defend the sovereign interests of states suffering environmental harm, it should use its full equitable powers to force abatement of pollution. As Justice Holmes explained in Georgia v. Tennessee Copper Co.:  

If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The States by entering the Union did not sink to the position of private owners subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction.

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42 Tenn. Copper Co., 206 U.S. at 237 (citing Missouri v. Illinois, 180 U.S. 208, 241 (1901)).
44 Id.
45 Id.
46 Tenn. Copper Co., 206 U.S. at 238.
against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. 47

On three occasions during this period, the Court itself issued pollution control injunctions. The first was in 1915 when the Court granted Georgia's request to impose detailed limits on sulphur dioxide emissions from a copper smelter in Tennessee. 48 Next, in 1930 the Court ordered Illinois to construct sewage treatment works so that Chicago's sewage could be disposed without diverting excessive amounts of water from Lake Michigan. 49 Then, in 1931 the Court ordered the city of New York to build municipal incinerators to dispose of garbage rather than dump it in New York Harbor—a practice that had polluted New Jersey beaches. 50

Because it was vindicating the rights of victim states to be free from environmental harm, the Court did not express concern about interfering with decision making by source states. Speaking for a unanimous Court shortly before his retirement, Justice Holmes emphasized that states must abate the practices causing harm and that if a state "constitution stands in the way of prompt action it must amend it or yield to an authority that is paramount to the State." 51 When Illinois balked at complying with the Court's order, Chief Justice Charles Evans Hughes rejected the notion that the Court had no power to require the state to act. "[T]he authority of the Court to enjoin the continued perpetration of the wrong inflicted upon complainants, necessarily embraces the authority to require measures to be taken to end conditions, within the control of defendant State, which may stand in the way of the execution of the decree." 52

Fourth, the Court recognized that improvements in scientific understanding made it possible to infer harm from practices that formerly seemed benign. With the acceptance of the new bacterial theory of disease, the concept of nuisance could embrace inferences from "the unseen." As Justice Holmes observed in Missouri v. Illinois:

At the outset we cannot but be struck by the consideration that if this suit had been brought fifty years ago it almost necessarily would have failed. There is no pretence that there is a nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses—no visible increase of filth, no new smell . . . . The plaintiff's case depends upon an inference of the unseen. It draws the inference from two propositions. First, that typhoid fever has increased considerably since the change and that other explanations have been disproved, and second, that the bacillus of typhoid can and does survive the journey and reach the intake of St. Louis in the Mississippi. 53

47 Id. at 237–38.
While accepting "the now prevailing scientific explanation of typhoid fever to be correct," Holmes ultimately denied Missouri the injunction it sought because it had not demonstrated that the disposal of Chicago's sewage was the cause of any significant harm to Missouri residents.\textsuperscript{54}

Fifth, the Court recognized that the law requiring it to abate interstate pollution was a form of federal common law whose principles could not be found directly in the Constitution. The Court acknowledged that the necessity to resolve disputes between states did not authorize it to take "the place of a legislature"; however, "[s]ome principles it must have power to declare."\textsuperscript{55} But because these principles can hardly be found in "the words of the Constitution" and cannot lightly be reversed, the Court must approach them with "great and serious caution" in deciding whether a state has proved its case.\textsuperscript{56} The Court concluded that it should be more reluctant to use its equitable powers in disputes between states than are lower courts where equitable relief is sought by parties within the same jurisdiction. The Court stated that when states are involved, "[b]efore this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."\textsuperscript{57}

The Court soon came to appreciate its limited capacity to serve as a kind of nationwide environmental protection agency. In 1921, when it rejected New York's request to stop New Jersey from dumping its sewage into New York Bay, the justices declared:

We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.\textsuperscript{58}

After the enactment in the 1970s of comprehensive federal regulatory programs to protect the environment, the Court ultimately held that Congress had preempted the federal common law of nuisance.\textsuperscript{59}

\section*{II. Early Constitutional Challenges to Regulation}

Although the Supreme Court's first encounters with environmental disputes involved claims of common law nuisance, the Court soon was confronted with constitutional challenges to early regulatory initiatives.

\textsuperscript{54} Id. at 523.
\textsuperscript{55} Id. at 519.
\textsuperscript{56} Id. at 520.
\textsuperscript{57} Id. at 521.
\textsuperscript{58} New York v. New Jersey, 256 U.S. 296, 313 (1921).
\textsuperscript{59} The Supreme Court stopped developing the federal common law of nuisance after declaring in \textit{Milwaukee v. Illinois} that the Clean Water Act's regulatory scheme was so comprehensive that it preempted federal common law for interstate pollution. City of Milwaukee v. Illinois, 451 U.S. 304, 317-19 (1981).
A. Land Use Regulation and Regulatory Takings

By 1920, for the first time in U.S. history, more than half of the nation’s population lived in cities and towns. New York City had adopted the first comprehensive municipal zoning ordinance in 1916. In 1926, the Supreme Court upheld the constitutionality of zoning in Village of Euclid v. Ambler Realty Co. The Court held that the police power could be used to exclude certain property uses from particular geographic areas if there was a rational basis for the exclusion related to “public health, safety, morals or general welfare.” While the Court indicated that principles of nuisance law could serve as useful guides for assessing the validity of zoning, it also endorsed the notion that zoning could properly be used to prohibit uses that would not in themselves be nuisances at common law. The Court explained that regulations necessarily must respond to changed circumstances:

Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

While it held that zoning was not unconstitutional on its face, the Court indicated that the line between legitimate and illegitimate zoning would vary with the facts and circumstances of individual cases.

Four years earlier, the Supreme Court had significantly broadened the scope of the Fifth Amendment’s Takings Clause. Although there is considerable evidence that the framers of the Constitution envisioned the Takings Clause to apply only when the government physically occupies property, in 1922 the Court ruled that the Clause could embrace circumstances where property was regulated too heavily. In Pennsylvania Coal Co. v. Mahon Justice Holmes stated that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” In previous cases, the Court had held that the Takings Clause

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60 272 U.S. 365 (1926).
61 Id. at 395.
62 Id. at 387–88.
63 Id. at 387.
64 Id. at 395–96.
66 260 U.S. 393 (1922).
67 Id. at 415.
covered government actions that resulted in a physical invasion of private property, such as flooding caused by the construction of a dam. However, the Court had held that compensation was not required when regulations severely affected the value of property, such as the effect on brewery owners of a ban on the production and sale of alcoholic beverages, or the impact on a brick manufacturer of a ban on the use of brick kilns in a neighborhood.

*Pennsylvania Coal* involved a challenge to a state law that prohibited mining of anthracite coal in a manner that would cause the subsidence of any surface structure used for human habitation, unless the structure was owned by the owner of the underlying coal. Because the law effectively prevented the company from mining the coal it owned beneath Mahon’s land, the Court found a regulatory taking. Justice Holmes recognized the danger of an overly expansive definition of regulatory takings. “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” In dissent, Justice Brandeis argued that the regulation was not a taking, but rather “merely the prohibition of a noxious use.” Brandeis’s view prevailed six years later when the Court rejected a takings challenge to a Virginia law used to order the destruction of trees on private land to prevent the spread of infection to trees on other private land.

The questions of how far is “too far” for regulation to run afoul of the Takings Clause and when the nuisance exception can be applied to avoid a regulatory takings claim have created considerable confusion. At times the law has moved toward ad hoc assessments of regulatory fairness. In 1960 the Supreme Court explained that the Takings Clause is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

Eighteen years later the Court, in *Penn Central Transportation Co. v. City of New York*, admitted that it “quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain... concentrated on a few persons.” Recognizing that it had been engaging in “essentially ad hoc, factual inquiries” in takings cases, the Court identified several factors it deemed relevant in assessing the fairness of government action: “The economic impact of the regulation on the claimant and, particularly the extent to

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68 Pumpelly v. Green Bay Co., 80 U.S. 166, 179 (1871).
72 *Id.* at 412–16.
73 *Id.* at 413.
74 *Id.* at 417.
75 Miller v. Schoene, 276 U.S. 272, 280 (1928).
78 *Id.* at 128.
which the regulation has interfered with distinct investment-backed expectations" and the "character of the governmental action" (whether a physical invasion or the product of "some public program adjusting the benefits and burdens of economic life to promote the common good"). Applying these factors, the Court rejected a takings challenge to a New York City historic preservation ordinance that barred the owners of Grand Central Station from building in the space above the historic building.

B. Federalism and the Commerce Clause

Until the late 1880s, most of the Court's Commerce Clause decisions focused on state power to regulate commerce in the absence of federal regulation. The Court had sought to uphold state regulation and taxation of manufacturing by holding that manufacturing was not commerce. There were few constitutional challenges to federal regulation because there were few instances in which Congress tried to regulate commerce. Federal efforts to regulate waterborne transportation were the exception. In 1838, Congress created a federal commission to impose safety regulations to prevent steamship boilers from exploding. The Supreme Court broadly interpreted federal authority over waterborne commerce. In 1871 the Court upheld the power of Congress to license a ship capable only of operating on an intrastate river because the goods it carried eventually traveled out of state.

The enactment of the Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act of 1890 represented the beginning of federal regulation of transportation and industrial production. During the next fifty years the Supreme Court sought to establish limits on the constitutional reach of federal authority under the Commerce Clause. In United States v. E.C. Knight Co., the Court held that even a trust controlling ninety-eight percent of the nation's domestic sugar refining could not be prosecuted under the Sherman Act because the company's operation involved manufacturing and not commerce. The Court also exempted mining, agriculture, and other activities from federal regulation because their effects on interstate commerce were too indirect. Efforts to prohibit the interstate movement of goods manufactured by child labor were similarly struck down.

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79 Id. at 124.
80 Id. at 138.
81 Kidd v. Pearson, 128 U.S. 1, 25 (1888) (indicating that shipment or transportation towards an out-of-state destination commences interstate commerce).
83 The Daniel Ball, 77 U.S. 557 (1871).
86 156 U.S. 1 (1895).
87 Id. at 17.
on the ground that the power to regulate commerce is not the power to forbid it. Because Congress believed it lacked the power to regulate manufacturing directly, when it sought to eliminate the use of white phosphorous in match manufacturing to prevent workers from suffering a horribly disfiguring disease, Congress imposed a federal excise tax to achieve its goal. The tax, which Congress had the power to impose under Article I, section 8's express grant of authority to lay and collect excise taxes, made it prohibitively expensive to use white phosphorous in match manufacturing.

The Depression and the New Deal produced a flurry of regulatory legislation, much of which the Court invalidated on the ground that it exceeded Congress's constitutional power to regulate interstate commerce. Among the statutes invalidated were the Bituminous Coal Conservation Act of 1935 (Guffey Coal Act), which sought to regulate coal prices and the wages and hours of miners, as well as the wage and hour provisions of the National Industrial Recovery Act. In 1937 the Supreme Court upheld Congress's power to regulate labor relations in manufacturing facilities in *NLRB v. Jones & Laughlin Steel Corp.* For nearly the next fifty years, the Court took an expansive view of Congress's power to regulate commerce while refusing to view the Tenth Amendment as an independent limit on federal regulatory authority.

For example, in 1942 the Court in *Wickard v. Filburn* upheld federal regulation of the growing of wheat for home consumption on the ground that the cumulative impact of such activity would have a substantial effect on the price and market for wheat sold in interstate commerce. Thus, when Congress adopted new and more extensive regulatory programs to protect workers, consumers, and the environment during the late 1960s and early 1970s, Congress's power to adopt these programs was believed to rest on a solid constitutional footing.

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89 See *White Phosphorous Match Act*, ch. 75, 37 Stat. 81 (1912). The tax was adopted at the behest of President William Howard Taft, who was so moved by the plight of workers who suffered "phossy jaw" that he lobbied for it in his 1910 State of the Union Address.
90 For a reassessment of the Court's performance during the New Deal era, which challenges the conventional notion that President Roosevelt's "Court packing" proposal was responsible for a supposedly abrupt change in constitutional interpretation, see G. Edward White, *The Constitution and the New Deal* (2000). White challenges the view that the New Deal era represented some sort of watershed "constitutional moment" that produced a transformational jurisprudential revolution in constitutional law without the benefit of constitutional amendments. See *id.* at 26; see also Bruce Ackerman, *We the People: Transformations* (1998); Barry Cushman, *Rethinking the New Deal Court* (1998).
93 301 U.S. 1, 43 (1937).
95 *Id.* at 127–28.
C. Standing to Sue for the Beneficiaries of Regulation

Standing to sue did not become a constitutional issue until the mid-twentieth century. Standing is not mentioned specifically in the Constitution. It was not until 1944 that the Supreme Court linked standing to Article III's "case or controversy" requirement. Prior to the invention of standing doctrine, courts simply focused on whether a litigant had a cause of action at common law or by statute. The first federal Congress authorized numerous *qui tam* actions that allowed citizens to bring civil suits against private parties on behalf of the government for violations of federal laws. Successful plaintiffs were allowed to keep a portion of the resulting recoveries and fines.

Standing first emerged as a distinct legal concept during the 1930s when Justices Brandeis and Frankfurter sought to discourage litigation challenging New Deal programs. Beneficiaries of regulation were not among the parties with standing under this common law model. However, in *FCC v. Sanders Bros. Radio Station* the Court allowed a competing radio station to challenge an FCC licensing decision on the ground that the station was a beneficiary of the efforts of the Federal Communications Act of 1934 to promote the public interest in adequate communications service. The Court thus recognized that Congress could confer standing on the beneficiaries of regulation, a notion codified in the Administrative Procedure Act (APA) when it was enacted in 1946. The APA authorizes judicial review at the behest of those who have suffered common law injuries ("person suffering legal wrong because of agency action") and those who are "adversely affected or aggrieved by agency action within the meaning of the relevant statute."

During the 1960s the lower federal courts interpreted the class of people suffering "legal wrong" under the APA to encompass not only regulatory targets, but also the beneficiaries of regulation. During the late 1960s and early 1970s this helped open the courts to newly formed environmental organizations who were seeking a forum to raise environmental concerns even before federal regulatory programs had been launched specifically to respond to those concerns. In 1970, the Supreme Court confirmed this shift when it held in *Association of Data Processing Organizations, Inc. v. Camp* that standing under the APA should not turn

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98 *Id.* at 175.
99 *Id.* at 179.
100 309 U.S. 470 (1940).
101 *Id.* at 475.
on whether a litigant had a cognizable legal interest at common law, but rather on whether the interest asserted was "arguably within the zone of interests" protected by the statute.106 However, the Court also required that a litigant show actual or threatened "injury-in-fact," shifting the inquiry from a legal one to a factual one, which eventually allowed the Court to re-inject private law notions of individualized proof of causal injury.107

The Supreme Court's landmark environmental standing decision in *Sierra Club v. Morton*108 was the first significant constitutional controversy involving the modern era environmental movement. The Sierra Club sued the Secretary of Interior, Rogers Morton, to prevent him from authorizing the Walt Disney Corporation's construction of a ski resort in a national-forest game refuge adjacent to Sequoia National Park. In an effort to create precedent granting it automatic standing to challenge development decisions, the Sierra Club refused to allege that it regularly used and recreasted in Mineral King Valley, the area where the ski resort was to be built. By a vote of 5-2 the Court held that a mere allegation of an interest in the subject matter of a dispute was insufficient to confer standing.109 In an impassioned dissent, the environmental champion Justice William O. Douglas argued that the Court should allow representation of inanimate objects, such as Mineral King.110 Also in dissent, Justice Blackmun noted the importance of a coming wave of environmental litigation and asked: "Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?"111

In retrospect, *Sierra Club v. Morton* was a significant advance for environmental interests because the Court expressly acknowledged that injuries to aesthetic or environmental interests were judicially cognizable even when "shared by the many rather than the few."112 To establish standing, the Sierra Club had to allege facts showing its members would be adversely affected by the development, a requirement that initially proved relatively unproblematic for environmental plaintiffs. The Court's decision the following term in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*113 seemed to confirm that the injury-in-fact test would be very easy to satisfy even with an allegation of an "attenuated line of causation."114 In *SCRAP* environmentally concerned law students alleged that a freight rate increase would harm them by discouraging the use of recycled materials and thus increasing litter and resource consumption. The

106 *Id.* at 153.
107 *See generally*, Sunstein, *supra* note 97, at 190–91 (arguing that the Court should abandon its focus on injury-in-fact for a strict look at whether Congress has conferred on the plaintiff a cause of action).
109 *Id.* at 739.
110 *Id.* at 741–42.
111 *Id.* at 755–56 (Blackmun, J., dissenting).
112 *Id.* at 734.
114 *Id.* at 688.
Court held this allegation sufficient to give the students standing to challenge the Interstate Commerce Commission's decision to approve the rate increase.116

III. CONSTITUTIONAL ISSUES RAISED BY CONTEMPORARY ENVIRONMENTAL REGULATION

In the early 1970s Congress enacted comprehensive federal regulatory programs to protect the environment, including the Clean Air Act (CAA),116 the Clean Water Act (CWA),117 the Endangered Species Act (ESA),118 the Safe Drinking Water Act (SWDA),119 the Federal Insecticide, Fungicide and Rodenticide Act (IFRRA),120 the Resource Conservation and Recovery Act (RCRA),121 and the Toxic Substances Control Act (TSCA).122 These legislative acts, and the regulatory programs they directed EPA and other agencies to implement, generated a flurry of legal challenges. While most of this early litigation focused on questions concerning how to interpret the new statutes, some also raised constitutional issues.

A. Environmental Regulation and the Rehnquist Court's "New Federalism"

1. A History of the New Federalism

The current Court's activism is in large part a product of decisions redefining the constitutional contours of American federalism by restricting federal authority and strengthening state sovereignty. Under the leadership of Chief Justice William H. Rehnquist, a long-time champion of states' rights, the Court has erected new limits on congressional regulatory authority while expanding state immunity from enforcement of federal requirements.

a. Planting the Seeds of the New Federalism

The Rehnquist Court's "new federalism" is the culmination of a lengthy crusade that the Chief Justice began shortly after he joined the Court as an associate justice. In Fry v. United States123 Justice Rehnquist served notice that he had a distinctly different view of federalism.124 Dissenting from a decision upholding the application of federal wage and price controls to state employees, Justice Rehnquist argued for broader constitutional

115 Id. at 690.
124 Id. at 549.
protection for state sovereignty and a narrower interpretation of federal powers. Rehnquist argued that his vision was implicit in the understanding of the framers of the Constitution, even apart from the language of the Tenth Amendment. He boldly suggested that issues of federalism were so important ("there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments") that stare decisis should be abandoned to overrule Maryland v. Wirtz, where the Court had upheld application of the federal minimum wage to employees of public schools and hospitals.

Some of the concerns about federal over-reaching that were voiced by Justice Rehnquist had been shared at times by other justices. Justice William O. Douglas dissented in Maryland v. Wirtz, joined by Justice Stewart. Douglas, who dissented in previous cases upholding federal taxation of state enterprises, argued that the majority's decision may be consistent with what he called "congressional federalism," but that it was "such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism." Douglas argued that states could be regulated under the commerce power, citing Parden v. Terminal Railroad of Alabama and United States v. California, which subjected state-owned railroads to the Federal Employers Liability Act and the Safety Appliance Act; and Sanitary District of Chicago v. United States, in which the federal government required Chicago to stop diverting water from Lake Michigan to flush away its raw sewage. Citing Wickard v. Filburn, Douglas even conceded that "[a]ll activities affecting commerce, even in the minutest degree... may be regulated and controlled by Congress." But he was concerned that federal regulation of wages and hours paid to state employees would "disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education" by regulating "essential functions" of the states.

b. A Short-Lived Victory—National League of Cities v. Usery

While no other justice joined his lone dissent in Fry, Justice Rehnquist prevailed the following term in National League of Cities v. Usery. In National League of Cities the Court ruled 5-4 that Congress could not require state governments to pay their employees the federal minimum

125 Id. at 559.
126 392 U.S. 183 (1967).
127 Maryland v. Wirtz, 392 U.S. at 201 (Douglas, J., dissenting).
129 297 U.S. 175 (1936).
130 266 U.S. 405 (1925).
131 317 U.S. 111 (1942).
132 Maryland v. Wirtz, 392 U.S. at 204 (Douglas, J., dissenting).
133 Id. at 203.
134 Justice Douglas argued that the case should be dismissed because the wage and price controls had expired before the case was decided. Fry v. United States, 421 U.S. 542, 549 (1975).
wage. Writing for the majority, Justice Rehnquist stated that the Court "has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce."\textsuperscript{136} While recognizing Congress's authority to regulate wages and hours paid by private businesses, Rehnquist stated that the Tenth Amendment barred Congress from regulating "an undoubted attribute of state sovereignty" in a manner that would "displace the States' freedom to structure integral operations in areas of traditional governmental functions."\textsuperscript{137} The crucial fifth vote in \textit{National League of Cities} came from Justice Blackmun. In a concurring opinion, Blackmun sought to qualify the reach of the Court's decision. He interpreted the majority as adopting a balancing approach that "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."\textsuperscript{138}

Despite Justice Blackmun's qualification, \textit{National League of Cities} had immediate implications for environmental regulation. The case was decided at a time when the Environmental Protection Agency (EPA) was trying to enforce regulations requiring states to enact transportation controls under the Clean Air Act. Several states and the District of Columbia had challenged the constitutionality of EPA's actions. United States Courts of Appeals in three circuits had ruled against EPA, though the Third Circuit agreed with the agency's argument that because the states encouraged motor-vehicle use by building highways and registering vehicles, Congress had authority under the Commerce Clause to require states to adopt the regulations. However, the Third Circuit's decision\textsuperscript{139} relied largely on \textit{Maryland v. Wirtz}, a decision whose "far-reaching implications" the Supreme Court overruled in \textit{National League of Cities}. After the Supreme Court agreed to review the four lower court decisions, EPA decided to withdraw the regulations.\textsuperscript{140}

The most significant early constitutional challenge to the new regulatory programs that the Court did decide involved the Surface Mining Control and Reclamation Act (SMCRA).\textsuperscript{141} In \textit{Hodel v. Virginia Surface Mining Association},\textsuperscript{142} the Court unanimously upheld the constitutionality of SMCRA.\textsuperscript{143} The Court had no difficulty finding that Congress had the power to regulate surface coal mining "to protect interstate commerce from

\textsuperscript{136} \textit{Id.} at 842.
\textsuperscript{137} \textit{Id.} at 845, 852.
\textsuperscript{138} \textit{Id.} at 856.
\textsuperscript{139} \textit{Pennsylvania v. EPA}, 500 F.2d 246 (3d Cir. 1974).
\textsuperscript{140} Before deciding to withdraw the regulations, attorneys at EPA and the Justice Department debated whether Justice Blackmun's concurrence in \textit{National League of Cities} was directed at the transportation control issue. However, they noted that it may instead have been directed at situations where the state itself is a polluter, rather than where its roads are used by private parties whose vehicles contribute to pollution. \textit{See Supreme Court Commerce Clause Ruling May Affect Transportation Control Issue}, 7 Env't Rep. (BNA) 399 (July 2, 1976).
\textsuperscript{141} Surface Mining Control and Reclamation Act, 30 U.S.C. \textsection{s} 1201-1328 (2000).
\textsuperscript{142} 452 U.S. 264 (1981).
\textsuperscript{143} \textit{Id.} at 268.
adverse effects that may result from that activity.” The Court cited congressional findings concerning the effects of surface mining on the environment and the economy, and the need for minimum national standards—findings the Court determined worthy of judicial deference.

Concurring in the judgment, Justice Rehnquist conceded that Congress had the power to regulate surface mining because of congressional findings concerning substantial effects on interstate commerce, though he argued “there can be no doubt that Congress in regulating surface mining has stretched its authority to the ‘nth degree.’” Rehnquist refused to join the majority opinion because he thought the Court had failed to emphasize that only substantial effects on interstate commerce could support federal regulatory authority. He cautioned that “it would be a mistake to conclude that Congress’s power to regulate pursuant to the Commerce Clause is unlimited.” In the slip opinion initially released by the Court, Justice Rehnquist stated that “Congress must show that its regulatory activity has a substantial effect on interstate commerce.” However, eleven weeks after the decision was released, he requested that the other justices allow him to amend this statement to read “Congress must show that the activity it seeks to regulate has a substantial effect on interstate commerce.” The justices did not object to this change, which was made in the bound volume of U.S. Reports.

The Hodel decision also rejected a Tenth Amendment challenge to SMCRA that had been premised on the notion that the federal law interfered with the traditional state function of regulating land use. The Court indicated that private activities impacting interstate commerce may be regulated by states, and that the Tenth Amendment does not limit congressional power to displace or preempt state regulation of such activities. The Hodel Court held that Congress does not violate powers reserved to states simply by its exercise of Commerce Clause authority with the effect of displacing the exercise of states’ police powers. It went on to outline three elements required to establish a Tenth Amendment violation.

First, there must be a showing that the challenged statute regulates the “States as States.” Second, the federal regulation must address matters that are indisputably “attribute[s] of state sovereignty.” And, third, it must be apparent that the states’ compliance with the federal law would directly impair their ability “to structure integral operations in areas of traditional governmental functions.”

Noting that SMCRA did not directly regulate states as states, the Court found no Tenth Amendment violation. The Court noted that the Act gave states the choice of either implementing a regulatory program in accordance

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144 Id at 281.
145 Id. at 311 (Rehnquist, J., concurring in the judgment).
146 Id. at 310 (Rehnquist, J., concurring in the judgment).
147 Hodel v. Va. Surface Mining Ass’n, No. 79-1538, slip. op. at 7 (1981); see also Memorandum to Conference from Justice William H. Rehnquist, Sept., 3, 1981. The Hodel decision had been released on June 15, 1981.
148 Hodel, 452 U.S. at 313 (Rehnquist, J., concurring in the judgment).
149 Id. at 287–88 (citations omitted).
with federal standards or letting the federal government bear the full burden of regulating private parties. "Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."150

The Court came much closer to finding unconstitutional commandeering the following year when it rejected a Tenth Amendment challenge to the Public Utility Regulatory Policies Act (PURPA)151 in Federal Energy Regulatory Commission (FERC) v. Mississippi.152 By a 5-4 vote, the Court upheld PURPA's requirement that state utility regulators consider adopting ratemaking standards proposed by FERC. Writing for the majority, Justice Blackmun explained that PURPA did not compel the states to adopt the standards, but rather simply to consider them as a condition for continued state activity in an otherwise preemptible field.153 Writing for the four dissenters, Justice O'Connor maintained that compelling states even to consider adopting the federal standards commandeered the state regulatory process in violation of the Tenth Amendment.154

c. Garcia Overrules National League of Cities

The five-justice majority in FERC v. Mississippi included the four dissenters from National League of Cities plus Justice Blackmun, who had become frustrated by the difficulty of determining whether federal regulation affected "traditional" or "integral state functions" under National League of Cities.155 Three years later, in 1985, Blackmun joined the four National League of Cities dissenters in a 5-4 decision overruling that decision. In Garcia v. San Antonio Metropolitan Transit Authority156 the Court upheld the application of federal wage and hour regulations to a government transportation agency.157 Justice Blackmun explained that he now believed the National League of Cities approach was "unsound in principle and unworkable in practice."158 Expressly overruling National League of Cities, he concluded the political process offered the best protection for state interests, rather than constitutional litigation that "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."159 In a short dissent, Justice Rehnquist predicted that his approach to the Tenth Amendment eventually would prevail.160

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150 Id. at 288.
153 Id. at 765.
154 Id. at 775 (O'Connor, J., concurring in the judgment in part and dissenting in part).
155 See National League of Cities, 426 U.S. 833, 852 (1976) (discussing the limitations the Tenth Amendment places on Congress).
157 Id.
158 Id. at 546.
159 Id.
160 Id. at 579–80 (Rehnquist, J., dissenting).
d. Efforts to Reconsider Eleventh Amendment Immunity

In 1986, a year after *Garcia*, Rehnquist became Chief Justice following the retirement of Chief Justice Warren Burger, and Antonin Scalia joined the Court as an associate justice. Justice Scalia favored more expansive interpretations of both the Tenth Amendment and the Eleventh Amendment than the Court had then adopted. In 1989 the Court heard an environmental case that raised an important Eleventh Amendment question. *Pennsylvania v. Union Gas Co.*\(^{161}\) raised the question whether a state could be held liable for response costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),\(^{162}\) the federal legislation that created the Superfund. The federal government had sued Union Gas Company, a private utility, for response costs after the Commonwealth of Pennsylvania, while working on a flood control project, struck a large deposit of coal tar at an abandoned coal gasification plant the company had once owned. Coal tar was released into a creek, and the nation’s first emergency Superfund site was created. After Union Gas filed a lawsuit in federal court seeking contribution from the Commonwealth, the court dismissed the suit on the ground that it was barred by the Eleventh Amendment. The Third Circuit initially affirmed, but after the Supreme Court remanded the case in light of new statutory amendments, the Third Circuit then reversed and held that Congress clearly intended to include states as potentially responsible parties under CERCLA and that it had the power to do so under the Commerce Clause.\(^{163}\)

Five justices initially voted that states could not be held liable. However, in preparing a draft majority opinion, Justice Scalia tried to use the case as a vehicle for holding that Congress did not have the constitutional authority to waive a state’s Eleventh Amendment sovereign immunity. Justice White, who had voted with the majority because he believed Congress had not clearly expressed an intent to waive state sovereign immunity when it enacted CERCLA, objected to Scalia’s effort to create new constitutional limits on congressional power. As a result, White refused to join Scalia’s draft opinion. While White believed the Fourteenth Amendment gave Congress the power to abrogate a state’s Eleventh Amendment immunity, Justice Brennan sought to use the case as a vehicle to overrule *Hans v. Louisiana*.\(^{164}\) Justice White did not wish to overrule *Hans*.

Caught between conflicting agendas, Justice White joined two separate five-justice coalitions. The result was a confusing decision holding that Congress had intended to waive state sovereign immunity—because five justices disagreed with Justice White on this point—and that Congress had

\(^{161}\) 491 U.S. 1 (1989).


\(^{164}\) 134 U.S. 1 (1890). *Hans* was a post-Civil War decision in which the Court, without regard to the text of the Eleventh Amendment, had extended the reach of state sovereign immunity to suits against states brought by their own citizens and to suits arising under federal law.
the constitutional power to do so.\textsuperscript{165} \textit{Hans} was not overruled, but the Court concluded that Congress had acquired the power to abrogate state sovereign immunity because the states ceded some of their sovereignty when they gave Congress plenary power to regulate commerce.\textsuperscript{166}

e. New York v. United States and the Tenth Amendment's Anti-Commandeering Doctrine

After \textit{Garcia} it was widely believed that the Tenth Amendment could not provide any independent check on exercises of federal regulatory authority. In the next major federalism case to reach the Court, \textit{New York v. United States},\textsuperscript{167} lawyers for New York reportedly feared imposition of Rule 11 sanctions for even raising a Tenth Amendment challenge to the Low Level Radioactive Waste Policy Amendments Act of 1985.\textsuperscript{168} Among other claims, New York argued that a provision requiring the state to "take title" to radioactive waste within its borders if the state failed to make arrangements for its disposal by a certain deadline violated the Tenth Amendment. The Court upheld the state's claim by a vote of 6-3.\textsuperscript{169}

The Court held the "take title" provision of the Act unconstitutionally sought to "commandeer" state governments into the service of federal regulatory purposes.\textsuperscript{170} Responding to Justice Blackmun's claim in \textit{Garcia} that the political process provided adequate protection for state interests, Justice O'Connor's majority opinion argued that the Act actually diminished political accountability by forcing state officials to bear the brunt of public disapproval for unpopular regulatory decisions forced on them by Congress. Justice O'Connor then spelled out constitutionally permissible means for Congress to influence state actions. She noted that under the Spending Clause of the Constitution, Congress could condition receipt of federal funds on the fulfillment of conditions that bear some reasonable relationship to the purpose of the federal spending.\textsuperscript{171} Congress also could give states the choice of regulating an activity according to federal standards or having state law preempted by federal regulation. Justices White, Blackmun, and Stevens dissented. They argued that the Court's decision actually hurt federalism by making it more difficult for Congress to devise creative means for preserving state decision making in programs addressing important national problems.\textsuperscript{172}

\footnotesize{\begin{itemize}
\item \textsuperscript{166} Pennsylvania v. Union Gas Co., 491 U.S. 1, 19–20 (1989).
\item \textsuperscript{167} 505 U.S. 144 (1992).
\item \textsuperscript{169} New York v. United States, 505 U.S. at 147.
\item \textsuperscript{170} \textit{Id.} at 175.
\item \textsuperscript{171} \textit{Id.} at 185.
\item \textsuperscript{172} \textit{Id.} at 206–07.
\end{itemize}}
*f. Lopez and Restrictions on Congressional Power*

*New York v. United States* represented the opening salvo in the Rehnquist Court’s crusade to revitalize federalism. Three years later, the Court took an even larger step in this direction when it decided *United States v. Lopez.* In *Lopez* the Court, for the first time in nearly sixty years, invalidated a federal law—the Gun-Free School Zones Act—on the ground that it exceeded Congress’s regulatory authority under the Commerce Clause. By a 5-4 majority, the Court held that Congress did not have the authority under the Commerce Clause to prohibit the possession of firearms in the vicinity of schools because Congress had not shown that the regulated activity “substantially affects interstate commerce.”

Chief Justice Rehnquist’s majority opinion argued that the Act had “nothing to do with ‘commerce’ or any sort of economic enterprise,” however broadly commerce might be defined, and that it had no jurisdictional element to ensure that it would be applied only to acts substantially affecting interstate commerce. Citing *Hodel* with approval, Rehnquist noted that Congress could regulate economic activity that substantially affected interstate commerce. He also cited with approval *Wickard v. Filburn,* where the Court upheld congressional power to regulate the production of wheat for personal consumption in light of the cumulative impact of individual production and consumption on the price of wheat sold in interstate commerce. The four dissenting justices criticized the majority’s efforts to base limits on federal regulatory power on distinctions between commercial and noncommercial conduct and its refusal to acknowledge that Congress rationally could have found a substantial link between gun-related school violence and interstate commerce. While acknowledging the legal uncertainty that could be spawned by basing federal power on distinctions between commercial and noncommercial activity, Chief Justice Rehnquist deemed it a necessary price to pay in pursuit of “judicially enforceable outer limits” on congressional power.

Following *Lopez,* many thought Congress would not have difficulty exercising federal regulatory authority if it simply made more detailed and careful findings concerning the effects on interstate commerce of the activities it regulated. Because *Lopez* cited *Wickard v. Filburn* with approval, it also was assumed that a cumulative effects analysis could continue to be used to meet the substantial effects test. These assumptions were called into question when the Court struck down a portion of the Violence Against

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175 *Lopez*, 514 U.S. at 559–68.
176 *Id.*
177 *Id.* at 561–62.
178 317 U.S. 111, 133 (1942)
179 *Lopez*, 514 U.S. at 566.
Women Act in *Morrison v. United States*. By the same 5-4 lineup as in the previous cases, the Court held that Congress exceeded the limits of its commerce power when it created a private cause of action in federal courts for victims of gender-motivated violence.

Unlike the situation in *Lopez*, Congress had made extensive findings concerning the impact of gender-motivated violence on interstate commerce, including lost days of work and women refraining from taking certain kinds of jobs or from working particular hours. However, in his majority opinion for the Court, Chief Justice Rehnquist rejected these findings as based on a line of “but for” causation that would allow Congress to regulate virtually anything, including “family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.”

Writing in dissent, Justice Breyer replied:

This consideration, however, while serious, does not reflect a jurisprudential defect, so much as it reflects a practical reality. We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate. And that fact makes it close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause “aggregation” rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce.

Chief Justice Rehnquist concluded that Congress’s commerce power is far broader when economic activity is regulated and that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.” While he declined to hold expressly that the effects of noneconomic activity cannot be aggregated for purposes of Commerce Clause analysis, the Chief Justice noted that “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.” *Morrison* thus raises the prospect that Congress cannot constitutionally regulate intrastate activity that the Court deems noneconomic in character. This could mean that Congress lacks the power to prohibit endangered species from being killed by activity that is not characterized as economic in nature, such as recreational dirt-biking.

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182 Id. at 615–16.
183 Id. at 660 (Breyer, J., dissenting) (citation omitted).
184 Id. at 613.
185 Id.
Seminole Tribe, the Eleventh Amendment, and State Sovereign Immunity

The year after it decided *Lopez*, the Rehnquist Court opened a new front in its campaign to revive constitutional protections for states when it decided *Seminole Tribe of Florida v. Florida.* In *Seminole Tribe* the same five-justice majority that prevailed in *Lopez* held that Congress does not have the authority under the Commerce Clause to abrogate a state's Eleventh Amendment immunity from suit by private citizens. To reach this result the Court overruled *Union Gas,* which, as noted above, upheld the authority of Congress under the Commerce Clause to abrogate a state's Eleventh Amendment immunity for purposes of authorizing private cost recovery actions against states under CERCLA. In support of its decision to overrule *Union Gas,* the Court characterized *Union Gas* as "a solitary departure from established law"—the product of a "deeply fractured decision" that had "created confusion."

*Seminole Tribe* also hinted at a narrowing of an exception to Eleventh Amendment immunity, derived from *Ex parte Young,* which permits private suits to enjoin individual state officials from violating federal law. Writing for the majority, Chief Justice Rehnquist observed that lower courts should be hesitant to apply *Ex parte Young* to permit private suits against state officials where Congress has prescribed a detailed remedial scheme for enforcement of statutorily created rights against states themselves. However, in a footnote Rehnquist cited both the Clean Water Act's citizen suit provision and part of the Emergency Planning and Community Right-to-Know Act as examples of remedial schemes Congress intended to apply directly to state officials and not to the states themselves.

The Court held that state sovereign immunity could only be abrogated pursuant to the Fourteenth Amendment or some other constitutional amendment ratified after the Eleventh Amendment. The Court conceded that the Fourteenth Amendment expanded federal power at the expense of state autonomy, and in doing so "fundamentally altered the balance of state and federal power struck by the Constitution." Rehnquist noted that because Article V of the Fourteenth Amendment states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article," Congress has the power to abrogate state sovereign immunity in order to subject states to private suits in federal courts when acting to

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187 Id. at 47.
189 *Seminole Tribe,* 517 U.S. at 64–66.
190 209 U.S. 123 (1908).
191 *Seminole Tribe,* 517 U.S. at 47–48.
192 Id. at 73–75.
193 Id. at 75, n.17.
194 Id. at 54–56.
195 Id. at 59 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).
196 U.S. CONST., amend. XIV, § 5.
remedy violations of the Fourteenth Amendment. However, in subsequent
decisions the Court has held that Congress did not have sufficient evidence of
constitutional violations to support abrogating state sovereignty through
the Age Discrimination in Employment Act and the Americans with
Disabilities Act.

Writing in dissent in Seminole Tribe, Justice Stevens decried the policy
consequences of the Court’s decision to overrule Union Gas. He noted that
“it prevents Congress from providing a federal forum for a broad range of
actions against States, from those sounding in copyright and patent law, to
those concerning bankruptcy, environmental law, and the regulation of our
vast national economy.”

Any doubt concerning the Court’s determination to expand state
sovereign immunity was laid to rest in Alden v. Maine. In Alden the Court
held, by the identical 5-4 lineup of justices that prevailed in prior cases, that
the Constitution does not permit private lawsuits to recover damages from
nonconsenting states for violations of federal rights even when the suits are
brought in state courts. To arrive at this result, the Court had to reach far
beyond the text of the Eleventh Amendment, which speaks only of the
“judicial power of the United States.” The opinion of the Court, written by
Justice Kennedy, explained that “[t]he 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.” Thus, it follows that “the States retain immunity
from private suit in their own courts, an immunity beyond the congressional
power to abrogate by Article I legislation.” Justice Kennedy wrote that this
sovereign immunity did not give states the power to disregard the
Constitution, but it does seem to give them considerable leeway. If a state
may not be sued for damages by a private citizen in federal court, and a state
may not be sued by a private citizen in its own courts, what recourse does a
plaintiff have?

Most recently, the same 5-4 majority concededly jettisoned the text of
the Eleventh Amendment when it held in Federal Maritime Commission v.
South Carolina State Ports Authority (FMC) that state sovereign immunity

197 Id.
Bd. of Regents, 528 U.S. 62 (2000) (discussing the Age Discrimination in Employment Act
of 1967 and holding that by passing the Act Congress exceeded its authority).
and holding that the Eleventh Amendment bars recovery of money damages in employment
discrimination cases against state employers).
200 Seminole Tribe, 517 U.S. at 77.
202 U.S. CONST., amend. XI.
203 Alden, 527 U.S. at 728–29.
204 Id. at 754.
205 Id.
bars the Federal Maritime Commission from adjudicating a private party's complaint against a nonconsenting state agency even though the commission does not exercise the judicial power of the United States. The Court stated that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." It concluded that "if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC."

Writing in dissent, Justice Breyer raised the prospect that the decision could undermine enforcement against state employers of whistleblower-protection provisions in the federal environmental laws, including the Clean Water Act, the Toxic Substances Control Act, and the Solid Waste Disposal Act. These provisions bar employers from firing or otherwise retaliating against workers who report violations of the environmental laws. They generally authorize the Secretary of Labor to hold public hearings in response to whistleblowers' complaints.

2. The Consequences of the New Federalism for Environmental Regulation

As a result of the Rehnquist Court's "new federalism," constitutional challenges to federal environmental regulations are now being raised with regularity. These challenges fall into three general categories: (1) arguments that a federal regulatory scheme has "commandeered" state regulatory authority in violation of the Tenth Amendment, (2) arguments that federal environmental regulations exceed the scope of Congress's power to regulate interstate commerce, and (3) claims that states are immune from private actions to enforce the federal environmental laws.

a. The Effect of the Tenth Amendment Prohibition on "Commandeering"

"Commandeering" challenges have been the rarest of the three categories. While New York v. United States established that the Tenth Amendment bars Congress from commandeering state regulatory authority, the decision has had little impact on environmental law outside the context of the Low Level Radioactive Waste Policy Amendments Act (LLRWPA). By invalidating the "take title" provision of the Act, the Court arguably removed the Act's most potent incentive for states to make arrangements for disposal of their low-level radioactive waste. This may help explain why the Act has not been highly successful in getting states to make politically difficult siting decisions.

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\(^{207}\) Id.
\(^{208}\) Id. at 978.
\(^{209}\) Id.
Aside from its effect on the LLRWPA, *New York v. United States* has not had much impact on environmental regulation because most of the federal environmental laws employ models of cooperative federalism that condition receipt of federal funds on compliance with federal standards, or that gives states a choice between regulating according to federal standards or having federal regulation preempt state regulation. The constitutionality of each of these devices for inducing states to act was expressly affirmed in Justice O'Connor's opinion for the Court in *New York v. United States*. Thus, courts have had little difficulty rejecting state claims of commandeering when federal regulatory programs are challenged. For example, the Commonwealth of Virginia challenged the Clean Air Act's requirement that states seeking authorization to administer the Act's permit program must allow anyone with Article III standing to challenge permit decisions. Virginia, which has a much more restrictive concept of standing that requires a demonstration of a property interest, argued that the federal requirement interfered with a core aspect of its sovereignty—its right to determine who should have access to its courts. The Fourth Circuit rejected this claim in *Virginia v. Browner*, noting that the Act did not compel Virginia to change its standing rules, but rather conditioned its voluntary decision to operate the permit program on its making such a choice.

The only case in which a provision of federal environmental law has been held to violate the Tenth Amendment involved an unusual provision of the Safe Drinking Water Act (SDWA). In *ACORN v. Edwards* the U.S. Court of Appeals for the Fifth Circuit invalidated a provision of the SDWA that required states to create a program to assist schools inremedying lead contamination in water coolers. Rather than giving states a choice to create such a program or have the federal government do it for them, as is typical of other environmental laws, the SDWA required state compliance under penalty of federal civil enforcement. This was held to violate the Tenth Amendment in light of *New York v. United States*.

The anti-commandeering doctrine remains alive and well, as demonstrated by *Printz v. United States*, where the Supreme Court invalidated a provision of the Brady Handgun Violence Protection Act that required local law enforcement officers to conduct background checks on handgun purchasers. *Printz* thus extends the anti-commandeering doctrine to cover situations where executive branch officials, rather than state legislators, are the targets of the commandeering. However, *Garcia* still remains good law. In his opinion for the Court, Justice Scalia was careful to distinguish *Garcia* from the situation in *Printz*. Scalia explained that *Printz*

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212 Id. at 876–77.
215 Id. at 1391–95.
216 Id.
did not involve the question "whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments," because "it is the whole object of the law to direct the functioning of the state executive." Thus, Garcia's commitment to leave vindication of federalism to the political process absent some public choice market failure is still the law of the land. The anti-commandeering principle continues to have little direct effect on federal environmental regulation because there are effective alternatives for inducing states to act that raise no constitutional problems.

b. The Environmental Consequences of Lopez's Limits on Congressional Commerce Power

By contrast, Lopez has spawned numerous interstate Commerce Clause challenges to federal environmental regulation. One federal district court relied on Lopez to hold that the application of CERCLA to a chemical plant that had been closed in 1982 exceeded Congress's authority to regulate interstate commerce. The court held that Congress did not have the authority to regulate contamination of real estate that neither crossed state lines nor emanated from plants currently operating. This decision was quickly reversed on appeal. The appellate court held that "the regulation of intrastate, on-site waste disposal constitutes an appropriate element of Congress's broader scheme to protect interstate commerce and industries thereof from pollution."

Post-Lopez challenges to regulations under the Endangered Species Act (ESA) have presented closer cases. In NAHB v. Babbitt, a three-judge panel of the D.C. Circuit voted 2-1 to uphold Congress's authority to prohibit the taking of an endangered fly found in only two counties of California. However, the court was badly split on its rationale for upholding Congress' exercise of its commerce power. Judge Wald argued that the ESA's anti-taking provision was a proper exercise of Congress' power to regulate the channels of interstate commerce by preventing interstate transport of an endangered species. She also maintained that the taking prohibition regulated an activity that substantially affects interstate commerce because it prevents destruction of biodiversity, protecting current and future interstate commerce that relies upon it, and because it prevents the destructive effects of interstate competition. Judge Henderson argued that although it was impossible to determine if the endangered fly would have

219 Printz, 521 U.S. at 932.
222 Id. at 1511.
224 130 F.3d 1041 (D.C. Cir. 1997).
225 Id. at 1046.
226 Id. at 1046, 1050-54.
any economic value or impact on interstate commerce, the regulations substantially affected commerce by preventing commercial development of land in the fly's habitat for a hospital and traffic intersection.227

In a fierce dissent, Judge David Sentelle declared that the "Commerce Clause empowers Congress 'to regulate commerce' not 'ecosystems.'"228 He maintained that Congress did not have the power to regulate the use of the fly's habitat because the fly itself had no substantial effect on interstate commerce. Each of the three judges in NAHB v. Babbitt focused on different things when assessing whether there was a substantial effect on interstate commerce, reflecting the confusion that pervades modern Commerce Clause analysis. Judge Wald focused on the purpose of the ESA—to protect biodiversity, which itself can have considerable economic value. Judge Henderson focused on the nature of the development barred by protection of the fly's habitat—construction of a hospital and a highway interchange.229 Judge Sentelle focused on the fly itself and its effect on interstate commerce.230

Another challenge to the constitutionality of the Endangered Species Act decided in the wake of Morrison illustrated the difficulty of distinguishing between economic and noneconomic activity. In Gibbs v. Babbitt231 a divided panel of the Fourth Circuit upheld Congress's authority to protect an experimental population of endangered red wolves from being harmed on private land in North Carolina. Construing the taking of red wolves by farmers as economic activity to protect farms, the majority concluded that the cumulative effect of individual takings would have a substantial effect on interstate commerce.232 The majority noted that many tourists and scientists cross state lines to view the wolves, and that efforts to protect wolves could ultimately permit a renewed market for wolf pelts.233 A dissenting judge argued that Congress did not have the power to regulate a handful of animals in one small region of one state because the activity had no economic character.234

The Supreme Court has refused to confront the question of the consequences of Lopez for the Endangered Species Act, denying review in both NAHB v. Babbitt and Gibbs. The one area in which the Court has addressed the effect of Lopez on environmental law, albeit somewhat obliquely, is with respect to the jurisdictional reach of the Clean Water Act. In Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)235 the Court considered whether Congress has the constitutional authority to regulate isolated wetlands used by migratory birds. Relying on Lopez, a county agency argued that Congress

227 Id. at 1057–58.
228 Id. at 1065.
229 Id. at 1057–60 (Henderson, J., concurring).
230 Id. at 1060–68 (Sentelle, J., concurring).
231 214 F.3d 483 (4th Cir. 2000).
232 Id. at 492–94.
233 Id. at 492–95.
234 Id. at 506–08 (Luttig, J., dissenting).
could not require it to obtain a federal permit under section 404(a) of the Clean Water Act to fill wetlands in an abandoned sand and gravel pit. The Seventh Circuit had found substantial effects on interstate commerce because of the millions of hunters and bird watchers who travel interstate to hunt or to observe migratory birds. The Supreme Court expressed skepticism toward this finding, but it ultimately ducked the constitutional issue by interpreting section 404(a) narrowly.\(^{236}\)

Deciding *SWANCC* by the same 5-4 lineup that prevailed in *Lopez*, the Court held that Congress had not expressed a clear intent to apply section 404(a) to isolated wetlands visited by migratory birds, which “would result in a significant impingement of the States’ traditional and primary power over land and water use.”\(^{237}\) To avoid what it described as “significant constitutional and federalism questions,” the Court held that the jurisdictional predicate of section 404(a)—“waters of the United States”—did not include isolated wetlands where migratory birds are present.\(^{238}\)

While *SWANCC* narrows the jurisdictional reach of the Clean Water Act, it has spawned great confusion concerning the current scope of federal jurisdiction. *SWANCC* also leaves unresolved important questions concerning the ultimate effect of *Lopez* on federal authority to protect the environment. For example, it remains unclear how the “substantially affects” test is to be applied. Is it the activity regulated (in *SWANCC*, a proposed commercial landfill) that has to have substantial effects on interstate commerce, or is it the environmental consequences of the activity (for example, loss of opportunities to view or to hunt migratory birds)? Does Congress have less constitutional power to protect the environment from destruction by noncommercial activities than by commercial ones? Can Congress protect endangered species that have little commercial value and are located entirely intrastate? The Court clearly is reluctant to address these subjects, for it has declined to review other decisions narrowly rejecting similar constitutional challenges to the Endangered Species Act.

\[c. \text{The Environmental Implications of the Court's Eleventh Amendment Jurisprudence}\]

Eleventh Amendment challenges are now being raised when state governments are defendants in cases involving federal environmental laws. As a result of the Court’s reversal of *Union Gas*, states are now able to escape liability for CERCLA response costs in contribution actions by private parties. However, Eleventh Amendment immunity does not extend to counties and municipalities, which own far more dumpsites than state entities do. Citizen suits seeking civil penalties against a state officer for violations of the Clean Water Act have been held to be barred by the Eleventh Amendment.\(^{239}\) Some courts have relied on *Ex parte Young* to

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\(^{236}\) Id at 171-72.

\(^{237}\) Id at 174.

\(^{238}\) Id.

\(^{239}\) NRDC v. Cal. Dep’t of Transp., 96 F.3d 420, 423–24 (9th Cir. 1996).
permit suits seeking prospective injunctive relief against state officers.\textsuperscript{240} Other courts have found that states have waived their Eleventh Amendment defenses.\textsuperscript{241}

The Eleventh Amendment derailed a challenge to the legality of mountaintop-removal coal mining.\textsuperscript{242} The lawsuit charged that West Virginia environmental officials violated the CWA and SMCRA when they approved mountaintop-removal mining operations, which result in the dumping of massive amounts of overburden in valleys, burying streams and drainage areas. After a federal district court found this practice violated federal law, the state appealed to the U.S. Court of Appeals for the Fourth Circuit, which held that the lawsuit was barred by the Eleventh Amendment.\textsuperscript{243} The citizen plaintiff argued that West Virginia had waived its sovereign immunity by accepting responsibility under SMCRA to implement a program that complied with federal law. But the court held that SMCRA’s citizen suit provision did not reveal clear congressional intent to require a state to waive its immunity when it accepted responsibility for implementing SMCRA.\textsuperscript{244} Because the court’s decision turned on unusual statutory language that makes state programs under SMCRA exclusively state law, rather than federal law implemented by the states, the decision is unlikely to have much effect outside the context of SMCRA.

The Supreme Court’s most recent decision in \textit{FMC}\textsuperscript{245} threatens to undermine enforcement of the worker protection provisions contained in most federal environmental laws when employees of state agencies are whistleblowers. These laws generally provide for the Secretary of Labor to investigate complaints by workers who believe they have suffered retaliation from their employers for reporting violations of the environmental laws.\textsuperscript{246} In \textit{Rhode Island Department of Environmental Management v. United States}\textsuperscript{247} the U.S. Court of Appeals for the First Circuit held that state sovereign immunity bars a state employee from seeking relief under the whistleblower provisions of the Solid Waste Disposal Act unless the United States Secretary of Labor intervenes in the action. At least one other federal trial court has reached a similar conclusion.\textsuperscript{248}

In other circumstances, the Court’s expansive interpretation of state sovereign immunity may make it more difficult for parties to challenge environmental regulations as regulatory takings, as discussed in Part IV.B.1 \textit{infra}.

\textsuperscript{240} Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 329–31 (4th Cir. 2001) (discussing the \textit{Ex parte Young} doctrine).

\textsuperscript{241} SDDS, Inc. v. South Dakota, 225 F.3d 970, 972–73 (8th Cir. 2000).

\textsuperscript{242} Bragg v. W. Va. Coal Ass’n, 248 F.3d 275 (4th Cir. 2001).

\textsuperscript{243} \textit{Id.} at 299–300.

\textsuperscript{244} \textit{Id.} at 298.

\textsuperscript{245} \textit{FMC}, 535 U.S. 743 (2002).


\textsuperscript{247} 286 F.3d 27 (1st Cir. 2002).

B. The Dormant Commerce Clause and State Regulation of Waste Disposal

Even as the Court has been restricting federal power and invoking the Tenth and Eleventh Amendments to revitalize state sovereignty, it has repeatedly invalidated state efforts to regulate disposal of waste generated in other states. Using the “dormant commerce clause,” the Court has declared per se invalid any restriction that is facially discriminatory in its regulation of waste from other states. Restrictions that are not facially discriminatory are analyzed to determine if their legitimate local benefits outweigh the burden imposed on interstate commerce, and whether there are less burdensome alternatives that would accomplish the state’s end.

The crucial early decision in the line of dormant commerce clause cases invalidating state waste disposal regulations came in 1978 in Philadelphia v. New Jersey. Declarng waste an article of commerce, the Court invalidated a New Jersey law prohibiting importation of most solid waste from other states as violative of the dormant commerce clause. The Court majority stated that it made no difference whether the law was motivated by genuine environmental concerns because it facially discriminated against out-of-state commercial interests. In dissent, Justice Rehnquist argued that the law should be upheld based on decisions upholding quarantine laws that banned the importation of noxious articles, such as diseased livestock. The majority rejected this view by noting that solid waste is not so noxious as to have the state restrict the movement of waste generated in-state. Rehnquist argued that even if that were true “I do not see why a State may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the State without undue hazard, will then simply pile up in an ever increasing danger to the public’s health and safety.”

In subsequent cases the Court invalidated state laws imposing differential fees on the disposal of hazardous waste originating out of state, a law authorizing counties to exclude waste originating in other counties (as part of their comprehensive twenty-year waste disposal planning), and a municipal flow control ordinance requiring that all garbage be processed initially at a particular transfer station. In these cases the Court explained that “[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”

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250 Id. at 626–27.
251 Id. at 631–33.
252 Id. at 632–33.
256 Id. at 390.
Rehnquist remained a consistent champion of state prerogatives by dissenting in each of these cases.

C. Justice Scalia’s Campaign to Restrict Environmental Standing

Prior to joining the Supreme Court, then-Circuit Judge Antonin Scalia advocated a more restrictive view of standing that would make it more difficult for environmental interests to have access to the courts. Arguing that standing doctrine was a “crucial and inseparable element” of separation of powers principles, Scalia maintained that more restrictive standing rules should be adopted to reduce judicial intrusion into the operations of the other branches. Scalia argued that judges who enforce environmental laws are “likely (despite the best of intentions) to be enforcing the political prejudices of their own class.” He explained that “[t]heir greatest success in such an enterprise—ensuring strict enforcement of the environmental laws . . . met with approval in the classrooms of Cambridge and New Haven, but not in the factories of Detroit and the mines of West Virginia.” Quoting a statement by Judge J. Skelly Wright in a famous early environmental case, he asked:

Does what I have said mean that, so long as no minority interests are affected, “important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?” Of course it does—and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere . . . . The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative. Sunday blue laws, for example, were widely unenforced long before they were widely repealed—and had the first not been possible the second might never have occurred.

While Scalia’s view of standing was sharply at odds with what Congress had in mind when it incorporated citizen suit provisions into the environmental laws, Scalia pressed with considerable success to implement his view of standing shortly after he joined the Supreme Court. In _Lujan v. National Wildlife Federation_ the Court placed more restrictive geographical limitations on standing by users of natural areas. The National Wildlife Federation challenged the Bureau of Land Management’s decision to reclassify thousands of acres of public lands, opening them for

258 _Id._ at 896.
259 _Id._ at 897.
260 _Id._ (quoting Calvert Cliffs Coordinating Commn., v. United States Atomic Energy Comm’n, 449 F.2d 1109 (D.C.C. 1971) (emphasis in original)).
262 _Id._ at 886–89 (discussing the defendant’s motion for summary judgment under Fed. R. Civ. P. 56 with regard to the plaintiff’s grounds for standing).
development activities. The Court, in a decision authored by Justice
Scalia, held that allegations by members of the group that they recreated “in
the vicinity” of the natural areas at issue were insufficient to establish
standing, given the enormous size of the parcels.

Two years later in *Lujan v. Defenders of Wildlife*, the Court refused
standing to members of a wildlife preservation group who sought to
challenge a regulation providing that the Endangered Species Act did not
apply to federal agencies funding projects abroad. Members of the group
alleged that they had traveled to foreign countries to observe the habitat of
several endangered species and that they intended to return there some time
in the future. While acknowledging that the desire to observe an animal
species was a cognizable interest for purposes of standing, the Court
nonetheless determined that the plaintiffs failed to allege an injury in fact
that was “imminent” because they failed to allege any “concrete plans” to
return to the site where they had previously observed the animals. In his
opinion for the Court, Justice Scalia suggested that separation of powers
principles limit the ability of Congress to confer standing in citizen suits by
defining what constitutes a judicially cognizable injury.

In a concurring opinion, Justice Kennedy, joined by Justice Souter,
suggested that the purchase of a plane ticket would have been sufficient to
demonstrate the plaintiffs’ standing. Justice Kennedy also noted that “[a]s
government programs and policies become more complex and far reaching,
we must be sensitive to the articulation of new rights of action that do not
have clear analogs in our common-law tradition.” He expressed the view
that “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.”

In the wake of *Defenders of Wildlife*, several lower courts adopted
extremely restrictive interpretations of standing requirements, essentially
requiring plaintiffs to prove that the specific pollutants that had been
illegally discharged caused environmental harm affecting them. This trend
came to an abrupt halt, however, when seven of the nine Justices rejected
Justice Scalia’s restrictive views of standing in *Friends of the Earth v.
Laidlaw Environmental Services (Laidlaw)*. In *Laidlaw* the Supreme Court
reversed a Fourth Circuit decision that held a Clean Water Act citizen suit

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263 *Id* at 879.
264 *Id* at 886–89.
266 *Id* at 578.
267 *Id* at 563.
268 *Id* at 560, 562–64.
269 *Id* at 559–60.
270 *Id* at 579 (Kennedy, J., concurring).
271 *Id* at 580. (Kennedy, J., concurring).
272 *Id*.
moot when the defendant came into compliance after the litigation commenced.275

Laidlaw decisively shifted standing doctrine away from private law concepts by rejecting the notion that plaintiffs must demonstrate specific harm from violations of discharge standards in order to establish standing. In an opinion by Justice Ruth Bader Ginsburg, the Court concluded that "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."276 The Court determined that requiring a showing of harm to the environment would "raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance."277 The Court's decision rejected Justice Scalia's restrictive concept of standing that would require proof of the kind of individualized, causal injury—a requirement jeopardizing achievement of the purposes of the environmental laws.278

Affidavits asserting members of the plaintiff environmental group had reduced their recreational activities in the area where illegal discharges had occurred were sufficient to demonstrate injury in fact.279 The Court stated that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."280 The Court distinguished the allegations in Laidlaw from those found insufficient in Lujan v. National Wildlife Federation and Defenders of Wildlife on the grounds that the Laidlaw plaintiffs asserted more than "conclusory allegations" or "speculative 'some day' intentions to visit endangered species halfway around the world"; rather the plaintiffs' allegations represent "reasonable concerns" about discharges affecting their "recreational, aesthetic, and economic interests."281

While only Justices Scalia and Thomas dissented in Laidlaw, in a concurring opinion Justice Kennedy expressed sympathy for the view that citizen suits may violate principles of separation of powers.282 Kennedy wrote that "[d]ifficult 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" to take care that the laws be faithfully executed.283 This concern was particularly ironic in Laidlaw because the executive branch

275 Id. at 173.
276 Id. at 191.
277 Id.
278 See Robert V. Percival & Joanna Goger, Escaping the Common Law's Shadow: Standing in the Light of Laidlaw, 12 Duke Envtl. L. & Pol'y F. 119, 146 (Fall 2001) (concluding that Laidlaw confirmed that detailed showings of causal injury are unnecessary despite Justice Scalia's attempts to push the doctrine in the other direction).
280 Id. (quoting Sierra Club v. Morton, 528 U.S. 727, 735 (1972)).
281 Id. at 183–84 (quoting Lujan v. Nat'l Wildlife Fed'n & Defenders of Wildlife, 504 U.S. 555, 564 (1992)).
282 Id. at 197 (Kennedy, J., concurring).
283 Id. (Kennedy, J., concurring).
enthusiastically supported the citizen suit. In dissent, Justice Scalia charged that the *Laidlaw* decision has “grave implications for democratic governance.”

### D. Regulatory Fairness: Takings, Due Process, Equal Protection, and Environmental Justice

Fairness concerns have become a prominent part of the environmental policy debate in recent years because of the rise of the property rights and environmental justice movements. The former has been far more successful in winning judicial support for its concerns because of the Rehnquist Court’s revival of regulatory takings jurisprudence.

#### 1. The Revival of Regulatory Takings Jurisprudence

Justice Rehnquist provided an early indication of his sympathy for regulatory takings claims in a relatively obscure case involving a privately developed lagoon in Hawaii.\(^{285}\) In *Kaiser Aetna v. United States* the Court rejected the government’s argument that because the developer dug a channel connecting the lagoon to a bay, making it a navigable water, the federal navigational servitude attached—requiring public access to the lagoon.\(^{286}\) In an opinion by Justice Rehnquist, the Court held that application of the federal navigational servitude would amount to a regulatory taking by depriving the developer of the right to exclude others.\(^{287}\) Thus, the Court determined that the developer could exclude the public even though the waterway could be regulated as a navigable water under the Rivers and Harbors Act.\(^{288}\) In a companion case the Court also ruled that privately constructed canals in Louisiana are not themselves subject to the federal navigational servitude.\(^{289}\)

Rehnquist’s approach—narrowly interpreting the scope of the federal navigational servitude to avoid collision with the Takings Clause—stands in sharp contrast to the approach of Justice White six years later in *United States v. Riverside Bayview Homes, Inc (Riverside Bayview)*.\(^{290}\) Reversing a lower court decision that narrowly construed regulations implementing section 404 of the Clean Water Act to avoid a possible regulatory taking, Justice White stated that the theoretical possibility that a permit denial would prevent economically viable use of the land was not sufficient grounds for construing the regulations narrowly.\(^{291}\) Rather than distort the

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\(^{284}\) *Id.* at 202 (Scalia, J., dissenting).


\(^{286}\) *Id.* at 179–80.

\(^{287}\) *Id.*


\(^{290}\) 474 U.S. 121 (1985).

\(^{291}\) *Id.* at 127–28.
scope of the statute, Justice White observed, the proper remedy would simply be to provide the just compensation required by the Takings Clause.\footnote{292}

After ducking several regulatory takings cases on procedural grounds, the Supreme Court decided three major regulatory takings cases in 1987. In \textit{Keystone Bituminous Coal Association v. DeBenedictis}\footnote{293} the Court decided a case presenting virtually the same facts as \textit{Pennsylvania Coal}. Yet by a 5-4 vote it reached the opposite result, holding that restrictions on the mining of coal to prevent surface subsidence were not a regulatory taking.\footnote{294} The Court distinguished \textit{Pennsylvania Coal} by noting that Keystone owned other coal deposits that allowed it to engage in its business profitably, despite the restrictions.\footnote{296}

In \textit{First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal. (First Lutheran)} the Court reversed a California decision holding that the only remedy for a regulatory taking under state law was invalidation of the regulation.\footnote{296} In an opinion by Justice Rehnquist, the Court concluded that although the invalidating of the ordinance that had prevented a summer camp for handicapped children from rebuilding damaged structures in a floodplain made any taking effected by the ordinance a temporary one, the Constitution "requires that the government pay the landowner for the value of the use of the land during this period."\footnote{297} The Court thus held that the Constitution requires that compensation be paid even when regulations effect only a temporary taking. While an initial draft of Justice Rehnquist's opinion for the Court mandated compensation on the record in the case, he later changed the opinion to clarify that the Court was holding only that it was improper to dismiss the plaintiff's inverse compensation action.\footnote{298} This proved important because on remand the state courts had little trouble finding no taking of any kind because the regulation prevented harm to public health and safety.\footnote{299}

The most significant breakthrough for the property rights movement came in 1992, when the Supreme Court decided \textit{Lucas v. South Carolina Coastal Council}.\footnote{300} In \textit{Lucas} the Court held a regulation denying a property owner all economically viable use of land constitutes a \textit{per se} regulatory taking for which just compensation must be paid.\footnote{301} Writing for the Court, Justice Scalia stated that the only exception to this \textit{per se} rule would arise if the proscribed use interests created a common law nuisance.\footnote{302} However,

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\begin{itemize}
\item \textit{Id.} at 127–29.
\item 480 U.S. 470 (1987).
\item \textit{Id.} at 485.
\item \textit{Id.}
\item 482 U.S. 304, 322 (1987).
\item \textit{Id.} at 319.
\item Percival, \textit{supra} note 165, at 10,619.
\item First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal. (\textit{First Lutheran}), 210 Cal. App. 3d 1353, 1370–72 (1989).
\item 605 U.S. 1003 (1992).
\item \textit{Id.} at 1015–19.
\item \textit{Id.} at 1029–32.
\end{itemize}
Justice Scalia expressed skepticism toward legislative declarations that a regulated activity was a source of harm.\textsuperscript{303} Lucas has been highly controversial for several reasons. The requirement that there be something akin to a "total wipeout" of economic value means that it applies only in a limited range of circumstances. The decision's \textit{per se} takings approach also seems to apply only to real estate and not to personal property. The Lucas majority stated that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless."\textsuperscript{304} While the Court recognized that legitimate exercises of a government entity's regulatory authority to prevent common law nuisances could be insulated from takings liability, the decision is vague concerning regulations that respond to newly discovered environmental risks. While the Court acknowledged that "changed circumstances or new knowledge may make what was previously permissible no longer so," it rejected out of hand South Carolina's efforts to justify its restrictions on coastal development on precisely those grounds.\textsuperscript{305}

In a concurring opinion, Justice Kennedy stated:

The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The state should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restriction. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.\textsuperscript{306}

Cases decided after Lucas suggested the decision would apply only to property acquired prior to the enactment of a new regulatory regime.\textsuperscript{307} This, coupled with the "total wipeout" requirement, suggested that Lucas was not a significant threat to legitimate environmental regulation. However, in 2001 the Court issued another takings decision that has created even more confusion.

In \textit{Palazzolo v. Rhode Island},\textsuperscript{308} the Court, by a 5-4 vote held that a property owner who acquired land after it had been subjected to regulation was not automatically foreclosed from bringing a takings claim challenging

\textsuperscript{303} Id. at 1031.
\textsuperscript{304} Id. at 1027–28.
\textsuperscript{305} Id. at 1031.
\textsuperscript{306} Id. at 1035 (citations omitted).
\textsuperscript{307} See PERCIVAL ET AL., supra note 122, at 805–08.
\textsuperscript{308} 533 U.S. 606 (2001).
the preexisting regulations. The Court also indicated that even regulations that did not cause a total wipeout could give rise to valid takings claims after consideration of the relevant factors outlined in Penn Central. This decision could open the floodgates to new takings claims. However, a concurring opinion by Justice O'Connor, whose vote was crucial to the 5-4 majority, suggests that the existence of a preexisting regulatory scheme at the time property is purchased will be a significant factor in evaluating the reasonableness of investment-backed expectations. Justice O'Connor's view stands in sharp contrast to that of Justice Scalia, who maintained in a separate concurrence that it would be better to provide a windfall to an astute developer than to provide an unjust profit to the government as a thief.

2. Equal Protection and the Environmental Justice Movement

By documenting the disproportionate exposure of minorities and the poor to environmental risk, the environmental justice movement has helped broaden the focus of United States environmental policy to encompass considerations of distributive fairness. Despite having considerable popular appeal, the environmental justice movement has been largely unsuccessful in its efforts to develop effective legal remedies to combat disproportionate exposure to risk among poor and minority communities. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits any state from denying to "any person within its jurisdiction the equal protection of the laws." This prohibition, which also applies to the federal government, has served as an important

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309 Id. at 610–11, 627.
310 Id. at 616.
311 Id. at 632–33 (O'Connor, J., concurring).

If investment-backed expectations are given exclusive significance in the Penn Central analysis and existing regulation dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.

Id. at 618.

312 According to a recent memo written by EPA Administrator Christine Whitman to top EPA officials, the United States Environmental Protection Agency now defines "environmental justice" as the "fair treatment of people regardless of all races, cultures, and incomes with respect to the development, implementation and enforcement of environmental laws and policies and their meaningful involvement in the decision making process of the government." Press Release, United States EPA, Administrator Whitman Reaffirms Commitment to Environmental Justice (Aug. 21, 2001), available at http://www.epa.gov/swerosps/ej/index.html. By "fair treatment" the agency means "that no group of people, including racial, ethnic, or social economic group should bear a disproportionate share of the negative environmental consequences resulting from industrial[,] municipal, and commercial operations or the execution of federal, state, local and tribal programs and policies." Id.

313 U.S. CONST. amend. XIV, § 2.
314 Bolling v. Sharpe, 347 U.S. 497 (1954) (While there is no provision in the Constitution}
constitutional restriction on government policies that discriminate on the basis of race or national origin, or that impinge upon individuals' exercise of fundamental rights. Government actions that discriminate on the basis of "suspect classifications," such as race or national origin, are subject to strict scrutiny under the Equal Protection Clause, while other actions must meet only a rational basis test.

Efforts to challenge siting decisions that concentrate locally undesirable land uses in minority neighborhoods on equal protection grounds have not been successful. Even though cases challenging siting decisions on environmental justice grounds involve allegations of racial discrimination, courts have required plaintiffs to prove that such decisions were undertaken with discriminatory intent before finding that they violate the Constitution's guarantee of equal protection of the laws. This intent requirement is a product of the Supreme Court's decision in *Washington v. Davis*,\(^{315}\) which rejected an equal protection challenge to the District of Columbia's police force applicant exam that African Americans had failed in disproportionate numbers. The Court held that a showing of disparate impact was insufficient to establish a deprivation of equal protection in the absence of proof of discriminatory intent. While the Court stated that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than another," a showing of disparate impact alone was insufficient to prove a denial of equal protection.\(^{316}\)

Efforts by environmental justice groups to prove discriminatory intent by inference from disparate impact have been largely unsuccessful. Despite the old common law maxim that intent can be inferred from a defendant's knowledge of the natural and probable consequences of an act, a showing of mere awareness that a siting decision would disproportionately disadvantage minorities is insufficient by itself to prove the intent requisite to establish a denial of equal protection.\(^{317}\) In *Bean v. Southwestern Waste Management Corporation*,\(^{318}\) a federal district court rejected an equal

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316 *Id.* at 242.
317 The Supreme Court has interpreted the Equal Protection Clause to protect not only groups, but also individuals. In *Village of Willowbrook v. Olech*, the Court held that an individual who claimed arbitrary and discriminatory treatment by the government could bring an equal protection challenge even if the discrimination alleged was against a "class of one." 528 U.S. 562 (2000). The plaintiff argued that a municipal government had discriminated against her by demanding a 33-foot easement as a condition of her connecting to the city water supply, when only a 15-foot easement was sought from all other homeowners. *Id.* at 563. While this decision may open the door to equal protection challenges by alleged victims of arbitrary treatment by government, at least one justice deemed it significant that the plaintiff alleged that the condition was imposed deliberately to punish her for filing a previous lawsuit against the city. *Id.* at 565–66. Thus, the decision may be consistent with the discriminatory intent requirement.
protection challenge to a decision to site a solid waste dump in a minority community. The court held that statistical evidence of the disparate impact was insufficient to establish intentional discrimination despite the fact that the community initially was told a shopping mall or steel mill was being built there. In *R.I.S.E., Inc. v. Kay*, a federal district court rejected an equal protection challenge to a county's decision to site a landfill in a predominately black neighborhood. The court stated that "the Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups."

3. The Due Process Clause and Regulatory Fairness

The Fifth Amendment to the U.S. Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law," a prohibition also applied to the states by the Due Process Clause contained in Section 1 of the Fourteenth Amendment. This due process guarantee has served as an important vehicle for protecting citizens against arbitrary government action. However, it does not bar the government from readjusting the burdens and benefits of regulation, even in instances when regulatory changes are given retroactive effect. In *Usery v. Turner Elkhorn Mining Company*, the Supreme Court upheld provisions of the Coal Mine Health and Safety Act requiring mine operators to pay health benefits for employees with black lung disease even if they had left the company prior to the Act's passage. The Court stated that although the liability imposed may not have been anticipated, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." The Court explained that due process is satisfied because the "imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor . . . ."

More recently, the Court has required that Congress make its intent clear before federal statutes will be interpreted to have retroactive effect. In *Landgraf v. USI Film Products*, the Court refused to apply an amendment to Title VII of the Civil Rights Act retroactively because Congress did not clearly express its intent to do so. The Court stated that absent a violation of a specific provision of the Constitution:

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319 Id. at 677.
321 Id. at 1150.
322 U.S. CONST. amend. V.
325 Id. at 16.
326 Id. at 18.
327 511 U.S. 244 (1994).
The potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.329

Several due process challenges have been made to the retroactive application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),330 also known as the Superfund legislation. The courts uniformly have rejected these challenges, even though CERCLA imposes strict, joint and several liability for the costs of cleaning up releases of hazardous substances dumped by companies long before the legislation was enacted. Rejecting a due process challenge to CERCLA’s retroactive application, the Eighth Circuit in United States v. Northeastern Pharmaceutical & Chemical Co., Inc.331 noted that the key to CERCLA’s success is its ability to reach past conduct.332

The only recent Supreme Court decision to invalidate retroactive application of a law on constitutional grounds is Eastern Enterprises v. Apfel,333 which found a retroactive application of the Coal Act unconstitutional because it required a coal company to pay medical benefits for former coal miners it had not employed and whose injuries were totally unrelated to the company’s previous activities. However, a majority of the Court could not agree on a consistent rationale for its decision. Of the five justices in the majority, four held that the legislation violated the Takings Clause of the Fifth Amendment, while Justice Kennedy found a denial of due process because the provision “bears no legitimate relation to the interest which the Government asserts in support of the statute.”334

E. Efforts to Revive the Non-Delegation Doctrine

In an important early case challenging a regulation by the Occupational Safety and Health Administration (OSHA), then-Justice Rehnquist tried to revive a constitutional doctrine that had lain dormant since the New Deal era.335 In two cases in 1935,336 the Supreme Court had invalidated New Deal

329 Id. at 267.
331 810 F.2d 726 (8th Cir. 1986).
332 Id. at 733.
334 Id. at 549.
regulatory initiatives on the ground that they impermissibly delegated legislative powers to executive agencies in violation of constitutional principles of separation of powers. These decisions rested on the absence of any statutory standards to control the exercise of discretion by executive agencies. Nearly fifty years later, in *Industrial Union Department, AFl-CIO v. American Petroleum Institute (Benzene)*, the Court was badly split over whether OSHA had adequate justification for imposing tighter regulations to control worker exposure to benzene, a toxic chemical. With the other Justices split evenly, Justice Rehnquist took the position that the statutory directive to “set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity” violates the doctrine against uncanalized delegations of legislative power.\footnote{Benzene, 448 U.S. at 672, 686 (Rehnquist, J., concurring).}

No other justice joined Rehnquist’s opinion, which was the decisive vote in the case striking down OSHA’s regulation.

Two decades later a federal appeals court sought to resuscitate the non-delegation doctrine in the context of a challenge to national air quality standards issued in 1997 by EPA under the Clean Air Act.\footnote{Am. Trucking Ass’ns, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), rev’d sub nom. Whitman v. Am. Trucking Ass’ns, Inc. 531 U.S. 457 (2001).} The standards were struck down by the U.S. Court of Appeals for the D.C. Circuit not because it found them unreasonable, but because it found that Congress had not been specific enough in telling EPA how to set them. The lower court’s surprising rationale—that the Clean Air Act’s directive to provide an “adequate margin of safety” could unconstitutionally delegate legislative power to the EPA—threatened to invalidate many other federal regulatory schemes.\footnote{Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 309 (1999).}

When EPA appealed the decision to the Supreme Court, opponents of the standards recognized they were on shaky grounds. Thus, they argued that the Court could avoid deciding the non-delegation issue by reinterpreting the Clean Air Act to require EPA to set standards on the basis of cost-benefit analysis.\footnote{Petitioner’s Brief at 25, Am. Trucking Ass’ns, Inc. v. Browner, 530 U.S. 1202 (2000), cert. granted sub nom. Whitman v. Am. Trucking Ass’ns, Inc., 531 U.S. 457 (2001) (No. 99-1426).} In their view cost-benefit analysis could provide the “intelligible principle” the D.C. Circuit had found lacking to constrain EPA’s discretion and avoid non-delegation problems.\footnote{Id.}

A major problem with this argument was that it was contrary to long-accepted interpretations of the law. For decades the D.C. Circuit had interpreted the Clean Air Act not to permit EPA to consider costs when it set air quality standards to protect public health.\footnote{See, e.g., Lead Indus. Ass’n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980).} That feature of the Act seemed so clear that even the lower court judges who struck down the standards had quickly dismissed the claim that EPA should consider costs when setting air quality standards.
Undaunted by this precedent, industry groups assembled a legal "Who's Who" to write briefs challenging the Clean Air Act. The General Electric Company hired Harvard constitutional law professor Laurence Tribe, who wrote an impassioned plea for the Court to strike down the Act on non-delegation grounds. Dozens of the nation's most eminent economists filed an unusual amicus brief urging the Court to find a way to rewrite the law to require cost-benefit analysis.

However, the Court unanimously rejected the legal assault on the Clean Air Act. The Court decided the Act was constitutional and that it did not permit EPA to consider costs in setting quality standards. In his majority opinion for the unanimous Court, Justice Scalia found the "scope of discretion" afforded EPA by the Clean Air Act "well within the outer limits of our non-delegation precedents." On the question of whether EPA could weigh costs, Justice Scalia noted that "[w]ere it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting standards."  

IV. HARMONIZING ENVIRONMENTAL AND CONSTITUTIONAL VALUES

A. Patterns in Constitutional Interpretation

While constitutional concerns were not a significant barrier to the rapid growth of federal regulatory programs to protect the environment in the 1970s and 1980s, they have appeared more frequently in environmental litigation during the last decade. This is the product of a remarkable series of decisions by a narrow conservative majority of Justices interpreting the Constitution in an effort to limit federal power, broaden state sovereignty, and bolster private property rights. The same 5-4 vote decided virtually every case advancing these goals, with vigorous objections from the four dissenters. Nearly all of these decisions occurred after Justice Clarence Thomas replaced Justice Thurgood Marshall in 1992.  


$^{345}$ Id. at 474.

$^{346}$ Id. at 465.

$^{347}$ Two studies of the voting patterns of the justices in environmental cases found that except for Justice William O. Douglas, well known as a champion of environmental causes, Justice Marshall was the justice most likely to support environmental interests in cases before the Court after 1969. Percival, Environmental Law in the Supreme Court: Highlights from the Marshall Papers, supra note 165, at 10626; Richard J. Lazarus, Thirty Years of Environmental
While a narrow conservative majority of the Court, with an activist agenda, has made substantial changes in constitutional doctrine, the practical effects of these changes on environmental law have been limited to date. They have chipped away some of the outer edges of federal power, and made it easier for owners of private property to challenge regulation and more difficult for private parties to enforce federally created rights against states. Although not yet causing fundamental changes in environmental regulation, they could well serve as a vehicle for doing so in the future.

The members of the current Court have served together for longer than any group of justices since 1823, when John Marshall was Chief Justice. Thus, it is not surprising that some clear patterns in their decision-making are discernable. For example, the conservative majority often raises the specter of unresolved constitutional questions as justification for narrowly interpreting regulatory statutes. While this is consistent with the principle that courts should decide cases on statutory grounds before reaching constitutional questions, the current conservative majority on the Court appears to relish using vague constitutional concerns as a justification for narrowing the reach of federal regulation. For example in *SWANCC*, the Court cited “significant constitutional and federalism questions” and “the States' traditional and primary power over land and water use” as a basis for its refusal to find that the Clean Water Act extended to isolated wetlands.\footnote{SWANCC, 531 U.S. 159, 174 (2001).} A year earlier the Court restricted the reach of the False Claims Act\footnote{False Claims Act, 31 U.S.C. §§ 3729–3733 (2000).} to avoid deciding whether Congress could waive a state’s Eleventh Amendment immunity by holding that Congress had not intended the Act to cover states.\footnote{Vt. Dep’t of Natural Res. v. Stevens, 529 U.S. 765, 780 (2000).} While this pattern is not entirely new,\footnote{See, e.g., Benzene, 448 U.S. 607, 646, 685–87 (1980).} the current Court’s receptiveness to constitutional challenges to regulation has encouraged litigants to raise novel constitutional concerns in efforts to persuade the Justices to rewrite regulatory statutes. This was well illustrated by the *Whitman v. American Trucking Associations, Inc.*, where litigants cited non-delegation concerns in an effort to persuade the Court to rewrite the Clean Air Act to require the use of cost-benefit analysis.\footnote{Whitman v. Am. Trucking Ass’ns, Inc., 531 U.S. 457, 462–64 (2001).}

Another discernible pattern is the continued influence of common law principles on the Court’s approach to regulatory statutes. In many areas of public law the Court continues to assess the impact of government action on litigants through a private law model derived from one-shot, private transactions between strangers. A more appropriate approach would examine the full range of interactions between the government and the public.\footnote{This point is developed in considerable detail in Daryl J. Levinson, Framing Transactions in Constitutional Law, 111 YALE L.J. 1311 (2002) (noting that in takings cases the Court usually looks only at the impact of a particular regulation on property values, rather than the larger set}
longer content with a showing of a general nexus between the harm sought to be prevented and the activity for which the exaction is sought. After Dolan v. City of Tigard, the Court now also insists on a detailed demonstration that the magnitude of the environmental impact is proportional to the magnitude of the exaction. Prior to Laidlaw, the Court’s standing decisions appeared to insist on a showing of individualized proof of causal injury, before citizens could enforce precautionary regulations even though the difficulty of making such a showing was one of the primary reasons for shifting away from the common law to regulatory programs to protect the environment.

Another pattern is the Court’s remarkable willingness to second-guess, or even to disregard entirely, legislative judgments concerning the effects of regulated activities. Called “dissing Congress” by one set of commentators, this phenomenon is easily discernible in Morrison where the Court disregarded extensive evidence of the impact of violence against women on interstate commerce to hold that Congress exceeded the reach of its powers under the Commerce Clause. The pattern also is displayed in Lucas, where the Court dismissed legislative findings of harm caused by construction on a barrier island to reject a defense to a regulatory takings claim. This phenomenon is likewise apparent in the Court’s decisions disallowing congressional abrogation of state sovereign immunity under Article 5 of the Fourteenth Amendment. Laidlaw represents a welcome departure from this pattern in light of Justice Ginsburg’s statement that a congressional finding that civil penalties deter future violations of environmental laws “warrants judicial attention and respect.” The extent to which the Court will respect future legislative judgments concerning the relationship between regulated activities and harm sought to be prevented will be a critical issue in future challenges to environmental regulation.

B. Doctrinal Disharmonies

Each of the Court’s recent constitutional decisions has an evolutionary consistency, as the law has developed through case-by-case adjudication, building upon lines of cases developed over time. Yet when one steps back and views the larger landscape of constitutional law through the lens of environmental concerns, these individual doctrines do not morph into a
pleasing mosaic. Rather, they exhibit some sharp inconsistencies, some of the most prominent of which are explored below.

1. The Expansion of State Sovereign Immunity and Regulatory Takings Doctrines

One of the most striking inconsistencies in the Court’s recent jurisprudence is the contrast between its expansion of state sovereign immunity and its revival of regulatory takings doctrine. The Court’s Eleventh Amendment jurisprudence has ventured far from any originalist or textualist perspective. It now promotes an expansive vision of state sovereign immunity with the primary purpose, as the Court now claims, of vindicating the “dignity” of states. As noted above, this makes it more difficult to hold states accountable for violations of federal environmental laws, and it may jeopardize the laws’ protection of state-employed whistleblowers.\(^{362}\) Moreover, it is necessary for states to assert sovereign immunity to avoid liability under federal law only in circumstances where Congress has applied federal power properly to constrain state action, circumstances where the state interest is at its least compelling in light of the Supremacy Clause. By leaving federal rights without private damages remedies, the Court’s approach is particularly inelegant. It also stands in sharp contrast to the Court’s insistence, as part of its revival of takings jurisprudence, that states are constitutionally required to pay damages to private parties when regulations effect even a temporary taking of private property.\(^{363}\)

On the surface, one might think the Court’s insistence on state sovereign immunity barring private damages action for violation of federal rights would bar all takings claims against states, just as it bars other types of claims against states for violation of federal rights, such as the federal rights asserted in Seminole Tribe\(^{364}\) and Aiden.\(^{365}\) However, in Lucas, the state sovereign immunity issue was not even raised as a defense, although the defendant, the South Carolina Coastal Council, was a state agency whose regulatory action was undertaken to implement state law.\(^{366}\)

In Esposito v. South Carolina Coastal Council,\(^{367}\) the Beachfront Management Act at issue in Lucas was alleged to have effected a regulatory taking in another lawsuit brought by private landowners against the South Carolina Coastal Council.\(^{368}\) The plaintiffs alleged the Council’s regulations to prevent severe coastal erosion effected a regulatory taking by preventing them from rebuilding or adding to their beachfront property.\(^{369}\) The district court had held that the Eleventh Amendment bars an award of just

\(^{362}\) See supra Part III.A.

\(^{363}\) See First Lutheran, 482 U.S. 304 (1987) (holding that the only remedy for a regulatory taking under state law was invalidation of the regulation).


\(^{367}\) 939 F.2d 165 (4th Cir. 1991).

\(^{368}\) Id. at 166–68.

\(^{369}\) Id. at 166–67.
compensation against a state in federal court.\textsuperscript{370} Although the plaintiffs did not challenge this portion of the court’s decision when they appealed unsuccessfully to the U.S. Court of Appeals for the Fourth Circuit,\textsuperscript{371} Judge Hall, in dissent, stated in a footnote that he had “strong doubts that it was correct.”\textsuperscript{372} Noting that the Fifth Amendment’s Just Compensation Clause was one of the earliest guarantees of the Bill of Rights to be enforced against the states through the Fourteenth Amendment, Hall argued that

the Eleventh Amendment’s general bar of damages against states must yield. Otherwise, a recalcitrant state could nullify the Just Compensation Clause by simply refusing to furnish a procedure to assess and award compensation. The Clause could be converted from a fundamental constitutional right into an empty admonition.\textsuperscript{373}

Two other United States Courts of Appeal have expressed contrary conclusions. In \textit{Harbert International, Inc. v. James},\textsuperscript{374} the Eleventh Circuit affirmed a district court decision holding that a takings action brought by a private contractor against the governor of Alabama and other state officials was barred by state sovereign immunity in light of the Supreme Court’s recent Eleventh Amendment jurisprudence.\textsuperscript{375} Although the defendants named in the suit were state officials, the court held that the lawsuit was, in effect, a claim against the State of Alabama, and, therefore, the defense of sovereign immunity was available.\textsuperscript{376} In \textit{Broughton Lumber v. Columbia River},\textsuperscript{377} the Ninth Circuit held that a private plaintiff’s inverse condemnation action against two states in federal court was barred by state sovereign immunity.\textsuperscript{378}

Other courts have noted the tension between the Court’s regulatory takings jurisprudence and its revival of state sovereign immunity, without articulating a solution. In \textit{New Hampshire Insurance Guaranty Association v. Markem Corporation and EPA},\textsuperscript{379} the Massachusetts Supreme Court Justice Charles Fried noted that the doctrine of sovereign immunity “has always been a doctrine that seemed at least in tension with the rule of law and also with particular constitutional protections, such as the prohibition against takings for public use without the payment of compensation.”\textsuperscript{380} In \textit{Arnett v. Myers},\textsuperscript{381} the U.S. Court of Appeals for the Sixth Circuit held that a takings

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\textsuperscript{371} Esposito v. S.C. Coastal Council, 939 F.2d 165 (4th Cir. 1991).

\textsuperscript{372} \textit{Id.} at 173 n.3 (Hall, J., dissenting).

\textsuperscript{373} \textit{Id.}

\textsuperscript{374} 157 F.3d 1271 (11th Cir. 1998).

\textsuperscript{375} \textit{Id.} at 1277.

\textsuperscript{376} \textit{Id.} However, the court noted that Alabama law provides an alternate procedure for contractors to recoup funds owed to them by the state. \textit{Id.} at 1279.

\textsuperscript{377} 975 F.2d 616 (9th Cir. 1992).

\textsuperscript{378} \textit{Id.} at 618–19.

\textsuperscript{379} 670 N.E. 2d 809 (Mass. 1997).

\textsuperscript{380} \textit{Id.} at 813.

\textsuperscript{381} 281 F.3d 552 (6th Cir. 2002).
claim was not barred by sovereign immunity, but only because the plaintiff requested prospective, injunctive relief against a state official, thus qualifying for the exception carved out in *Ex parte Young*:382 However, the *Arnett* court cited with approval *Idaho v. Coeur d'Alene Tribe of Idaho*,383 which held the *Ex parte Young* exception inapplicable in a quiet title action because it implicated state sovereignty protected by the Eleventh Amendment.384

Several federal district courts have noted the tension between state sovereign immunity and regulatory takings claims premised on state regulation. In *Eberwine v. Proctor*,385 a federal district court dismissed a takings claim on other grounds, but it noted the question "whether the Eleventh Amendment even applies to Fifth Amendment claims of taking without just compensation."386 The court suggested it was possible that the Eleventh Amendment would not bar takings claims, but it did not decide the issue.387 In other takings cases, district courts have dismissed claims for monetary damages against states, based on Eleventh Amendment immunity, while allowing claims for prospective injunctive relief against state officials to be pursued.388

Some state courts have rejected the notion that state sovereign immunity bars takings claims. In July 2002 the South Dakota Supreme Court rejected the sovereign immunity defense in a takings claim against the state.389 The court stated that "[t]he *Aidin* trilogy does not suggest that Fifth Amendment takings claims that originate from the Constitution itself are barred by the Eleventh Amendment. On the contrary, the Eleventh Amendment will not immunize states from compensation specifically required by the Fifth Amendment."390 In so holding, the court cited *First Lutheran*391 for the proposition that the Just Compensation Clause is a self-executing constitutional provision.392 The court found that because it is self-executing, the remedy does not depend on statutory facilitation and is not barred by the Eleventh Amendment.393 In *First Lutheran*, although sovereign immunity was not specifically raised as a defense, the Solicitor General filed an amicus brief that made a sovereign immunity argument. While noting this argument in a footnote, the Court declared that "a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing...
character of the constitutional provision with respect to compensation..."\textsuperscript{304}

The Oregon Court of Appeals also rejected the notion that sovereign immunity bars takings claims from being asserted against a state in state court. In a takings case based on logging restrictions, the court noted \textit{Alden's} holding that states enjoy sovereign immunity in their own courts from suits brought by private actors based on federal law.\textsuperscript{305} However, the court also concluded that "because of the 'self-executing' nature of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, a state may be sued in state court for takings in violation of the federal constitution."\textsuperscript{306}

The U.S. Supreme Court may well hold that the Fourteenth Amendment's application of the Takings Clause to the states trumps state sovereign immunity for damages in takings cases brought by private parties. However, if the justification for state sovereign immunity is to protect the dignity of the states, and if this is such an important goal that it bars damages actions to enforce other federally created rights, why must state dignity yield and a federal damages remedy be required in cases where private parties challenge state exercise of regulatory power by bringing a takings claim? The tension between the Court's Eleventh Amendment jurisprudence and its revival of regulatory takings doctrine is undeniable, regardless of how courts ultimately seek to resolve it.

2. \textit{Limits on Federal Commerce Power, Preemption, and the Dormant Commerce Clause}

Curiously, the Rehnquist Court's revival of the Tenth and Eleventh Amendments, and its decisions limiting federal commerce powers, unfold against a backdrop of other decisions in which the Court has been decidedly unsympathetic toward the interests of state governments. While the Court seeks to vindicate the dignity and sovereignty of states, it readily found federal preemption of state law.\textsuperscript{307} In the first nine years after Justice Thomas joined the Court in 1992, the Court decided thirty-five preemption cases and found full or partial preemption in twenty-two of them.\textsuperscript{308} The Court also has used the dormant commerce clause aggressively to invalidate state efforts to regulate waste disposal. This is particularly curious because there is neither textual support nor clear historical understanding that the Constitution bars state regulation disadvantaging out-of-state interests.\textsuperscript{309} To

\textsuperscript{304} \textit{First Lutheran}, 482 U.S. at 315 (quoting United States v. Clark, 445 U.S. 253, 257 (1980)).


\textsuperscript{306} \textit{Id.} at 569.


\textsuperscript{309} See Martin H. Redish & Shane Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987 Duke L.J. 589 (arguing that there is no textual support for the dormant commerce clause).
be sure, Chief Justice Rehnquist has been a persistent dissenter in the dormant commerce cases, consistent with his respect for state sovereignty. But the Court's current dormant commerce clause jurisprudence is undeniably in tension with the Court's efforts to vindicate the dignity and sovereignty of states. A Court that once extolled the importance of upholding states' sovereign interests in protecting their citizens against unwanted exposure to risks originating in other states now routinely invalidates their regulatory initiatives that seek to do so.

3. Regulatory Fairness: Takings versus Environmental Justice

The fairness concerns raised by the environmental justice and property rights movements share important similarities, but they have been given very different receptions by courts.\(^{400}\) Both argue government action unfairly burdens them—one with disproportionate exposure to pollution and the other with a disproportionate share of the economic burden of responding to environmental problems. Takings issues usually are the product of regulatory transitions (though in light of \textit{Palazzolo},\(^{401}\) they now may be raised even to challenge preexisting regulatory regimes), while environmental justice claims often focus on opposition to specific siting decisions.

Although property rights claims have been viewed as inimical to environmental protection, much of the common law of environmental protection was developed to remedy unauthorized invasions of property rights. As environmental regulation expands, it is important that legislators and courts be sensitive to fairness concerns, whether raised by the minorities awash in islands of risk or by property owners allegedly burdened unfairly by regulatory changes. Just as the Takings Clause has been considered the "visible, formal expressions of society's commitment to fairness as a constraint on its efficiency,"\(^{402}\) the Constitution's Equal Protection Clause promises that governmental action will not unfairly discriminate against individuals or groups.\(^{403}\)

Takings jurisprudence now invites courts to make essentially ad hoc inquiries into the fairness of government action. Yet while property owners may recover compensation based on the disparate impact of government action, environmental justice claimants generally fail because they must prove intentional discrimination. Yet in other areas of law the Court premises findings of unconstitutional discrimination on the disparate impact of regulation without requiring a showing of discriminatory intent. For example, in a long line of dormant commerce clause cases, the Court has invalidated even facially neutral state regulations if they disproportionately


\(^{403}\) U.S. CONST. amend. XIV, § 1.
burden out-of-state interests. 404 Environmental justice claims are even more
difficult to pursue than other equal protection claims where courts have
been more willing to infer discriminatory intent from awareness of
disproportionate impact. 405

C. Harmonizing Environmental and Constitutional Values

Judicial appreciation of environmental concerns has come a long way
from the days when courts viewed wetlands as nuisances to be eradicated.
Constitutional law has also evolved, though in fits and starts and through a
series of doctrines that now compose a confusing patchwork of limits on
federal and state authority. The mosaic formed by these doctrines can be
brought into greater harmony with the objectives of environmental laws if
constitutional interpretation evolves in the proper directions. The sections
that follow offer suggestions concerning how to achieve greater harmony
between environmental and constitutional values.

1. The Environment, Commerce, and Federal and State Regulatory Authority

The Supreme Court’s revival of limits on federal authority under the
Commerce Clause creates confusion concerning which activities may be
regulated by Congress and for what purposes. This is illustrated by the
sharply differing views on the impact of environmental regulation on
interstate commerce reflected in decisions challenging regulations to protect
endangered species. From the very beginnings of its Commerce Clause
jurisprudence in Gibbons v. Ogden, 406 the Court recognized that the
authority to regulate commerce embraced more than simply the authority to
regulate commercial transactions. 407 In Wickard v. Filburn 408 recognition that
intrastate activity could be regulated as part of a broader national scheme—
be it to regulate the price of wheat or to prevent drug trafficking by those
fond of home grown products—extended the reach of federal regulation to
cover virtually any activity Congress deems worth regulating. 409 In today’s
integrated national economy, efforts to draw lines between what is truly
national and what is truly local are doomed to generate confusing and
inconsistent distinctions.

flow control ordinance for waste disposal on the ground that the ordinance disproportionately
burdens interstate commerce).
405 Richard J. Lazarus, Pursuing “Environmental Justice”: The Distributional Effects of
Environmental Protection, 87 NW. U. L. REV. 787, 833 (1993) (comparing the favorable treatment
of Equal Protection cases based on the disparate provision of municipal services where courts
have been more willing to infer discriminatory intent and suggesting it may reflect a reluctance
of the court to award relief for cases with a large “harm shifting” burden).
406 22 U.S. (1 Wheat) 1, 190 (1824).
407 Id. at 190.
408 317 U.S. 111 (1942).
409 See id. at 124–25 (finding that the local character of an activity may be considered but is
not determinative in deciding whether the activity affects interstate commerce).
Consistent with the Court’s recognition in *Sierra Club v. Morton*\(^{410}\) that environmental and aesthetic values are equally deserving of judicial cognizance as economic values,\(^{411}\) regulations to protect the environment should not be parsed into economic and non-economic categories for purposes of Commerce Clause analysis. Environmental protection has been transformed from a state or local responsibility into a shared national priority. Activities that threaten endangered species, whether the product of commercial activity or private recreation should be equally capable of being subject to federal regulation if Congress so chooses.

As *Garcia* acknowledges, absent some defect in the political process that the Court’s prohibition on federal commandeering has already rectified, representation of states in Congress guarantees that the political process will prevent federal overreaching.\(^{412}\) Indeed in the few instances where federal regulation has gone too far, intruding on state and local prerogatives, such as EPA’s ill-fated efforts to mandate local transportation controls, Congress quickly enacted legislation prohibiting such action. Congress has generally sought to vindicate the principle that environmental laws apply equally to all entities whose activities may cause harm, and it has repeatedly waived sovereign immunity for violations by federal entities.\(^{413}\)

If respect for federalism truly animates the Court’s new federalism, the Court should substantially reformulate its dormant commerce clause analysis of restrictions on waste disposal. If waste is commerce, as *Philadelphia v. New Jersey* declares, even though it is undesirable and costly to dispose of, then efforts to prevent other sources of environmental risk should also be deemed within the commerce power even if they involve restricting the private noncommercial activities of individuals. The Court’s dormant commerce clause analysis should focus on whether states are trying to internalize externalities involved in waste disposal or simply seeking to export locally generated problems to other states.\(^{414}\)

A century ago the U.S. Supreme Court recognized the importance of environmental protection to vindicating state sovereignty. It eschewed this role only after Congress adopted truly comprehensive national regulatory programs to protect the environment. Having justified preemption of the federal common law of nuisance by reference to the comprehensiveness of national regulatory programs, the Court should not now seek to narrow the limits of federal jurisdiction on the basis of constitutional concerns.

\(^{410}\) 405 U.S. 727 (1972).

\(^{411}\) *Id.* at 734.

\(^{412}\) See *Garcia*, 469 U.S. 528, 528–29 (1985); see also supra Part III.A.1.c.

\(^{413}\) This history is discussed in detail in Robert V. Percival, *Overcoming Interpretive Formalism: Legislative Reversals of Judicial Constructions of Sovereign Immunity Waivers in the Environmental Statutes*, 43 WASH. U. J. URB. & CONTEMP. L. 221 (1993).

2. Returning the Eleventh Amendment to its Textual and Historical Roots

The Court’s current Eleventh Amendment jurisprudence has expanded state sovereign immunity far beyond any notion supported by the text of the Amendment or the historical context of the controversy that spawned it. The Court in Seminole Tribe sought not only to bar federal court judgments that must be paid out of a state’s treasury, but also to protect states from “the indignity of [being subjected] . . . to the coercive process of judicial tribunals at the instance of private parties.” 415 While the former stands in sharp contrast to the Court’s regulatory takings jurisprudence demanding states pay damages to private parties for even temporary takings, the latter has no obvious bounds. Concerns about protecting the dignity of states were used by the Court in FMC 416 to extend state sovereign immunity even beyond the context of the “Judicial power of the United States” referred to in the Eleventh Amendment to cover actions taken by federal administrative agencies in response to citizen complaints. 417

Writing for the majority, Justice Thomas argued in FMC that although the Court’s broad expansion of state sovereign immunity may be inefficient, it is necessary to protect liberty. 418 This seems a strange conclusion because sovereign immunity is being used to prevent private parties from vindicating federal rights that are concededly being violated. In light of the Supremacy Clause of the Constitution, in circumstances where either federal law or the Constitution limits state power, the sovereignty interests of the states should be of lesser importance. 419

The proper solution to the mess the Court has created by its broad expansion of state sovereign immunity is simply to return to the text and historical context of the Eleventh Amendment, by holding that it bars only suits brought under federal diversity jurisdiction for violations of rights founded on state law. 420 This comports with the facts of Chisholm v. Georgia, the text of the Eleventh Amendment, and the understanding of the framers who decided Chisholm. 421 An amendment with historical roots founded on the premise that states should be able to avoid payment of their lawful debts, should not have been broadly expanded to prevent private parties from vindicating state-violated federal rights. It is unfair for states to escape liability for response costs incurred when their actions contribute to releases of hazardous substances at Superfund sites. Seminole Tribe’s overruling of Union Gas should be reversed and the Eleventh Amendment

417 U.S. CONST. amend. XI.
419 Fallon, supra note 398, at 459.
421 Fallon, supra note 398, at 443–44.
returned to the properly limited scope it occupied prior to *Hans v. Louisiana*.\(^{422}\)

3. **Appreciating the Consequences of the Shift from Private to Public Law**

While the Supreme Court has recognized that our understanding of what causes environmental harm has changed over time,\(^{423}\) it has not fully adapted the principles of interpretation it employs to embrace the shift from a legal system dominated by a common law model of private transactions to a public law model of preventive regulation. As noted above, the Court has been anything but deferential to legislative judgments concerning the effects of regulated activities, because it has been influenced by the common law's insistence on individualized proof of causal injury.\(^{424}\) It has also demanded more detailed demonstrations of the relationship between regulated activities and environmental harm.\(^{425}\) The Court's state sovereign immunity jurisprudence expanded a constitutional provision designed to protect states from private enforcement in federal court of private rights (the collection of a debt under state law) to embrace private lawsuits to enforce public law rights. While the Court has left the federal government free to conduct its own enforcement of federal rights, it has not appreciated the importance to public law of allowing private enforcement, given the limited enforcement resources of the federal government. It also rejected Congress's efforts to use its enforcement powers under Article 5 of the Fourteenth Amendment to define violations of certain federally created rights.\(^{426}\)

There are signs that the Court is beginning to appreciate the consequences of the shift toward public law. *Laidlaw* represents an important step in this direction. Justice Ginsburg's opinion for the Court recognizes that public law litigation should not be derailed by insisting on more detailed demonstrations of individual harm than would be necessary to establish the violation for which enforcement action is being taken. Justice Kennedy also has shown signs of appreciating the shift away from the common law model. In his concurring opinion in *Lujan v. Defenders of Wildlife*, he wrote:

> As Government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.... In my view, Congress has the

\(^{422}\) 134 U.S. 1 (1890) (finding state sovereign immunity to suits brought by their own citizens and to suits arising under federal law).


power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . . 427

Judicial recognition of the importance of precautionary regulation played an important role in the development of environmental law in the past. 428 In the future the Supreme Court should show greater respect for legislative judgments concerning the relationship between regulated activities and harm, whether for purposes of determining the constitutional scope of federal jurisdiction or the validity of regulatory programs to protect the environment.

The Court’s abandonment of the federal common law of nuisance reflects its realization that expert administrative agencies are in a better position than the judiciary to make judgments concerning the appropriate level of preventive regulation. The Court should show similar deference to legislative judgments concerning the scope of regulatory programs by abandoning the practice it employed in SWANCC of using vague constitutional concerns as an excuse for narrowly construing regulatory statutes. Whitman v. American Trucking Associations, Inc. represents a welcome move in this direction because the Court unanimously rejected an effort to leverage farfetched constitutional concerns into a wholesale rewriting of the Clean Air Act. 429

Just as conceptions of the nature of environmental risk have changed over time, so too should conceptions of property rights. 430 As Justice Kennedy noted in another important concurring opinion:

The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society . . . . The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and the courts must consider all reasonable expectation, whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. 431

The Constitution need not stand as an obstacle to environmental progress. All changes in government policy create winners and losers, and

427 504 U.S. 555, 580 (Kennedy, J., concurring).
428 For example, in Ethyl Corp. v. EPA, the D.C. Circuit, by a 5-4 margin, reversed en banc a decision striking down EPA’s initial regulations limiting the lead content of gasoline where the evidence of harm was “speculative and inconclusive at best.” 541 F.2d 1, 7, 72 (D.C.Cir. 1976) (en banc). The decision, which stands as a powerful endorsement of precautionary regulation, set in motion the eventual phase-out of lead from gasoline, which is widely viewed as one of the most significant advances in the history of environmental regulation.
the case for singling out only the owners of real estate for compensation is shaky both from a constitutional and an economic perspective. While current regulatory takings doctrine may serve largely a legal fiction to deter the most extreme cases of regulatory overreaching, public policy should be sensitive to the fairness concerns raised by both property owners affected by regulatory transitions and low-income and minority communities disproportionately exposed to environmental risk.

V. CONCLUSION

The United States Constitution has been remarkably durable in large part because of its ability to adapt to vast changes in our society and economy unforeseen by the Constitution’s framers. In response to environmental concerns, our legal system has shifted away from exclusive reliance on the common law by erecting a vast body of public law in which administrative agencies implement comprehensive, national regulatory programs to protect the environment. The first generation of federal environmental statutes raised a host of legal questions because of their novelty, breadth, and complexity. But the Constitution did not stand as an obstacle to efforts to protect the environment. While the judiciary played a major role overseeing agency implementation of the new laws, it did not upset their fundamental architecture.

Today, an activist Court led by a narrow conservative majority is reshaping constitutional law to limit federal power, bolster state sovereignty, and increase protection for property rights. These decisions should not serve as vehicles for undermining environmental protection if the Constitution is properly understood. Federal power to regulate activities that may cause environmental damage should not be at its lowest ebb when exercised to protect resources like endangered species that are in the greatest peril. The judiciary, which once played a significant role in defending states’ sovereign rights to protect against environmental harm, should appreciate the causes and consequences of our legal system’s shift away from a private law model to the modern regulatory state. One hopeful sign is that each time the Supreme Court has confronted an opportunity to dismantle fundamental elements of the federal regulatory infrastructure that protects the environment, it has refused to do so. Our Constitution, which was created at a time when the United States was a fledgling, largely agrarian nation, should continue to adapt to the needs of a vast, modern nation with an integrated national economy and a strong public commitment to protecting against environmental harm.

432 Louis Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509 (1986) (suggesting that markets adjust to risk, even the risk of regulatory changes, more efficiently than government).