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Federal Environmental Law in the 'New Federalism' Era

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As we wrote last year, the U.S. Supreme Court has shown considerable interest during the past decade in reconsidering many constitutional doctrines regarding federalism and congressional power.[1] In a series of important decisions, always decided with the same five justices in the majority,[2] the Court has begun to redefine the federal-state relationship and the scope of federal authority.[3] The past term generally continued that trend, with one important commerce power decision,[4] one significant Eleventh Amendment/Fourteenth Amendment § 5 decision,[5] and a number of decisions that involve or affect federalism and the scope of federal power, although the Court sometimes relied on statutory interpretation to avoid serious constitutional issues.[6] Part I of this Article describes the most recent decisions.

This continuing redefinition of the scope of federal power in relation to that of the states is potentially significant for the implementation and enforcement of federal environmental laws, the main focus of this Article. The effectiveness of federal environmental regulation depends not only, however, on the degree to which the federal government is authorized to control activities with potential adverse environmental effects, but also on the manner in which that authority is allocated among the three branches of the federal government. The Court did not immerse itself in the last two years in this second aspect of the two main branches of structural constitutional inquiry to the same degree that it tackled high-profile federalism issues. A couple of decisions handed down during the Court's last term concerning standing to sue and a case the Court has agreed to hear during the October Term 2000 may yet bring these separation-of-powers questions to the fore, however. To round out the analysis of the status of federal power to affect matters environmental, therefore, this Article seeks as a secondary matter to consider briefly the potential impact of the Court's separation-of-powers jurisprudence on federal environmental law.

Part I of the Article briefly summarizes several potentially important cases to be decided during the October Term 2000 that involve serious questions of constitutional power. Two of the cases raise federalism issues. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANNC)*,[7] the Court will consider whether the federal government has the constitutional authority under the U.S. Commerce Clause to regulate isolated intrastate wetlands. The second case is not itself an environmental case, although its resolution may affect the manner in which the federal environmental laws may be enforced. In that case, the Court will once again examine the scope of Congress' power under § 5 of the Fourteenth Amendment, this time in the

context of determining whether Congress validly abrogated the states' Eleventh Amendment immunity under the Americans With Disabilities Act.[8] The third pending case represents perhaps the most important separation-of-powers case involving federal administrative law that the Court has agreed to hear in decades. In *U.S. Environmental Protection Agency v. Browner*,[9] a case involving U.S. Environmental Protection Agency (EPA) regulations implementing the Clean Air Act (CAA), the Court will consider whether EPA acted pursuant to an unconstitutional delegation of legislative authority.

Part II of this Article analyzes the Court's recent federalism decisions and congressional power decisions. Part II begins by addressing the implications of the Court's recent commerce power decisions for federal environmental laws, as well as reviewing recent lower court decisions in which regulated entities have challenged the validity of federal environmental regulation as beyond the scope of the commerce power. It next considers briefly the manner in which **[30 ELR 11123]** the lower courts have reacted to the trilogy of Eleventh Amendment cases decided by the Court during the October Term 1999, which we wrote about last year.[10] Because the Court avoided addressing an unresolved Eleventh Amendment issue this year in a case in which the Court itself raised an important standing question, we take the opportunity in this part of the Article to consider the opinion and another recent standing decision that affects the degree to which the federal courts have the authority to assist in the implementation of federal environmental legislation.

Part II then considers some new developments in the Court's Fourteenth Amendment jurisprudence that may have some bearing on the federal environmental laws. Part II next addresses a potential "disconnect" in the Court's federalism jurisprudence: at the same time the Court has reinvigorated the Tenth and Eleventh Amendments, and has interpreted Congress' commerce power more restrictively than it previously had, the Court has pursued a jurisprudence of federal preemption that has permitted extensive preemption of state laws and regulations, including in the environmental context.[11]

The federal-state relationship in the implementation of environmental legislation is a multifaceted one. Not all of its components have received as much attention as the Court's commerce power or Tenth, Eleventh, and Fourteenth Amendment decisions. Part II concludes with a discussion of some lower court cases that do not involve constitutional questions but that nevertheless affect the federalism equation in environmental law in potentially significant ways. To date, these statutory interpretation cases have not generally been connected with the Court's federalism jurisprudence that is the principal focus of this Article. The cases we explore briefly here relate to the degree to which the states may enforce their own environmental laws against the federal government and the extent to which state enforcement of environmental regulation may preclude the federal government from pursuing its own enforcement initiatives.

I. Recent Federalism and Congressional Power Cases

During the October Term 1998, the Court focused its efforts in the federalism arena on exploring the parameters of the states' constitutionally protected immunity from suit. In *Alden v. Maine*,[12] the Court held that Congress lacks the power to subject unconsenting states to suits in state court for alleged violations of the federal Fair Labor Standards Act. In two related cases involving alleged violations by the state of Florida of the federal patent and trademark laws, the Court held that

Congress lacks the authority under § 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity from suit in federal court for alleged trademark and patent transgressions.[13] Although two of these cases involved the interplay of the Eleventh Amendment and § 5 of the Fourteenth Amendment, all three cases revolved around the scope of the constitutional immunity afforded to the states to avoid suits by private individuals.

The cases handed down by the Court during its October Term 1999—and the cases the Court has agreed to hear during its October Term 2000—lack such a legal focal point. Instead, these cases invoke a series of constitutional provisions that bear on the division of governmental powers between the federal and state governments. The affected provisions include the Commerce Clause,[14] the Tenth, Eleventh, and Fourteenth Amendments, and the Supremacy Clause.[15] For good measure, the Court has agreed to hear a case in which it may decide whether Congress' power to protect the environment pursuant to the Commerce Clause may in turn be delegated to a federal administrative agency.

A. The October Term 1999

1. The Commerce Power

a. United States v. Morrison

The most important commerce power decision of the past term was *United States v. Morrison*.[16] In a 5-4 decision, the Court held that 42 U.S.C. § 13981—a provision of the Violence Against Women Act (VAWA) that created a civil remedy for victims of gender-motivated violence—exceeded Congress' commerce power.[17]

Applying the Court's decision in *United States v. Lopez*,[18] the Chief Justice's opinion for the Court concluded that gender-motivated violence had an insufficient effect on interstate commerce to justify the statutory provision as an exercise of the commerce power. The Court emphasized that *Lopez* categorized Congress' commerce power as having three aspects—the authority to regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) those activities that cumulatively have a substantial effect on interstate commerce.[19] When a case falls into the third category (substantial effects), as this case did, the Court observed that *Lopez* directs the Court to look at several factors, such as (1) the nature of the activity at issue, (2) the presence or absence of a jurisdictional, interstate commerce element in the statute, and (3) any findings made by Congress regarding the effects on interstate commerce.[20]

Examining those factors in this case, the Court concluded that "the proper resolution of the present cases is clear."[21] First, the Court declared that gender-motivated violence is **[30 ELR 11124]** "not, in any sense of the phrase, economic activity."[22] Nor does the VAWA's civil remedy provision have a jurisdictional element limiting such actions to cases involving proof of interstate activity.[23] The Court acknowledged that Congress did make extensive findings regarding the effects of gender-motivated violence on interstate commerce, but the Court concluded that those findings were unpersuasive and not well-reasoned.[24] The Court opined that Congress' reasoning that the cumulative effect of gender-motivated crimes is a decrease in employment, travel, production, and so forth, all of which affects interstate commerce, was an invitation to permit Congress to regulate

virtually any crimes or activity, including traditional state prerogatives such as marriage, divorce, and childrearing.[25] According to the Court, such an expansion of congressional power would, in turn, obliterate any distinction between national and local authority.[26]

b. Reno v. Condon

The second case that raised commerce power issues was *Reno v. Condon*,[27] in which the state of South Carolina challenged the constitutionality of the federal Driver's Privacy Protection Act (DPPA) of 1994.[28] Among other things, that statute restricted the states' ability to disclose driver's license information without a driver's consent. The Court considered and rejected two challenges to the statute: (1) that it exceeded Congress' commerce power, and (2) that the law violated the Tenth Amendment.[29]

The Court quickly dispensed with South Carolina's commerce power challenge, concluding that driver's license information is "an article of commerce" and that, at least in this context, "its sale or release into the interstate stream of business is sufficient to support congressional regulation."[30] After reaching this conclusion, the Court then observed that "we need not address the Government's alternative argument that the States' individual, intrastate activities in gathering, maintaining, and distributing drivers' personal information has a sufficiently substantial impact on interstate commerce to create a constitutional base for federal legislation."[31]

c. Jones v. United States

Finally, in *Jones v. United States*,[32] the Court held that the federal arson statute[33] does not apply to arson of a private, owner-occupied residence. Relying on the statute's language, which makes it a federal crime to commit arson upon "any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," the Court held that the key word was "used."[34] That word, according to the Court, indicates that Congress did not intend the statute to invoke the full scope of Congress' authority under the Commerce Clause.[35] Rather, Congress intended to criminalize only those arsons of buildings used in interstate commerce.

Applying that interpretation of the statute to this case, the Court concluded that the private residence at issue was not "used" in interstate commerce. The Court rejected the government's claims that the statute applied because the mortgage on the home was held by an out-of-state entity, the home was insured by an out-of-state entity, and the home received natural gas from out-of-state sources.[36] Finally, the Court observed that the government's broader reading of the statute would raise serious constitutional questions, in light of *Lopez*, and that the doctrine of constitutional doubt therefore favored the Court's adoption of the narrower construction.[37]

Justice Stevens, joined by Justice Thomas, concurred but observed that the Court should be particularly reluctant to interpret federal criminal statutes broadly when the federal interest in the case is marginal.[38] Justice Thomas also concurred separately, with Justice Scalia, to emphasize that they were not expressing any opinion on the question whether the federal statute, even as narrowly construed by the majority, "is constitutional in its application to all buildings used for commercial activities."[39]

2. Tenth Amendment

The only true Tenth Amendment decision the past term was *Reno*.[40] In that case, as indicated above, South Carolina challenged the constitutionality of the federal DPPA.[41] That law generally prohibits states and others from disclosing driver's license information without the driver's consent, and imposes several penalties for noncompliance. South Carolina argued that the DPPA effectively "commandeered" state employees in violation of the Tenth Amendment, by requiring those employees to learn the federal law's provisions and spend considerable time implementing it.[42]

The Court agreed that the DPPA "will require time and effort on the part of state employees,"[43] but quickly rejected the argument that the federal law violated the Tenth Amendment principles set forth in *New York v. United States*[44] and *Printz v. United States*.[45] The Court found those two cases inapplicable, and instead relied upon its earlier decision in *South Carolina v. Baker*,[46] which upheld a federal statute that prohibited states from issuing unregistered bonds. The **[30 ELR 11125]** Court drew a distinction between federal statutes that seek to control the manner in which the states regulate private parties (the situations in *New York* and *Printz*) and federal laws that regulate the states in their own activities.[47] It is only the former that pose the kind of "commandeering" threat to state sovereignty that prompted invalidation of the laws in *New York* and *Printz*.

The Court then concluded that "the DPPA does not require the states in their sovereign capacity to regulate their own citizens. The DPPA regulates the states as the owners of databases."[48] Lastly, the Court addressed South Carolina's argument that Congress cannot regulate the states exclusively, but rather may regulate them only by means of "generally applicable" laws that apply to individuals as well as the states.[49] The Court found it unnecessary to resolve the issue because it concluded that the DPPA "is generally applicable. The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information . . . ."[50]

3. Eleventh Amendment

The Court decided two cases the past term that dealt at least tangentially with the Eleventh Amendment. In one case, the Court avoided directly deciding the Eleventh Amendment issue by interpreting a federal statute to exclude states from its coverage.[51] In the other, the Court's focus was on Congress' power under § 5 of the Fourteenth Amendment to abrogate the states' immunity from suit in federal court.[52]

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[53] the Court was asked to decide whether the word "person" includes the states, when used in the federal False Claims Act (FCA) provision that permits private parties to bring *qui tam* actions against "any person" who knowingly defrauds the government. The second question presented was whether the Eleventh Amendment barred such actions in federal court when the United States does not formally intervene in the case. Sua sponte, and shortly before the oral argument of the case, the Court ordered the parties to address a third question: whether *qui tam* plaintiffs have Article III standing to bring such suits on behalf of the United States.

The Court decided that *qui tam* plaintiffs do have Article III standing. Although the harm to the United States as a sovereign and the government's loss due to fraud do not give such plaintiffs

standing,[54] the Court concluded that *qui tam* cases are analogous to those in which the Court has found standing for the assignee of a legal claim.[55] Effectively, held the Court, the FCA results in a partial assignment (in the form of a bounty to successful *qui tam* plaintiffs) of the government's claim against the defrauder.[56] The Court found further support for that conclusion in the long tradition of *qui tam* actions in both England and the American Colonies.[57] The Court's holding on standing is potentially important for the enforcement of the federal environmental laws for reasons discussed below.[58]

The Court, however, avoided the Eleventh Amendment issue altogether. Focusing on the FCA's use of the word "person" to describe the category of defendants in *qui tam* actions, the Court started with its "long-standing interpretive presumption that 'person' does not include the sovereign."[59] The Court opined that the statute's legislative history did not support applying the provision at issue to the States, nor do other related statutes and statutory provisions.[60] With respect to the Eleventh Amendment, the Court added at the end of its opinion the following observation: "We of course express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is 'a serious doubt' on that score."[61]

The second pseudo-Eleventh Amendment case of the term was *Kimel v. Florida Board of Regents*,[62] discussed fully in the next section. In *Kimel*, the Court held that Congress lacked the constitutional authority—under § 5 of the Fourteenth Amendment—to abrogate the states' Eleventh Amendment immunity from claims of age discrimination under the federal Age Discrimination in Employment Act (ADEA) of 1967.[63]

4. Section 5 of the Fourteenth Amendment

a. Kimel v. Florida Board of Regents

In *Kimel*,[64] the Court addressed the scope of Congress' power under § 5 of the Fourteenth Amendment to create a federal cause of action and money damages remedy for age discrimination in employment matters. The Court first concluded that in enacting the ADEA, Congress intended to subject the states to suits by individuals in federal court for violations of the Act.[65] The Court further concluded, however, that Congress lacked the constitutional authority to subject the states to such suits.[66]

Emphasizing that recent decisions have made clear that Congress lacks the constitutional authority to abrogate the states' immunity pursuant to Congress' Article I powers, the Court considered whether Congress nevertheless could accomplish the same result under the authority vested in it by **[30 ELR 11126]** § 5 of the Fourteenth Amendment.[67] Articulating and applying the *City of Boerne v. Flores*[68] test—that Fourteenth Amendment, § 5 legisiation must be "congruent" and "proportional" to the constitutional violations it is addressing, the Court concluded that the ADEA failed that test.

The Court began by emphasizing that age classifications are not considered "suspect" for equal protection purposes and that the Court has only applied rational basis review to constitutional age discrimination claims, generally in rejecting such claims.[69] Thus, the Court found the ADEA's

provisions to "prohibit[] substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[70] Nonetheless, the Court recognized that § 5 legislation can be "prophylactic" in nature, i.e., designed to prevent and deter serious constitutional violations from occurring.[71] The Court was unpersuaded that the ADEA's provisions fell into that category, concluding instead that Congress had no real evidence before it when enacting the ADEA that the states were engaging in serious or systematic age discrimination against their employees.[72]

b. United States v. Morrison

In *Morrison*,[73] whose commerce power analysis is discussed above, the Court struck down the civil remedy provision of the federal VAWA.[74] The Court acknowledged that Congress had developed a voluminous record showing that "there is pervasive bias in various state justice systems against victims of gender-motivated violence,"[75] which Congress relied upon as justifying the civil remedy provision of the VAWA.

The Court observed, however, that Congress' power under § 5 of the Fourteenth Amendment is limited in several respects. "Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."[76] The Court found that the VAWA provision at issue—which created a civil remedy for the victims of gender-motivated violence against their private attackers—exceeded congressional authority in that respect: the provision "is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."[77] Moreover, with reference to the *City of Boerne* "congruence" and "proportionality" test, the Court concluded that the statute was too sweeping in its reach to be justified under § 5, because "it applies uniformly throughout the Nation,"[78] rather than to only those states where discrimination against the victims of gender-motivated violence has been demonstrated.

5. The Supremacy Clause

An area of "federalism" jurisprudence that has often been overlooked is federal preemption of state common law and state statutory law. In contrast to its Commerce Clause and Fourteenth Amendment decisions, the Court this past term decided every important preemption case (one involving state environmental regulations) in favor of the federal government, reading expansively the federal power to preempt state law. As we discuss later in this Article, and as other commentators have begun to discuss,[79] one might legitimately question whether the preemption cases are consistent with the Court's other federalism jurisprudence. For that reason, we describe the cases very briefly.

In response to the *Exxon Valdez* oil spill off the coast of Alaska in 1989, the state of Washington promulgated numerous regulations addressing the design, equipment, reporting, and operation requirements of oil tankers. In *United States v. Locke*,[80] the Court held that federal statutes[81] preempted many of those state regulations. The Court began by emphasizing the federal government's strong and long-standing interest in maritime matters.[82] According to the Court, the long-standing federal interest in maritime matters undermined any claim that the Court should employ a "presumption against preemption" in this case. Rather, "an 'assumption' of nonpre-

emption is not triggered when the State regulates in an area where there has been a history of significant federal presence."[83]

The Court then reviewed the various federal statutes at issue and concluded that federal law occupied the "field" with respect to regulations involving the design, construction, maintenance, manning, and other operational aspects of oil tankers.[84] Thus, the states have no authority to regulate such matters, even in the absence of federal regulation (field preemption).[85] The Court acknowledged that states have the authority to regulate with respect to the peculiarities of local **[30 ELR 11127]** waters, but only so long as state regulations do not conflict with any federal law (conflict preemption).[86]

Another important preemption case was *Geier v. American Honda Motor Co.*[87] By a 5-4 vote, the Court held that a federal safety standard which gave car manufacturers the option of installing airbags in 1987 model-year cars[88] preempts state common-law tort actions in which the plaintiff claims the manufacturer should have installed airbags. In reaching that conclusion, the majority addressed three questions.

First, the Court held that the state-law tort claim was not expressly preempted by federal law,[89] because the relevant statute—the National Traffic and Motor Vehicle Safety Act of 1966[90]—had an express savings clause which provided that compliance with federal standards "does not exempt any person from any liability under common law."[91] But second, and perhaps most importantly, the Court held that the law's savings clause did not foreclose the possibility of "implied" preemption where application of state tort law would actually "conflict" with federal standards.[92] Thus, in spite of the express savings provision, the Court concluded that the defendant did not have to meet any "special burden" to establish federal preemption.[93] Finally, the Court held that state-tort law conflicts with the federal standard, which was designed to give car manufacturers flexibility and incentives to develop and install a variety of passive restraint devices, not just airbags.[94]

Perhaps most interesting is the dissenting opinion in *Geier*, written by Justice Stevens but joined by Justices Souter, Thomas, and Ginsburg. The second paragraph of Justice Stevens' dissent begins as follows:

"This is a case about federalism," that is, about respect for "the constitutional role of the States as sovereign entities." It raises important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions.[95]

Importantly, the dissent argued that there is a presumption against preemption of state tort law by federal regulations, and that the party asserting that state law has been displaced bears a "special burden" in overcoming the presumption.[96]

Three other cases merit brief mention. In *Jones*,[97] decided the same day as *Geier*, Justice Stevens (joined by Justice Thomas) concurred in the result—that the federal statute at issue did not reach the arson of a private residence not used in interstate commerce—but wrote separately to emphasize federalism principles. Thus, Justice Stevens wrote that it "seems appropriate, however, to emphasize the kinship between our well-established presumption against federal pre-emption of

state law, and our reluctance to 'believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this.'"[98] Thus, he reiterated his "firm belief that we should interpret narrowly federal criminal laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain."[99]

In *Norfolk Southern Railway Co. v. Shanklin*,[100] the Court held that federal law preempts state tort law—that would otherwise apply to an accident between a car and a train at a railroad crossing—when federal money was used to install whatever warning devices were present at the crossing. This holding resulted from the Court's reading of a rather confusing pair of regulations[101] that the Federal Railroad Safety Act of 1970[102] specifically authorized the Secretary of Transportation to promulgate.

Finally, in *Crosby v. National Foreign Trade Council*,[103] the Court unanimously held that federal law preempts Massachusetts' "Burma" law. In June 1996, Massachusetts enacted a law restricting the authority of its agencies to purchase goods or services from companies doing business with Burma. Three months later, Congress enacted measures imposing mandatory and conditional sanctions on Burma. The issue in the case was whether the federal actions preempted the Massachusetts law.

In concluding that federal law preempted the Massachusetts law, the Court relied on "conflict" preemption.[104] The Court concluded that the Massachusetts law frustrated the purpose and effect of the federal measures in at least three ways: by interfering with the discretion Congress delegated to the president to control economic sanctions against Burma,[105] by potentially expanding the limited sanctions Congress authorized,[106] and by undermining the president's authority to speak for the United States among the world's nations to develop a Burma strategy.[107] Interestingly, in resolving the case, the Court left "for another day a consideration in this context of a presumption against preemption," finding that the Massachusetts Burma law actually conflicted with federal law.[108]

B. The October Term 2000

1. The Commerce Power

The Commerce Clause case the Court has agreed to hear this term deals with the issue of Congress' authority to regulate the development of isolated intrastate wetlands under the **[30 ELR 11128]** dredge and fill permit program of the Clean Water Act (CWA).[109] The Seventh Circuit held in a 1992 decision that EPA regulation of isolated wetlands (a 1-acre pond located 750 feet from a stream in the Chicago suburbs) was beyond the commerce power,[110] but the court later vacated that decision and ruled that the statute covers waters whose connection to interstate commerce is potential and minimal and that EPA reasonably designated the use of wetlands by migratory birds as a sufficient connection to interstate commerce to support regulation.[111] The Ninth Circuit subsequently ruled that, although regulation of isolated wetlands used as migratory bird habitat "tests the limits of Congress's commerce powers," such regulation is not unconstitutional.[112] The Fourth Circuit, however, in a 1997 decision, invalidated as beyond the scope of the statute the portion of the U.S. Army Corps of Engineers' regulation that included the migratory bird rule.[113] The court supported its narrow reading of the statute by casting doubt on the constitutional validity

of a broader interpretation.

The Court has granted certiorari in *SWANCC*,[114] a case in which a municipal corporation created by a group of 23 municipalities sought to convert about 180 acres of a 533-acre parcel (located in Cane and Cook counties and once used as a gravel mining operation) into a balefill for the disposal of nonhazardous solid waste.[115] Gravel pits at the site over time had become transformed into more than 200 permanent and seasonal ponds ranging in size from less than one-tenth of an acre to several acres, and from several inches to several feet in depth. The surrounding early successional stage forest was vegetated by about 170 different species of plants and was home to a variety of small animals. More than 100 species of birds were observed there, including endangered, water-dependent, and migratory species, such as great blue herons.[116] The Corps determined that 17.6 acres of the balefill area contained "navigable waters," as defined by the CWA, and therefore required the plaintiff to obtain a dredge and fill permit. The Corps' regulations defined jurisdictional waters to include wetlands whose "use, degradation or destruction could affect interstate or foreign commerce,"[117] and the preamble to the regulations explained that those wetlands include wetlands which "are or could be used by migratory birds which cross state lines."[118]

SWANCC, the owner of the proposed balefill site, claimed that the site was not subject to federal regulatory jurisdiction because the migratory birds found there have no relationship to interstate commerce in that they do not support any human commercial activity on the site itself.[119] When the district court ruled to the contrary,[120] SWANCC appealed. The Seventh Circuit affirmed.

The first issue, according to the court, was whether *Lopez* dictates the conclusion that Congress' powers under the Commerce Clause are not broad enough to permit regulation of waters based on the presence of migratory birds.[121] The court interpreted *Lopez* as confirming the principle that a single activity that itself has no discernible effect on interstate commerce may nevertheless be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce. The issue, therefore, was whether the destruction of the natural habitat of migratory birds in the aggregate "substantially affects" interstate commerce.[122] The court concluded that the aggregate effect is clear, citing evidence that Americans spend more than $ 1 billion a year hunting migratory birds, and that about 11% of the 3.1 million hunters cross state lines to do so. Another 17 million people observe birds in states other than their residence, most of them traveling for just that purpose. The court responded to SWANCC's contention that such a result "excludes nothing"[123] by noting that the Corps may not assert jurisdiction under the migratory bird rule unless it first makes a factual determination that a particular body of water provides a habitat for migratory birds, and that "habitat" means a place where a species naturally lives or grows, not just alights for a few minutes. The Corps made just such a showing here.

SWANCC also charged that sustaining the validity of the migratory bird rule is inconsistent with "the principles of federalism that motivated the Court in *Lopez*, because it erodes the 'distinction between what is truly national and what is truly local.'"[124] But the court rejected the notion that the protection of migratory bird habitat is a matter of purely local concern, citing the numerous international treaties that protect those birds as evidence to the contrary.[125] SWANCC claimed that allowing a federal agency such as the Corps to **[30 ELR 11129]** override local zoning and land use planning decisions conflicts with notions of state sovereignty. The court disagreed, reasoning that

because regulation of migratory birds falls within the scope of the commerce power, the Supremacy Clause supports the legitimacy of giving federal law precedence over local land use laws.[126]

SWANCC argued next that, even if Congress could constitutionally have exercised authority over the balefill site based on the actual or potential presence of migratory bird habitat, it did not intend to do so. Citing a line of cases that support interpreting the CWA as reaching as many waters as the Commerce Clause allows,[127] the court concluded that the interpretation of the statute adhered to by EPA and the Corps, i.e., that it encompassed activities covered by the migratory bird rule, was a reasonable one.[128] The court distinguished the Fourth Circuit's decision in *Wilson* on the ground that the court there held that Congress did not intend to regulate situations in which use or destruction of the wetlands "could" affect interstate commerce. In this case, the unchallenged facts showed that the filling of the acres in question *would* have an immediate effect on migratory birds that actually used the area as a habitat.[129]

SWANCC sought certiorari on both the constitutional and statutory issues addressed by the Seventh Circuit,[130] and the parties have briefed both sets of issues.[131] Accordingly, it is possible that the Court will conclude that the statute does not cover the proposed balefill site and therefore, like the *Wilson* court, avoid the necessity of confronting the constitutional question directly.

2. The Nondelegation Doctrine

The link between federalism and separation-of-powers issues may not be immediately apparent. To be sure, both sets of questions require definition of the allocation of governmental power under the structural provisions of the U.S. Constitution. The link may be even more direct, however. In a recent case challenging a regulation designed to protect endangered species as beyond the scope of the federal commerce power, a federal appellate court warned that "separation of powers principles mandate" that the courts leave decisions over the substantive merit of the scope and manner of environmental protection measures "to Congress and to agencies with congressionally sanctioned expertise and authority."[132]

The link between federalism and separation-of-powers issues in environmental law is highlighted by the presence on the Court's October Term 2000 docket of two environmental cases, one of which, *SWANCC*, involves delineation of the scope of the Commerce Clause as it applies to environmental legislation, the other of which presents perhaps the most fundamental separation-of-powers question involving the scope of administrative agency authority to face the Court in decades. Depending upon how the Court resolves that case, inquiries about the constitutional validity of the actions of EPA, the U.S. Department of the Interior, and other federal environmental agencies might proceed along a dual track in the future. First, the courts will inquire whether Congress is empowered by the Commerce Clause (or some other source of federal power, such as the treaty power or the Property Clause) to engage in a particular form of environmental regulation. Second, assuming the answer to that question is affirmative, the courts might have to investigate whether Congress has appropriately delegated that authority to an administrative agency like EPA.

The nondelegation doctrine is based on the constitutional provision vesting all legislative powers in Congress.[133] The doctrine makes it improper for Congress to delegate those powers to another

institution.[134] To avoid running afoul of that prohibition, Congress, when it delegates authority to an administrative agency, must provide the agency with an intelligible principle to guide the exercise of its discretion.[135] The Court relied on the nondelegation doctrine to strike down key aspects of the initial wave of New Deal legislation.[136] In the last 65 years, the Court has not relied on the doctrine to invalidate a single piece of federal legislation,[137] although it (and the lower courts) has invoked the doctrine to support narrow interpretations of statutes delegating authority to federal agencies.[138]

Given that historical backdrop, the result in the D.C. Circuit's 1999 decision in *American Trucking Ass'n, Inc. v. U.S. Environmental Protection Agency*,[139] where the court struck down EPA's 1997 revisions to the national ambient air quality standards (NAAQS) for ozone and particulate matter based on the nondelegation doctrine, was surprising.[140] The court agreed with the argument of the small business **[30 ELR 11130]** petitioners that EPA had "construed §§ 108 and 109 of the [CAA] so loosely as to render them unconstitutional delegations of legislative power."[141] The problem, according to Judge Stephen Williams' opinion for a 2-1 majority, was the Agency's failure to articulate an "intelligible principle" to channel its application of the factors the Agency was supposed to consider in determining the level at which NAAQS would be "requisite to protect the public health"[142] with an adequate margin of safety.[143] Although the factors EPA selected to determine the manner in which it would set the standards were permissible, "what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much."[144] EPA failed to provide any convincing explanation of why it chose not to set the standards at either a higher or lower level.

The court's decision is surprising in part because the CAA is among the most detailed of the federal environmental statutes and would not seem a likely candidate for invalidation on the ground of lack of specificity. Indeed, as Judge Tatel pointed out in his dissenting opinion, EPA's authority to enact or revise NAAQS had been the subject of numerous previous decisions, none of which had even hinted at a potential nondelegation problem.[145] Moreover, the relevant CAA provision was at least as specific as many the Court has upheld against nondelegation challenges in the past.[146] The D.C. Circuit in *American Trucking* did not strike down the provision of the CAA authorizing EPA to establish NAAQS, however. Instead, the court remanded to EPA to "give the agency an opportunity to extract a determinate standard on its own."[147] It is that very remedy that provides an additional peculiar aspect of the majority's decision to invalidate the challenged NAAQS on nondelegation grounds. As Judge Silberman noted in his dissent from the decision on rehearing, the purpose of the nondelegation doctrine is "to ensure that Congress makes the crucial policy choices that are carried into law."[148] The majority's decision and accompanying remedy forces EPA, not Congress, to supply a narrowing construction of the statute.

The Court granted certiorari and will hear the case during the October Term 2000. It may not reach the constitutional issue, however, because it granted not only EPA's petition challenging the D.C. Circuit's resolution of the nondelegation issue, but also industry's petition[149] challenging the D.C. Circuit's affirmation of previous cases that established the proposition that the CAA bars EPA from considering cost when it promulgates a NAAQS.[150] If the Court were to conclude that the statute requires EPA to consider cost, and that the 1997 NAAQS revisions are invalid due to the Agency's failure to do so, the Court presumably would be able to, and would choose to, avoid the constitutional question. Such a decision would itself have far-reaching implications for EPA's

administration of the CAA, and perhaps for the interpretation of other federal environmental legislation that, on its face, does not mandate cost consideration or cost-benefit analysis. Those implications would pale by comparison, however, to a decision upholding the D.C. Circuit's decision that the NAAQS violate the nondelegation doctrine. Such a result would place in issue the constitutional validity of countless federal regulatory actions undertaken pursuant to a plethora of environmental and nonenvironmental statutes alike. Indeed, it might usher in an era that could properly be labeled the "new" separation-of-powers jurisprudence.[151]

3. Section 5 of the Fourteenth Amendment

In *University of Alabama at Birmingham Board of Trustees v. Garrett*,[152] a likely reprise of the Court's decision last term in *Kimel v. Florida Board of Regents*,[153] the Court will consider whether Congress had the constitutional authority—pursuant to § 5 of the Fourteenth Amendment—to abrogate the states' Eleventh Amendment immunity when Congress enacted the Americans With Disabilities Act (ADA).[154] Like the ADEA,[155] which was at issue in *Kimel*, the ADA does not deal with a classification (disability) that receives a heightened level of scrutiny under the Court's Fourteenth Amendment equal protection jurisprudence.[156] Thus, only irrational disability classifications are likely to **[30 ELR 11131]** amount to constitutional violations, and the ADA—like the ADEA—will be difficult to justify as merely creating a remedial scheme for redressing constitutional violations. Instead, as with the ADEA, the United States likely will have to argue that the ADA is a prophylactic measure necessary to deter and preclude irrational discrimination by the states against the disabled. The critical questions then are likely to be whether the Court will accept that argument and whether, even if so, the Court will find the ADA's provisions to be both "proportional" and "congruent" to the disability discrimination problems Congress perceived.[157]

C. Summary

The federalism cases the Court decided during the October Term 1999 ranged broadly across the terrain of constitutional federalism. The most striking decision almost certainly was *Morrison*, in which the Court made it clear that the 1995 *Lopez* decision is something more than an isolated anomaly and that, contrary to pre-1995 appearances, questions involving the scope of the federal commerce power are far from settled, at least at the periphery of that power. The expected decision in the *SWANCC* case, discussed more fully below, may provide specific further insight into the degree to which these recently enunciated limits are likely to affect existing federal environmental legislation. The area in which the Court was most active last year was preemption, a sometimes neglected stepchild of the "new" federalism. As Part II of this Article indicates, the Court's recent preemption cases raise troubling questions about the consistency of the Court's recent federalism jurisprudence. The Court's opportunity to plow further Eleventh Amendment ground disappeared when it disposed of the *Vermont Agency* case on statutory grounds, but a disclaimer at the end of that opinion[158] makes it clear that the Court has still more questions involving the scope of state immunity from suit to resolve. Finally, the Court held in *Kimel* that § 5 of the Fourteenth Amendment does not vest Congress with the power to subject the states to suit for alleged violations of the ADEA. The Court will soon address a similar question under the ADA, and may reach the same decision as it reached in *Kimel* with respect to the ADEA.

What lessons do these diverse federalism cases provide for those seeking to ascertain how, if at all,

the "new" federalism will affect efforts to adopt, implement, and enforce federal environmental protection laws? Part II seeks to address that question.

II. The New Federalism and Federal Environmental Law

The Court has filled its plate during the past two terms with cases bearing upon the allocation of decisionmaking authority between the federal government and the states. The discussion in the previous section indicates that the Court continues to find federalism to be an area worthy of further exploration. In the federalism Article we wrote last year, we concluded that,although the Court's federalism decisions had the potential to make the implementation and enforcement of federal environmental laws "more complicated and difficult in some instances," they "do not ultimately appear to preclude Congress from regulating environmental matters in any significant measure."[159] In particular, we surmised that the Court's 1999 Eleventh Amendment trilogy was not likely to pose significant obstacles to the enforcement of federal environmental laws against state governments alleged to have violated those laws. The purpose of this part is to explore whether subsequent decisions, both by the Court and the lower federal courts, provide a basis for altering those conclusions. In short, we continue to inquire here whether the "new" federalism is likely to have significant implications for federal environmental law.

A. The Commerce Power—Lopez *Has Teeth*

1. *SWANCC*

In perhaps its most important federalism decision of the past term, the Court made clear that *Lopez* has teeth, at least for now. Thus, in *Morrison*,[160] the Court struck down a federal statute that was supported by an extensive factual record documenting the effects of gender-motivated violence on interstate commerce. *Morrison* makes clear that a federal law that does not deal with economic activity cannot be justified—at least on a commerce power basis—simply by the existence of congressional findings proclaiming effects on interstate commerce. That proposition is important, because it means that the Court's decision in *Lopez* cannot be explained away as merely an example of defective or insufficient legislative process.

To date, the Court has not explored whether the new teeth will have any bite in the environmental context. But *SWANCC*, discussed above,[161] provides the Court with an opportunity to clarify the significance of *Morrison* in the implementation and enforcement of federal environmental laws. To the extent that such laws do not deal with classic economic activity, their proponents will shoulder a greater burden to justify those measures on a commerce power basis. On the other hand, many federal environmental laws would not necessarily appear to intrude into areas of traditional state sovereignty, such as domestic relations or enforcement of the general criminal laws. For the future of federal environmental regulation of problems that are not necessarily transboundary in nature, such as wetlands protection measures, *SWANCC* promises to be the case to watch from the 2000 Term.

In *Lopez*, the Court identified three categories of activities subject to the federal commerce power: the use of the channels of interstate commerce, the instrumentalities of interstate commerce or persons or things in interstate commerce, and activities having a substantial relation to (or that

substantially affect) interstate commerce.[162] The court of appeals in *SWANCC* asserted that "the gun control law at issue in *Lopez*, like the migratory bird rule challenged here, could only have been sustained as an exercise of the third **[30 ELR 11132]** variety of regulatory power."[163] It is not impossible to imagine characterizing the migratory bird rule as an attempt to regulate either a channel or an instrumentality of interstate commerce. Because a wetland that harbors migratory birds must constitute a "navigable water" to be within the scope of the CWA's jurisdiction, for example, the regulated wetlands could be deemed channels of interstate commerce.[164] A body of water need not be navigable in fact, however, to qualify as a "navigable water" for purposes of the CWA.[165] Similarly, a rule whose function is to protect migratory birds could be characterized as an effort to control (and facilitate) things in interstate commerce.[166] Assuming the Court reaches the constitutional question, however, the case will most likely turn on whether the regulated activity will be regarded as one that substantially affects interstate commerce, as the court of appeals held. The Seventh Circuit did not have the benefit of the *Morrison* decision when it addressed that question.

Morrison emphasized that in *Lopez*, "the noneconomic, criminal nature of the conduct was central to our decision."[167] In *Lopez*, the Court concluded that the possession of a gun in a local school zone was not an economic activity.[168] Likewise, in *Morrison*, the Court found that gender-motivated crimes of violence such as rape "are not, in any sense of the phrase, economic activity."[169] That characterization was significant because, although the Court disclaimed the need to "adopt a categorical rule against aggregating the effects of any noneconomic activity" to decide *Morrison*, it nevertheless stated 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."[170] Despite the disclaimer, the Court ultimately held that Congress may not regulate "non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[171]

The regulated conduct in *SWANCC* is arguably distinguishable from the conduct in both *Lopez* and *Morrison* for two reasons. First, there is a strong argument that the conduct was economic in nature. In *Lopez*, the conduct was "possession of a gun in a local school zone."[172] In *Morrison*, it was the act of committing a gender-motivated crime of violence. The CWA, as interpreted by Corps and EPA regulations, prohibits the dredging or filling of wetlands without a permit. In *SWANCC*, the conduct was the filling of wetlands for the purpose of constructing a site for the disposal of the trash of 23 Illinois municipalities. The dredging and filling of wetlands is often undertaken for purposes of commercial development. In this case, the entity engaged in the construction was presumably getting paid, and the trash that would wind up being sent to the balefill undoubtedly would include trash generated by businesses as well as homeowners. As the Court has recognized, the flow of waste can amount to commerce.[173]

Second, *SWANCC*, unlike *Lopez* and *Morrison*, did not involve criminal conduct. The CWA empowers the United States to pursue criminal sanctions against those who engage in dredging or filling of navigable waters without or in violation of a permit.[174] SWANCC was not charged with a criminal violation of the statute, however. Rather, it sought review in a civil suit under the federal Administrative Procedure Act of the Corps' denial of its dredge and fill permit application.[175] The migratory bird rule, as applied to SWANCC, therefore, does not invade the traditional province of the states to suppress violent crime or vindicate its victims.[176] As the Court noted in *Morrison*, it

was the criminal as well as the noneconomic nature of the regulated conduct that was "central" to the decisions in both that case and *Lopez*.[177] It is of course true that land use regulation is an area of "traditional state regulation,"[178] and at least one justice has taken the position that the Court has consistently rejected readings of the Commerce Clause that would authorize federal power that would permit Congress to exercise a police power.[179] It is a little late in the day, however, for the Court to take the position that environmental regulation, which often involves the imposition of constraints on land use, amounts to an inappropriate intrusion into an inviolate realm of state sovereignty.[180]

There is yet another arguably distinguishing feature of *SWANCC*. In neither *Lopez* nor *Morrison* was the Court able to discern a "jurisdictional element" which might limit the reach of the statutes in question to a "discrete set" of activities with an "explicit connection with or effect on interstate commerce."[181] The presence of such an element supports the contention that the regulated conduct is sufficiently tied to interstate commerce to pass constitutional muster. The CWA arguably possesses a jurisdictional element. The statute bars the discharge of pollutants without the required permit.[182] The statute defines the discharge of a pollutant as its addition to "navigable waters."[183] Navigable waters, in turn, are defined to mean "waters of the United States."[184] The **[30 ELR 11133]** legislative history demonstrates convincingly that Congress meant by this definition to vest in EPA and the Corps the power to regulate activities to the fullest extent authorized by the Commerce Clause.[185] Even the Corps' regulations, which interpret waters of the United States to include intrastate waters and wetlands, reach only those whose "use, degradation or destruction . . . could affect interstate or foreign commerce,"[186] and the migratory bird rule, as the Court of Appeals in *SWANCC* noted, extends the prohibition on dredging or filling to waters "*otherwise* unrelated to interstate commerce," which are or could be used as migratory bird habitat.[187] Thus, it is only waters that *are* somehow related to interstate commerce that fall within the intended scope of the rule.

If the Court were to hold that the migratory bird rule exceeds the scope of federal power under the Commerce Clause, Congress would not necessarily lack the constitutional authority to bar the dredging and filling of wetlands as a means of protecting migratory bird habitat. The treaty power[188] might well supply an alternative jurisdictional basis for the migratory bird rule, based on implementation of the Migratory Bird Treaty Act (MBTA) of 1918, which the Court has upheld as a valid exercise of the treaty power.[189]

2. Lower Court Cases

Although the Court has yet to address the manner in which the *Lopez* and *Morrison* framework for analyzing the scope of the federal commerce power is likely to play out in the environmental arena, several lower court decisions have addressed the question. Whether the Court's resolution of *SWANCC* confirms or deviates from the results in those cases of course remains to be seen. The lower federal courts decided two important cases in the past year in which they rejected attacks on environmental regulation as beyond the scope of the federal commerce power. Both cases were handed down after the Court's decision in *Morrison*, and both may shed light on the Court's upcoming disposition of *SWANCC* as well as on the fate of other federal environmental statutes that may be attacked as unwarranted exercises of the commerce power.[190]

a. Red Wolves

In the first case, the Fourth Circuit addressed the constitutionality of a regulation issued by the U.S. Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA).[191] The agency undertook a program of reintroducing red wolves into national wildlife refuges in North Carolina and Tennessee pursuant to a provision of the ESA allowing the FWS to designate as "experimental" reintroduced populations of endangered or threatened species.[192] That designation allows the agency to exempt the reintroduced animals from some of the more stringent protective provisions of the ESA.[193] In this case, the FWS relaxed the Act's prohibition on the taking of members of listed species[194] by allowing a person, among other things, to take red wolves on private land, provided the taking is unintentional, or is in the defense of human life, livestock, or pets.[195] Several landowners brought a declaratory judgment action to invalidate the regulation as beyond the scope of the federal commerce power. The district court upheld the regulation, concluding that the wolves are "things in interstate commerce" because they have moved across state lines and are followed by tourists, academics, and scientists, and because they generate substantial effects in interstate commerce.[196]

The Fourth Circuit's decision, written by Chief Judge Wilkinson, is notable for its insistence that the federal judiciary exercise restraint in the disposition of constitutional challenges involving allegedly excessive exercises of federal power,[197] as well as for the vigorous dissent penned by Judge Luttig. The majority characterized the applicable analytical framework emanating from *Lopez* and *Morrison* as "rational basis review with teeth."[198] Judge Wilkinson added, however, that the courts "may not simply tear through the considered judgments of Congress. Judicial restraint is a long and honored tradition and this restraint applies to Commerce Clause adjudications."[199] Although the federal judiciary must enforce "the structural limits of Our Federalism," it must "also defer to the political judgments of Congress."[200]

[30 ELR 11134]

Having set the stage, the majority proceeded to apply the *Lopez-Morrison* framework. The FWS' regulation was not a regulation of the channels of interstate commerce, which include things like navigable rivers, lakes, and canals. It did not regulate the movement of wolves or wolf products in the channels of interstate commerce.[201] Nor did the regulation involve the protection of things in interstate commerce. The FWS did transport wolves interstate to study and reintroduce them, but, contrary to the district court's conclusion, "this is not sufficient to make the red wolf a 'thing' in interstate commerce."[202]

If the government sought to defend the validity of the regulation on the basis of the aggregate effects of the class of regulated activities on interstate commerce, it had to show that "the regulated activity was of an apparent commercial character."[203] According to the Fourth Circuit majority, "economic activity must be understood in broad terms" because "a cramped view of commerce would cripple a foremost federal power and in so doing would eviscerate national authority."[204] Here, it was reasonable for the FWS to conclude that it was regulating economic activity. According to the court, the taking of red wolves "implicates a variety of commercial activities and is closely connected to several interstate markets."[205] Further, the regulation was an integral part of the overall scheme to protect, preserve, and rehabilitate endangered species, "thereby conserving

valuable wildlife resources important to the welfare of our country."[206] A primary reason to take red wolves on private land is to protect commercial and economic assets; farmers and ranchers take wolves due to concern that they pose a risk to commercially valuable livestock and crops.[207] Moreover, the court discerned a direct relationship between red wolf takings and interstate commerce because the disappearance of red wolves would mean the obliteration of tourism and scientific research related to the wolves and the commercial trade in red wolf pelts. Through preservation, the impact of the endangered species on interstate commerce could not but increase.[208] Thus, the regulation was directed at economic activity and the individual takings of wolves could be aggregated for purposes of Commerce Clause analysis.[209] The court proceeded to detail precisely how and to what degree red wolves generated—or could generate—interstate tourism, scientific research, and a trade in wolf pelts. The last point is particularly salient in assessing the possible outcome in *SWANCC*. If "the possibility of a renewed trade in fur pelts"[210] is a sufficient basis for concluding that the regulated activity has sufficient interstate impact to justify federal regulation, then perhaps a finding that migratory birds *could* use a particular isolated wetland as habitat is enough to justify the Corps' migratory bird rule as well.

Finally, in *Gibbs v. Babbitt*,[211] the court noted that the taking of red wolves is connected to interstate markets for agricultural products and livestock; by restricting the taking of wolves, the regulation was alleged to impede economic development and commercial activities such as ranching and farming. That effect on commerce qualifies as a legitimate subject for regulation. The regulation targeted takings that are economically motivated in that farmers takes wolves to protect valuable livestock and crops. According to Judge Wilkinson, "it is for Congress, not the courts, to balance economic effects" by deciding whether the negative effects on commerce resulting from red wolf predation are outweighed by the benefits to commerce flowing from wolf restoration. "To say that courts are ill-suited for this act of empirical and political judgment is an understatement."[212] Likewise, the migratory bird rule is alleged to impede real estate development and the regulation targets activities that are economically motivated. Indeed, if the government can demonstrate a trade in migratory birds or bird parts, or even the possibility of such trade, its argument for sustaining the rule would be still stronger.

The *Gibbs* court provided additional ammunition of several types for proponents of the migratory bird rule. First, the court posited that Congress has ample authority "to regulate the coexistence of commercial activity and endangered wildlife in our nation and to manage the interdependence of endangered animals and plants in large ecosystems."[213] It was permissible for Congress to "find that conservation of endangered species and economic growth are mutually reinforcing. It is simply not beyond the power of Congress to conclude that a healthy environment actually boosts industry by allowing commercial development of our natural resources."[214] There is no apparent reason to confine this analysis to endangered species, as opposed to other kinds of plant and animal life, such as nonendangered migratory birds. Indeed, the last part of the quoted excerpt provides a strong defense of all kinds of federal environmental regulation, from protection of isolated wetlands that harbor migratory birds to protection of scarce and valuable resources such as clean air and water and uncontaminated land. The speculation inherent in assessing or predicting the extent to which environmental protection may promote economic development ought not to weaken this argument. As the Fourth Circuit indicated, "Congress is entitled to make the judgment that conservation is potentially valuable, even if that value cannot be presently ascertained."[215]

Second, quoting *Lopez*, the *Gibbs* court sustained the regulation as an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[216] The **[30 ELR 11135]** court also quoted from the Supreme Court's 1981 decision in *Hodel v. Indiana*,[217] where the Court concluded that a complex regulatory program

can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.[218]

The government, then, presumably need not show that each and every isolated wetland is directly related to interstate commerce, as long as wetlands regulation is part of an integrated scheme for the protection of our nation's water resources and the ecosystems of which they are a part.[219]

Third, the landowners in *Gibbs* claimed that the FWS regulation improperly infringed on traditional state powers over wildlife. The court responded that state control over wildlife "is circumscribed by federal regulatory power."[220] In addition, the challengers protested that the regulation invaded traditional state prerogatives to regulate local land use, a contention that is certain to be at the core of the challenge to the migratory bird rule in *SWANCC*. The court's response was straightforward: "It is well established . . . that Congress can regulate even private land use for environmental and wildlife conservation."[221] Accordingly, endangered wildlife regulation has not been an exclusive or even primary state function.[222] Neither has protection of migratory birds, which has been a matter of federal concern since at least 1918, or prevention of water pollution, which dates back as far as 1899, the date of adoption of the Rivers and Harbors Act, or at least to 1948, when the first Federal Water Pollution Control Act was enacted.[223] "The conservation of scarce natural resources," in short, "is an appropriate and well-recognized area of federal regulation."[224]

Fourth, the *Gibbs* majority, citing Congress' ability to take cognizanceof and seek to halt the notorious "race to the bottom" with the aim of preventing interstate competition the effect of which is environmentally damaging, reasoned that the ESA was spurred in part by a desire to put in place uniform federal standards for the protection of endangered wildlife. The court refused to strike down the regulation in part because it might subject interstate companies "to a welter of conflicting obligations . . . . Courts cannot simply ignore or negate congressional efforts to devise [an] effective solution to a significant national problem."[225] Efforts to prevent the "race to the bottom" lie, of course, not only behind the CWA, which spawned the migratory bird rule, but behind virtually every piece of federal environmental protection legislation,[226] whether or not one is convinced of the legitimacy of the phenomenon (although the effort is often reflected in minimum rather than uniform federal standards).[227]

In dissent, Judge Luttig took issue with the proposition that the FWS' regulation was directed at economic activity, and therefore protested application of the aggregation principle. Even if the regulation applied to economic activity, he charged, that activity lacked the requisite substantial effects on interstate commerce.[228] Neither the statute nor the regulation contained an express interstate commerce jurisdictional requirement to ensure its constitutional validity.[229] The

regulation was directed at "an activity that implicates but a handful of animals, if even that, in one small region of one state."[230] In effect, the majority opinion sought to confine both *Lopez* and *Morrison* to aberrational status.[231]

b. Architectural Coatings

The second post-*Morrison* environmental case was a challenge to EPA regulations issued under the CAA[232] that limited the content of volatile organic compounds (VOCs) in architectural coatings to facilitate achievement of the NAAQS for ozone.[233] An association of manufacturers and distributors of these coatings asserted that the regulation exceeded the scope of the commerce power on the ground that there is an insufficient nexus between coatings manufacture and the interstate phenomenon of ozone formation.[234] The D.C. Circuit distinguished *Lopez* and *Morrison* on four grounds. First, both those cases dealt with the control of noneconomic activity. The CAA's provision authorized regulation only of coatings sold or distributed in interstate commerce.[235] Second, the statutes struck down in the two Supreme Court cases lacked a jurisdictional element that limited their reach to activities connected to interstate commerce. The CAA's provision covered only products sold or distributed in interstate commerce.[236] Third, neither of the statutes—the Gun-Free School Zones Act and the VAWA—nor their legislative histories included congressional **[30 ELR 11136]** findings regarding the effects of the regulated activity on interstate commerce. The legislative history of the CAA described the problem of interstate transport of ozone as well as its effects on the national economy.[237] Fourth, the link between gun possession or gender-motivated violence and interstate commerce was attenuated, whereas the interstate character of ozone formation and transport was clear.[238]

At least two of these distinctions pertain to the isolated wetlands case, too. As indicated above, the activities regulated in *SWANCC* are arguably economic in character and the dredge and fill permit provisions appear to contain at least an implicit jurisdictional element. Further, the D.C. Circuit noted that the Court in both *Lopez* and *Morrison* cited with approval the *Hodel* case, where the Court endorsed the proposition that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards, that *may* have effects in more than one State."[239] If the government in *SWANCC* can demonstrate that the potential aggregate effects of the dredging or filling of isolated wetlands on interstate commerce are substantial, then the CAA case supports an affirmance of the Seventh Circuit's decision. Even if it cannot, and the migratory bird justification for the isolated wetlands permit program is invalidated, the D.C. Circuit's opinion should provide comfort to those who fear the impact of *Morrison* on federal environmental regulation. The court's closing statement, quoted from *Hodel*, makes it relatively clear that the core aspects of federal environmental regulatory programs, where interstate effects will be demonstrable, should not be threatened by this aspect of the "new" federalism.

3. The Dormant Commerce Clause

Whatever the limits turn out to be in the environmental context, the Commerce Clause provides an affirmative delegation of authority to Congress to regulate some activities with adverse environmental consequences. That delegation also imposes limits on the degree to which the states may regulate matters with interstate implications, however.[240] A recently enacted New York statute

raises interesting questions concerning the operation of the "dormant" Commerce Clause. The 1990 amendments to the CAA created a new program to control the emission of pollutants that are precursors to the formation of acid deposition, primarily sulfur dioxide (SO_2) and oxides of nitrogen. The statute caps the allowable emissions of SO_2 from electric power plants designated in the statute by assigning to them "allowances" to emit specified tons of SO_2 annually.[241] It also authorizes regulated units to purchase and sell allowances, provided a particular unit does not emit SO_2 in amounts that exceed the allowances it holds, either through the initial statutory assignment or through subsequent purchase.[242]

Acid deposition is acknowledged to be an interstate phenomenon. Utilities that emit SO_2 in the Midwest can exacerbate acid deposition in the Adirondack Mountains in New York, for example. In May 2000, the New York legislature, finding that the CAA is inadequate to protect the state, its people, and its resources from irreparable acid deposition-related damage, authorized a state agency to assess an "air pollution mitigation offset" against utility corporations that engage in the sale of SO_2 allowances for use in "acid precipitation source states."[243] In effect, the statute seeks to create disincentives for New York utilities to sell SO_2 allowances to sources in any state in which power plants could generate emissions that, due to prevailing wind patterns, might increase acid deposition in New York. At some point, the courts could well have to decide whether the New York statute is sufficiently disruptive of interstate commerce that it runs afoul of the dormant Commerce Clause.[244]

B. The Eleventh Amendment

1. Lower Court Cases

In last year's Article, we minimized the significance of the Court's 1999 Eleventh Amendment trilogy for the enforcement of environmental law against the states by exploring six alternatives to private enforcement of federal environmental legislation against the states. These include (1) the exercise of "good faith" by the states; (2) "voluntary" state consent to suit for statutory violations; (3) Congress' power to abrogate state sovereign immunity pursuant to its powers under § 5 of the Fourteenth Amendment; (4) suits against municipal governments that do not enjoy constitutionally protected sovereign immunity; (5) suits for injunctive relief directed at individual state officers; and (6) suits by the United States to enforce state compliance with federal mandates.[245] We not only explained how each of these alternatives may mitigate the unavailability of direct suits against the states by private individuals in either state or federal court, but provided examples of circumstances in which resorting to these alternatives had already succeeded.

The lower courts in the past year have provided additional examples that confirm both the availability and utility of these options. Perhaps the most novel of the Eleventh Amendment issues to be resolved this year related to the second and fifth categories of alternative enforcement options, state consent, or waiver of sovereign immunity.[246] The Central Interstate Low-Level Radioactive Waste Commission (Commission) and several utilities sued Nebraska alleging **[30 ELR 11137]** breach of its obligations under the Central Interstate Low-Level Radioactive Waste Compact.[247] The plaintiffs alleged that the state improperly impeded licensing of a disposal facility in violation of the state's contractual and fiduciary obligations to the Commission. The state claimed Eleventh Amendment immunity to suit, but the Eighth Circuit held that by entering into

the interstate compact, Nebraska had waived its immunity from suit in federal court by the Commission to enforce the state's contractual obligations. The compact was a congressionally sanctioned agreement authorizing (indeed requiring) the Commission to enforce it against member states in federal court.[248] In the alternative, the court held that the district court had jurisdiction to enjoin state officers from violating the compact under *Ex parte Young*[249] because the relief sought was wholly prospective and the Commission made a sufficient showing of an ongoing violation of federal law.[250]

In the category of suits brought by the United States, the Ninth Circuit held that the Eleventh Amendment did not bar a third-party claim against Alaska for equitable apportionment of tort liability arising out of the state's alleged negligence in contributing to leakage of fuel from a storage tank.[251] The state argued that the state comparative fault statute created no legal duty between a defendant/third-party plaintiff and a third-party defendant. As a result, a claim by the United States against a state for equitable apportionment was essentially a claim asserted on behalf of a private citizen plaintiff, who could not assert the claim directly due to the state's sovereign immunity. The United States, in other words, acted as a conduit for the plaintiff's claim against the state as a means of circumventing the Eleventh Amendment.

The court responded that in substance the federal government's claim was neither a private action nor intended to benefit primarily a private party. Instead, the main purpose of the third-party claim was to benefit the United States by reducing any damages it otherwise would owe to the plaintiff. Moreover, even if the private plaintiff would benefit by having the United States bring in the state as a party, the Eleventh Amendment does not bar the federal government from bringing a claim against a state.[252] Finally, the court rejected the state's argument that Eleventh Amendment immunity applied because the federal court's allocation of fault to the state might be converted into a money judgment enforceable by the plaintiff. The court interpreted *Alden* as supporting the proposition that the United States may sue a state even when its claim ultimately can result in a payment from the state's treasury to a private party. The relief sought by the federal government was equitable in nature. The remedy merely shifted a portion of the liability from the United States to the third-party defendant state.[253]

Still, in cases in which none of the options discussed above is available, litigants pursuing environmental and related claims against the states or state agencies in federal or state court for violations of federal law are likely to be thwarted by the Eleventh Amendment and the principle of state sovereign immunity, as interpreted in the Court's 1999 trilogy. In one case, for example, a federal district court in New York held that the state's environmental agency was immune from a suit alleging that the state was violating the MBTA by spreading vegetable oil on unhatched cormorant eggs.[254] The plaintiff argued that because the MBTA was adopted pursuant to Congress' treaty power, the Supremacy Clause dictates the conclusion that the MBTA overrides state sovereign immunity.[255] Quoting *Alden*, however, the court concluded that the Supremacy Clause does not "confer authority [on Congress] to abrogate the States' immunity from suit in federal court."[256]

The Second Circuit recently held that the Eleventh Amendment barred a citizen suit under three federal pollution control laws against state officers for injunctive and monetary relief relating to hazardous substance contamination emanating from a state-run prison.[257] It was clear that Congress

did not unequivocally abrogate state sovereign immunity (indeed, it explicitly preserved it).[258] The plaintiffs **[30 ELR 11138]** alleged that the suit could nevertheless proceed because the suits were in the nature of *qui tam* actions in which the United States was the real party in interest, but the court quoted the statutes, which authorized citizens to sue "on [their] own behalf." Thus, the United States was not the real party in interest.[259]

The court also inquired whether Congress had abrogated the states' Eleventh Amendment immunity when it authorized suits for the recovery of response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Following *Seminole Tribe of Florida v. Florida*,[260] the court concluded that Congress could not have done so pursuant to the Commerce Clause.[261] The plaintiffs argued that CERCLA was also adopted pursuant to the spending power.[262] The court, however, construed *Seminole Tribe* as well as the 1999 Eleventh Amendment trilogy as precluding resort to *any* Article I power as a source of abrogation authority.[263] The spending power, however, is *sui generis*. As the Supreme Court recognized in one of the 1999 trilogy of Eleventh Amendment cases, Congress can invoke state consent to a waiver of sovereign immunity or impose other conditions when it exercises that power because "Congress has no obligation to use its Spending Power to disburse funds to the States; such funds are gifts."[264] The plaintiffs also claimed that by creating a claim for recovery of response costs, CERCLA created a property right and was therefore enacted pursuant to Congress' authority under § 5 of the Fourteenth Amendment. But the court found that the mere creation of a private claim for damages does not give rise to a property interest in the form of a legitimate claim of entitlement.[265] Finally, the plaintiffs argued that the state's acceptance of federal funds under CERCLA amounted to consent to suit, but the court found no evidence that Congress intended to condition receipt of CERCLA monies on a waiver of the recipient state's sovereign immunity.[266]

2. Standing

The Court had the opportunity to clarify another Eleventh Amendment issue of potential significance for environmental law litigation in *Vermont Agency*.[267] The issue was whether a private individual may bring a suit in federal court on behalf of the United States against a state or state agency under the FCA.[268] An individual brought a *qui tam* action in federal district court against a Vermont environmental agency, alleging that it had submitted false claims to EPA in connection with federal grant programs administered by the agency. After the United States refused to intervene, the defendant moved to dismiss on the grounds that a state is not a "person" subject to liability under the FCA and that a *qui tam* action in federal court against a state is barred by the Eleventh Amendment. The Court introduced a preliminary question, however: whether the plaintiff had Article III standing. The Court ruled that the plaintiff had standing because the FCA, which provides a bounty to prevailing plaintiffs, could be regarded as effecting a partial assignment to such plaintiffs of the government's damage claims.[269] On the basis of this "representational standing" analysis, therefore, the Court held that the plaintiff demonstrated sufficient injury to satisfy Article III's injury-in-fact requirement.[270] The Court then held that a state is not a "person" subject to suit under the FCA,[271] thereby precluding the need to address the Eleventh Amendment question.

The *Vermont Agency* case is potentially significant for two reasons. First, the Court's holding on the standing issue eliminates a potentially troublesome barrier to standing for environmental

groups that might have resulted from a ruling that Article III precludes private individuals from bringing *qui tam* actions. An environmental plaintiff seeking to demonstrate Article III standing must show, among other things, that the relief being sought is redressable by the court. Before the Court's decision in the *Laidlaw* case, discussed below, there was some question whether citizen suit plaintiffs seeking the imposition of civil penalties payable to the government could make such a showing. Some commentators suggested increased reliance on *qui tam* actions as a means of solving the potential redressability problem.[272] Had the Court in *Vermont Agency* held that Article III principles bar the pursuit of *qui tam* actions, such a solution would not have been available.

Second, the Court's resolution of the statutory issue in *Vermont Agency* raises a strong presumption that the word "person" in a statute such as the FCA does not include sovereign states, and requires a "clear statement" from Congress in the relevant statute indicating that "person" does include the states in a particular instance to overcome the presumption. As indicated below,[273] however, Congress in most of the federal environmental statutes has already explicitly defined the "persons" subject to suit for statutory violations to include states and state agencies. As a result, this aspect of *Vermont Agency* should not meaningfully restrict the ability of citizen suit plaintiffs to seek redress in federal court for state noncompliance. The Eleventh Amendment question the Court did not reach in *Vermont Agency*, however, remains open and could be a significant issue in litigation against a state under a federal statute that defines "person" to include the states.

[30 ELR 11139]

The Court's generous standing ruling in *Vermont Agency* must be further qualified because of an additional constitutional question the Court chose not to address. In some of the Court's restrictive standing cases handed down during the 1990s, the Court raised the possibility that citizen suits to enforce the environmental laws could be regarded as an improper infringement on the president's responsibility under Article II of the Constitution to "take Care that the laws be faithfully executed."[274] In *Vermont Agency*, the Court "expressed no view on the question whether *qui tam* suits violate" the "take Care" clause of Article II.[275] Justice Stevens, joined by Justice Souter, dissenting in *Vermont Agency*, concluded that the commonplace use of *qui tam* actions during the 19th century rebuts the notion that the framers regarded them as foreclosed by the president's Article II powers.[276] The views of the other seven members of the Court on the issue are not as clear, however. Should a majority of the justices ever conclude that *qui tam* actions or citizen suits pose a threat to the executive branch's ability to oversee enforcement of federal statutes, the critical role that citizen suits have played in supplementing government enforcement could be in jeopardy.

The Court provided environmentalists with a clearcut victory in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,[277] where it held that a plaintiff suing under the CWA need not establish actual harm to the environment but, rather, only harm to the plaintiff's interests in using and enjoying natural resources. Professor Daniel Farber has described the opinion as "refashioning" the Article III injury-in-fact inquiry by broadening the focus to include "not merely changes in the welfare of the individual considered in isolation, but also changes in the relationship between the individual and a natural resource."[278] Thus, for example, a plaintiff may establish standing by demonstrating reluctance to swim in a river because of feared pollution rather than having to prove that the river was in fact unsafe due to pollution. This is a major victory for

environmental plaintiffs.

In addition, the Court in *Laidlaw* rejected the contention that the CWA's citizen suit plaintiff lacked standing to seek civil penalties because the penalties are payable exclusively to the government and payment therefore redresses no harm to the plaintiffs. Civil penalties, the Court reasoned, have deterrent effects. Therefore, "for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description."[279] The environmental public interest community emitted a huge collective sigh of relief in response to that aspect of *Laidlaw*, for a contrary conclusion would again have seriously threatened the utility of citizen suits under a host of federal environmental statutes as a mechanism for obtaining anything other than prospective injunctive relief.

C. Fourteenth Amendment Power

1. Section 5 of the Fourteenth Amendment

In *Kimel*,[280] the Court made clear that it meant what it began in *City of Boerne v. Flores*[281]: Congress cannot merely invoke § 5 of the Fourteenth Amendment whenever it addresses some form of discrimination and rely on that provision to abrogate the states' Eleventh Amendment immunity from suit. Rather, the Court will carefully review federal statutes that provide for suits against the states in contexts involving classifications, such as age or perhaps disability, that do not receive a heightened level of constitutional scrutiny.

In conducting its § 5 inquiry, the Court will require that Congress have carefully and extensively documented the factual basis for addressing perceived problems. Moreover, the Court appears quite willing to scrutinize whetherCongress has tailored such measures to the parameters of the documented problems and has enacted targeted remedies for addressing those problems. The Court appears disinclined to approve § 5 legislation that relies upon sweeping factual generalizations or that provides for sweeping remedies. In light of *Kimel*, the ADA's abrogation provision appears likely to fail the Court's § 5 standards this term.[282]

Although important in the context of federal antidiscrimination statutes generally, the Court's developing § 5 jurisprudence seems less practically significant for the implementation and enforcement of the federal environmental laws. The point is not that sovereign states typically have not been the defendants in environmental cases, although that is by and large true. As our Article last year indicated, state agencies sometimes are named as defendants in such cases. Nor is the point that *Vermont Agency* makes it clear that the courts will apply a presumption that any federal statute making a "person" subject to suit does not include states as a matter of statutory interpretation. Most of the major federal environmental statutes explicitly define "person" to include states.[283]

Rather, the point is that, to date, Congress has not relied on its § 5 authority to adopt environmental legislation, preferring instead to invoke other sources of authority including (primarily) the Commerce Clause, as well as the Property **[30 ELR 11140]** Clause[284] and the treaty power.[285] If the Court in cases such as *SWANCC* makes it clear that some activities with potential adverse

environmental effects are not within the reach of the commerce power, Congress may seek at some point to rely more heavily on alternative sources of regulatory authority, including § 5 of the Fourteenth Amendment. Reliance on § 5 is certainly a possibility, for example, as a means of combating "environmental racism." In such a context, the Court's § 5 jurisprudence could become important, although Congress' constitutional power to abrogate the states' immunity is probably at its zenith when Congress is addressing race discrimination problems. Generally, however, it would appear that the scope of Congress' power to abrogate the states' immunity under § 5 is not terribly significant in the context of federal environmental law. The scope of Congress' commerce power is far more important.

2. The Privileges and Immunities Clause

An aspect of Fourteenth Amendment jurisprudence that could develop into a significant constraint on state power is the Privileges and Immunities Clause.[286] Largely considered a dead-letter since the *Slaughter-House Cases*,[287] the Court potentially revived that provision in *Saenz v. Roe*.[288] The Court's reliance on this long dormant provision was somewhat surprising because, as Justice Thomas opined in dissent, "legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873."[289]

In *Saenz*, the Court struck down, as a violation of the Privileges and Immunities Clause, a California durational residency requirement for welfare recipients. The majority characterized the residency requirement as interfering with the "right to travel," which does not appear in the Constitution's text but which the Court has recognized in previous cases.[290] It is unclear, however, whether the Court would be willing to extend the protections of the clause to other kinds of statutory entitlements or benefits that might in some sense deter travel or migration. Moreover, it is not clear whether the Court will invoke the clause in circumstances that do not allegedly involve the "right to travel." Justice Thomas, in dissent, argued that the clause should be limited by historical understandings of "fundamental rights," and should apply only to state discrimination against nonresidents with respect to such rights, which would not include statutory benefits and entitlements.[291]

It is likely that litigants will try to push the privileges and immunities envelope further than that. Property rights advocates, for example, have indicated that they will invoke the clause in an attempt to invalidate state and local regulatory infringements on economic liberties, including common-law property rights.[292] State and local restrictions on development whose goal is environmental protection seem an obvious target for those pursuing this strategy, in the same way that these restrictions have become targets of advocates for an expanded role for the Takings Clause of the Fifth Amendment.

D. The Obvious Disconnect?: Federal Preemption of State Law

Although the states generally fared well this past term in federalism and enumerated powers cases such as *Kimel* and *Morrison*, they lost every preemption case the Court decided.[293] One commentator has suggested that "there is an obvious disconnect between the court's recent pre-emption cases—generally displacing state laws—and many of its recent commerce clause and 11th

Amendment cases—generally protecting state laws and powers."[294]

Whether that is in fact an accurate assessment may become an important question. Justice Thomas, for example, joined the dissent in one important case last term in which the majority found broad federal preemption and disavowed reliance upon any "presumption against preemption."[295] If conservative justices become convinced that current pre-emption jurisprudence is inconsistent with federalism principles, then that jurisprudence may change in a way favorable to the states and less favorable to Congress.

One commentator recently argued that "pre-emption law is on a collision course with the conservative justices' celebrated project to re-establish structural constitutional principles on federalism."[296] Focusing on the Court's decision in *Geier*,[297] he asserted that "federalism concerns become particularly pressing when pre-emption derives not directly from statutory language, but rather from an administrative agency's action under its delegated authority."[298] **[30 ELR 11141]** He then opined that the "attorneys who will argue the next pre-emption dispute may be looking at a case where *every* vote is in play,"[299] because the liberal justices (who generally oppose federalism or state power) often embrace it in preemption cases, while the conservative justices cannot be counted on to ignore preemption as an area that raises a threat to federalism principles.[300]

Other commentators have responded that "there is no real tension between the Supreme Court's federalism decisions and its pre-emption cases because the latter, properly understood, are not 'about federalism.'"[301] Their primary argument is that the key constitutional provision in the preemption context, the Supremacy Clause, is only "a choice-of-law rule in favor of federal law"[302] when federal and state law conflict. Thus, in their view, the issue in pre-emption cases is essentially one of statutory interpretation, and there is no dispute about the relevant constitutional provision in such cases. They further argue that nothing in the constitutional text or structure supports application of even a "presumption against preemption" when the Court engages in that inquiry.[303] Thus, according to them, it is consistent for conservative justices to vote to limit Congress' commerce power, for example, but to hold that federal law displaces state law when Congress has appropriately exercised that power.

Who has the better of the argument here? Perhaps there is some merit to both positions. Even accepting the proposition that preemption has nothing to do with federalism principles and is a matter of statutory interpretation, it is at least problematic that the issue often arises in the context of interpreting the preemptive effect of an *administrative regulation*.[304] Nor is it so obvious, in light of cases such as *Alden*,[305] that the current Court would agree that nothing in the Constitution's structure supports reliance on a "presumption against preemption" when interpreting federal laws. On the other hand, nothing in the text of the Supremacy Clause suggests such a tilting of the scales in favor of the states, and indeed several of Congress' Article I powers are *exclusive* to the federal government. Thus, it is clear that the Constitution's text contemplates areas of federal exclusivity, which is what a finding of preemption essentially establishes in any particular case.

There does seem, however, to be common ground that there is no constitutional text that requires interpretation in preemption cases. Thus, the critical issue may well be whether constitutional structure justifies or fails to justify a presumption either against or in favor of federal preemption when the issue arises. This is essentially a question of whether one side or the other bears a burden

of proof (or in the words of the *Geier* majority, a "special burden") in either establishing or refuting a claim of federal preemption of state law.

In the environmental cases, the Court has sometimes invoked a presumption against preemption,[306] but not always.[307] The existence of a presumption can be extremely important, as it may often be determinative of the outcome, i.e., the party that bears the burden of proof is more likely to lose. Thus, the Court's reading of the savings clause in *Geier* appears critical to the outcome in that case. In spite of that clause, the *Geier* majority refused to conclude that the party claiming federal preemption bore any "special burden" in establishing that claim. Indeed, after *Geier* it is not clear what Congress would have to say in a savings clause to avoid the possibility of federal preemption.[308]

Even if the Court purports to apply a presumption against preemption, however, that presumption is likely manipulable by the Court. For example, the result in field preemption cases like *Locke*,[309] may well depend on how the Court defines the relevant "field." In *Locke*, the Court essentially defined the field as "maritime matters," which favored a finding of federal preemption because of the long federal involvement in maritime law and matters generally. On the other hand, had the Court defined the field as "regulation of the transportation of dangerous water contaminants," then the history of federal involvement would have been less comprehensive and shorter in duration. Thus, the Court can effectively control the outcome of cases by manipulating the definition of the relevant field.

Another justification for a broad reading of federal pre-emption is a bias in favor of less regulation and a free market economy. Federal preemption may well be preferred by companies that do business in numerous jurisdictions. If state law is precluded by virtue of federal authority, then, at a minimum, those companies will only have to comply with one set of regulations regarding any particular activity.[310] For this reason, companies may well prefer federal regulation of environmental matters, if coupled with preemption of state law regulation.

Environmentalists, however, probably should disfavor federal preemption of state law. Although they desire a broad reading of Congress' commerce power, in situations such as the one facing the Court in the *SWANCC* case, they should not necessarily also advocate for broad federal pre-emption. From their perspective, it may well be more desirable to have multiple layers of regulation, or at least the possibility of such regulation, than a single, uniform federal rule.

E. Additional Statutory Federalism Issues

As the discussion above indicates, the allocation of power to control conduct with potentially damaging environmental **[30 ELR 11142]** impact between the federal government and the states is a matter not only of constitutional mandate, but also of statutory decree. Two other issues that cropped up in the decisions of the lower federal courts during the past year may affect that allocation in important ways and are the focus of this concluding section. The manner in which these issues impact the respective roles of the federal and state governments in the "new" federalism era is within Congress' control as the issues are statutory rather than constitutional in nature.

1. Federal Sovereign Immunity

The focus of the Article we prepared last year on the "new" federalism, and the subject of the sections of this Article that deal with Eleventh Amendment, is the degree to which the states are immune from efforts by private citizens to enforce federal environmental obligations against them. The states do not represent the only level of government that is subject to, and sometimes violates, applicable environmental mandates. The federal government is a notorious culprit, responsible for a significant percentage of violations of both federal and state environmental laws.[311] A recurring question is whether the states can enforce their own environmental laws against agencies of the federal government alleged to have violated them. A recent Ninth Circuit case facilitates such efforts by preserving state judicial fora for the imposition of liability on federal agencies.

The case involved a suit by a California pollution agency in state court against the United States in which California sought civil penalties for violations of a state air quality permit at McClellan Air Force base.[312] The United States removed the dispute to federal district court, which held that the CAA does not waive the federal government's sovereign immunity from liability to civil penalties imposed by a state to punish past violations of state and local air quality laws. Although the state agency did not challenge the propriety of the removal on appeal, the Ninth Circuit sua sponte addressed the issue to determine whether the district court had jurisdiction over the case.

The Ninth Circuit held that removal was improper. The CAA's citizen suit provision provides that "nothing in this section or any other law of the United States shall be construed to prohibit, exclude, or restrict" state or local authorities from "bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court" against the United States respecting control and abatement of air pollution."[313] The court found that this provision directly conflicts with the right of the federal government to remove actions from state to federal court under the general federal removal statute.[314] The CAA provision "protects the right of state and local governments to obtain remedies or sanctions against the federal government in nonfederal fora" under state and local air quality laws,[315] and therefore implicitly bars removal of such enforcement actions. The court vacated with directions to remand to the state court for consideration of whether the CAA waives federal sovereign immunity to civil penalties for past violations of state or local air quality laws.

2. "Reverse" Preemption to Enforce Environmental Laws

The preemption questions addressed above[316] relate to the degree to which Congress, by adopting environmental legislation, or agencies such as EPA, in the course of implementing that legislation, preclude environmental protection efforts by the states that either fall within a field occupied exclusively by the federal government or that conflict with federal statutory text or purposes. By and large, the federal environmental statutes invite the cooperation and active participation of the states, which can assist in promoting federal statutory objectives, rather than disabling such supplemental efforts. Is it possible, however, that by authorizing state action to implement federal environmental laws (or state laws adopted in pursuit of federal environmental objectives), Congress may impose limits on the degree to which EPA is capable of enforcing the federal laws? That was the issue in the 1999 *Harmon Industries, Inc. v. Browner*[317] case, and the Eighth Circuit

provided an affirmative answer to the question.[318]

Harmon was prompted by an investigation by the Missouri Department of Natural Resources (MDNR) into the practice of discarding of volatile solvent residue behind a railroad control equipment manufacturing plant. The state agency decided that the practice did not pose a threat to health and the environment and created a plan requiring Harmon to clean up the disposal area. While Harmon was cooperating with the MDNR, EPA began an administrative enforcement action in which it sought more than $ 2 million in civil penalties. Harmon requested that the MDNR not impose civil penalties. While EPA's administrative enforcement action was pending, a Missouri state court judge approved a consent decree entered into by Harmon and the MDNR in which the MDNR released Harmon from any liability for civil penalties, based on the fact that Harmon self-reported its violations. When a federal administrative law judge subsequently imposed a $ 500,000 civil penalty on Harmon, Harmon filed a complaint challenging the validity of that penalty. The district court held that imposition of the penalty violated the Resource Conservation and Recovery Act (RCRA) and was barred by principles of res judicata. EPA appealed, and the Eighth Circuit affirmed.

[30 ELR 11143]

The court based its holding on two alternative grounds. First, it held, EPA's overfiling was inconsistent with the statute. RCRA authorizes states to apply to EPA for permission to administer the statute's hazardous waste program. If EPA approves, the state is authorized to "carry out [the] program in lieu of the Federal program" in that state.[319] The court reasoned that the plain language of the statute reveals Congress' intent that an authorized state program supplant the federal hazardous waste program in all respects, including enforcement.[320] In essence, EPA's decision to approve a state program divests EPA of the authority to enforce it. In short, "EPA may not . . . simply fill the perceived gaps it sees in a state's enforcement action by initiating a second enforcement action without allowing the state an opportunity to correct the deficiency and then withdrawing the state's authorization."[321] Allowing EPA to overfile would violate "the principles of comity and federalism so clearly embedded in the text and history of RCRA."[322]

Second, Missouri law gave res judicata effect to the consent decree, thereby barring EPA's civil penalty action. The question turned on whether the plaintiffs in the two enforcement actions were identical or nearly identical. The court concluded that they were. Once EPA approved Missouri's program, it operated in lieu of the federal program. Thus, the two parties stood in the same relationship to one another, and it did not matter what their subjective interests were.[323]

The precedential value of *Harmon* as a component of the "new" federalism era is not yet clear. The degree to which other circuits will follow, extend, distinguish, or depart from the Eighth Circuit's approach has yet to be sorted out. Just a week before *Harmon* was decided, the Tenth Circuit assumed without deciding that EPA had the power to overfile under RCRA.[324] A federal district court in Ohio has interpreted Sixth Circuit precedent to refute the notion that a mere grant by EPA of enforcement authority to a state agency curtails EPA's own enforcement options.[325]

Even if other circuits follow the lead of the Eighth Circuit, it is not yet clear whether the bar on overfiling recognized in *Harmon* is unique to RCRA or extends to other federal pollution control

laws. The court in *Harmon* placed its primary reliance in resolving the statutory interpretation issue on the portion of RCRA that provides that an EPA-approved state hazardous waste program operates "in lieu of" the federal program. Other statutes, such as the CWA, lack that precise language.[326] Regulated entities have already begun the process of trying to stretch the parameters of *Harmon*'s prohibition on overfiling both geographically and in terms of subject matter. The fate of *Harmon* therefore bears close watching.

III. Conclusion

For all of the rhetoric associated with and attention being given to the Court's recent federalism decisions, as a practical matter the Court is tinkering at the edges of Congress' Article I powers and battling rear-guard federalism actions. Although a case like *SWANCC* could make a notable dent in federal authority to regulate some environmental problems, Congress' power to enact virtually all of the existing federal environmental statutes likely will remain intact. Moreover, the 1999 Term saw the Court adopt an expansive view of standing that makes it easier for many environmental plaintiffs to get into court to seek enforcement of various federal statutes. Thus, our general conclusion remains that the ability of Congress to enact, and for plaintiffs to enforce, federal environmental laws is largely uncurtailed by the Court's recent federalism and congressional power decisions.

An often overlooked, and perhaps underestimated, piece of the environmental protection puzzle, however, may be the efforts of the states to regulate such matters. Generally speaking, it would appear that environmentalists should favor the availability of dual federal and state regulation of environmental matters, rather than exclusive federal regulation. For that reason, the interests of environmentalists and the defenders of states' rights may converge in the preemption context. For the same reason, in the environmental context anyway, business interests may prefer a jurisprudence that favors federal preemption of state law. Both because of the Court's current interest in federalism issues, and the current disarray of the Court's preemption jurisprudence, the intersection of these doctrines (if indeed they intersect at all) promises to be an area to watch in the near future.

1. *See* Stephen R. McAllister & Robert L. Glicksman, *State Liability for Environmental Violations: The Supreme Court's "New" Federalism*, 29 ELR 10665 (Nov. 1999).

2. The "federalism five" consists of Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, Justice Kennedy, and Justice Thomas.

3. *See, e.g.*, United States v. Morrison, 120 S. Ct. 1740 (2000); Reno v. Condon, 120 S. Ct. 666 (2000); Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000); Alden v. Maine, 527 U.S. 706 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Printz v. United States, 521 U.S. 898 (1997); City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144, 22 ELR 21082 (1992).

4. *Morrison*, 120 S. Ct. at 1740.

5. *Kimel*, 120 S. Ct. at 631.

6. *See, e.g., Reno*, 120 S. Ct. at 666 (rejecting commerce power and Tenth Amendment challenges to the federal Drivers Privacy Protection Act); Vermont Agency of Natural Resources v. United States ex rel. Stevens, 120 S. Ct. 1858, 30 ELR 20622 (2000) (holding that the word "person" in the federal *qui tam* statute does not include states and thus avoiding Eleventh Amendment issues); Jones v. United States, 120 S. Ct. 1904 (2000) (holding that the federal arson statute does not reach residential arsons and thus avoiding commerce power issues); Crosby v. National Foreign Trade Council, 120 S. Ct. 2288 (2000) (holding that congressional enactments preempted Massachusetts' "Burma" law and thus avoiding constitutional foreign affairs power issues).

7. No. 99-1178, *cert. granted*, 120 S. Ct. 2003 (2000) (lower court decision, 191 F.3d 845, 30 ELR 20161 (7th Cir. 1999)).

8. University of Ala. at Birmingham Bd. of Trustees v. Garrett, No. 99-1240, *cert. granted*, 120 S. Ct. 1669 (2000) (lower court decision, 193 F.3d 1214 (11th Cir. 1999)).

9. No. 99-1257, *cert. granted*, 120 S. Ct. 2003 (2000), and No. 99-1426, *cert. granted*, 120 S. Ct. 2193 (2000) (lower court decisions, 175 F.3d 1027 (D.C. Cir. 1999), and 195 F.3d 4 (D.C. Cir. 1999)).

10. *See* McAllister & Glicksman, *supra* note 1.

11. *See, e.g.*, United States v. Locke, 120 S. Ct. 1135, 30 ELR 20438 (2000) (finding state laws and regulations regarding the operation and maintenance of oil tankers to be preempted by federal statutes); Geier v. American Honda Motor Co., 120 S. Ct. 1913 (2000) (finding state tort law preempted by federal regulations regarding the use of airbags in automobiles); Norfolk S. Ry. Co. v. Shanklin, 120 S. Ct. 1467 (2000) (finding state tort law preempted when federal funds were used to install railroad crossing signs at an intersection where a train-automobile accident occurred); *Crosby*, 120 S. Ct. at 2288 (finding a state law generally prohibiting state agencies from contracting with companies that do business with Burma to be preempted by federal statutes addressing the U.S. relationship with Burma).

12. 527 U.S. 706 (1999).

13. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999).

14. U.S. CONST. art. I, § 8, cl. 3.

15. *Id.* art. VI, cl. 2.

16. 120 S. Ct. 1740 (2000).

17. The Court also held that the statutory provision could not be sustained as an exercise of Congress' power under § 5 of the Fourteenth Amendment. *See infra* Part I.A.4.

18. 514 U.S. 549 (1995).

19. *Morrison*, 120 S. Ct. at 1749-50.

20. *Id.* at 1749-51.

21. *Id.* at 1751.

22. *Id.*

23. *Id.* at 1751-52.

24. *Id.* at 1752-53.

25. *Id.*

26. *Id.* at 1754.

27. 120 S. Ct. 666 (2000).

28. 18 U.S.C. §§ 2721-2725.

29. The Tenth Amendment holding is discussed *infra* at Part I.A.2.

30. *Reno*, 120 S. Ct. at 671.

31. *Id.*

32. 120 S. Ct. 1904 (2000).

33. 18 U.S.C. § 844(i).

34. *Jones*, 120 S. Ct. at 1909.

35. *Id.* at 1909-10.

36. *Id.* at 1910-11.

37. *Id.* at 1911-12.

38. *Id.* at 1912-13 (Stevens, J., concurring).

39. *Id.* at 1913 (Thomas, J., concurring).

40. 120 S. Ct. at 666.

41. 18 U.S.C. §§ 2721-2725.

42. *Reno*, 120 S. Ct. at 671-72.

43. *Id.* at 672.

44. 505 U.S. 144, 22 ELR 21082 (1992).

45. 521 U.S. 898 (1997).

46. 485 U.S. 505 (1988).

47. *Reno*, 120 S. Ct. at 672.

48. *Id.*

49. *Id.*

50. *Id.*

51. Vermont Agency of Natural Resources v. United States ex rel. Stevens, 120 S. Ct. 1858, 30 ELR 20622 (2000).

52. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000).

53. 120 S. Ct. 1858, 30 ELR 20622 (2000).

54. *Id.* at 1862, 30 ELR at 20623-24.

55. *Id.* at 1863, 30 ELR at 20623-24.

56. *Id.*

57. *Id.* at 1863-65, 30 ELR at 20623-25.

58. *See infra* Part II.B.2. Indeed, the past term resulted in two decisions that took a relatively expansive view of the interests and injuries that could give rise to constitutional "standing" to file suit. Another important case for environmental law enforcement was Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 120 S. Ct. 693, 30 ELR 20246 (2000), which is also discussed *infra* at Part II.B.2.

59. *Vermont Agency*, 120 S. Ct. at 1866, 30 ELR at 20625.

60. *Id.* at 1867-70, 30 ELR at 20625-26.

61. *Id.* at 1870, 30 ELR at 20626 (quoting Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).

62. 120 S. Ct. 631 (2000).

63. 29 U.S.C. § 621 et seq.

64. 120 S. Ct. at 631.

65. *Id.* at 640-42.

66. *Id.* at 642-50.

67. *Id.* at 643-44.

68. 521 U.S. 507 (1997).

69. *Kimel*, 120 S. Ct. at 645-46.

70. *Id.* at 647.

71. *Id.* at 648.

72. *Id.* at 649 ("A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age.").

73. 120 S. Ct. at 1740.

74. 42 U.S.C. § 13981.

75. *Morrison*, 120 S. Ct. at 1755.

76. *Id.* at 1756.

77. *Id.* at 1758.

78. *Id.* at 1759.

79. *See, e.g.*, Michael Greve, *Collision Court: Upcoming Clash Between Federalism and Pre-emption Is Foretold in the* Geier v. American Honda *Opinions*, LEGAL TIMES, June 12, 2000, at 74; Paul D. Clement & Viet D. Dinh. *When Uncle Sam Steps in: There's No Real Disharmony*

Between High Court Decisions Backing Pre-emption and the Federalism Push of Recent Years, LEGAL TIMES, June 19, 2000, at 66; Marcia Coyle, *Air-Bag Ruling: Business Boon*, NAT'L L.J., June 5, 2000, at B1, B4 ("There is an obvious disconnect between the court's recent pre-emption cases—generally displacing state laws—and many of its recent commerce clause and 11th Amendment cases—generally protecting state laws and powers.").

80. 120 S. Ct. 1135, 30 ELR 20438 (2000).

81. The Tank Vessel Act of 1936, 49 Stat. 1889; The Port and Waterways Safety Act of 1972, as amended by the Port and Tanker Safety Act of 1978, 92 Stat. 1471; The Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761, ELR STAT. OPA §§ 1001-7001.

82. *Locke*, 120 S. Ct. at 1143, 30 ELR at 20439 ("The State of Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established.").

83. *Id.* at 1147, 30 ELR at 20441 (internal citations omitted).

84. *Id.* at 1150-52, 30 ELR at 20442-42.

85. The Court therefore found preempted Washington regulations regarding navigation watch procedures, crew English language skills and training, and maritime casualty reporting requirements. *Id.*

86. *Id.* at 1152, 30 ELR at 20443.

87. 120 S. Ct. 1913 (2000).

88. The standard is known as Federal Motor Vehicle Safety Standard 208 and was promulgated under the National Traffic and Motor Vehicle Safety Act of 1966. 15 U.S.C. § 1381 et seq.

89. *Geier*, 120 S. Ct. at 1918-19.

90. The U.S. Department of Transportation (DOT) had promulgated the safety standard at issue pursuant to the DOT's authority under this Act.

91. 15 U.S.C. § 1397(k).

92. *Geier*, 120 S. Ct. at 1919-22.

93. *Id.* at 1920-21.

94. *Id.* at 1922-28.

95. *Id.* at 1928 (Stevens, J., dissenting) (internal citations omitted).

96. *Id.* at 1938-42.

97. 120 S. Ct. at 1904. This federal arson case is discussed above in Part I.A.1.c. (concerning the commerce power).

98. *Jones*, 120 S. Ct. at 1912 (Stevens, J., concurring) (internal citations omitted).

99. *Id.* at 1912-13.

100. 120 S. Ct. 1467 (2000).

101. *See* 23 C.F.R. § 646.214(b)(3), (4).

102. 49 U.S.C. § 20101 et seq.

103. 120 S. Ct. 2288 (2000).

104. *Id.* at 2294.

105. *Id.* at 2295-96.

106. *Id.* at 2296-98.

107. *Id.* at 2298-301.

108. *Id.* at 2294 n.8.

109. The CWA prohibits the dredging or filling of navigable waters, including certain wetlands, without a permit, 33 U.S.C. §§ 1311(a), 1344(a), ELR STAT. FWPCA §§ 301(a), 404(a). *See also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 16 ELR 20086 (1985) (deferring to interpretation of the U.S. Army Corps of Engineers that navigable waters include freshwater wetlands adjacent to other covered waters and their tributaries).

110. Hoffman Homes Inc. v. EPA, 961 F.2d 1310, 22 ELR 21148 (7th Cir.), *vacated*, 975 F.2d 1554, 22 ELR 21547 (7th Cir. 1992), *on reh'g*, 999 F.2d 256, 23 ELR 21139 (7th Cir. 1993).

111. *Hoffman Homes, Inc.*, 999 F.2d at 256, 23 ELR at 21139. The court nevertheless invalidated an administrative penalty imposition for filling without a permit on the ground that the agency provided insufficient evidence that the area filled was suitable migratory bird habitat.

112. Leslie Salt Co. v. United States, 55 F.3d 1388, 1396, 25 ELR 21046, 21050 (9th Cir.), *cert. denied sub nom.* Cargill, Inc. v. United States, 516 U.S. 955, 26 ELR 20001 (1995).

113. United States v. Wilson, 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997).

114. 191 F.3d at 845, 30 ELR at 20161, *cert. granted*, 120 S. Ct. at 2003. For contrary views of the

decision and its implications, *contrast* Craig N. Johnston, *1999—Year in Review*, 30 ELR 10173 (Mar. 2000) (the Corps and EPA have strong cases for jurisdiction over isolated wetlands) *and* Philip Weinberg, *Does That Line in the Sand Include Wetlands? Congressional Power and Environmental Protection*, 30 ELR 10894 (Oct. 2000) ("migratory bird rule" is constitutional) *with* Timothy S. Bishop et al., *One for the Birds: The Corps of Engineers' "Migratory Bird Rule,"* 30 ELR 10633 (Aug. 2000) (rule should be invalidated).

115. *SWANNC*, 998 F. Supp. at 948, *aff'd*, 191 F.3d at 845, 30 ELR at 20161, *cert. granted*, 120 S. Ct. at 2003.

116. *SWANCC*, 191 F.3d at 848, 30 ELR at 20161, *cert. granted*, 120 S. Ct. at 2003.

117. 33 C.F.R. § 328.3(a)(3).

118. *SWANCC*, 998 F. Supp. at 948 (quoting 51 Fed. Reg. 41217 (Nov. 13, 1986)). The promulgated regulation and preamble language asserting jurisdiction over "isolated" wetlands used as a habitat for migratory birds are, together, known informally as the "migratory bird rule."

119. *Id.* at 949.

120. *Id.* at 951-52.

121. *SWANCC*, 191 F.3d at 849, 30 ELR at 20162.

122. *Id.* at 850, 30 ELR at 20162.

123. *Id.*

124. *Id.* (quoting *Lopez*, 514 U.S. at 567-68).

125. *Id.* at 851, 30 ELR at 20163.

126. *Id.*

127. *E.g.*, Rueth v. EPA, 13 F.3d 227, 231, 24 ELR 20214, 20216 (7th Cir. 1993); United States v. Byrd, 609 F.2d 1204, 1209, 9 ELR 20757, 20760 (7th Cir. 1979).

128. *SWANCC*, 191 F.3d at 851, 30 ELR at 20163.

129. *Id.* at 852, 30 ELR at 20163. The court also rejected SWANCCs claim that the migratory bird rule is unreasonable because it is designed to protect wildlife rather than water quality. Among the CWA's purposes is restoration of the biological integrity of the nation's waters, so the Corps' jurisdiction need not be defined solely by reference to water quality itself. *Id.* (citing 33 U.S.C. § 1251(a), 30 ELR STAT. FWPCA § 101(a)).

130. *See* Petition for a Writ of Certiorari, available at http://www/swancc.org/supreme.htm (stating

the question as "whether the U.S. Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause . . ., may assert jurisdiction over isolated intrastate wetlands solely because those waters do or potentially could serve as habitat of migratory birds").

131. *E.g.*, Petitioner's Brief, 2000 WL 1041190 (July 27, 2000).

132. Gibbs v. Babbitt, 214 F.3d 483, 498, 30 ELR 20602, 20607 (4th Cir. 2000).

133. U.S. CONST. art. I, § 1.

134. RICHARD J. PIERCE JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 50 (3d ed. 1999).

135. *Id.* at 51.

136. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

137. According to Judge Silberman, citing Judge Tatel, the nondelegation doctrine "is at this stage of constitutional 'evolution' not in particularly robust health." American Trucking Ass'n, Inc. v. EPA, 195 F.3d 4, 14, 30 ELR 20119, 20122-23 (D.C. Cir. 1999).

138. *E.g.*, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 10 ELR 20489 (1980).

139. 175 F.3d 1027, 29 ELR 21071 (D.C. Cir.), *modified in part on reh'g*, 195 F.3d 4, 30 ELR 20119 (D.C. Cir. 1999), *cert. granted sub nom.* Browner v. American Trucking Ass'n, Inc., 120 S. Ct. 2003 (2000).

140. For more detailed analyses of *American Trucking*, *see* Craig Oren, *Run Over by* American Trucking *Part I: Can EPA Revive Its Air Quality Standards?*, 29 ELR 10653 (Nov. 1999); Craig Oren, *Run Over by* American Trucking *Part II: Can EPA Implement Revised Air Quality Standards?*, 30 ELR 10034 (Jan. 2000); Robert W. Adler, American Trucking *and the Revival(?) of the Nondelegation Doctrine*, 30 ELR 10233 (Apr. 2000). *See also* Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999); Richard J. Pierce Jr., *The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine*, 52 ADMIN. L. REV. 63 (2000).

141. *American Trucking*, 175 F.3d at 1034, 29 ELR at 21071.

142. 42 U.S.C. § 7409(b)(1), ELR STAT. CAA § 109(b)(1).

143. *American Trucking*, 175 F.3d at 1034, 29 ELR at 21071.

144. *Id.*

145. *Id.* at 1057, 29 ELR at 21081 (Tatel, J., dissenting).

146. *Id.* (citing, e.g., Yakus v. United States, 321 U.S. 414 (1944); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944)).

147. *Id.* at 1038, 29 ELR at 21073.

148. *American Trucking*, 195 F.3d at 15, 30 ELR at 20123 (Silberman, J., dissenting from the denial of the rehearing en banc).

149. American Trucking Ass'n, Inc. v. Browner, 120 S. Ct. 2193 (2000).

150. *American Trucking*, 175 F.3d at 1040-41, 29 ELR at 21074 (citing Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 10 ELR 20643 (D.C. Cir. 1980)).

151. Or, perhaps, more accurately, a return to an old, i.e., early New Deal, era of separation-of-powers jurisprudence. *American Trucking* was not the D.C. Circuit's only recent pronouncement on the nondelegation doctrine. In Michigan v. EPA, 213 F.3d 663, 30 ELR 20407 (D.C. Cir. 2000), the court, in another decision written by Judge Williams, distinguished the nondelegation doctrine holding of *American Trucking*. The court upheld the validity of an EPA rule requiring 22 states in the eastern half of the country to revise their state implementation plans (SIPs) under the CAA to mitigate the interstate transport of ozone pollution. The state petitioners argued that EPA failed to set forth any "intelligible principle" for determining whether a state is "significantly contributing" to interstate ozone pollution, and is therefore required to revise its plan. Judge Williams indicated, however, that the states had ignored a limit to the nondelegation doctrine. In both *American Trucking* and a previous D.C. Circuit case involving a challenge to an Occupational Safety and Health Administration regulation, the court had noted that the power of the agency in question was "immense, encompassing all American enterprise."). *Id.* at 680, 30 ELR at 20413 (quoting International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Occupational Safety & Health Admin., 938 F.2d 1310 (D.C. Cir. 1991)). Section 110 of the CAA, 42 U.S.C. § 7410, ELR STAT. CAA § 110, which governs revision of implementation plans, nominally encompasses all American enterprise. But as a practical mater, the court said, EPA must make a number of threshold determinations that in practice appear to have confined the statute to "a modest role." Before assessing significance, EPA must (1) find emissions activity within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment in the downwind state. Thus, although nearly half the nation was affected by the so-called SIP call and control costs would be substantial, EPA's authority was sufficiently limited to withstand an attack on nondelegation grounds.

152. 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, No. 99-1240, 120 S. Ct. 1669 (2000).

153. 120 S. Ct. 631 (2000).

154. 42 U.S.C. § 12101 et seq.

155. *Id.* § 621 et seq.

156. *See, e.g.*, Heller v. Doe, 509 U.S. 312 (1993); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

157. For an argument that the Court will likely apply the congruence and proportionality test "fairly strictly," see Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629, 1649-53 (2000).

158. 120 S. Ct. at 1870, 30 ELR at 20626. *See supra* Part I.B.3.

159. McAllister & Glicksman, *supra* note 1, at 10681.

160. 120 S. Ct. at 1740.

161. *See supra* Part I.B.1.

162. *Lopez*, 514 U.S. at 558-59.

163. *SWANCC*, 191 F.3d at 849, 30 ELR at 20162.

164. *See, e.g.*, Gibbs v. Babbitt, 214 F.3d 483, 490-91, 30 ELR 20602, 20604 (4th Cir. 2000) (describing these channels to include navigable rivers, lakes, and canals).

165. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133, 16 ELR 20086, 20089 (1985).

166. *But cf. Gibbs*, 214 F.3d at 490-91, 30 ELR at 20604 (holding that regulation restricting the taking of endangered wolves was neither a regulation of the use of the channels of interstate commerce nor a regulation of instrumentalities of or things in interstate commerce).

167. *Morrison*, 120 S. Ct. at 1750.

168. *Lopez*, 514 U.S. at 567.

169. *Morrison*, 120 S. Ct. at 1751.

170. *Id.*

171. *Id.* at 1754.

172. *Lopez*, 514 U.S. at 567.

173. Philadelphia v. New Jersey, 437 U.S. 617, 622-23 (1978). *See, e.g.*, John H. Turner, *Solid Waste Flow Control: The Commerce Clause and Beyond*, 19 MISS. COLL. L. REV. 53 (1988); John Turner, *The Flow Control of Solid Waste and the Commerce Clause:* Carbone *and Its*

Progeny, 7 VILL. ENVTL. L.J. 203 (1996).

174. 33 U.S.C. § 1319(c), ELR STAT. FWPCA § 309.

175. *SWANCC*, 998 F. Supp. at 948.

176. *See Morrison*, 120 S. Ct. at 1754.

177. *Id.* at 1750.

178. *Id.* at 1753.

179. *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring).

180. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 11 ELR 20569 (1981). *See also* ENVIRONMENTAL LAW INSTITUTE, SUSTAINABLE ENVIRONMENTAL LAW: INTEGRATING NATURAL RESOURCE AND POLLUTION ABATEMENT LAW FROM RESOURCES TO RECOVERY 31 (Celia Campbell-Mohn et al. eds., 1993).

181. *Lopez*, 514 U.S. at 562; *Morrison*, 120 S. Ct. at 1751.

182. 33 U.S.C. § 1311(a), ELR STAT. FWPCA § 301(a).

183. *Id.* § 1362(12)(A), ELR STAT. FWPCA § 502(12)(A).

184. *Id.* § 1362(7), ELR STAT. FWPCA § 502(7).

185. *E.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133, 16 ELR 20086, 20089 (1985) (Congress intended "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical interpretation of that term"); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 4 ELR 20784 (6th Cir. 1974). *See also* 118 CONG. REC. 33,756-57 (1972) (statement of Rep. Dingell).

186. 33 C.F.R. § 328.3(a)(3).

187. *SWANCC*, 191 F.3d at 848, 30 ELR at 20162 (emphasis added).

188. U.S. CONST. art. II, § 2, cl. 2.

189. Missouri v. Holland, 252 U.S. 416 (1920).

190. In a third case, a federal district court, in a decision rendered two weeks after *Morrison*, held that an order issued by EPA under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requiring a landowner to allow the agency to enter his property to implement an action responding to the release of hazardous substances, was valid even though the

government failed to show that the alleged contamination affected interstate commerce. United States v. Tarkowski, No. 99 C 7308, 2000 WL 696740, 30 ELR 20622 (N.D. Ill. May 30, 2000). The court first issued an oral ruling rejecting the constitutional challenge to the order on the ground that the statutory scheme as a whole bears a significant relation to interstate commerce and that the de minimis character of the particular contamination was of no consequence. The court reconsidered its ruling after the decision in *Morrison*, but refused to change its mind. *Id.* at * 1 n.2.

191. Gibbs v. Babbitt, 214 F.3d 483, 30 ELR 20602 (4th Cir. 2000).

192. 16 U.S.C. § 1539(j), ELR STAT. ESA § 10(j).

193. *See generally* Holly Doremus, *Restoring Endangered Species: The Importance of Being Wild*, 23 HARV. ENVTL. L. REV. 1 (1999).

194. 16 U.S.C. § 1538(a)(1)(B), ELR STAT. ESA § 9(a)(1)(B).

195. 50 C.F.R. § 17.8(c)(4).

196. Gibbs v. Babbitt, 31 F. Supp. 2d 531 (E.D.N.C. 1998), *aff'd*, 214 F.3d 483, 30 ELR 20602 (4th Cir. 2000).

197. *E.g.*, *Gibbs*, 214 F.3d at 504, 30 ELR at 20610 ("To invalidate this regulation would require courts to move abruptly from preserving traditional state roles to dismantling federal ones."); *id.* ("Our dissenting colleague would rework the relationship between the judiciary and the coordinate branches."); *id.* at 505, 30 ELR at 20610 ("Reversing the presumption in favor of constitutionality plunges our dissenting brother into the thicket of political controversy."); *id.* ("Why the judicial branch should place its thumb on either side of this old political scale is simply beyond our comprehension."); *id.* ("an indiscriminate willingness to constitutionalize recurrent political controversies will weaken democratic authority and spell no end of trouble for the courts."); *id.* ("Striking down this regulation will turn federalism on its head.").

198. *Id.* at 490, 30 ELR at 20604.

199. *Id.*

200. *Id. See also id.* at 497, 30 ELR at 20607 ("To overturn this regulation would start courts down the road to second-guessing all kinds of legislative judgments.").

201. Similarly, the migratory bird rule in *SWANCC* arguably did not regulate the movement of birds or bird products in the channels of interstate commerce.

202. *Gibbs*, 214 F.3d at 491, 30 ELR at 20604.

203. *Id.* (quoting *Morrison*, 120 S. Ct. at 1750 n.4).

204. *Id.*

205. *Id.* at 492, 30 ELR at 20605.

206. *Id.* The same argument might be made with respect to the migratory bird rule at issue in *SWANCC*. It is, for example, arguably an integral part of the overall scheme to protect and preserve not only migratory birds, but the wetlands habitats upon which they rely.

207. *Id.* Similarly, a primary reason to dredge or fill wetlands is to enable their development for commercial purposes.

208. *Id.* at 492-93, 30 ELR at 20605.

209. *Id.* at 493, 30 ELR at 20605.

210. *Id.* at 495, 30 ELR at 20606.

211. 214 F.3d 483, 30 ELR 20602 (4th Cir. 2000).

212. *Id.* at 495, 30 ELR at 20606.

213. *Id.* at 496, 30 ELR at 20606.

214. *Id.*

215. *Id. See also id.* ("it is reasonable for Congress to decide that conservation of species will one day produce a substantial commercial benefit to this country and that failure to preserve a species will result in permanent, though unascertainable, commercial loss").

216. *Id.* at 497, 30 ELR at 20607 (quoting *Lopez*, 514 U.S. at 561).

217. 452 U.S. 314, 11 ELR 20581 (1981).

218. *Gibbs*, 214 F.3d at 497, 30 ELR at 20607 (quoting *Hodel*, 452 U.S. at 329 n.17, 11 ELR at 20585 n.17).

219. *See also id.* at 498, 30 ELR at 20607, where the court stated that "the effects on interstate commerce should not be viewed from the arguably small commercial effect of one local taking, but rather from the effect that single takings multiplied would have on advancing the extinction of a species."

220. *Id.* at 499, 30 ELR at 20608.

221. *Id.* at 500, 30 ELR at 20608.

222. *Id.*

223. *See* FREDERICK R. ANDERSON, ROBERT L. GLICKSMAN, DANIEL R. MANDELKER & A. DAN TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 586-87 (3d ed. 1999).

224. *Gibbs*, 214 F.3d at 500, 30 ELR at 20608.

225. *Id.* at 502, 30 ELR at 20609.

226. *See generally* Kirsten Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271 (1997); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE J. ON REG. 67 (1996).

227. *E.g.*, Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U.L. REV. 2341 (1996).

228. *Gibbs*, 214 F.3d at 507, 30 ELR at 20611 (Luttig, J., dissenting).

229. *Id.* at 508, 30 ELR at 20611-12.

230. *Id.*, 30 ELR at 20612. Judge Luttig pointed out, however, that the regulation could have been adopted under Congress' spending power and under the Property Clause. *Id.* at 509, 30 ELR at 20612.

231. *Id.* at 508, 30 ELR at 20611.

232. 42 U.S.C. § 7511b(e), ELR STAT. CAA § 183(e).

233. Allied Local & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61, 30 ELR 20723 (D.C. Cir. 2000).

234. *Id.* at 81, 30 ELR at 20730. Interestingly, a trade association of paint and coatings manufacturers and distributors that intervened in the case opposed this attack, "preferring uniform national regulation to the 'multiple, divergent state rules' that would otherwise hold sway." *Id.* (quoting the intervenor's brief).

235. *Id.* at 82, 30 ELR at 20731.

236. *Id.* (citing 42 U.S.C. § 7511b(e)(1)(C), ELR STAT. § 183(e)(1)(C)).

237. *Id.*

238. *Id.* at 82-83, 30 ELR at 20731.

239. *Id.* at 83 (quoting *Hodel*, 452 U.S. at 282, 11 ELR at 20573) (emphasis added).

240. *See generally* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

241. 42 U.S.C. § 7651c (tbl. A), ELR STAT. CAA § 404 (tbl. A).

242. *Id.* § 7651b(b).

243. N.Y. PUB. SERV. LAW § 66-k(2) (McKinney 2000). "Acid precipitation source states" are defined to include 14 states that are located upwind from New York, ranging from North Carolina to Michigan. *Id.* § 66-k(1)(d).

244. Even if the statute is not unconstitutional as an unwarranted interference with the free flow of interstate commerce, it could conceivably be preempted by the CAA. For a discussion of the Supreme Court's latest environmentally related preemption cases, *see infra* Part II.D.

245. *See* McAllister & Glicksman, *supra* note 1, at 10669.

246. In a case that falls into the fourth category, a federal district court allowed a suit alleging a violation of the ESA to proceed against a county, the Eleventh Amendment notwithstanding. Loggerhead Turtle v. County Council of Volusia County, Fla. 92 F. Supp. 2d 1296, 1302 n.14, 30 ELR Digest 20621 (M.D. Fla. 2000). In addition, the plaintiffs sought declaratory and injunctive relief against state officers, and thus were able to take advantage of *Ex parte Young*, which relates to the fifth alternative.

247. Entergy Arkansas, Inc. v. Nebraska, 210 F.3d 887, 30 ELR 20449 (8th Cir. 2000).

248. *Id.* at 896-97. *See also* Entergy Arkansas, Inc. v. Nebraska, 68 F. Supp. 2d 1093, 30 ELR Digest 20174 (D. Neb. 1999), where the court concluded that neither *Alden* nor the two *College Savings Bank* cases decided by the Court in 1999 preclude suit by a compact-created entity against one of the member states. The court reasoned that when states engage in activities they are barred from engaging in without prior congressional consent, the normal Eleventh Amendment rules do not apply. "Simply put, a signatory state has no immunity from suit by a Compact Clause creation because that state had no sovereignty (power) over the enforcement mechanism chosen by Congress." *Id.* at 1099, 30 ELR Digest at 20174. Alternatively, the court ruled, Nebraska obligated itself to exercise good faith when it entered the compact. Accepting the state's argument that it was immune from suit for alleged breaches would frustrate the compact's purpose "since it could permit Nebraska to escape from its obligation to exercise good faith." *Id.* at 1102, 30 ELR Digest at 20174. The court therefore ruled that a monetary judgment could be entered against the state. *Id.* at 1104, 30 ELR Digest at 20174.

249. 209 U.S. 123 (1908).

250. *Entergy Arkansas*, 210 F.3d at 898, 30 ELR 20453.

251. Bethel Native Corp. v. Department of the Interior, 208 F.3d 1171, 30 ELR Digest 20492 (9th Cir. 2000).

252. *Id.* at 1175, 30 ELR Digest at 20492. *See also* Alden v. Maine, 527 U.S. 706, 756 (1999). *See, e.g.*, McAllister & Glicksman, *supra* note 1, at 10678-79.

253. *Bethel Native*, 208 F.3d at 1177, 30 ELR Digest at 20492.

254. Atlantic Legal States Found. v. Babbitt, 83 F. Supp. 2d 344, 30 ELR 20361 (N.D.N.Y. 2000).

255. This argument is a curious one. *Seminole Tribe* stands for the proposition that any constitutional power in existence before the adoption of the Eleventh Amendment, including both Article I and, presumably, Article VI, does not give Congress the authority to abrogate the states' Eleventh Amendment immunity. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 65-66 (1996) (Eleventh Amendment immunity cannot be limited "through appeal to antecedent provisions of the Constitution") (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 42, 19 ELR 20974, 20986 (1989) (Scalia, J., dissenting)). Further, the Supremacy Clause does not itself represent an affirmative grant of federal power, but rather a preemption or choice of law rule. The issue, therefore, in *Atlantic Legal States* was whether the treaty power, an 'antecedent" provision, allows Congress to abrogate Eleventh Amendment immunity.

256. *Atlantic Legal States*, 83 F. Supp. 2d at 347, 30 ELR at 20363. The court did allow the plaintiff to amend its complaint to name the commissioner of the state agency as a defendant in his official capacity, so that the plaintiff could take advantage of the *Ex parte Young* exception to Eleventh Amendment immunity. *Id.* at 348-49, 30 ELR at 20363. For a case in which the Eleventh Amendment barred suit alleging a variety of tort-related claims, see Vaizburd v. United States, 90 F. Supp. 2d 210, 215-16 (E.D.N.Y. 2000) (dismissing claim for retroactive monetary relief filed by property owners for damage to their homes and properties caused by allegedly negligent design and implementation of shoreline protection project).

257. Burnette v. Carothers, 192 F.3d 52, 30 ELR Digest 20124 (2d Cir. 1999).

258. *See* 33 U.S.C. § 1365(a)(1), ELR STAT. FWPCA § 505(a)(1) (authorizing citizen suits "to the extent permitted by the eleventh amendment"); 42 U.S.C. § 6972(a)(1), ELR STAT. RCRA § 7002(a)(1); *id.* § 9659(a)(1), ELR STAT. CERCLA § 310(a)(1) (to the same effect).

259. *Burnette*, 192 F.3d at 58, 30 ELR Digest at 20124 (quoting 33 U.S.C. § 1365(a), ELR STAT. FWPCA § 505(a)).

260. 517 U.S. 44 (1996).

261. *Burnette*, 192 F.3d at 59, 30 ELR Digest at 20124.

262. U.S. CONST. art. I, § 8, cl. 1.

263. *Burnette*, 192 F.3d at 59, 30 ELR Digest at 20124.

264. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686-87 (1999).

265. *Burnette*, 192 F.3d at 59-60, 30 ELR Digest at 20124.

266. *Id.* at 60, 30 ELR Digest at 20124. The same court remanded to the district court a case in which the plaintiff alleged that Connecticut's top environmental official violated RCRA by failing to take effective enforcement action against a lessee operating a bulky waste disposal facility so that the lower court could determine whether the plaintiff alleged ongoing violations of specific provisions of RCRA. Farricielli v. Holbrook, 215 F.3d 241, 30 ELR 20683 (2d Cir. 2000).

267. 120 S. Ct. 1858, 30 ELR 20622 (2000).

268. 31 U.S.C. §§ 3729-3733.

269. *Vermont Agency*, 120 S. Ct. at 1863, 30 ELR at 20624.

270. *Id.* The "long tradition of *qui tam* actions in England and the American Colonies" confirmed the Court in its conclusion. *Id.*

271. *Id.* at 1871, 30 ELR at 20625.

272. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 173-76 (1992). *See also* Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275 (1989).

273. *See infra* Part II.C.1.

274. U.S. CONST. art. II, § 3. *See, e.g.*, Defenders of Wildlife v. Lujan, 504 U.S. 555, 22 ELR 20913 (1992).

275. *Vermont Agency*, 120 S. Ct. at 1865 n.8, 30 ELR at 20624 n.8.

276. *Id.* at 1878, 30 ELR at 20627 (Stevens, J., dissenting).

277. 120 S. Ct. 693, 30 ELR 20246 (2000).

278. Daniel A. Farber, *Environmental Litigation After* Laidlaw, 30 ELR 10516 (July 2000). *See also* Michael P. Healy, *Standing in Environmental Citizen Suits:* Laidlaw's *Clarification of the Injury-in-Fact and Redressability Requirements*, 30 ELR 10455 (June 2000): Craig N. Johnston, *Standing and Mootness After* Laidlaw, 30 ELR 10317 (May 2000).

279. *Laidlaw*, 120 S. Ct. at 706, 30 ELR at 20249.

280. 120 S. Ct. at 631.

281. 521 U.S. at 507.

282. Of course, a ruling by the Court that Congress lacks the constitutional power to abrogate the states' immunity does not necessarily mean the sky is falling. Instead, such a conclusion means only that a plaintiff cannot sue a state directly. Several other options remain available, including official and personal capacity suits against individual government officers. *See, e.g.*, McAllister & Glicksman, *supra* note 1, at 10677-78.

283. *E.g.*, 33 U.S.C. § 1362(5), ELR STAT. FWPCA § 502(5); 33 U.S.C. § 1401(e) (Marine Protection, Research, and Sanctuaries Act); 33 U.S.C. § 2701(27), ELR STAT. OPA § 1001(27); 42 U.S.C. § 300f(12)-(13), ELR STAT. SDWA § 1401(12)-(13); 42 U.S.C. § 6903(15), ELR STAT. RCRA § 1004(15); 42 U.S.C. § 7602(e), ELR STAT. CAA § 302(e); 42 U.S.C. § 9601(21), ELR STAT. CERCLA § 101(21); 42 U.S.C. § 11049(7), ELR STAT. EPCRA § 329(7).

284. U.S. CONST. art. IV, § 3, cl. 2. *See generally* GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 3.03[3] (1990).

285. U.S. CONST. art. II, § 2, cl. 2. *E.g.*, the Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-711.

286. U.S. CONST. Amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").

287. 83 U.S. (16 Wall.) 36 (1872).

288. 526 U.S. 489 (1999).

289. *Id.* at 523 n.1 (Thomas, J., dissenting) (citing numerous books and law review articles).

290. *See id.* at 498-500.

291. *Id.* at 521-28 (Thomas, J., dissenting).

292. *See, e.g.*, Carrie Johnson, *The Road to* Saenz v. Roe, LEGAL TIMES, May 24, 1999, at 1-2.

293. *See, e.g.*, United States v. Locke, 120 S. Ct. 1135, 30 ELR 20438 (2000) (finding state laws and regulations regarding the operation and maintenance of oil tankers to be preempted by federal statutes); Geier v. American Honda Motor Co., 120 S. Ct. 1913 (2000) (finding state tort law preempted by federal regulations regarding the use of airbags in automobiles); Norfolk S. Ry. Co. v. Shanklin, 120 S. Ct. 1467 (2000) (finding state tort law preempted by federal regulations when federal funds were used to install railroad crossing signs at an intersection where a train-automobile accident occurred); Crosby v. National Foreign Trade Council, 120 S. Ct. 2288 (2000) (finding a state law generally prohibiting state agencies from contracting with companies that do business with Burma to be preempted by federal statutes addressing the U.S. relationship with

Burma). For a criticism of the Court's ruling in *Locke, see* Paul S. Weiland, *Preemption of Environmental Law? Is the U.S. Supreme Court Heading in the Wrong Direction?*, 30 ELR 10579 (July 2000).

294. Coyle, *supra* note 79.

295. *See Geier*, 120 S. Ct. at 1928 (Stevens, J., dissenting, joined by Justices Souter, Thomas and Ginsburg) ("'This is a case about federalism'") (quoting Coleman v. Thompson, 501 U.S. 722, 726 (1991)).

296. Greve, *supra* note 79, at 74 (also quoting a Justice O'Connor opinion (joined by the Chief Justice, Justice Scalia, and Justice Thomas) in Medtronic v. Lohr, 518 U.S. 470, 512 (1996)). In *Medtronic*, the Court stated that "it is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference."

297. 120 S. Ct. at 1913.

298. Greve, *supra* note 79, at 74.

299. *Id.* at 75.

300. *Id.*

301. Clement & Dinh, *supra* note 79, at 66.

302. *Id.*

303. *Id.* at 66-67.

304. *See, e.g.*, Geier v. American Honda Motor Co., 120 S. Ct. 1913 (2000) (finding state tort law preempted by federal regulations regarding the use of airbags in automobiles); Norfolk S. Ry. Co. v. Shanklin, 120 S. Ct. P467 (2000) (finding state tort law preempted by federal regulations when federal funds were used to install railroad crossing signs at an intersection where a train-automobile accident occurred).

305. 527 U.S. at 706.

306. *See, e.g.*, Milwaukee v. Illinois, 451 U.S. 304, 11 ELR 20406 (1981).

307. *See, e.g.*, International Paper Co. v. Ouellette, 479 U.S. 481, 17 ELR 20327 (1987).

308. For example, "compliance with this law does not exempt any person from state tort law under either the field or conflict branches of the Supreme Court's inscrutable pre-emption jurisprudence"? Or perhaps, "compliance with this law does not exempt any person from state tort law, and we mean it!"

309. 120 S. Ct. at 1135, 30 ELR at 20438.

310. Indeed, such a bias seems inherent in the Court's long-standing dormant commerce power jurisprudence.

311. *See, e.g.*, Robert L. Glicksman, *Pollution on the Federal Lands I: Air Pollution Law*, 12 UCLA J. ENVTL. L. & POL'Y 1 (1993); Robert L. Glicksman, *Pollution on the Federal Lands II: Water Pollution Law*, 12 UCLA J. ENVTL. L. & POL'Y 61 (1993); Robert L. Glicksman, *Pollution on the Federal Lands III: Regulation of Solid and Hazardous Waste Management*, 13 STAN. ENVTL. L.J. 3 (1994); Robert L. Glicksman, *Pollution on the Federal Lands IV: Liability for Hazardous Waste Disposal*, 12 UCLA J. ENVTL. L. & POL'Y 233 (1994).

312. California v. United States, 215 F.3d 1005, 30 ELR 20633 (9th Cir. 2000).

313. 42 U.S.C. § 7604(e)(1), ELR STAT. CAA § 304(e)(1).

314. 28 U.S.C. § 1442(a)(1).

315. *California*, 215 F.3d at 1009, 30 ELR at 20635.

316. *See supra* Part II.D.

317. Harmon Indus., Inc. v. Browner, 191 F.3d 894, 29 ELR 21412 (8th Cir. 1999).

318. For more complete discussion of *Harmon*, see Jerry Organ, *Environmental Federalism Part I: The History of Overfiling Under RCRA, the CWA, and the CAA Prior to* Harmon, Smithfield, *and* CLEAN, 30 ELR 10615 (Aug. 2000); Jerry Organ, *Environmental Federalism Part II: The Impact of* Harmon, Smithfield, *and* CLEAN *on Overfiling Under RCRA, the CWA, and the CAA*, 30 ELR 10732 (Sept. 2000) [hereinafter Organ, *Environmental Federalism Part II*]. *See also* Ellen R. Zahren, *Overfiling Under Federalism: Federal Nipping at State Heels to Protect the Environment*, 49 EMORY L.J. 373 (2000).

319. 42 U.S.C. § 6926(b), ELR STAT. RCRA § 3006(b).

320. *Harmon*, 191 F.3d. at 899, 29 ELR at 21413.

321. *Id.* at 901, 29 ELR at 21414.

322. *Id.* at 902, 29 ELR at 21414.

323. *Id.* at 903, 29 ELR at 21414, EPA also argued that sovereign immunity precluded application of principles of res judicata to the United States because it was not a party to the litigation that culminated in the Missouri consent decree. The court rejected that contention, concluding that EPA had ceded its authority to the state when it approved the state's program. From that point on, the MDNR prosecuted RCRA violations as if it were EPA. *Id.* at 903-04, 29 ELR at 21414.

324. United States v. Power Eng'g Co., 191 F.3d 1224, 1228-29, 30 ELR 20067, 20068 (10th Cir. 1999).

325. United States v. City of Youngstown, 109 F. Supp. 2d 739 (N.D. Ohio 2000). *Compare* United States v. Elias, 30 ELR 20558 (D. Idaho 2000).

326. The CWA does say that EPA must "suspend the issuance" of federal permits as to discharges subject to a state NPDES permit program. 33 U.S.C. § 1342(c)(1), ELR STAT. FWPCA § 402(c)(1). A court could interpret such a suspension as having the same effect as EPA approval of a RCRA hazardous waste program does. The CWA language, however, seems more narrowly focused on permit issuance rather than enforcement, unlike RCRA, which states that a state program operates in lieu of the federal "program." The court in *Harmon* interpreted the "program" to include enforcement of regulatory obligations. For further analysis of the possible distinctions between how RCRA and other federal pollution control laws affect the practice of overfiling, see Organ, *Environmental Federalism Part II, supra* note 318.
